The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
II. THE SOURCES AND BINDING FORCE OF THE LAW OF NAVAL WARFARE

A. THE SOURCES OF THE LAW OF NAVAL WARFARE

The great dividing line in the historical development of the law of naval warfare must be drawn at the outbreak of the first World War in 1914, for what is generally referred to as the "traditional law" is substantially the law as it appeared at this date. In the main, the traditional law of naval warfare is customary in character, developing out of eighteenth and—particularly—nineteenth century practices. The various attempts to codify this customary law have never enjoyed the same degree of success that have attended similar efforts with respect to the codification of land warfare. There is no convention dealing with the regulation of naval hostilities that compares in scope and importance to the Regulations attached to Hague Convention IV (1907), Respecting the Laws and Customs of War on Land. The Hague Conventions of 1899 and 1907 which dealt specifically with the conduct of naval warfare are few in number and, with the exception of XIII (1907) concerning the Rights and Duties of Neutral States in Maritime War, of relatively minor significance.¹

Historically, the most important, and certainly the most controversial, disputes arising in the course of naval hostilities related to the extent and character of the right of belligerents to interfere on the high seas with private neutral trade. In the Declaration of London of 1909 the attempt was made to produce a generally acceptable codification of nineteenth century practices in this area of the law. However, the Declaration was never ratified by any of the signatory states; and despite the occasional claims of belligerents and neutral states during the first World War that the Declaration of London set forth the valid law regulating belligerent behavior at sea, it was not binding upon the naval belligerents in either World War.²

¹ The Hague Conventions of 1907 relating to the conduct of naval warfare are: VI Status of Enemy Merchant Ships At the Outbreak of Hostilities; VII Conversion of Merchant Ships in Time of War; VIII Laying of Automatic Contact Mines; IX Bombardment by Naval Forces in Time of War; X Adaptation to Naval War of the Principles of the Geneva Convention; XI Certain Restrictions with Regard to the Rights of Capture in Naval War; and XIII Concerning the Rights and Duties of Neutral States in Maritime War. The United States ratified Conventions VIII, IX, X and XI. Convention XIII was adhered to by the United States subject to certain reservations (see pp. 218 ff.).—During the nineteenth century the most important Convention concluded for the regulation of maritime warfare was the Declaration of Paris (1856). On the present status of the rules making up the Declaration of Paris, see pp. 99-102.

² For further remarks dealing generally with the Declaration of London, see pp. 187-9.
In the period of over four decades that has elapsed since the outbreak of the first World War there has been only one international instrument concluded for the regulation of naval hostilities that has received general adherence, and that instrument is the London Protocol of 1936 requiring submarines to conform in their actions against merchant vessels to the rules of international law to which surface vessels are subject. To the extent, then, that the traditional law has been changed, such change has come principally through the practices of two World Wars.

In recent years attention has been increasingly called to the uncertainty that characterizes a substantial portion of this traditional law of naval warfare. The principal source of this uncertainty undoubtedly stems from the practices of the two World Wars. Although exaggerated accounts of the lawless behavior of the major naval belligerents frequently have been given there is no denying the fact that both wars—and particularly the second World War—witnessed the widespread violation of the traditional law. In the period following World War I it seemed plausible to contend that the circumstances of this conflict were exceptional (which, indeed, they were as judged by the circumstances of earlier wars), and that the effects of the war upon the traditional law had to be considered in the light of these exceptional circumstances. In general, this attitude led to the result that the traditional law—the law in force at the outbreak of World War I—was still considered, on the whole, to remain unimpaired.

Thus H. A. Smith has observed that:

After the armistice of 1918 opinion in the Allied countries tended to regard the experience of the war as something both deplorable and exceptional. It was hoped that the authority of the old rules could be restored and this view found expression in the unratified treaty drawn up at the Washington Conference of 1922, which declared in effect that submarines must obey the same rules as surface ships. Almost all the writers of textbooks assumed that the rules of 1914 were still in force, and that the departures from these rules could be attributed to temporary causes not likely to be repeated. The official manuals issued in many countries for the instruction of naval officers all assumed the same point of view.

The general reaction that has followed in the wake of the second World War, a war that served largely to confirm and to carry still further the prac-
tices initiated a quarter of a century earlier, has been quite different. The argument that the circumstances of this second conflict were exceptional appears, for obvious reasons, far less plausible and has been resorted to only infrequently. If anything, there now seems to be a widespread—though by no means unanimous—conviction that the experience of World War II must be considered as the probable standard for the future conduct of war at sea rather than an exceptional event of the past whose recurrence is unlikely. Occasionally, this more recent reaction has taken the form of expressing the belief that in modern war much of the traditional law is simply inapplicable given the far-reaching transformation of the nineteenth century environment in which this law developed and from which it derived its meaning and significance. From this latter point of view it is insufficient to concentrate attention only upon the actual practices of the two World Wars. In addition, an inquiry must be made into the social, political and technological developments that have led to these recent practices. The experience of the two World Wars is held—according to this view—to indicate not only the relative ineffectiveness of many of the traditional rules. Even more important is the allegation that the traditional law no longer bears a meaningful relationship to the contemporary—and, it is assumed, the future—environment. Hence, it is this ever widening gap, this growing tension, between the contemporary social, political and technological environment and the environment presupposed by the traditional law that will presumably determine the inapplicability of this law in future hostilities at sea.

To a limited degree, the difficulties encountered in the endeavor to assess

6 Among recent expressions to this effect, Julius Stone, op. cit., pp. 402-13, 508-10, 599-607; H. A. Smith, The Crisis in the Law of Nations (1947), pp. 33-66; H. Lauterpacht, "The Problem of the Revision of The Law of War," B. Y. I. L., 29 (1952), pp. 373-7. It is an interesting gloss on the complexity of the attempt to evaluate the effects of recent practice on the traditional law that assertions as to the future ineffectiveness of this law are frequently made by writers—including those cited above—who nevertheless insist upon the continued validity of this law.

7 Thus the argument cited above usually places emphasis upon the fact that the traditional law developed from, and consequently presupposed for its operation, a certain type of state and a certain type of war. The conception of the state was not necessarily democratic, but it was a state with limited powers. It presupposed economic liberalism, with a clear distinction to be drawn between the activities of the state and the activities of the private individual. The nineteenth century conception of war was that of a limited war, limited not only in terms of the number of states involved in any conflict, but also limited in terms of the fraction of each belligerent's population which either actively participated in or closely identified itself with the conduct of war. Finally, this conception of war presupposed limited war aims on the part of belligerents, which in turn facilitated the introduction of effective restraints upon the methods by which these aims might be pursued. Perhaps the decisive factor in conditioning the development of the traditional law was the assumption that in any war a substantial number of states would refrain from participating in hostilities, and that the interests of these non-participants would have to be respected (see pp. 181-4). The conditions under which the two World Wars were fought, it is contended, have either placed in serious question or have swept away entirely these nineteenth century conceptions.
the impact of the two World Wars upon the traditional law may be lessened once it is recognized that the continued validity of this law is dependent upon a minimum degree of effectiveness. In a legal system characterized by a low stage of procedural development—as is the international legal system—the prolonged and marked ineffectiveness of a once valid rule would appear to result in rendering this rule no longer binding. In the case of customary rules—and they form the primary concern here—the requirement that continued validity must presuppose a minimum degree of effectiveness would seem almost compelling, for the creation of customary law depends upon a well-established practice of states that is accompanied by the general conviction that the practice in question is both obligatory and right. The effectiveness of the practice which serves to create customary law forms an essential prerequisite. Conversely, the invalidation of a rule of customary law may be brought about by a sustained and effective practice that is contrary to once-established custom, particularly a practice that has ceased to provoke either protest or reprisal on the part of interested states. Presumably, the same requirement of effectiveness may be considered applicable to general rules established by convention; rules that are neither obeyed nor applied by the parties to a convention over a substantial period of time may be considered as being no longer valid.

The apparent ease with which the general relationship between the binding quality of the rules of war and the effectiveness of these rules may be stated should not prove misleading, however. In practice, the difficulties occur when the descent is made from the general proposition to the concrete case, and the question is posed: has this rule of customary (or conventional) law ceased to be valid for the reason that over a defined period of time it has been ineffective in regulating belligerent behavior? Merely to formulate the problem in this manner suggests the serious obstacles in the way of a practical and useful solution.

There is, to begin with, no rule of positive international law indicating either the length of the period or the degree of ineffectiveness sufficient to invalidate established rules of custom (or convention), just as there is no rule determining the point at which established usage turns into custom. And although the development from usage to custom is a decisive one, since it is only after this development has occurred that we are entitled to speak of laws of warfare, it is frequently difficult to determine this point in time. Nor is the absence of precise criteria for the determination of these questions relieved by the presence of an international tribunal competent to render authoritative and binding judgments in doubtful cases. In the absence of international tribunals competent to render such decisions in a manner binding upon states, the latter themselves must so decide, and

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8 In this sense, the "procedural development" of a legal system refers to the process of effective centralization of the judicial, executive and legislative functions.

9 See, Law of Naval Warfare, Article 211.
the evidence of such decisions will commonly be manifested in the instructions many states issue to their naval forces, in the diplomatic correspondence carried on by states, in the prize codes states enact when engaged in hostilities, and in the decisions rendered by national prize courts. Yet these "decisions," insofar as they constitute an interpretation of the law of naval warfare, are not binding upon other states; the right of each state to interpret the law is not a right to decide this law in the sense that this interpretation is obligatory for other states.\(^{10}\)

It is quite true that the absence of compulsory international tribunals affects the utility of conventional rules as well, since not infrequently the provisions of conventional rules are subject to widely varying interpretations.\(^{11}\) Nevertheless, in the case of customary rules this difficulty is normally magnified, since the degree of uncertainty as to the content of a customary rule is not only likely to be greater, but the very existence of the rule is in many instances the real subject of dispute. In the history of naval warfare controversies over the meaning or even the purported existence of customary rules have never been absent, and this uncertainty has had as a consequence the furnishing of belligerents with a convenient pretext for the taking of reprisals against allegedly unlawful behavior of an enemy.

In short, the obvious consequences of the far-reaching decentralization characteristic of the international legal order are perhaps even more readily apparent in time of war than in time of peace, and the uncertainty produced by this condition is more clearly evident in the case of customary rules than in the case of conventional rules. Hence, even if it is generally admitted that a necessary relationship must exist between the validity and the effectiveness of the rules regulating the conduct of war at sea, the above considerations would appear to indicate that in practice a large number of these rules must continue to lead what might be termed a "shadowy existence."

There is a further, and closely related, factor that contributes to the difficulty of rendering a satisfactory evaluation of the impact of recent practices upon the traditional law. During both World Wars the major

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\(^{10}\) "The technical organizational insufficiency of international law may, and in fact does, make it difficult to determine whether a state acts in accordance with, or contrary to, international law . . . . It is generally recognized that the root of the unsatisfactory situation in international law and relations is the absence of an authority generally competent to declare what the law is at any given time, how it applies to a given situation or dispute, and what the appropriate sanction may be. In the absence of such an authority, and failing agreement between the states at variance on these points, each state has a right to interpret the law, the right of auto-interpretation, as it might be called. This interpretation, however, is not a 'decision' and is neither final nor binding upon the other parties." Leo Gross, "States as Organs of International Law and the Problem of Auto-Interpretation," *Law and Politics in the World Community*, pp. 76-7.

\(^{11}\) An example of such widely varying interpretations may be seen in the case of the provisions of Hague VIII (1907), dealing with the laying of automatic contact mines. See pp. 303-5.
naval belligerents deemed it necessary to conduct hostilities at sea largely upon the basis of measures whose legal justification—if the continued validity of the traditional law is assumed—could rest only upon the belligerent right of reprisal. The declaration of operational (war) zone within which neutral shipping was subject to special hazards, the indiscriminate laying of mines, the resort to unrestricted aerial and submarine warfare, the substantial alteration of the traditional law governing blockade and contraband—these and other measures were based for the most part upon the belligerent claim of reprisal. There is no need, at this point, to consider the nature and permissible extent of the belligerent right to resort to reprisals in maritime warfare, particularly when belligerent reprisals are found to operate principally against neutral shipping.\textsuperscript{12} Nor is it necessary to examine in this connection the controversial question of ultimate responsibility for the initiation of the seemingly endless series of reprisals at sea. It is relevant to observe, however, that the resort to reprisals in both World Wars provided—in certain instances at least—a convenient method for evading the restrictions imposed by the traditional law, and, it has been contended, for effecting changes in this law that ordinarily would have been left to the explicit agreement of the interested states.\textsuperscript{13}

At the same time, the care with which belligerents have frequently sought to base departures from the traditional law upon the right of reprisal against allegedly unlawful actions of an enemy \textsuperscript{14} has had the result of denying the possibility of rendering an unambiguous interpretation of the measures which formed the content of these reprisals. Normally, the resort to reprisals may be interpreted as an affirmation of the continued validity of the law the violation of which forms the condition of the reprisal. A reprisal between belligerents is an act, otherwise unlawful, that is exceptionally permitted to a belligerent as a reaction against a previous violation of law by an enemy.\textsuperscript{15} Despite the evident desire of belligerents

\textsuperscript{12} See pp. 187–90, 233–8.

\textsuperscript{13} “In the sphere of maritime law the operation of reprisals in both World Wars has, in practice, replaced most of the traditional rules. In a sense, reprisals have often fulfilled the function which would normally have been left to the agreement between States, namely, that of the adaptation of the law to the changed conditions of modern warfare. For this reason it is not always profitable to inquire whose original illegality opened wide the flood gates of retaliation. It is sufficient to note that the torrent swept away with devastating thoroughness many of the elaborate, though often controversial, rules.” H. Lauterpacht, “The Law of Nations and the Punishment of War Crimes,” \textit{B. Y. I. L.}, 21 (1944), p. 76. See also the penetrating comments of Julius Stone (\textit{op. cit.}, pp. 355–66, 366–7) on the “legislative function” of reprisals in naval warfare.

\textsuperscript{14} A care which Nazi Germany did not abandon even at the height of her wartime victories. Thus the German “blockade” announcement of August 18, 1940, sought to justify the measures to be taken against enemy and neutral vessels upon the right of retaliation. For text of the German “blockade” announcement, see \textit{U. S. Naval War College, International Law Documents}, 1940, pp. 46–50. Also, see pp. 296–305.

\textsuperscript{15} On reprisals generally, see pp. 150–3.
in recent maritime warfare to use reprisals as a pretext for evading the traditional law, there is nevertheless considerable merit in the argument that the very care with which such departures were usually justified as reprisals indicates the continued existence of a conviction that behavior in conformity with this law is normally both obligatory and right. It has already been observed that this conviction is a necessary element—along with the criterion of effectiveness—in the creation of customary law. It would appear equally true that the retention of this conviction must be taken into consideration when attempting to determine the continued validity of the traditional law. This consideration, therefore, must form a qualification upon an uncritical use of the principle of effectiveness.

There are, of course, limits to the significance that reasonably can be given to the claim of reprisals. This is especially so when acts resorted to as reprisals threaten to become part of the permanent structure of naval hostilities rather than a temporary and limited exception. Still, the fact that belligerents have felt the necessity to use the plea of reprisals when departing from the traditional law warrants the most careful inquiry before a rule of maritime warfare can be considered, with assurance, as no longer valid.  

B. THE BINDING FORCE OF THE LAW OF NAVAL WARFARE

As a general rule, the binding force of conventional rules of war is limited to the contracting parties, and then only to the extent specified by the terms of the convention in question and by the conditions accompanying ratification or adherence. On the other hand, the customary rules of the law of war are binding upon all states and under all circumstances. The
statement is frequently made that reprisals form one clear exception to the binding force of customary rules.\textsuperscript{18} However, this manner of formulation may easily prove misleading. The act of taking reprisals does not represent a restriction to the binding force of customary law. On the contrary, this law remains fully binding, and the act of taking reprisals is itself a clear indication of the continued binding force of the customary law the violation of which forms the condition for the act of reprisal. Reprisals do not represent—at least not in theory\textsuperscript{19}—an abandonment of the customary law (or the conventional law for that matter), but rather the enforcement of that law; at the very least, reprisals represent an act of "self help" permitted against a previous violation of law.\textsuperscript{20}

Apart from reprisals, the principle of military necessity has generally been considered as the most important qualification to the binding force of both the customary and conventional law of war. Indeed, the extent to which this principle may be held to restrict the operation of the rules of war has provided one of the most disputed issues among writers.\textsuperscript{21}

The core of the controversy has centered about the doctrine that interprets military necessity as serving to justify departure from any of the established rules of war when the observance of these rules either would endanger the

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on the Protection of Victims of War provides that the contracting Parties to the conventions—in time of conflict—remain bound by the conventions, as among themselves, even though one of the belligerents is not so bound. Thus: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are Parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

\textsuperscript{18} Thus Oppenheim-Lauterpacht (op. cit., p. 231): "As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects."

\textsuperscript{19} A different question, of course, concerns the practical effect of reprisals, particularly as operative in hostilities at sea.

\textsuperscript{20} Law of Naval Warfare, Article 213a.

\textsuperscript{21} It should be made clear that in this context the principle of military necessity is considered as a rule of positive law and not as an ideal (or policy) influential in the development of the law of war. However, as a rule of positive law the principle of military necessity has been used in two quite different senses, which should be distinguished clearly. In the first sense, military necessity is held to constitute a restriction—whether explicit or implicit—upon the operation of the positive rules of custom and convention. Here military necessity refers to those exceptional conditions or circumstances in which behavior otherwise prescribed by established rules of law may be disregarded. In the second sense, the principle of military necessity forms a standard (along with the principle of humanity) for determining the legality of a weapon or method of warfare not already expressly regulated by a rule of custom or convention. In the former sense, then, military necessity relates to restrictions upon the operation of existing rules; in the latter sense military necessity provides a standard for judging the legality of weapons and methods not already expressly regulated. It is the first meaning of the principle that is considered here, whereas the latter meaning is considered when dealing with the general principles governing the weapons and methods of warfare (see pp. 45–50). Article 220a of the Law of Naval Warfare includes both meanings within its definition of military necessity.

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success of a military operation or would threaten the survival (self-preservation) of a military unit.\textsuperscript{22} In either circumstance, the principle of military necessity is considered to be operative and to free belligerents from behaving in accordance with otherwise valid law.\textsuperscript{23}

As against this interpretation of military necessity it has been argued, principally by English and American writers, that military necessity—more precisely, that the circumstances held to constitute a condition of military necessity—can justify a departure from behavior normally demanded by the law of war only when conventional or customary rules expressly provide for the exceptional operation of military necessity.\textsuperscript{24}

According to this latter interpretation—which is believed to be correct—military necessity must be interpreted "to denote those exceptional circumstances of practical necessity contemplated by express reservations to be found in several Articles of the Hague Regulations and other Conventions in regard to acts otherwise prohibited. The general principle is that conventional and customary rules of warfare are always binding upon belligerents and cannot be disregarded even in case of military necessity."\textsuperscript{25}

\textsuperscript{22} In its classic form this doctrine is usually identified with the German proverb—\textit{kriegsraison geht vor kriegsmanier}—necessity in war overrules the manner of warfare. The proverb is somewhat misleading since it has not been used primarily to refer to the manner or usages of war (\textit{kriegsmanier})—which would raise no serious question—but rather to the established law of war (\textit{kriegsrecht})—which does raise a serious question. This is clear from the formulation of \textit{kriegsraison} given by Leuder (quoted in The Collected Papers of John Westlake on Public International Law (1914), pp. 244-5) to the following effect: "\textit{Kriegsraison} embraces those cases in which, by way of exception, the law of war ought to be left without observance... When... the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war, and can only be accomplished by breaking through these limitations, the latter is what ought to happen."

\textsuperscript{23} Strictly speaking, this particular interpretation of military necessity does not deny the general validity of the customary and conventional law of war. Hence, military necessity is not used to deny the binding force (validity), in the formal sense, of these rules, though this may well be the practical effect of the doctrine. It is asserted, however, that this principle must be held to constitute an implied restriction to, and therefore can in the appropriate circumstances override, any otherwise valid rule of warfare.

\textsuperscript{24} Examples of conventional rules providing for the exceptional operation of military necessity are: in land warfare, Article 23g of the Regulations attached to Hague Convention IV (1907) forbidding belligerents to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"; in naval warfare, Article 16 of Hague Convention X (1907) requiring that "after every engagement the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick and wounded, and to protect them, as well as the dead, against pillage and ill treatment" (Article 18 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea substantially repeats this earlier provision, save that it uses the words "take all possible measures to search for").

Hence, the principle of military necessity cannot be considered as superior to, and thereby restricting the operation of, all other rules of warfare, whether customary or conventional. On the contrary, it is the principle of military necessity that may be restricted by the positive law of war, and occasionally is so restricted. Not everything necessary to the purpose of war is allowed by the law of war.

qualified rule of law. Such acts always constitute a violation of the law of war." Oppenheim-Lauterpacht (op. cit., p. 232): "These conventions and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self-preservation." Also Erik Castren (The Present Law of War and Neutrality, (1954), p. 66): "This view (i. e., doctrine of kriegsraison) of the elasticity of the laws of war must be absolutely rejected as it cannot be legally justified and as its practical consequences are most dangerous." Section 220a of the Law of Naval Warfare speaks of the operation of military necessity when "not otherwise prohibited by the laws of war." (And see notes to this provision for further elaboration.)

26 It has been pointed out by many writers that one reason why military necessity may not be invoked except when expressly provided for by rules of warfare is that in establishing these rules military necessity has already been taken into consideration. This is held to be particularly true of conventional rules. (And the preamble to Hague Convention IV (1907), furnishes some support for this opinion in declaring that: "according to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit. . . .") While this contention is justified in large measure, it is important to recognize, at the same time, that certain rules clearly do not allow for the operation of military necessity. Thus the prohibitions against killing prisoners of war—or helpless survivors at sea—are absolute, and circumstances of military necessity do not justify any departures from these prohibitions. To a certain extent, therefore, it is a fiction to maintain that the law of war has in each instance already taken into account the requirements of military necessity, since in some instances action is prohibited even though circumstances constituting military necessity may otherwise require the performance of the prohibited action. Article 2 common to the four 1949 Geneva Conventions states that: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." [italics added] Finally, for an earlier—and emphatic—statement in the German literature to the effect that military necessity can be invoked only in the case of norms specifically providing for the exceptional operation of military necessity, see J. L. Kunz, Kriegsrecht und Neutralitatsrecht (1935), pp. 26–8.

27 With respect to this more restrictive interpretation of military necessity it has been recently stated that: "This reasoning . . . would forbid departure from the rules of war-law even in face of the direst needs of survival. Yet it remains ground common to British, American, French, Italian and other publicists, as well as German, that a State is privileged, in title of self-preservation, to violate its ordinary duties under international law, even towards States with which it is at peace; and may also itself determine when its self-preservation is involved. Neither practice nor the literature explain satisfactorily how the privilege based on self-preservation in times of peace can be denied to States at war." Stone, op. cit., pp. 352–3. Although the principle of military necessity more commonly refers "to the plight in which armed forces may find themselves under stress of active warfare" and not to "a danger or emergency of such proportions as to threaten immediately the vital interests, and, perhaps, the very existence of the state itself" (Dunbar, op. cit., p. 443), it is nevertheless true that departures from the law of war can be—and frequently have been—justified in terms of the states' "fundamental right" of self-preservation. To this extent Professor Stone is certainly correct in observing a contradiction between the latitude ascribed by writers to the states' "right of self-preservation" in time of peace and a denial of the same right in time of war. In fact, however, the criticism
It is this latter, and more restrictive, interpretation of military necessity that has recently received clear judicial endorsement. In the war crimes trials following the second World War the chief preoccupation of tribunals called upon to interpret the principle of military necessity was to determine when circumstances of military necessity could be considered as serving to justify departures from conduct normally prescribed by the rules of warfare. Although the judgments of tribunals were by no means identical on a number of points, there nevertheless was a remarkable uniformity of judicial opinion, which—taken as a whole—clearly appears to support the narrow interpretation of military necessity. The following is a brief summary of these judgments.

(1) Military necessity may serve as a defense plea against charges of committing acts normally forbidden by the law of war only when the rule in question can be interpreted as permitting such exceptional departure in circumstances constituting a condition of military necessity. Thus in the Hostages Trial the tribunal stated that the prohibitions contained in the Hague Regulations "are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. . . ." 28 In the case of conventional law the rule in question must provide expressly for military necessity. In particular, where the prohibition contained in a rule is absolute in character, military necessity cannot be used as a defense. Thus circumstances of military necessity have not been considered as justifying the killing of prisoners of war. 29

Professor Stone properly raises points to the necessity of a "frank review of the meaning of the self-preservation" doctrine as it applies in time of peace. The right of self-preservation accorded to a state in time of peace must therefore be limited to a right of action against measures which are prima facie unlawful. Neither "necessity in self-preservation" in time of peace nor "military necessity" in time of war can be held to justify a departure from established law, if such departure is taken in response to acts admittedly lawful in character. 30

In his excellent survey of these and other cases, Dunbar (op. cit., p. 452) states that: "It seems likely that courts will be disinclined to enlarge the doctrine of military necessity beyond that countenanced by express reservations appearing in the Hague and Geneva Conventions. The general principle is that belligerents must always respect and observe customary and conventional rules of warfare." 31

28 (Trial of Wilhelm Liss and Others), Law Reports . . . , 8 (1949), p. 69. Elsewhere the Tribunal went so far as to state that "the rules of International Law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation" (p. 67). In the Krupp Trial the tribunal declared that: "It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war." (Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others), Law Reports . . . , 10 (1949), p. 139. Also see the Trial of Erhard Milch, Law Reports . . . , 7 (1948), pp. 44, 64-5.

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29 In the Trial of Gunther Thiele and Georg Steinert (Law Reports . . . , 3 (1948), pp. 56-9) a United States Military Commission tried and sentenced the accused to death by hanging for unlawfully ordering and killing prisoners of war. At the time the offense was committed the accused were "part of a German unit which was closely surrounded by United States troops, from which the Germans were hiding."
(2) In the case of rules allowing for the exceptional operation of military necessity, departure from normally prescribed behavior is justified for reasons of self-preservation or for insuring the success of a military operation. In addition, there must be an element of urgency involved that allowed—or seemed to allow—no alternative course of action. However, it does not appear that it is essential to establish that the circumstances constituting a condition of military necessity were objectively present in a given situation. It is sufficient only to establish that the individual putting forth the plea of military necessity as a defense honestly believed at the time that such circumstances were present.\(^{30}\)

\(^{30}\) This last point was given special emphasis in the Hostages Trial where one of the accused had been charged with the wanton destruction of property while retreating before Russian forces. The accused maintained that he acted only under circumstances he believed to constitute a condition of military necessity, and that his behavior was justified by Article 23g of Hague IV (1907). In its judgment, the Tribunal stated: "There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal." (Trial of Wilhelm List and Others) Law Reports . . ., 8 (1949), pp. 68–9. A substantially similar conclusion was reached by the Tribunal in the German High Command Trial (Trials of Wilhelm Von Leah and Thirteen Others) Law Reports . . ., 12 (1949), pp. 93–4.