INTERNATIONAL CASES

ARBITRATIONS AND INCIDENTS ILLUSTRATIVE OF INTERNATIONAL LAW AS PRACTISED BY INDEPENDENT STATES

VOLUME II

WAR AND NEUTRALITY

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BOSTON NEW YORK CHICAGO
HOUGHTON MIFFLIN COMPANY
The Riverside Press Cambridge

The Riverside Press
CAMBRIDGE . MASSACHUSETTS
U . S . A

TO
JOHN BASSETT MOORE

PREFACE

In the preface to *International Cases*, Volume I, the purpose and method of the selection of material have been fully considered. Here it is only necessary to draw attention to two essential features: the method of classification and the great proportion of contemporaneous material. The merits of the classification, from the point of view of its practicability as well as the science of its related parts, will best appear from experience in its use, and we commend it to the criticism of the student at the same time that we warn him that no classification has yet become so generally accepted as to be considered standard. In regard to the selection of material, it should never be forgotten that international law as a practical system requires rules of which a prompt application can be made. In time of peace the possibility of an ultimate recourse to war serves as a sanction, albeit defective. In time of war, on the other hand, if statesmen should defer action until after years of discussion and investigation, the outcome might prevent any redress. If the transgressor could count upon such a convenient delay, he might strengthen his position by a series of violations. In time of war acts of governments and those for whom they stand responsible are to be judged upon the facts as they appear at the time, especially when the government concerned makes no effort to furnish the evidence which it has at its disposal, or which it might procure. Hence it is that a collection of cases to serve as a basis for the study of the law of war and neutrality ought to be made *flagrante bello*. With the return of peace any incident of a controversial nature can be subjected to a *post-mortem* examination, studied and dissected, but it can no longer serve as a living example.

With this thought in view we have endeavored to make a full collection of the material relating to the war in course and take advantage of the moment which will not return to make the volume a wartime publication. Certain of the selections as we have

given them are *ex-parte* allegations of fact and assertions of law not likely to withstand the more impartial attitude of *post-bellum* criticism. For this very reason, however, they offer to the impartial student an excellent opportunity to employ critical faculty in a search for the comprehension and elucidation of the fundamental principles of international law applicable to war and neutrality. To this end we hope that the system of classification which we have adopted will give a hint of the underlying principles which may be supplemented by explanations of the instructor or further investigations of the authorities, amongst which we would particularly recommend J. M. Spaight: *War Rights on Land* [London, 1911]; John Westlake: *International Law*, vol. II, *War* [2d ed., Cambridge, 1913]; and Percy Bordwell: *Law of War between Belligerents* [Chicago, 1908].

Every effort has been made to be as objective as possible and to preserve perfect impartiality. Classification of itself implies a certain criticism, but some of the instances in this collection serve also to illustrate prevalent though erroneous views. Others have been chosen because they allege a state of facts which, if accepted as true, will illustrate the principles. Of certain important international controversies of the past we have made a critical study and presented the conclusions reached. The confusion existing in the popular mind relative to the existing law governing the retaliatory measures of the Entente Allies seemed to make necessary a word of explanation. Nevertheless it is believed that any criticisms of the so-called blockade measures, the black-list, etc., which by way of exception this volume may contain, will be found to coincide with the opinions of the majority of those jurists of both belligerents who have preserved a legal attitude toward the international questions which have arisen in course of the conflict in which their nations are engaged. In the one or two instances where there may seem to be an expression of views upon national or international action, it should be understood that the opinions are those of Mr. Stowell.

E. C. S.
H. F. M.

Columbia University,
November, 1916.

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INTERNATIONAL CASES

CHAPTER I

MEASURES SHORT OF WAR

§ 1. REPRISALS

THE FRANCO-AMERICAN REPRISALS (1793–1800)

In 1793, in consequence of the excesses of the French Revolution, Great Britain and other European states went to war with France. As in the later Napoleonic wars, neutral commerce was subjected to illegal seizures made under French decrees and British orders in council. The situation between the United States and France, however, was rendered the more delicate because of the treaties of 1778 and the Consular Convention of 1788 under which France claimed wide privileges in American ports with respect to the fitting out of privateers, the bringing in of captures, and the exercise of prize jurisdiction. As a result of the difficulties that arose, Genêt, the French Minister to the United States, was recalled, as also was Morris, the American Minister at Paris. In 1794 the Jay Treaty was made with Great Britain, a measure resented by France as nullifying in large measure the special advantages enjoyed by her under the Treaty of 1778. This — the non-execution of the treaty with France — was the chief count in the recital of French grievances against the United States. In December, 1796, Mr. Pinckney, who had been sent to succeed James Monroe as Minister, was notified by the French Minister for Foreign Affairs that the Directory would "no longer recognize nor receive a minister plenipotentiary from the United States until after a reparation of the grievances demanded of the American Government" though this determination did not "oppose the continuance of the affection between the French republic and the American people, which is grounded on former good offices and

reciprocal interest." (*Am. State Papers, For. Rel.*, vol. 1, pp. 746–47.)

On February 28, 1798, Mr. Pickering, Secretary of State, in pursuance of an order of the Senate upon a memorial presented by citizens of Philadelphia who had suffered losses at the hands of the French authorities, reported as follows:

"That since the commencement of the present war, various and continual complaints have been made by citizens of the United States to the Department of State, and to the ministers of the United States in France, of injuries done to their commerce under the authority of the French republic, and by its agents. These injuries were:

"1st. Spoliations and maltreatment of their vessels at sea by French ships of war and privateers.

"2d. A distressing and long continued embargo laid upon their vessels at Bordeaux in the years 1793 and 1794.

"3d. The non-payment of bills and other evidences of debt due, drawn by the colonial administrations in the West Indies.

"4th. The seizure or forced sale of the cargoes of their vessels, and the appropriating of them to public use, without paying for them, or paying inadequately, or delaying payment for a great length of time.

"5th. The non-performance of contracts made by the agents of the Government for supplies.

"6th. The condemnation of their vessels and cargoes under such of the marine ordinances of France, as are incompatible with the treaties subsisting between the two countries. And

"7th. The captures sanctioned by a decree of the National Convention of the 9th of May, 1793 . . . which, in violation of the treaty of amity and commerce, declared enemy's goods on board of their vessels lawful prize, and directed the French ships of war and privateers, to bring into port neutral vessels laden with provisions and bound to an enemy's port." (*Am. State Papers, For. Rel.*, vol. 1, p. 748.)

On March 19, 1798, President Adams sent a message to Congress, urging the adoption of measures of defense as well as the provision of "such efficient revenue as will be necessary to defray extraordinary expenses, and supply the deficiencies which may be

occasioned by depredations on our commerce." The following passage was significant: "The present state of things is so essentially different from that in which instructions were given to the collectors to restrain vessels of the United States from sailing in an armed condition, that the principle on which those orders were issued has ceased to exist. I therefore deem it proper to inform Congress that I no longer conceive myself justifiable in continuing them, unless in particular cases, where there may be reasonable ground of suspicion, that such vessels are intended to be employed contrary to law."

One more attempt was made by Adams to obtain amicable settlement, but the ignominious treatment accorded his envoys by Talleyrand made it impossible to entertain any overtures that the French Government might make. The return of the American mission precipitated a crisis and brought on a series of reprisals which, in effect, amounted to open war. The situation as it existed for two years (1798–1800) is thus summarized by Moore (*Arbitrations*, vol. v, pp. 4426–27):

"Measures to put the country in a condition for war were immediately adopted. On June 13, 1798, before the reception of the correspondence between Talleyrand and the envoys, the President approved an act to suspend commercial intercourse between the United States and France and her dependencies. On the 22d of June acts were passed to increase the naval armament of the United States and to amend an act of the 28th of May, authorizing the President to raise a provisional army. In quick succession other acts were passed to authorize the arrest and expulsion of aliens; to authorize the defense of merchant vessels of the United States against French depredations; to protect the commerce and coasts of the United States; to augment the army of the United States; and to enable the President to borrow money. On the 7th of July the President approved an act by which it was declared that, as the treaties between the two countries had been repeatedly violated by France, the just claims of the United States for reparation refused, and their attempts to negotiate an amicable adjustment repelled with indignity; and as there was still being pursued against the United States, under the authority of the French Government, a system of predatory violence, in

conflict with the treaties and hostile to the rights of a free and independent nation, the United States were 'of right freed and exonerated from the stipulations of the treaties, and of the consular convention' and that these compacts should 'not henceforth be regarded as legally obligatory on the government or citizens of the United States.' At the next session of Congress the commercial intercourse between the United States and France was further suspended; authority was given to the President to exchange or send away French citizens who had been or might be captured and brought into the United States; provision was made for augmenting the army; and various other acts were adopted in relation to the hostilities which Congress had authorized. The command in chief of the army was offered to Washington and accepted by him. On the 21st of August, 1798, the Attorney-General of the United States advised the Secretary of State that, taking into consideration the acts of the French republic toward the United States, and the legislation adopted by Congress at its preceding session, he was of opinion that there not only existed an actual maritime war between France and the United States, but a maritime war authorized by both nations." [1]

On intimation from Talleyrand that the French Government was willing to entertain proposals looking towards the settlement of all differences between the two nations, Adams, in 1799, sent three plenipotentiaries, Ellsworth, Murray and Davie, who on September 30, 1800, concluded a convention which restored normal

[1] The anomalous situation presented some difficulty for the courts, but in *Bas* v. *Tingy* (4 Dall. 37–46), the Supreme Court of the United States held that "limited hostilities authorized by the legitimate authority of two governments against each other, constitute a public war, and render the parties respectively enemies to each other," so that in this case an American vessel was condemned to pay salvage to an American ship of war for her recapture from a French privateer.

Webster, however, was of opinion that "whatever misunderstanding existed . . . did not amount, at any time, to open and public war. . . . This act [May 28, 1798], it is true, authorized the use of force, under certain circumstances, and for certain objects, against French vessels. But there may be acts of authorized force; there may be assaults; there may be battles; there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under that practice of *retorsion* which is justified, when adopted for just cause, by the laws and usages of nations, and which all the writers distinguish from general war." (Cited in Moore: *Digest of International Law*, vol. VII, p. 158.)

relations but failed to revive the former treaties, agreement upon the latter having been found at the time impossible.

(*American State Papers, Foreign Relations*, vols. I, II, *passim;* Moore: *International Arbitrations*, vol. V, pp. 4399–4446.)

THE PREFERENTIAL TREATMENT OF CLAIMS AGAINST VENEZUELA

Permanent Court of Arbitration at The Hague, February 22, 1904

[THE references are to the pages of the Report prepared by W. L. Penfield, *Senate Document*, No. 119, 58th Congress, 3d Session.]

The British Government had complained of a number of violations of the rights of its citizens committed by Venezuelan authorities. The most serious of these acts was the seizure of the *Queen*,[1] in consequence of which demands were made that Venezuela give assurance that acts such as these would not be repeated, and that compensation would be paid. The British Government in a note of July 30, 1902, indicated that its patience was near the breaking point, and notified the Vene-

The Facts

[1] The British Memorandum of July 20, 1902, on existing causes of complaint against Venezuela contains the following statement relative to the case of the *Queen:*

"In this case it appears, from sworn evidence, that the vessel while on her voyage from Grenada to Trinidad in ballast, was overhauled by the Venezuelan gunboat *Restaurador* some twenty miles off Carupano; that after the seizure the *Queen* was towed into the Venezuelan port of Porlamar, there stripped of her sails and papers, and finally confiscated on a mere suspicion of having carried a cargo of arms to Venezuela, the crew being put on shore and left destitute.

"The master and one of the crew, after remaining there twenty-seven days, obtained a passage on a Venezuelan sloop and found their way to La Guaira, where they reported themselves to the British Vice-Consul.

"The facts having been brought to the knowledge of His Majesty's Minister, he at once addressed a representation to the Minister for Foreign Affairs and requested 'to be informed what steps the Venezuelan Government intended to take with reference to this charge, in which more than one important question was involved.'" (P. R. 612.)

On November 11, 1902, Lord Lansdowne instructed the British Ambassador to inform Secretary Hay of Venezuela's action. In view of her wholly unsatisfactory reply to the British formal protest, the Secretary for Foreign Affairs declared that they were "compelled to consider what course it may be necessary to pursue in order to enforce their demands." (P. R. 636.)

zuelan Minister that if it became necessary to take action in support of these claims it would also insist upon the payment of certain other claims. At the interview (August 1) the British representative translated to the Minister for Foreign Affairs word for word the instructions which he was requested to present, and assured himself that the latter thoroughly understood each sentence, impressing upon him the serious consequences which might be expected to follow the refusal of the Venezuelan Government to comply with the just demands of the British Government.

The Venezuelan Minister accepted the note quietly, and remarked that they "were used to these communications," to which the British representative replied that "that might be the case, but not from England; that his excellency must bear in mind that we had been extraordinarily patient; that His Majesty's Government were slow in taking such a weighty decision, but that they had the power to execute it when once taken." (P. R. 625.)

The Venezuelan Government replied at once (August 2), and stated that "until the complaints of the Venezuelan Government in reference to the *Ban Righ* were satisfied they could not even discuss any other matters." [1] (P. R. 627.)

On November 11 a further remonstrance was addressed to the Venezuelan Government to the effect that the British Government could not accept a refusal to discuss their complaints. (P. R.

[1] The *Ban Righ*, as the event proved, was a filibustering vessel, fitted out in the Thames to aid the Venezuelan insurgents. In spite of the suspicious circumstances surrounding the fitting out of the vessel, and notwithstanding the protest of the Venezuelan representative, she was allowed to depart, after the Colombian Minister had stated that she was intended for the service of his Government. As no state of war existed between Venezuela and Colombia, the British Government considered that it had no right to detain the vessel — such a course, it believed, would constitute an act of war against Colombia. When, however, it was evident that the vessel was actively engaged in hostilities against Venezuela, the British authorities required her to depart from Trinidad, so that she might not make use of British territory as a base of action against Venezuela. (P. R. 563.)

Instead of regarding this as a friendly action not, strictly speaking, imposed by international law, Venezuela looked upon it as a tardy admission that Great Britain's course could not be justified, and asserted that the failure to detain the vessel after her true character became apparent rendered Great Britain responsible for the injury subsequently caused to Venezuelan interests.

The truth of the matter seemed to be that Venezuela in her difficult situation did not find it expedient to declare war against Colombia, but expected Great Britain to assume *de facto* the same responsibilities in regard to the enforcement of neutrality which would have resulted *de jure* after a declaration of war.

636, 661.) The Venezuelan Minister for Foreign Affairs replied November 14 (P. R. 661) with a reiteration of the refusal of his government to consider the British complaints until they had received satisfaction for the injury alleged to have been caused by the *Ban Righ*. (P. R. 643.) The British Government considered it impossible to acquiesce in this position, and on December 2 instructed their representative at Caracas to present a final remonstrance, which he was to make clear must be regarded in the light of an ultimatum. (P. R. 656.) He also received instructions "to act in close conjunction" with his German colleague.

Germany had claims of a somewhat different character, mainly monetary, for damage done during the civil wars. When it appeared that, through diplomatic representations, Venezuela could not be induced to settle, Great Britain and Germany entered upon an agreement that the claims of one would not be accepted without the settlement of those of the other. (P. R. 649, 650.) The United States and other European nations also had claims against Venezuela, but took no action, with the exception of Italy, who later asked to participate in coercive measures against her. (P. R. 657, 665.)

On December 7, 1902, the British and German representatives presented simultaneous ultimatums to Venezuela (P. R. 693), and, when no answers were received within twenty-four hours, they left Caracas. (P. R. 664–65, 694.) After another twenty-four hours, on December 9,[1] three Venezuelan war-ships were seized and a fourth disabled without resistance, and two of them were subsequently sunk by the German commander. (P. R. 666–67.)

President Castro retaliated by arresting and imprisoning all persons of British and German nationality in Caracas, but they were soon released through the intercession of the United States Minister, Mr. Bowen. (P. R. 667–69.)

Two forts at Puerto Cabello were subsequently (December 13) shelled, after warning and refusal to offer an apology for the ill-treatment of a British vessel and the hauling down of British colors. There was practically no resistance, and a force was landed to destroy the guns of the fort. (P. R. 676, 712–15.)

[1] An unsatisfactory reply was received by the representatives on this date. (P. R. 673, 694.)

When these measures did not bring Venezuela to terms, Great Britain and Germany in pursuance of their plan of action next instituted a pacific blockade,[1] each power blockading different ports and issuing each its own notifications and instructions. (P. R. 669–85.) The blockade commenced on December 20, 1902, and was maintained until after the signing of the protocols of settlement. It was applied to all vessels, although days of grace were allowed to steamers and sailing vessels of third states, in accordance with the distance of their ports of departure.[2]

Subsequently the blockading forces seized the custom-houses at several ports, including La Guaira and Puerto Cabello. Almost all of the Venezuelan navy and many Venezuelan vessels and cargoes were captured by the blockading squadrons.

When the Venezuelan Government perceived no means of escape, President Castro sued for mercy.

The Negotiation of the Compromis

Negotiations were initiated through the American representative in London, in an interview of December 15. Two days before, Chargé White had passed along the proposal of the Venezuelan Government to submit to arbitration "the difficulty respecting the manner of settling claims for injuries to British and German subjects during the insurrection." (P. R. 672, 675.)

The landing of European forces on American soil and the drastic manner in which the German commander had sunk the Venezuelan vessels caused no little excitement in the United States, while in Great Britain the Government was freely criticized for endangering the cordial relations with the United States by its association with Germany in coercing an American state. The delicacy of the situation made particularly valuable the friendly offices of the United States.

[1] The exact nature of this blockade is a subject of discussion.

[2] In its instructions to naval officers, the British Government ordered the seizure of Venezuelan vessels and of other vessels, after they had received a special warning of the existence of the blockade and a notification not to attempt to violate it. It was announced that a prize court would be established at Port of Spain, and provision was made to interfere as little as possible with the egress from the blockaded ports of persons then in Venezuela who wished to leave the country. Further provision was made for ships in distress and mail steamers. The latter were nevertheless subject to the restrictions of the blockade. (P. R. 671, 683.)

On December 17, the American Chargé informed the Marquis of Lansdowne that "the Venezuelan Government now earnestly wished for arbitration, which, in the opinion of the United States Government, seemed to afford a most desirable solution of the question in dispute." (P. R. 677.)

The British and German Governments, without desisting from the measures of coercion then in progress, "accepted in principle the idea of settling the Venezuelan dispute by arbitration," but considered that some of their claims were of a kind that could not be included in the reference, and they asked President Roosevelt to act as arbitrator. (P. R. 679.)

President Castro's telegram of December 18 stated that he had conferred full powers upon Mr. Bowen to enter into negotiations to settle the difficulty which had arisen with Great Britain, Germany, and Italy.

The next day the following instrument was executed:

"The Venezuelan Government confers on Mr. Herbert W. Bowen full powers to enter into negotiations to settle, in the most favorable manner possible to the interests of the Republic, the present difficulty which has arisen with the United Kingdom of Great Britain, the German Empire, and the Kingdom of Italy.

"In witness whereof these presents are issued in Caracas, the 18th December, 1902.

"Cipriano Castro,
"*Constitutional President.*

"Countersigned:

"López Baralt,
"*Minister for Foreign Affairs.*"

In a memorandum of December 23, the British Government stated its demands. (P. R. 687–89.) A few days later, President Castro recognized "in principle" the claims, and bowing to superior force, said he would authorize Mr. Bowen to represent Venezuela and wished to have him proceed to Washington "to confer with the representatives of the powers that have claims against Venezuela, in order to arrange for an immediate settlement of all the claims, or the preliminaries for a reference to the tribunal of The Hague, or to an American Republic to be selected by the

Allied Powers, and by the Government of Venezuela." (P. R. 692.)

On January 5, 1903, the British Government replied that they understood President Castro's recognition "in principle" of the claims to signify that any negotiations with Mr. Bowen at Washington would "proceed upon the assumption that the Venezuelan Government unreservedly accept, and agree to be bound by the conditions laid down in the memorandum of December 23, 1902," the terms of which were again recited.

"On receiving a definite assurance from President Castro that this interpretation of his language is accepted by him as correct, and that, whatever procedure be adopted, adequate provision will be made for the prompt satisfaction of the claims specified in paragraph (1) [of the first rank so-called]," the British Secretary promised to authorize the British representative at Washington to confer on this basis with Mr. Bowen, as representative of the Venezuelan Government, and to furnish the British representative at Washington "with the necessary instructions for examining the possibility of an immediate settlement, or, failing such a settlement, for arranging a reference of all points left open for arbitration to the tribunal at The Hague." (P. R. 699.)

On January 9, the American representative communicated a copy of President Castro's telegram accepting the conditions, which he had received from Mr. Bowen, together with the latter's explanation: "If, as I understand, Great Britain and Germany want to know what guarantee they will have, please inform them that it will be the custom-houses. Consequently, I beg that the blockade be raised at once." (P. R. 703.)

President Castro's telegram to Mr. Bowen read as follows:

"*Mr. Minister:* The Venezuelan Government accepts the conditions of Great Britain and Germany and requests you to go immediately to Washington for the purpose of conferring there with the diplomatic representatives of Great Britain, Germany, and with the diplomatic representatives of the other nations that have claims against Venezuela, and to arrange either an immediate settlement of said claims, or the preliminaries for submitting them to arbitration." (P. R. 703.)

Mr. Bowen's request, made January 21, that the blockade be

raised was refused until a satisfactory understanding had been arrived at. (P. R. 719, 731.)

When Mr. Bowen entered into negotiations with Sir Michael Herbert, the British Ambassador at Washington, it soon appeared that the former expected the pacific powers to share equally in the security of 30 per cent of the customs receipts from La Guaira and Puerto Cabello, which Venezuela proposed to set aside as a guarantee. The blockading powers did not feel that this arrangement would assure them a punctual settlement of their claims, in accordance with the promise received from President Castro. To avoid prolonging the blockade unnecessarily, it was eventually agreed that after the other demands were satisfactorily settled, this remaining point should be referred to arbitration; and on February 13, Venezuela signed with the blockading powers protocols embodying the terms of the agreement, including the reference to arbitration of the one point left unsettled.

After the signature of the protocol, in accordance with its terms, the blockade was raised on February 14, 1903.

The questions to be submitted to arbitration were stated in the separate protocols signed by the blockading powers on February 13, and also in the different and successive protocols later signed with the other creditor nations; for in accordance with his full powers, Mr. Bowen had negotiated protocols with the other creditor nations to settle their claims out of the allotted 30 per cent of the customs, so that they became interested to urge their claim for an equal share in this assignment.

The issues were finally formulated and submitted in the protocols signed on May 7, 1903, between Venezuela and the blockading powers as follows:[1]

[1] The remaining articles of the British protocol of May 7, 1903, were as follows:

"Whereas protocols have been signed between Venezuela on the one hand and Great Britain, Germany, Italy, United States of America, France, Spain, Belgium, the Netherlands, Sweden and Norway, and Mexico on the other hand, containing certain conditions agreed upon for the settlement of claims against the Venezuelan Government;

"And whereas certain further questions arising out of the action taken by the Governments of Great Britain, Germany, and Italy, in connection with the settlement of their claims, have not proved to be susceptible of settlement by ordinary diplomatic methods;

"And whereas the powers interested are resolved to determine these questions by reference to arbitration in accordance with the provisions of the convention for the

"ARTICLE I. The question as to whether or not Great Britain, Germany, and Italy are entitled to preferential or separate treatment in the payment of their claims against Venezuela shall be submitted for final decision to the tribunal at The Hague.

"Venezuela having agreed to set aside 30 per cent of the customs revenues of La Guaira and Puerto Cabello for the payment of

pacific settlement of international disputes, signed at The Hague on the 29th July, 1899;

"The Governments of Venezuela and Great Britain have, with a view to carry out that resolution, authorized their representatives — that is to say:

"For Venezuela Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela, and for Great Britain His Excellency Sir Michael Henry Herbert, G.C.M.G., C.B., His Britannic Majesty's ambassador extraordinary and plenipotentiary to the United States of America, to conclude the following agreement:

"ARTICLE I

[*See above*]

"ARTICLE II

"The facts on which shall depend the decision of the questions stated in Article I shall be ascertained in such manner as the tribunal may determine.

"ARTICLE III

"The Emperor of Russia shall be invited to name and appoint from the members of the permanent court of The Hague three arbitrators to constitute the tribunal which is to determine and settle the questions submitted to it under and by virtue of this agreement. None of the arbitrators so appointed shall be a citizen or subject of any of the signatory or creditor powers.

"This tribunal shall meet on the first day of September, 1903, and shall render its decision within six months thereafter.

"ARTICLE IV

"The proceedings shall be carried on in the English language, but arguments may, with permission of the tribunal, be made in any other language also.

"Except as herein otherwise stipulated, the procedure shall be regulated by the convention of The Hague of July 29, 1899.

"ARTICLE V

"The tribunal shall, subject to the general provision laid down in article 57 of the international convention of July 29, 1899, also decide how, when, and by whom the costs of this arbitration shall be paid.

"ARTICLE VI

"Any nation having claims against Venezuela may join as a party in the arbitration provided for by this agreement.

"Done at Washington this seventh day of May, 1903.

"[SEAL.] HERBERT W. BOWEN.

"[SEAL.] MICHAEL H. HERBERT."

the claims of all nations against Venezuela, the tribunal at The Hague shall decide how the said revenues shall be divided between the blockading powers on the one hand and the other creditor powers on the other hand, and its decision shall be final.

"If preferential or separate treatment is not given to the blockading powers, the tribunal shall decide how the said revenues shall be distributed among all the creditor powers, and the parties hereto agree that the tribunal in that case shall consider, in connection with the payment of the claims out of the 30 per cent, any preference or pledges of revenue enjoyed by any of the creditor powers, and shall accordingly decide the questions of distribution so that no power shall obtain preferential treatment, and its decision shall be final."

The other states which joined in the arbitration in accord with the terms of Article VI were The United States, Mexico, Spain, France, Belgium, The Netherlands, Sweden and Norway — eleven powers in all.

Preliminary Questions

The pacific powers raised in the course of their arguments two which might be classed as of a preliminary nature, if we may be permitted to take them out of their context as presented in connection with the discussion of the other questions: (1) That the blockading powers in claiming a preferential treatment were asking the tribunal to make an exception to the ordinary rule of the equality of states, and that in consequence, the burden of proof of the justice of their claims should fall upon the blockading powers. (2) That the blockading powers had been guilty of an abuse of force, and that it was not in harmony with the ethical and moral concepts of humanity, nor yet with the spirit of the international arbitration instituted under the Hague Convention, that the tribunal should concede to the blockading powers any advantage from such acts.

Another preliminary question of considerable importance seems not to have been argued: Whether the action taken by the blockading powers constituted war or merely a limited form of hostilities, such as reprisals.[1]

[1] In the protocol of submission and throughout the discussion, the hostilities are spoken of as "war." Hogan gives an interesting discussion of the question and in-

We may consider that these preliminary questions were disallowed, since it appears from the award that neither of them gained the approval of the court.[1]

The arguments of the agents and counsel of the respective governments covered a wide range. Without following the cases, counter-cases, and oral arguments of the two groups of powers, we must content ourselves with the merest outline.

The Arguments

The views of the pacific powers as set forth may be briefly summarized as follows:

(1) That equality of treatment was the rule among nations.
(2) That a grant of preferential treatment would encourage recourse to force over the peaceful methods of diplomacy.
(3) That new rights could not arise from the use of force.
(4) That since the basic idea of the Hague Arbitration Convention under which the tribunal was organized was opposed to force, it was the duty of the court to refuse a preference to those employing force.
(5) That it would discourage arbitration to put a premium on the use of force.
(6) That an agreement between Venezuela and the blockading powers could not affect the rights of third states.
(7) That the blockading powers had already received a preferential treatment, and
(8) That they had acknowledged that they were not entitled to any further preference.

In support of their contentions, the pacific powers laid great stress upon the precedent of the Boxer indemnity, which was made to include the claims of the non-intervening powers equally with those whose forces marched to the rescue of the beleaguered legations at Pekin. The blockading powers did not consider the case analogous, since the purpose of the use of force was different in the

clines to deny the existence of a state of war, concluding: "On the whole, therefore, it seems justifiable to consider the operations as in fact a pacific blockade." (Albert E. Hogan: *Pacific Blockade* [Oxford, 1908], p. 157.)

[1] The student is warned that the arguments in the proceedings do not classify the questions, as they are here set forth. The purpose of the editors is to simplify the nexus of interlacing arguments.

two instances, and the claims of the non-interfering powers against China were negligible in amount.

Another interesting discussion centered about the comparison of the claims against an embarrassed or delinquent nation and the case of bankruptcy in private law.

The Venezuelan case as presented by Messrs. Penfield, Bowen and MacVeagh was mainly devoted to an appeal of an *ad hominem* nature, which amounted to asking the Court by its decision not to place a premium on war and encourage armed conflicts between creditor states having claims against a common debtor. The case quoted the pacific utterances of the Russian Emperor in 1899, through his Minister of Foreign Affairs, Mourawieff (President of the tribunal) and in a poetic flight referred to Russia as

> The Hercules of nations, shaggy-browed,
> Enormous-limbed, supreme on steppe and plain.

and later on to the Peace Conference as breathing the hope that the "long and bloody era of

> The lust of gain
> In the spirit of Cain

was approaching its end."

The blockading powers in answer to this urged that one of the principal advantages of international law was that it furnished fixed rules to guide the actions of states in the place of uncertain and fantastical theories based upon the ethical and moral ideas peculiar to particular individuals or nations. They considered that a judicial tribunal like the Hague Court would do most for the cause of peace by making its award in accordance with the recognized principles of international law.

On their side the blockading powers set forth the arguments:

(1) That the failure of the other powers to protest had constituted a tacit recognition of the rightful action of the blockading powers.

(2) That the rights they had acquired should not suffer prejudice because they had been willing to submit to arbitration, in place of extorting from Venezuela a complete compliance with their views.

(3) That the sole question before the court was the interpretation of the agreement between Venezuela and the blockading powers.

This last and most important argument was supplemented by the contentions that any later agreements between Venezuela and the pacific powers by which the latter were promised a share in the 30 per cent customs receipts could not affect the rights of the blockading powers to secure the punctual payment of their claims, which they alleged to be the consideration in return for which the blockade had been raised. They further contended that the agreement was not completely set forth in the protocol of submission, and could only be understood in the light of the previous negotiations. Accordingly the efforts of the blockading powers were principally confined to a careful exposition of the documents and circumstances prior to the signing of the protocol which terminated the hostilities. This required a review of the whole history of the causes of the difference, including the diplomatic interchanges relative thereto, and the coercive measures undertaken. It will not be necessary to recapitulate these events, since they have been already set forth in the statement of the facts of the case.

Costs

It was argued in the French case that since the blockading powers were in the attitude of a plaintiff asking the tribunal to depart from the recognized rule of equality between nations, the costs of arbitration should be placed upon them.

Venezuela claimed that she should not be assessed any portion of the costs, since her only interest in the contest was that justice be done. It was, however, answered that if the blockading powers should be granted a preferential treatment, it might be necessary for her to furnish other security to meet the claims of the pacific powers.

Procedure

Several interesting questions of procedure gave rise to differences of opinion. The interpretation which the tribunal gave to the provision of the compromis making English the official language had the practical effect of substituting French. This course did not meet with general approval.

Some objection was raised because the French Government employed as their agent the distinguished jurist M. Renault, who was a member of the Hague Tribunal. The French Government maintained with reason that the question was one which must be settled through the diplomatic channel or referred to the next Hague Conference, when the convention would be under revision.

The award was rendered on February 22, 1904, as follows:

Award of the Tribunal of Arbitration

"The Tribunal of Arbitration, constituted in virtue of the protocols signed at Washington on May 7, 1903, between Germany, Great Britain, and Italy on the one hand and Venezuela on the other hand;

"Whereas other protocols were signed to the same effect by Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway, and the United States of America on the one hand and Venezuela on the other hand;

"Whereas all these protocols declare the agreement of all the contracting parties with reference to the settlement of the claims against the Venezuelan Government;

"Whereas certain further questions, arising out of the action of the Governments of Germany, Great Britain, and Italy concerning the settlement of their claims, were not susceptible of solution by the ordinary diplomatic methods;

"Whereas the powers interested decided to solve these questions by submitting them to arbitration, in conformity with the dispositions of the convention, signed at The Hague on July 29, 1899, for the pacific settlement of international disputes;

"Whereas in virtue of Article III of the protocols of Washington of May 7, 1903, His Majesty the Emperor of Russia was requested by all the interested powers to name and appoint from among the members of the Permanent Court of Arbitration of The Hague three arbitrators, who shall form the Tribunal of Arbitration charged with the solution and settlement of the questions which shall be submitted to it in virtue of the above-named protocols;

"Whereas none of the arbitrators thus named could be a citizen or subject of any one of the signatory or creditor powers, and whereas the tribunal was to meet at The Hague on September 1, 1903, and render its award within a term of six months;

"His Majesty the Emperor of Russia, conforming to the request of all the signatory powers of the above-named protocols of Washington of May 7, 1903, graciously named as arbitrators the following members of the Permanent Court of Arbitration:

"His Excellency Mr. N. V. Mourawieff, Secretary of State of His Majesty the Emperor of Russia, Actual Privy Councilor, Minister of Justice and Procurator-General of the Russian Empire,

"Mr. H. Lammasch, Professor of Criminal and of International Law at the University of Vienna, member of the Upper House of the Austrian Parliament, and

"His Excellency Mr. F. de Martens, Doctor of Law, Privy Councilor, Permanent Member of the Council of the Russian Ministry of Foreign Affairs, member of the Institut de France;

"Whereas by unforeseen circumstances the Tribunal of Arbitration could not be definitely constituted till October 1, 1903, the arbitrators, at their first meeting on that day, proceeding in conformity with Article XXXIV of the convention of July 29, 1899, to the nomination of the President of the Tribunal, elected as such His Excellency Mr. Mourawieff, Minister of Justice;

"And whereas in virtue of the protocols of Washington of May 7, 1903, the above-named arbitrators, forming the legally constituted Tribunal of Arbitration, had to decide in conformity with Article I of the protocols of Washington of May 7, 1903, the following points: [See above, p. 14.]

"Whereas the above-named arbitrators, having examined with impartiality and care all the documents and acts presented to the Tribunal of Arbitration by the agents of the powers interested in this litigation, and having listened with the greatest attention to the oral pleadings delivered before the Tribunal by the agents and counsel of the parties to the litigation;

"Whereas the Tribunal, in its examination of the present litigation, had to be guided by the principles of international law and the maxims of justice;

"Whereas the various protocols signed at Washington since February 13, 1903, and particularly the protocols of May 7, 1903, the obligatory force of which is beyond all doubt, form the legal basis for the arbitral award;

"Whereas the Tribunal has no competence at all either to

contest the jurisdiction of the mixed commissions of arbitration established at Caracas nor to judge their action.

"Whereas the Tribunal considers itself absolutely incompetent to give a decision as to the character or the nature of the military operations undertaken by Germany, Great Britain, and Italy against Venezuela;

"Whereas also the Tribunal of Arbitration was not called upon to decide whether the three blockading powers had exhausted all pacific methods in their dispute with Venezuela in order to prevent the employment of force;

"And it can only state the fact that since 1901 the Government of Venezuela categorically refused to submit its dispute with Germany and Great Britain to arbitration, which was proposed several times and especially by the note of the German Government of July 16, 1901;

"Whereas after the war between Germany, Great Britain, and Italy on the one hand and Venezuela on the other hand no formal treaty of peace was concluded between the belligerent powers;

"Whereas the protocols, signed at Washington on February 13, 1903, had not settled all the questions in dispute between the belligerent parties, leaving open in particular the question of the distribution of the receipts of the customs of La Guaira and Puerto Cabello;

"Whereas the belligerent powers in submitting the question of preferential treatment in the matter of these receipts to the judgment of the Tribunal of Arbitration agreed that the arbitral award should serve to fill up this void and to insure the definite reëstablishment of peace between them;

"Whereas, on the one hand, the warlike operations of the three great European powers against Venezuela ceased before they had received satisfaction on all their claims, and, on the other hand, the question of preferential treatment was submitted to arbitration, the Tribunal must recognize in these facts precious evidence in favor of the great principle of arbitration in all phases of international disputes;

"Whereas the blockading powers, in admitting the adhesion to the stipulations of the protocols of February 13, 1903, of the other powers which had claims against Venezuela, could evidently not

have the intention of renouncing either their acquired rights or their actual privileged position;

"Whereas the Government of Venezuela in the protocols of February 13, 1903 (Article I), itself recognizes 'in principle the justice of the claims' presented to it by the Governments of Germany, Great Britain, and Italy;

"While in the protocol signed between Venezuela and the so-called neutral or pacific powers the justice of the claims of these latter was not recognized in principle;

"Whereas the Government of Venezuela until the end of January, 1903, in no way protested against the pretensions of the blockading powers to insist on special securities for the settlement of their claims;

"Whereas Venezuela itself during the diplomatic negotiations always made a formal distinction between 'the allied powers' and 'the neutral or pacific powers';

"Whereas the neutral powers, who now claim before the Tribunal of Arbitration equality in the distribution of the 30 per cent of the customs receipts of La Guaira and Puerto Cabello, did not protest against the pretensions of the blockading powers to a preferential treatment either at the moment of the cessation of the war against Venezuela or immediately after the signature of the protocols of February 13, 1903;

"Whereas it appears from the negotiations which resulted in the signature of the protocols of February 13 and May 7, 1903, that the German and British Governments constantly insisted on their being given guarantees for 'a sufficient and punctual discharge of the obligations' (British memorandum of December 23, 1902, communicated to the Government of the United States of America);

"Whereas the plenipotentiary of the Government of Venezuela accepted this reservation on the part of the allied powers without the least protest;

"Whereas the Government of Venezuela engaged, with respect to the allied powers alone, to offer special guarantees for the accomplishment of its engagements;

"Whereas the good faith which ought to govern international relations imposes the duty of stating that the words 'all claims'

used by the representative of the Government of Venezuela in his conferences with the representatives of the allied powers (statement left in the hands of Sir Michael Herbert by Mr. H. Bowen of January 23, 1903) could only mean the claims of these latter and could only refer to them;

"Whereas the neutral powers, having taken no part in the warlike operations against Venezuela, could in some respects profit by the circumstances created by those operations, but without acquiring any new rights;

"Whereas the rights acquired by the neutral or pacific powers with regard to Venezuela remain in the future absolutely intact and guaranteed by respective international arrangements;

"Whereas in virtue of Article V of the protocols of May 7, 1903, signed at Washington, the Tribunal 'shall also decide, subject to the general provisions laid down in Article LVII of the international convention of July 29, 1899, how, when, and by whom the costs of this arbitration shall be paid';

"For these reasons, the Tribunal of Arbitration decides and pronounces unanimously that:

"(1) Germany, Great Britain, and Italy have a right to preferential treatment for the payment of their claims against Venezuela;

"(2) Venezuela having consented to put aside 30 per cent of the revenues of the customs of La Guaira and Puerto Cabello for the payment of the claims of all nations against Venezuela, the three above-named powers have a right to preference in the payment of their claims by means of these 30 per cent of the receipts of the two Venezuelan ports above mentioned;

"(3) Each party to the litigation shall bear its own costs and an equal share of the costs of the tribunal.

"The Government of the United States of America is charged with seeing to the execution of this latter clause within a term of three months.[1]

[1] In his instructions of March 9, 1904, to Minister Newell at The Hague respecting this third clause of the decision, Secretary Hay said: "Inasmuch as the protocols did not confer upon the Tribunal any power to commission any government to see to the execution of the award or any part of it by other governments, the United States Government would feel great delicacy in undertaking to execute the mandate. The want of authority on its part to do so would make it extremely embarrassing. In case any one of the other States should refuse to pay its own costs or its share

"Done at The Hague, in the Permanent Court of Arbitration, February 22, 1904.

"(Signed)	N. MOURAWIEFF.
"(Signed)	H. LAMMASCH.
"(Signed)	MARTENS."

At the final meeting of the Tribunal, and before he had declared the close of the session, the President, M. Mourawieff, launched into an extraordinary harangue against the conduct of the Japanese Government in attacking Russia. In answer the Japanese Government lodged a vigorous protest with the Secretary General of the Tribunal, condemning the action of the Russian arbitrator.

Mr. Herbert W. Bowen, agent for Venezuela, on March 15, 1904, addressed to the Secretary General of the Tribunal at The Hague a vigorous protest in which he set forth grounds of objection to the award.

(Penfield's *Report, Senate Document*, No. 119, 58th Congress, 3d Session, pp. 140–41.)

of the costs of the Tribunal, the United States Government would have no means to execute the mandate. The action of the United States in respect to the payment of the costs must, therefore, be limited to the payment of its own costs and its share of the costs of the Tribunal." (*Foreign Relations of the United States, 1904*, p. 516.)

CHAPTER II

THE INTERRUPTION OF PEACEFUL RELATIONS

§ 2. THE OUTBREAK OF WAR

THE OUTBREAK OF WAR BETWEEN THE UNITED STATES AND SPAIN (1898)

April 20, 1898, the President approved a joint resolution of Congress, by which it was declared (1) that "the people of Cuba are, and of right ought to be, free and independent"; (2) that it was the duty of the United States to demand, and that the United States did thereby demand, that Spain at once relinquish her authority and government in Cuba and withdraw her land and naval forces from the island and its waters; (3) that the President was directed and empowered to use the land and naval forces of the United States and to call into actual service the militia, to such extent as might be necessary to carry these resolutions into effect; and (4) that the United States disclaimed any disposition or intention to exercise sovereignty, jurisdiction, or control over the island except for the pacification thereof, and asserted its determination, when that was accomplished, to leave the government and control of the island to its people.

On the same day the Spanish Minister at Washington asked for and obtained his passports, and the text of the joint resolution was cabled by the United States to its minister in Madrid for communication to the Spanish Government. But before it could be so communicated the American Minister, on April 21, received from the Spanish Government a note, in which it was stated that the joint resolution was considered as an obvious declaration of war, and that all diplomatic relations consequently were severed. On April 22 the President issued a proclamation, in which, referring to the joint resolution of Congress, he declared a blockade of ports on the

north coast of Cuba from Cardenas to Bahia Honda, and of the port of Cienfuegos on the south coast. The blockade was instituted on the same day. By an act of Congress approved April 25, 1898, war was declared to have existed since April 21, inclusive, and the President was directed and empowered to use the entire land and naval forces of the United States, and to call into actual service the militia for the purpose of carrying it on.

(Taken textually from Moore: *Digest of International Law*, vol. VII, pp. 170–71; refers to *House Ex. Doc.*, No. 428, 55th Cong., 2d Sess.)

THE COMMENCEMENT OF HOSTILITIES IN THE RUSSO-JAPANESE WAR (1904)

JANUARY 13, 1904, "now for the fourth time, and against the wishes of the majority of the people, the Government of Tokio reminded Russia of the serious position in which the two Powers found themselves, and begged her to reconsider the situation." [1] (Asakawa, *The Russo-Japanese Conflict* [Boston, 1904], p. 337.)

JANUARY 16, Japan's last proposals were received by the Russian Government. (Asakawa, p. 349.)

JANUARY 21, "two battalions of infantry and some artillery were sent from Port Arthur and Talien to the northern frontier of Korea." (Asakawa, p. 353, quoting communication to the members of the Japanese Government, March 3.)

JANUARY 25 or 26, Count Lamsdorff informed M. Kurino, the Japanese Minister, that the Tsar had referred the consideration of the Japanese proposals to a special conference which would meet January 28, and that the Russian decision would probably not be given before February 2. (Asakawa, p. 341.)

JANUARY 28, Viceroy Alexieff "ordered Russian troops near the Yula to be placed on a war footing." (Asakawa, p. 349.)

JANUARY 30, Count Lamsdorff told M. Kurino (the Japanese

[1] At the outbreak of the Russo-Japanese War the two governments debated in the forum of the world's public opinion three questions: (1) the responsibility for the recourse to arms, (2) the violation of the neutrality of Korea, and (3) whether Japan had violated the law of nations by her manner of opening hostilities. The extracts here given are intended to refer to this last controversy only.

Minister) that he could not tell him the exact date when the Russian reply would be sent. (Asakawa, pp. 349–50 *n.*)

FEBRUARY 1, the Governor of Vladivostok asked the Japanese commercial agent to prepare to withdraw Japanese subjects residing there, "as the Governor was under instructions from his government, ready at any time to proclaim martial law." (Asakawa, p. 354.)

FEBRUARY 3. the Russian Government telegraphed Viceroy Alexièff the full text of a draft statement, giving the reasons which "prompted the Russian Government in making some modifications in the Japanese proposals, and the general instructions to the Russian Minister at Tokio concerning the presentation of the reply to the Japanese Government." (Asakawa, p. 350.) In order to save time, identical telegrams were sent direct to Baron Rosen [Russian Minister at Tokio]. (From the account published in the Russian *Official Messenger*, Feb. 20; Asakawa, p. 350.)

FEBRUARY 3, and 4, the Japanese Cabinet and Privy Council held a conference to discuss the situation, which the Japanese Government considered had reached a critical point. (Asakawa, p. 342.)

FEBRUARY 4, the Russian Government dispatched its squadron from the port of Suez. (T. J. Lawrence: *War and Neutrality in the Far East* [London, 1904], p. 33.)

FEBRUARY 4, 8 P.M., Count Lamsdorff had a conversation with M. Kurino about the contents of the Russian reply (note). The Russian statement (Asakawa, p. 350) declares "that Count Lamsdorff notified the Japanese Minister of the despatch to Baron Rosen of the Russian proposals in reply to the Japanese note." Asakawa states that this is merely a statement of the probable contents of the reply, and nothing more than Count Lamsdorff's "personal opinion. It was not an official statement of the exact contents of the reply." (Asakawa, p. 350 *n.*)

FEBRUARY 5, 5:05 A.M., M. Kurino telegraphed Baron Komura the probable terms of the Russian reply. This reply, as Asakawa states, "reached Tokio at 5:15 P.M., or three hours and a quarter after the Japanese notes severing relations had been sent." (Asakawa, pp. 339–40, *n.* 4.)

FEBRUARY 5, according to the Russian statement, a message

"arrived from the Viceroy [Alexieff] stating that he had heard from the Baron [Rosen] that the latter had received the Russian reply." (Asakawa, p. 350, citing the account in the Russian *Official Messenger*, February 20.)

FEBRUARY 5, AT 2 P.M., Baron Komura, Japanese Minister for Foreign Affairs, telegraphed M. Kurino to close the negotiations, and in a simultaneous note instructed him immediately thereafter to present a second note severing diplomatic relations.[1] (Asakawa, pp. 342–44.)

[1] The two notes and explanatory instructions read as follows:

"Further prolongation of the present situation being inadmissible, the Imperial Government have decided to terminate the pending negotiations and to take such independent action as they may deem necessary to defend their menaced position and to protect their rights and interests. Accordingly you are instructed to address to Count Lamsdorff, immediately upon receipt of this telegram, a signed note to the following effect:

"'The undersigned, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan, has the honor, in pursuance of instructions from his Government, to address to His Excellency the Minister for Foreign Affairs of His Majesty the Emperor of all the Russias the following communication:

"'The Government of His Majesty the Emperor of Japan regard the independence and territorial integrity of the Empire of Korea as essential to their own repose and safety, and they are consequently unable to view with indifference any action tending to render the position of Korea insecure.

"'The successive rejections by the Imperial Russian Government by means of inadmissible amendments of Japan's proposals respecting Korea, the adoption of which the Imperial Government regarded as indispensable to assure the independence and territorial integrity of the Korean Empire and to safeguard Japan's preponderating interests in the Peninsula, coupled with the successive refusals of the Imperial Russian Government to enter into engagements to respect China's territorial integrity in Manchuria which is seriously menaced by their continued occupation of the province, notwithstanding their treaty engagements with China and their repeated assurances to other powers possessing interests in those regions, have made it necessary for the Imperial Government seriously to consider what measures of self-defense they are called upon to take.

"'In the presence of delays which remain largely unexplained and naval and military activities which it is difficult to reconcile with entirely pacific aims, the Imperial Government have exercised in the depending negotiations a degree of forbearance which they believe affords abundant proof of their loyal desire to remove from their relations with the Imperial Russian Government every cause for future misunderstanding. But finding in their efforts no prospect of securing from the Imperial Russian Government an adhesion either to Japan's moderate and unselfish proposals or to any other proposals likely to establish a firm and enduring peace in the Extreme East, the Imperial Government have no other alternative than to terminate the present futile negotiations.

"'In adopting that course the Imperial Government reserve to themselves the right to take such independent action as they may deem best to consolidate

FEBRUARY 6, 7 A.M., the Japanese fleet left Sasebo with the intention of attacking. (Hurst and Bray: *Russian and Japanese Prize Cases*, vol. II [*Japanese Cases*], pp. 4, 16; Takahashi: *The Russo-Japanese War*, p. 22.)

FEBRUARY 6, 9 A.M., a Japanese warship captured the Russian steamship *Ekaterinoslav* of the Russian Volunteer Fleet Company near Fusan, Korea. This vessel was subsequently condemned as good prize. (Hurst and Bray, p. 9.)

FEBRUARY 6, 2 P.M., the Russian Minister at Tokio was informed of the severance of diplomatic relations with Russia. (Asakawa, pp. 344–45; Hurst and Bray, p. 16.)

FEBRUARY 6, 2:45 P.M., a Japanese warship captured the Russian steamship *Mukden* at Fusan, Korea. (Hurst and Bray, p. 13.)

and defend their menaced position, as well as to protect their established rights and legitimate interests.'"

(Telegram from Baron Komura to Mr. Kurino, Tokio, February 5, 1904, 2:15 P.M. *Correspondence regarding the Negotiations between Japan and Russia, 1903–04, Presented to the Imperial Diet, March, 1904*, No. 48; Cf. Asakawa, pp. 296–97.)

The second telegram reads:

"You are instructed to address to Count Lamsdorff a signed note to the following effect simultaneously with the note mentioned in my previous telegram:

"'The Undersigned, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan, has the honor, in pursuance of instructions from his Government, to acquaint His Excellency the Minister for Foreign Affairs of His Majesty the Emperor of all the Russias that the Imperial Government of Japan, having exhausted without effect every means of conciliation with a view to the removal from their relations with the Imperial Russian Government of every cause for future complications, and finding that their just representations and moderate and unselfish proposals in the interest of a firm and lasting peace in the Extreme East are not receiving the consideration which is their due, have resolved to sever their diplomatic relations with the Imperial Russian Government which for the reason named have ceased to possess any value.

"'In further fulfilment of the command of his Government, the Undersigned has also the honor to announce to His Excellency Count Lamsdorff that it is his intention to take his departure from St. Petersburg with the staff of the Imperial Legation on , date.'"

(Telegram from Baron Komura to Mr. Kurino, Tokio, February 5, 1904, 2:15 P.M. *Ibid.*, No. 49.)

These notes have been taken from Correspondence rather than from Asakawa's translation, firstly, because the former is couched in more diplomatic language; secondly, because the more peremptory terms of Asakawa's translation would be evidence of more strained relations. As both sources are Japanese, it seems fair to select that which is in the politer language.

After all it is not the translation of the Japanese original which is important, but the language of the translation as presented by M. Kurino at St. Petersburg.

FEBRUARY 6, 10:59 P.M. (4 P.M. at St. Petersburg),[1] M. Kurino, as instructed, presented the note terminating the negotiations, and, immediately following it, another severing diplomatic relations between the two states. The date of his withdrawal left blank in Baron Komura's instructions was filled in with "February 10th." "These notes were accompanied by a private letter from the Japanese Minister to Count Lamsdorff, in which the hope was expressed that the rupture of diplomatic relations would be confined to as short a time as possible."[2] (Asakawa, p. 351.)

FEBRUARY 7, 6:30 A.M., the Russian merchant vessel *Rossia* was captured by a Japanese warship about six nautical miles from Kushingan, Korea. (Hurst and Bray, pp. 39–45; Takahashi, pp. 557–59.)

FEBRUARY 8, AT NOON, "the *Koreetz* and *Variag* were ordered to leave Chemulpo. Fight ensued in which both the Russian warships were sunk." (Takahashi, p. 22.)

FEBRUARY 8, AT 11 P.M., "the Japanese torpedo boats attacked Port Arthur and gave serious injury to the Russian warships." (Takahashi, p. 22.)

FEBRUARY 10, the Tsar of Russia issued the following manifesto, declaring war against Japan:

"We proclaim to all our faithful subjects that, in our solicitude for the preservation of that peace so dear to our heart, we have put forth every effort to assure tranquillity in the Far East. To these pacific ends we declared our assent to the revision, proposed by the Japanese Government, of the agreements existing between the two Empires concerning Korean affairs. The negotiations initi-

[1] The following courteous communication was received from the Superintendent of the United States Naval Observatory:

"Replying to your letter of June 28, 1916, Japan was using in 1904, and is still using, the time of 135° east longitude, which is nine hours later than Greenwich mean time. St. Petersburg was using local time two hours and one minute later than Greenwich mean time. Hence 4 P.M. in St. Petersburg corresponded to 10:59 P.M., same date, in Tokio."

[2] The interpretation which Russia would put upon the rupture of diplomatic relations would be derived from:

(1) the language of the original notes as presented by the Japanese Minister;

(2) the interval before the departure of the Japanese mission; and

(3) the contents of the Minister's private letter, which does not seem to have been published. The manner in which the notes were presented would also be taken into account.

ated on this subject were, however, not brought to a conclusion, and Japan, not even awaiting the arrival of our last reply [1] and the proposals of our Government, informed us of the rupture of the negotiations and of diplomatic relations with Russia.

"Without previously notifying us that the rupture of such relations implied the beginning of warlike action, the Japanese Government ordered its torpedo boats to make a sudden attack on our squadron in the outer roadstead of the fortress of Port Arthur. After receiving the report of our Viceroy on the subject, we at once commanded Japan's challenge to be replied to by arms.

"While proclaiming this our resolve, we, in unshakable confidence in the help of the Almighty, and firmly trusting in the unanimous readiness of all our faithful subjects to defend the Fatherland together with ourselves, invoke God's blessing on our glorious forces of the army and navy." (Asakawa, pp. 345–46.)

FEBRUARY 10,[2] the Japanese Imperial Rescript, declaring war against Russia, read as follows:

"We, by the Grace of Heaven, the Emperor of Japan, seated on the Throne occupied by the same dynasty from time immemorial, do hereby make proclamation to all our loyal and brave subjects:

"We hereby declare war against Russia. We command our army and navy to carry on hostilities against her with all their strength, and we also command all our officials to make effort, in pursuance of their duties and in accordance with their powers, to attain the national aim, with all the means within the limits of the law of nations.

"We deem it essential to international relations, and make it

[1] The Russian Government, in a statement issued March 12 (see Asakawa, pp. 360–62), state that "a telegram to Baron Rosen at Tokio [then Russian Minister to Japan] sent from St. Petersburg February 4, was not delivered until the morning of February 7. That delay did not occur on the Siberian line, as was shown by the fact that a reply to a telegram from Viceroy Alexieff sent at the same time was received the same day. Therefore, it is conclusive that the Rosen telegram was held by the Japanese and not delivered for two days."

[2] Count Lamsdorff's circular of February 11 states that Japan made the attack three days prior to the declaration of war. If the Declaration was properly dated, the 10th, the attack at Port Arthur would only be two days prior. Count Lamsdorff perhaps referred to the time the notice of the Declaration was received. The date of the Declaration is also given as the 11th, in the Russian *Official Messenger*. (Asakawa, p. 351. See *post*, p. 33 *n.*) Takahashi has February 10. (Takahashi, p. 60.)

our constant aim, to promote the pacific progress of our Empire in civilization, to strengthen our friendly ties with other states, and thereby to establish a state of things which would maintain enduring peace in the East, and assure the future security of our Empire without injury to the rights and interests of other powers. Our officials also perform their duties in obedience to our will, so that our relations with all powers grow steadily in cordiality.

"It is thus entirely against our wishes that we have unhappily come to open hostilities against Russia.

"The integrity of Korea has long been a matter of the gravest concern to our Empire, not only because of the traditional relations between the two countries, but because the separate existence of Korea is essential to the safety of our Empire. Nevertheless, Russia, despite her explicit treaty pledges to China and her repeated assurances to other powers, is still in occupation of Manchuria, and has consolidated and strengthened her hold upon it, and is bent upon its final absorption. Since the possession of Manchuria by Russia would render it impossible to maintain the integrity of Korea, and would, in addition, compel the abandonment of all hope for peace in the Far East, we expected, in these circumstances, to settle the question by negotiations and secure thereby a permanent peace. With this object in view, our officials by our order made proposals to Russia, and frequent conferences were held during the last half-year. Russia, however, never met such proposals in a spirit of conciliation, but by her prolonged delays put off the settlement of the pending question, and, by ostensibly advocating peace on the one hand, and on the other secretly extending her naval and military preparations, sought to bring about our acquiescence. It is not possible in the least to admit that Russia had from the first a sincere desire for peace. She has rejected the proposals of our Empire; the safety of Korea is in danger; the interests of our Empire are menaced. At this crisis, the guarantee for the future which the Empire has sought to secure by peaceful negotiations can now only be sought by an appeal to arms.

"It is our earnest wish that, by the loyalty and valor of our faithful subjects, peace may soon be permanently restored and the glory of our Empire preserved." (Asakawa, pp. 346–48.)

FEBRUARY 11. Count Lamsdorff addressed to the Russian representatives abroad a circular mainly devoted to the violation of the alleged neutrality of Korea, in which was included the following statement in regard to the commencement of hostilities:

"2. With a division of its [Japan's] fleet made a sudden attack on February 8 — that is, three days prior to the declaration of war — on two Russian warships in the neutral port of Chemulpo. The commanders of these ships had not been notified of the severance of diplomatic relations, as the Japanese maliciously stopped the delivery of Russian telegrams by the Danish cable and destroyed the telegraphic communication of the Korean Government.[1] The details of this dastardly attack are contained and published in an official telegram from the Russian Minister at Seoul.

"3. In spite of the international laws above mentioned, and shortly before the opening of hostilities, the Japanese captured as prizes of war certain Russian merchant ships in the neutral ports of Korea.

. . . . . .

"Recognizing that all of the above facts constitute a flagrant breach of international law, the Imperial Government considers it to be its duty to lodge a protest with all the powers against this procedure of the Japanese Government, and it is firmly convinced that all the powers, valuing the principles which guarantee their relations, will agree with the Russian attitude."[2] (Asakawa, pp. 356–57.)

The statement of the Japanese Government of March 9, answering each of the charges *seriatim*, replied to these particular accusations as follows:

"2. The Imperial [Japanese] Government declare that the Russian allegation that they stopped the delivery of Russian tele-

[1] This is denied by Japan. (See p. 34.)

[2] An account of the severance of diplomatic relations, published in the Russian *Official Messenger* February 20, concludes as follows:

"Although the breaking off of diplomatic relations by no means implies the opening of hostilities, the Japanese Government, as early as the night of the 8th, and in the course of the 9th and 10th, committed a whole series of revolting attacks on Russian warships and merchantmen, attended by a violation of international law. The decree of the Emperor of Japan on the subject of the declaration of war against Russia was not issued until the 11th instant." (Asakawa, p. 351.)

grams by the Danish cable and destroyed the Korean Government's telegraphic communication is wholly untrue. No such acts were done by the Imperial [Japanese] Government.

"Regarding the alleged sudden attack, on February 8 last, upon two Russian men-of-war in the port of Chemulpo, it is only necessary to say that a state of war then existed, and that, Korea having consented to the landing of Japanese troops at Chemulpo, that harbor had already ceased to be a neutral port, at least as between the belligerents.

"3. The Imperial Government have established a Prize Court, with full authority to pronounce finally on the question of the legality of seizures of merchant vessels. Accordingly, they deem it manifestly out of place to make any statement on their part regarding the Russian assertion that they unlawfully captured as prizes of war the Russian merchantmen which were in the ports of Korea." [1] (Asakawa, pp. 358–59.)

AUSTRIA'S NOTIFICATION TO NEUTRALS OF WAR DECLARED AGAINST SERBIA (1914)

Sir M. de Bunsen to Sir Edward Grey

[Enclosure in a dispatch of July 28, 1914, from the British Ambassador at Vienna]

Copy of Note verbale, dated Vienna, July 28, 1914

[Translation]

In order to bring to an end the subversive intrigues originating from Belgrade and aimed at the territorial integrity of the Austro-

[1] Russia's counter-reply to the Japanese answer (mainly devoted to the alleged violation of Korean neutrality) was in the form of an inspired communication to the press (March 12) and contained the following:

"Japan pleads that the charge against her seizure of Russian merchantmen before the declaration of war cannot lie after the establishment of prize courts. Their seizure before the declaration of war being piracy is not defensible by the establishment of prize courts, which cannot exist before a declaration of war. The steamer *Russia* was seized in the waters of southern Korea even before M. Kurino had presented his note here." (Asakawa, pp. 361–62.)

For the decision in the case of the *Russia* see Hurst and Bray, pp. 39–42. At the time this counter-reply was issued perhaps the Russian Government had not received notice of the earlier seizures of the *Ekaterinoslav* and the *Mukden* as given in the chronology.

Hungarian Monarchy, the Imperial and Royal Government has delivered to the Royal Serbian Government a note in which a series of demands were formulated, for the acceptance of which a delay of forty-eight hours has been granted to the Royal Government. The Royal Serbian Government not having answered this note in a satisfactory manner, the Imperial and Royal Government are themselves compelled to see to the safeguarding of their rights and interests, and, with this object, to have recourse to force of arms.

Austria-Hungary, who has just addressed to Serbia a formal declaration, in conformity with Article 1 of the Convention of the 18th October, 1907, Relative to the Opening of Hostilities, considers herself henceforward in a state of war with Serbia.

In bringing the above to notice of His Britannic Majesty's Embassy, the Ministry for Foreign Affairs has the honor to declare that Austria-Hungary will act during the hostilities in conformity with the terms of the Conventions of The Hague of the 18th October, 1907, as also with those of the Declaration of London of the 28th February, 1909, provided an analogous procedure is adopted by Serbia.

The embassy is requested to be so good as to communicate the present notification as soon as possible to the British Government.

(*British White Paper, Miscellaneous No. 6, 1914*, No. 50.)

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§ 3. THE LIQUIDATION OF PEACE

(*a*) Days of grace

THE *BUENA VENTURA*

The Supreme Court of the United States, December 11, 1899

Mr. Justice Peckham, after stating the facts, delivered the opinion of the Supreme Court of the United States in the case of the *Buena Ventura* as follows:[1]

"The *Buena Ventura* was a Spanish merchant vessel in the peace-

[1] Chief Justice Fuller and Associate Justices Gray and McKenna dissented.

ful prosecution of her voyage to Norfolk, Virginia, from Ship Island, in the State of Mississippi, when, on the morning of April 22, 1898, she was captured as lawful prize of war, of the existence of which, up to the moment of capture, all her officers were ignorant. She was not violating any blockade, carried neither contraband of war nor any officer in the military or naval service of the enemy, nor any dispatch of or to the Spanish Government, and attempted no resistance when captured.

"The facts regarding this vessel place her within that class which this Government has always desired to treat with great liberality. It is, as we think, historically accurate to say that this Government has always been, in its views, among the most advanced of the Governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas. (3 Wharton's *International Law Digest*, § 342.) The refusal of this Government to agree to the Declaration of Paris was founded in part upon the refusal of the other Governments to agree to the proposition exempting private property, not contraband, from capture upon the sea.

"It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out, would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.

"This is the doctrine of the English courts, as exemplified in *The Phœnix* (Spink's *Prize Cases*, 1, 5) and *The Argo* (*id.*, p. 52). It is the doctrine which this court believes to be proper and correct.

"To ascertain the intention of the Executive we must look to the words which he uses. If the language is plain and clear, and

the meaning not open to discussion, there is an end of the matter. If, however, such is not the case, and interpretation or construction must be resorted to for the purpose of ascertaining the precise meaning of the text, it is our duty with reference to this public instrument to make it as broad in its exemptions as is reasonably possible.

"If inferences must be drawn therefrom in order to render certain the limitations intended, those inferences should be, so far as is possible, in favor of the claimant in behalf of the owners of the vessel.

"The language to justify an exemption of the vessel must, it is true, be found in the proclamation; yet if such language fail to state with entire clearness the full extent and scope of such exemption, thereby making it necessary that some interpretation thereof should be given, it is proper to refer to the prior views of the Executive Department of the Government as evidence of its policy regarding the subject. This is not for the purpose of enlarging the natural and ordinary meaning of the words used in the proclamation, but for the purpose of thereby throwing some light upon the intention of the Executive in issuing the instrument and also to aid in the interpretation of the language employed therein, where the extent or scope of that language is not otherwise entirely plain and clear. A reference to the views that have heretofore been announced by the Executive Department is made in 3 Wharton, *supra*, and it will be found that they are in entire accord with the most liberal spirit for the treatment of non-combatant vessels of the enemy.

"We come now to the construction of the instrument. It will be seen that Congress on the 25th of April, 1898, declared war against Spain, and in the declaration it is stated that war had existed since the 21st of April preceding. The President on the 26th of April issued his proclamation regarding the principles to be followed in the prosecution of the war. It is dated the day it was issued. The fourth clause thereof may for convenience be here reproduced, as follows:

> "'4. Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21st, 1898, inclusive, for loading their cargoes and departing from such

> ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy; or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.'

"What is included by the words 'Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places'? At what time must these Spanish vessels be 'in any ports or places within the United States' in order to be exempt from capture? The time is not stated in the proclamation, and therefore the intention of the Executive as to the time must be inferred. It is a case for construction or interpretation of the language employed.

"That language is open to several possible constructions. It might be said that in describing Spanish merchant vessels in any ports, etc., it was meant to include only those which were in such ports on the day when the proclamation was issued, April 26. Or it might be held (in accordance with the decision of the District Court) to include those that were in such ports on the 21st of April, the day that war commenced, as Congress declared. Or it might be construed so as to include not alone those vessels that were in port on that day, but also those that had sailed therefrom on any day up to and including the 21st of May, the last day of exemption, and were, when captured, continuing their voyage, without regard to the particular date of their departure from port, whether immediately before or subsequently to the commencement of the war or the issuing of the proclamation.

"The District Judge, before whom several cases were tried together, held that the date of the commencement of the war (April 21) was the date intended by the Executive; that as the proclamation of the 22d of April gave thirty days to neutral vessels found in

blockaded ports, it was but reasonable to consider that the same number of days, commencing at the outbreak of the war, should be allowed so as to bring it to the 21st of May, the day named; that although a retrospective effect is not usually given to statutes, yet the question always is, what was the intention of the legislature?

"He also said that 'the intention of the Executive was to fully recognize the recent practice of civilized nations, and not to sanction or permit the seizure of the vessels of the enemy within the harbors of the United States at the time of the commencement of the war, or to permit them to escape from ports to be seized immediately upon entering upon the high seas.' (See preamble to proclamation.)

"In the *Buena Ventura*, the case at bar, the District Judge held that her case 'clearly does not come within the language of the proclamation.'

"It is true the proclamation did not in so many words provide that vessels which had loaded in a port of the United States and sailed therefrom before the commencement of the war should be entitled to continue their voyage, but we think that those vessels are clearly within the intention of the proclamation under the liberal construction we are bound to give to that document.

"An intention to include vessels of this class in the exemption from capture seems to us a necessary consequence of the language used in the proclamation when interpreted according to the known views of this Government on the subject and which it is to be presumed were the views of the Executive. The vessel when captured had violated no law, she had sailed from Ship Island after having obtained written permission, in accordance with the laws of the United States, to proceed to Norfolk in Virginia, and the permission had been signed by the deputy collector of the port and the fees therefor paid by the ship. She had a cargo of lumber, loaded but a short time before the commencement of the war, and she left the port but forty-eight hours prior to that event. The language of the proclamation certainly does not preclude the exemption of this vessel, and it is not an unnatural or forced construction of the fourth clause to say that it includes this case.

"The omission of any date in this clause, upon which the vessel must be in a port of the United States, and prior to which the ex-

emption would not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified. Whether it was before or after the commencement of the war, would be entirely immaterial. This seems to us to be the intention of the Executive, derived from reading the fourth clause with reference to the general rules of interpretation already spoken of, and we think there is no language in the proclamation which precludes the giving effect to such intention. Its purpose was to protect innocent merchantmen of the enemy who had been trading in our ports from capture, provided they sailed from such ports before a certain named time in the future, and that purpose would be wholly unaffected by the fact of a sailing prior to the war. That fact was immaterial to the scheme of the proclamation, gathered from all its language.

"We do not assert that the clause would apply to a vessel which had left a port of the United States prior to the commencement of the war and had arrived at a foreign port and there discharged her cargo, and had then left for another foreign port prior to May 21. The instructions to United States ships, contained in the fourth clause, to permit the vessels 'to continue their voyage' would limit the operation of the clause to those vessels that were still on their original voyage from the United States, and had taken on board their cargo (if any they had) at a port of the United States before the expiration of the term mentioned. The exemption would probably not apply to such a case as *The Phœnix* (Spink's *Prize Cases*, 1). That case arose out of the English Order in Council, made at the commencement of the Crimean War. The vessel had sailed from an English port in the middle of February, 1854, with a cargo, bound for Copenhagen, and having reached that port and discharged her cargo by the middle of March, she had sailed therefrom on the 10th of April, bound to a foreign port, and was cap-

tured on the 12th of April while proceeding on such voyage. The Order in Council was dated the 29th of March, 1854, and provided that 'Russian merchant vessels, in any ports or places within Her Majesty's dominions, shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places,' etc. The claim of exemption was made on the ground that the vessel had been in an English port, and although she sailed therefrom in the middle of February to Copenhagen and had there discharged her cargo, before the Order in Council was promulgated, yet it was still urged that she was entitled to exemption from capture. The court held the claim was not well founded, and that it could not by any latitude of construction hold a vessel to have been in an English port on the 29th of March, which on that day was lying in the port of Copenhagen, having at that time discharged the cargo which she had taken from the English port. It is true the court took the view that the vessel must at all events have been in an English port on the 29th of March in order to obtain exemption, and if not there on that day, the vessel did not come within the terms of the order and was not exempt from capture. From the language of the opinion in that case it would seem not only that a vessel departing the day before the 29th of March would not come within the exemption, but that a vessel arriving the day after the 29th, and departing before the 10th of May following, would also fail to do so; that the vessel must have been in an English port on the very day named, and if it departed the day before or arrived the day after, it was not covered by the order.

"The French Government also, on the outbreak of the Crimean War, decreed a delay of six weeks, beginning on the date of the decree, to Russian merchant vessels in which to leave French ports. Russia issued the same kind of a decree, and other nations have at times made the same provisions. It is claimed that they confine the exemption to vessels that are actually within the ports of the nation at the date of issuing the decree or order.

"We are not inclined to put so narrow a construction upon the language used in this proclamation. The interpretation which we have given to it, while it may be more liberal than the other, is still one which may properly be indulged in.

"If this vessel, instead of sailing on the 19th, had not sailed until the 21st of April, the court below says she would have been exempt from capture. In truth, she was from her character and her actual employment just as much the subject of liberal treatment, and was as equitably entitled to an exemption when sailing on the 19th, as she would have been had she waited until the 21st. No fact had occurred since her sailing which altered her case in principle from the case of a vessel which had been in port on, though sailing after, the 21st. To attribute an intention on the part of the Executive to exempt a vessel if she sailed on or after the 21st of April, and before the 21st of May, and to refuse such exemption to a vessel in precisely the same situation, only sailing before the 21st, would, as we think, be without reasonable justification. It may safely be affirmed that he never had any such distinction in mind and never intended it to exist. There is nothing in the nature of the two cases calling for a difference in their treatment. They both alike called for precisely the same rule, and if there be language in the clause or proclamation from which an inference can be drawn favorable to the exemption, and none which precludes it, we are bound to hold that the exemption is given. We think the language of the proclamation does permit the inference and that there is none which precludes it.

"We are aware of no adjudications of our own court as to the meaning to be given to words similar to those contained in the proclamation, and it may be that a step in advance is now taken upon this subject. Where, however, the words are reasonably capable of an interpretation which shall include a vessel of this description in the exemption from capture, we are not averse to adopting it, even though this court may be the first to do so. If the Executive should hereafter be inclined to take the other view, the language of his proclamation could be so altered as to leave no doubt of that intention, and it would be the duty of this court to be guided and controlled by it.

"Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar.

"The question of costs then arises. We had occasion in *The Olinde Rodrigues*, 174 U. S. 510, to examine that question in rela-

tion to the existence of probable cause for making the capture. In that case it was held that such probable cause did exist, and although the facts therein proved did not commend the vessel to the favorable consideration of the court, yet upon a careful review of the entire evidence we held that we were not compelled to proceed to the extremity of condemning the vessel. Restitution was, therefore, awarded, but without damages. Payment of the costs and expenses incident to her custody and preservation, and of all costs in the case except the fees of counsel, were imposed upon the ship.

"In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy's property. At the time of seizure, however (April 22), that proclamation had not been issued, and hence there was probable cause for her seizure, although the vessel was herself entirely without fault. The subsequent issuing of the proclamation covering the case of a vessel situated as was this one took away the right to condemn which otherwise would have existed. Thus, at the time of seizure, both parties, the capturing and the captured ship, were without fault, and while we reverse the judgment of condemnation and award restitution, we think it should be without damages or costs in favor of the vessel captured.

> "*The ship having been sold, the moneys arising from the sale must be paid to the claimant without the deduction of any costs arising in the proceeding, but after deducting the expenses properly incident to her custody and preservation up to the time of her sale, and it is so ordered.*"

(*United States Reports*, vol. 175, p. 384 *ff.*)

THE *PERKEO*

The High Court of Justice, in Prize, September 4, 1914

On August 5, 1914, the day after a state of war existed between Great Britain and Germany, the *Perkeo*, a steel four-masted barque of 3765 tons, flying the German flag, was captured off Dover by H.M.S. *Zulu*, and brought into port as prize. The *Perkeo* had sailed from New York for Hamburg in ballast on July 14, and it was admitted that her master was in ignorance of the outbreak of

hostilities. The certificate given by the German Consul at New York stated that the *Perkeo* was a German ship, and her papers showed that she was formerly the British barque *Brilliant*, which had been transferred to the German flag shortly before the outbreak of war.

. . . . . .

Sir Samuel Evans, President: "From the evidence it is quite clear that the *Perkeo* was a German ship transferred from the British to the German flag on July 14, 1914. She was also under the command of a German citizen when captured. She is the type of ship referred to in article 3 of Convention VI of the Hague Conference, 1907; but the exception therein provided does not arise at all, because the German Empire refused to be bound by article 3. The right of capture therefore exists in this case, and there will be an order for the condemnation of the ship and for her appraisement and sale."

(Statement of facts and decision taken textually from E. C. M. Trehern: *British and Colonial Prize Cases* [London, 1915], pp. 136–37.)

(*b*) The treatment of resident alien enemies: expulsion and internment

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BRITISH AND GERMAN INTERNED CIVILIANS (1916)

Debate in the House of Lords, May 25, 1916

Lord Newton, replying to Lord Beresford, said that the number of British subjects repatriated as unfit since December, 1914, was 628 and the number of Germans 1160. As he had already informed the House, there were, roughly speaking, about 27,000 German civilians interned in this country. As against that number there were 4000 British civilians interned in Germany, all at Ruhleben. In view of these figures, he was reluctantly compelled to admit that the number of repatriations seemed to be thoroughly and distinctly unsatisfactory.

The lot of the British interned civilians was specially hard; it appeared to be harder than that of military prisoners. The condition of these British civilians in Germany was so unfortunate that

he was given to understand that many of them were losing their reason. Of the nine civilians repatriated a few days ago three were described as insane. It might be rejoined that the case of the Germans interned in this country was equally hard, and he was not disposed to dispute that assertion altogether. The cases, however, were not on a par, because the lot of the German civilians interned here was appreciably better than the lot of the British interned at Ruhleben. Men who had come back from that camp stated that the interned German civilians here were treated more kindly, were better fed and clothed, and had privileges not enjoyed by prisoners at Ruhleben.

His noble and gallant friend asked whether any extension of the present system of exchange was contemplated. The British Government had proposed a short time ago to the German Government that the age, which was now fixed at fifty-five, should be lowered to fifty, and that in the case of men unfit for active service in the field the age limit should be reduced to forty-five. To this proposal, made some weeks ago, the Government had not yet had a reply. But even if the proposal were accepted there would be no considerable change in the rate of the rapidity of exchange. Everyone would have realized by this time that the ultimate decision in regard to the exchange of prisoners rested with the naval and military authorities, and whatever agreement might be come to, experience showed that these authorities upon both sides would discover reasons why men should not be repatriated. The authorities were prone to regard every civilian as having some potential military or naval capacity. To show the length to which the restrictions were pushed on either side he might mention that among the interned there were men of sixty and seventy and a retired military man in Germany who was actually eighty years old.

While there were distinct advantages in a policy of general internment, there were also obvious disadvantages. The interned men cost a great deal of money. They also required a great deal of guarding, and, further, it was highly probable that internment turned men who were originally friendly into most determined enemies. Therefore, it was open to argument whether the principles on which both countries had acted ought not to be changed or modified. He was also asked whether any alteration was con-

templated in the system of exchange. There was one principle upon which the Foreign Office, the Home Office, the Admiralty, and the War Office were agreed. They had all come to the conclusion that the practice of individual exchange was thoroughly unsatisfactory. In the first place, it involved very long negotiations which led in most cases to very inadequate results, and then it created the strongest feeling of discontent and dissatisfaction on the part of the unfortunate people who were unable to command any influence upon their behalf. The process of individual exchange almost inevitably took the form of a bargain, and each Government was perpetually trying to get the better over the other. Everybody knew the case of Lord De Ramsey, who suffered from a physical infirmity which prevented him from being of military value, but in spite of this the German Government detained him for about a year upon the pretext that he had at one time been a soldier. Of course the obvious reason was that they wanted to get somebody back from this country whom they thought of particular value. But the strongest defect of the system of individual exchange was to be found in the fact that scarcely any individual exchanges had been effected under it at all, and it was also a melancholy and painful fact that there had been many cases in which endeavors had been made to secure the liberation of British officers and civilians by means of individual exchange, and these unfortunate men were now no nearer liberation than they were months or even more than a year ago. In his opinion, and it was the opinion of everybody who had had anything to do with the question, there was only one fair system of exchange, and that was that the question should be decided solely by age and physical condition. That was a principle which he hoped would not be departed from unless it could be shown that the exchange of a particular individual would be one of definite public advantage.

The arrangements with regard to the transfer of British and German incapacitated soldiers to Switzerland had been agreed to. The Swiss Commission had already arrived in this country. They were in course of visiting various camps, and had already examined a certain number of men. It was hoped that by the end of the month sufficient progress would have been made to permit of the actual transfer of some of those men on both sides. He had heard

in a vague and indefinite way from Switzerland that the number of British prisoners expected there amounted to something like 1200, but whether there was any foundation for this assumption he was not in a position to say. Every effort would be made to carry out the arrangement as quickly as possible, and he hoped, in the interests of all concerned, that a large number of unfortunate men would find their way to Switzerland.

(Debates in the House of Lords, May 25, 1916, as reported in the London *Times* May 26, 1916.)

RUSSIA'S TREATMENT OF ALIEN ENEMIES (1914)

Austro-Hungarian Consul, Von Hoffinger, to the Austro-Hungarian Ministry of Foreign Affairs

VIENNA, *October 23, 1914.*

SEVERAL days before the general mobilization in Russia, the issuance of passports to Austrians, Hungarians, and Germans had been stopped.

On the day of the declaration of war all our male nationals whose age made them liable to military service were arrested. At the beginning of the arrests the persons referred to were taken into custody without any explanation, and were put into low-class lodging-houses or police stations, and were not told until a few days later that this was only a preliminary to their deportation into the interior of Russia. Moreover, a great number of men above the military age, and numerous Austrian and Hungarian women and children, were deported from Moscow, from the Baltic cities, and from towns in western Russia.

To the accompaniment of a persistent press campaign, the Russian Government put into force several restrictive measures against our nationals, which involved complete financial ruin in addition to the deportation. Factories were compelled to dismiss their Austro-Hungarian employees, and innumerable families were deprived of their living. A special ordinance deprived nationals of enemy countries of their standing before the courts, whereby merchants lost their right to enforce payment of debts due them, and simultaneously were barred from the benefits of the moratorium.

Consequently the deported as well as the families who were with them were thrown into steadily increasing distress.

(From the *Collection of Evidence* [concluded January 31, 1915], published by the Austro-Hungarian Ministry of Foreign Affairs [English edition], No. XX, p. 45.)

CHAPTER III

THE LAWS OF WAR

§ 4. MILITARY HONOR

(*a*) Express agreements

THE ESCAPE OF GERMAN INTERNS (1915)

On October 10, 1915, six officers of the German cruiser *Kronprinz Wilhelm*, interned at Norfolk, Virginia, received permission to go ashore and to return by eight A.M., October 11. They failed to do so, and it was thought that they had broken parole and fled in the yacht *Eclipse*, purchased by one of the officers shortly before their departure. The circumstances of the case and of other breaches of parole were brought to the attention of the German Government in a note of November 16, 1915. The actions of the German officers were characterized "as breaches of the honorable conduct to be expected of officers and men of visiting and interned ships of war of a belligerent nation." In consequence the American Government declared that it was forced to restrict the very liberal privileges the interned German officers had hitherto enjoyed. Secretary Lansing "recalled that during the Russo-Japanese War, when the Russian ship *Lena* was interned by United States authorities on the Pacific Coast, three officers of that ship escaped and returned to Russia; and that upon the Government of the United States calling the matter to the attention of the Russian Government it immediately caused the escaped officers to return to American jurisdiction, where they were interned for the remainder of the war."

This precedent the American Government regarded "as in accord with the best practice of nations and applicable to the cases"

referred to in the note. The note closed by asking for the return, to the United States, of the escaped officers. Especial mention was made of one Otto Brauer, executive officer of the *Prinz Eitel Friedrich*, who had fled from that cruiser and, according to "reliable information," returned to Germany and was then "on duty on board the Cruiser *Lutzow* at Danzig."

A few days later, when the naval authorities, by way of precaution against further evasions, prepared to photograph the interned German officers, their Ambassador, Count von Bernstorff, in a note of November 22, 1915, wrote: "I realize that the deplorable escapes of the past, although inspired by patriotic motives, justify strict methods of surveillance, but believing that effective measures already have been taken to insure further escapes I would appreciate it greatly if these officers and crews could be spared the humiliation of having their photographs taken."

Secretary Lansing, on the following day, granted the request, "although," he added, "I consider that the redoubling of the vigilance of our naval authorities is even more humiliation to the interned than to be photographed."

The notes subsequently exchanged indicate how differently the two Governments understood the obligation of officers of belligerent vessels voluntarily seeking internment in a neutral port:

[Translation]

FOREIGN OFFICE,
BERLIN, *February 16, 1916.*

The undersigned has the honor to inform His Excellency, the American Ambassador, Mr. James W. Gerard, in answer to the communication of December 24, 1915, regarding the escape of officers and men from the German auxiliary cruisers *Kronprinz Wilhelm* and *Prinz Eitel Friedrich*, at present interned in American ports, that the matter has been brought to the attention of the German Naval Administration. According to the investigations made by the latter, the commanders of the two auxiliary cruisers, unfortunately, did not sufficiently instruct their officers and crews regarding the significance of the "assurance" ("Versicherung") given by them. Moreover, the expression "pledge" chosen by Rear Admiral Beatty in his letter to the commanders does not conform absolutely to the idea of the "word of honor" ("Ehren-

wort"). The persons who escaped, therefore, were obviously convinced that they would not, through their act, render themselves guilty of a breach of their word of honor.

The German Government acknowledges the fact, however, that the members of the crew — and only they — who escaped after the "assurance" ("Versicherung") of the commanders had been given on April 13 and May 5, 1915, respectively, were in the wrong towards the American Government, and that they are to be sent back to their vessels.[1] Of the persons mentioned in the note of the American Government to the German Ambassador at Washington of November 16, 1915, No. 1661, the following are therefore concerned: Marine-Stabsarzt Krüger-Kroneck, Leutnant zur See Koch, Dr. Nolte, Vize-Steuermann der Reserve Hoffmann, Vize-Steuermann der Reserve Ruedebusch, Vize-Steuermann der Reserve Forstreuter, Vize-Steuermann der Reserve Biermann, Ingenieur-Aspirant der Reserve Lustfeld, Ingenieur-Aspirant der Reserve Fischer, Heizer Thierry.

Of these persons, only Stabsarzt Krüger-Kroneck returned so far to Germany. He will be instructed to return to his vessel as soon as the American Government has obtained safe-conduct for him from the hostile Governments.

The German Government states expressly that by the return on board his ship of Stabsarzt Krüger-Kroneck the question is not touched whether, after his return, his release later on may not have to be granted in accordance with the Hague Convention regarding the application of the rules of the Geneva Convention to naval warfare.

In requesting to bring the foregoing to the attention of the American Government, the undersigned avails himself, etc.

ZIMMERMANN.

The Secretary of State to Ambassador Gerard

[Telegram — Paraphrase]

DEPARTMENT OF STATE,
WASHINGTON, *March 9, 1916.*

Mr. Gerard is informed that the reply of the German Foreign Office regarding the escape of officers and men of the German

[1] See *post*, p. 52, note.

Cruisers at present interned in ports of the United States was referred to the Navy Department. In reply the position is taken by the Navy Department that the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich* sought refuge in an American port and agreed to be interned. Therefore, the obligation of remaining with their vessels rested wholly with the officers of those vessels.

That these officers are not cognizant of the principles of international law cannot be assumed. Promises were given in writing by the captains of the two vessels for themselves, the officers, and the crews of the vessels that they would in no way violate American neutrality during their internment. It seems to be indicated by the answer of the German naval administration that it does not appreciate fully the seriousness of the obligation assumed thus by their naval representatives on the two vessels in question to remain within the assigned limits with the minimum of trouble to the Government of the country in which they are interned. They were considered as guests of the American Government and not as prisoners of war, and as such guests permission was given them to leave the navy yard and to visit on leave any part of the United States. Lieutenant Zur see Koch and Doctor Kruger Kroneck, after having availed themselves of the permission mentioned to leave the limits of their internment, failed to return as they were unquestionably bound to do. Furthermore, money was supplied by Doctor Kroneck with which the yacht *Eclipse* was purchased by six officers of the *Kronprinz Wilhelm* who escaped from the jurisdiction of the Government of the United States. Should the return of Doctor Kroneck be effected the Government of the United States should not consent to his release under the application to naval officers of the Geneva Convention rules, as on account of considerable sickness on the interned ships his presence on board is necessary. No mention is made in the reply of the German Foreign Office of Otto Brauer,[1] the executive officer of the

[1] In his note of November 24, 1915, Ambassador Bernstorff referred to the case of Brauer: "Captain Lieutenant Bauer was still on board H.M.S. *Prinz Eitel Friedrich* on March 16, but was no longer there on the 17th. Until then the commanding officer had no other directions than that of letting no one go on shore and had accordingly notified his officers and men that there was no shore leave to be had for the time being. Not until the 19th of March did he receive permission for his crew to get leave to go to certain defined places on land: 'Officers on parole and men under

ship *Prinz Eitel Friedrich*, who left that ship after the captain of the vessel had been requested by the Government of the United States not to give permission to his officers or men to go on shore, which request was acknowledged by the captain who stated that he would act in accordance therewith. It can not be conceived by the Navy Department that the executive officer, the next in command, was ignorant of this request of the Government of the United States. The departure of Otto Brauer, the executive officer, was taken against this Government's express direction, and the Navy Department is of the opinion that he should be returned to the jurisdiction of the Government of the United States. Also in the case of the engineer officer, Herman Dieke, of the *Locksun*, interned at Honolulu, who, while on parole, absented himself, no reply is made. The full reply of the Navy Department is being sent by mail to Mr. Gerard, who is directed to present the views of the Government of the United States, and to say that the Department would be glad to have an early reply.

THE *OREL*

The Sasebo Prize Court, July 25, 1905

CONDEMNING the *Orel*, a Russian hospital ship, seized by a Japanese cruiser May 27, 1905, the conclusion of the Sasebo Prize Court was as follows:

"A hospital ship is only exempt from capture if she fulfills certain conditions and is engaged solely in the humane work of aiding the sick and wounded. That she is liable to capture, should she be used by the enemy for military purposes, is admitted by international law, and is clearly laid down by the stipulations of The Hague Convention No. 3 of July 29, 1899, for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864. Although the *Orel* had been lawfully equipped and due notification concerning her had been given by the Russian Government to the Japanese Government, yet her action in com-

guard of American soldiers.' Captain Lieutenant Koch therefore could not have broken his parole, but merely disobeyed orders. There can be no question, therefore, of his being sent back to the United States on the above-stated ground."

municating the orders of the commander-in-chief of the Russian Second Pacific Squadron to other vessels during her eastward voyage with the squadron, and her attempt to carry persons in good health, i.e., the master and three other members of the crew of a British steamship captured by the Russian fleet, to Vladivostok, which is a naval port in enemy territory, were evidently acts in aid of the military operations of the enemy. Further, when the facts that she was instructed by the Russian squadron to purchase munitions of war, and that she occupied the position usually assigned to a ship engaged in reconnaissance, are taken in consideration, it is reasonable to assume that she was constantly employed for military purposes on behalf of the Russian squadron. She is, therefore, not entitled to the exemptions laid down in The Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention, and may be condemned according to international law."

(Extract from Hurst and Bray: *Russian and Japanese Prize Cases* [London, 1913], vol. II (*Japanese Cases*), p. 356.)

GENERAL TOTLEBEN'S OBSERVATION TOWERS (1878)

. . . DURING the armistice of Adrianople, which preceded the Peace of San Stefano, General Totleben erected a series of high observation posts, from which the Russian sentries could see into the Turkish entrenchments, along the front of his position. Such posts could not have been erected without opposition had no armistice existed, and the Turkish commander, Fuad Pasha, demanded that they should be removed at once, failing which he proposed to open fire along the whole line. Totleben declined to remove the posts and sent a strongly worded remonstrance to Constantinople, with the result that Fuad Pasha's action was disavowed by his Government.

(Extract from J. M. Spaight: *War Rights on Land* [London, 1911], p. 236; referring to Von Pfeil: *Experiences of a Prussian Officer during the Russo-Turkish War*, pp. 346–48.)

GILBERT'S ESCAPE (1916)

PARIS, May 28: Eugène Gilbert, the popular French airman, has a third time escaped.

Gilbert was obliged to land on Swiss territory after a successful air raid on the Zeppelin works at Friedrichshafen, and was interned on parole. Last August he escaped into France, but was obliged to return to captivity owing to the fact that the letter in which he notified the Swiss military authorities that he would take back his parole was received after he had made his escape. His second attempt to regain liberty was made last February, when with a fellow prisoner Gilbert got as far as Olten, where the fugitives were discovered by gendarmes and sent back to custody. Since then Gilbert has been watched strictly day and night, as he was no longer considered a prisoner on parole.

(Extract from the report of the Paris correspondent of the London *Times* May 29, 1916.)

PARIS, June 8. . . . At the back of it are Gilbert's fellow townsmen from the Auvergne province, the manufacturer of the motor that Gilbert used on his aeroplane, and a Paris newspaper with the largest circulation in the world.

Gilbert was imprisoned in the third story of a large barracks in Zurich and was watched night and day by special guards. One day a Frenchman arrived on the scene, a M. Robère-Mélard, ostensibly a dealer in wool, but really a general commission agent who has acted as a Sherlock Holmes on various occasions, especially since the war.

"It took me three months to arrange affairs," M. Mélard relates, "for I met with several failures. The first thing I had to do was to inspire confidence in some one around Gilbert, who would allow me, without being aware of it, to get into close touch with the man whose escape I wished to aid. Such a man I found in Captain Sturm, who was charged with watching over the prisoner and was inflexible as to his duties.

"I made no secret of being a friend of Gilbert's, but I explained that although I was glad to see him again, I had come to Switzerland on business. To convince the Captain I talked to him and showed him heavy orders I had given in accordance with orders

received from various aviation and other firms in France. I ordered all sorts of things, one day buying several cords of wood. All these orders started, but somehow or other some combination prevented delivery and in the end few went through.

"I soon found Captain Sturm's weak point. It was gastronomical. We lunched together, we had dinner and supper together, and the fare was always so good that he soon allowed me to see his prisoner almost daily. Before the Captain we talked about the weather and such exciting topics, but we wrote each other dozens of little notes which we used to slip under the table as we raised our glasses to the Captain's health.

"That lasted three whole months, by which time Sturm and I were inseparable and Gilbert and I had formed our plans.

"A certain person was to pass in front of the barracks at 7:30 P.M. If he lit his cigarette twice in front of the railing between the barracks and the police station the attempt was to be made that night, but if he blew his nose ostentatiously it meant the attempt was to be postponed. Gilbert knew that he could escape by a ventilation shaft that passed through the lavatory on his landing.

"The guards at his door were changed each night at 2 A.M. The plan was to go to the washroom at 1:50 A.M. and hope that the departing guards would fail to notify the newcomers of his absence. On Monday and Tuesday nights the relieving sentinels were informed, but on Wednesday night this duty was overlooked. Gilbert, dressed in uniform, let himself slip down the narrow ventilating shaft into the ground floor, from which he escaped by a key that I had provided. I should explain that when everything had been arranged I said good-bye to Captain Sturm and left for France just before the escape was tried. Gilbert climbed the wall around the barracks and found civilian clothes in the automobile waiting for him at the point arranged."

Gilbert's friend Arnold Bontemps, the newspaper man who worked his first escape, then took charge of the proceedings. It was hopeless to think of smuggling Gilbert out of the country at once, however well he might be disguised. The hue and cry would be too strong.

"I took him to a safe place where we were sure the police would

never think of coming, just because the apartment was one open to any visitor," said Bontemps.

"This operation took fifteen minutes, and five minutes later the alarm was given. Gilbert was stowed away in a closet of which he could leave the door ajar, closing it on the least sound. At night only he could take some rest. There he remained six days to let the storm roll by. French papers announced his arrival in Paris, declaring that he had been seen by friends, and this lulled suspicion in Switzerland.

"I returned to Zurich with a disguise for him, false beard, spectacles, heavy shoes, etc., and Gilbert took the train, having bought a return ticket for Bienne. There we walked some miles toward Geneva, when an automobile met us, which tooted its horn three times. In a second we were inside and, taking a side road to avoid the highroad, reached a little wood near Geneva, where we received the latest news about the direction police activities were taking.

"We decided to start next day, which was Ascension Day, which seemed appropriate for an aviator. The last night was passed in a village near Geneva and after some hours' walking next morning we saw the frontier, the railroad, and the road from Annemesse to Bellegarde. This was the point we had chosen for crossing the line.

"The actual crossing proved easy. The Swiss guard happened to be some yards away and Gilbert took to his legs and got into France before the guard reached him." [1]

The French guard, however, challenged him, and the only "papers" Gilbert could show were his Legion of Honor cross, his

[1] In a dispatch of June 2, 1916, the Paris correspondent of the London *Times* gives the following account of Gilbert's actual crossing of the international frontier: After his escape from Zurich Barracks on May 24 Gilbert lay low for six days while his friends devised means for getting him across the frontier. A hamlet near the Salève Mountain, Haute Savoie, on the French border, was discovered which answered the purpose, being only frequented by peasants who cross and recross from one country to the other. Gilbert's friends awaited the fugitive on the French side in a wayside tavern, the only persons in view being the Swiss and French frontier guards. Presently an aged peasant appeared painfully wending his way down the path leading to France. As he approached the frontier a Swiss gendarme challenged him, when suddenly the old peasant threw aside the stick on which he was leaning, took to his heels, and was on French soil in a moment. A French *chasseur alpin* hurried to intercept the fugitive, when Gilbert's friends called to him, "It is Gilbert." (London *Times*, June 3, 1916.)

military medal, and his war cross. When he gave his name, the brave guard accepted these decorations as proof of identity and telephoned his superior officers, who brought an automobile for Gilbert's use.

A triumphant welcome met him at Lyons, where he was able to borrow an aviator officer's uniform. A still more enthusiastic welcome awaited him at Paris, where the Minister of War congratulated him and gave him a *permission* so that he can take a short rest before resuming his place at the front. Gilbert needs some rest, as, in addition to his irksome life as a prisoner, he had to thin himself down considerably in order to be sure of passing down the ventilation shaft.

(Extract from the New York *Sun*, June 8, 1916.)

(*b*) Sponsions

THE TERMS OF JOHNSTON'S SURRENDER TO SHERMAN (1865)

On April 17, 1865, just after General Sherman learned of Lincoln's assassination, he had a conference with General Johnston relative to the latter's surrender. Lee had already surrendered to Grant on the 9th. General Johnston admitted that he could not oppose Sherman's army, and that since Lee had surrendered he could do the same with honor and propriety, and added that any further fighting would be "murder" (Sherman's *Memoirs*, vol. II, p. 349); but he thought that, instead of surrendering piecemeal, they might arrange terms that would embrace *all* the Confederate armies. Sherman asked him if he could control other armies than his own. The Confederate general replied, not then, but intimated that he could procure authority from Mr. Davis.

Sherman for his part was particularly anxious to secure a complete surrender of all the Confederate armies, so as to prevent their "dispersing" into guerrilla bands, to "die in the last ditch," and entail an indefinite and prolonged military occupation, and consequent desolation (p. 344). After Sherman had talked the matter over with nearly all the general officers of the army, and had been

advised by them to agree to some terms, another interview was held. General Johnston assured the Union commander that he had authority over all the Confederate armies, so that they would obey his orders to surrender on the same terms with his own, but he argued that, to obtain so cheaply this desirable result, Sherman ought to give his men and officers some assurance in regard to their political rights after their surrender. General Sherman explained to him that President Lincoln's proclamation of amnesty, of December 8, 1863, still in force, enabled every Confederate soldier and officer, below the rank of colonel, to obtain an absolute pardon, by simply laying down his arms, and taking the common oath of allegiance, and that General Grant, in accepting the surrender of General Lee's army, had extended the same principle to *all* the officers, General Lee included; such a pardon, Sherman said, he understood would restore to them all their rights of citizenship. But General Johnston insisted that the officers and men of the Confederate army were unnecessarily alarmed about this matter, as a sort of bugbear (p. 352). When General Johnston proposed to call in Mr. Breckenridge, General Sherman objected on the score that he was in Davis's cabinet, and that the negotiations should be confined strictly to belligerents. It was, however, agreed that Breckenridge, sinking his character of Secretary of War of the Confederacy, might attend as major-general in the Confederate army.

The officers then discussed the whole situation. General Sherman, finding the terms of the draft proposed by the Confederates too general and verbose, sat down at a table and wrote off the terms [1] which he thought concisely expressed the views and wishes

[1] *Memorandum, or Basis of Agreement, made this 18th day of April,* A.D. *1865, near Durham's Station, in the State of North Carolina, by and between General Joseph E. Johnston, commanding the Confederate Army, and Major-General William T. Sherman, commanding the Army of the United States in North Carolina, both present:*

1. The contending armies now in the field to maintain the *statu*[*s*] *quo* until notice is given by the commanding general of any one to its opponent, and reasonable time — say, forty-eight hours — allowed.

2. The Confederate armies now in existence to be disbanded and conducted to their several State capitals, there to deposit their arms and public property in the State Arsenal; and each officer and man to execute and file an agreement to cease from acts of war, and to abide the action of the State and Federal authority. The number of arms and munitions of war to be reported to the Chief of Ordnance at

of President Lincoln, as given in the interview which he had with him at City Point on March 28 (p. 325), and explained that he was willing to submit these terms to the new President, Mr. Johnson, provided that both armies should remain *in statu quo* until the truce therein declared should expire. Sherman had full faith that Johnston would religiously respect the truce, which he did; and considered that he himself would be the gainer, for in the few days it would take to send the papers to Washington, and receive an answer, he could finish the railroad up to Raleigh, and be the better prepared for a long chase (p. 353). Sherman then dispatched the terms of the agreement to Washington, and at the same time wrote to General Halleck, Chief of Staff, explaining the circumstances, and asked him to influence the President not to vary the terms. In his letter to General Grant, Sherman also asked him to get the President simply to endorse the copy and commission him

Washington City, subject to the future action of the Congress of the United States, and, in the mean time, to be used solely to maintain peace and order within the borders of the States respectively.

3. The recognition, by the Executive of the United States, of the several State Governments, on their officers and Legislatures taking the oaths prescribed by the Constitution of the United States, and, where conflicting State Governments have resulted from the war, the legitimacy of all shall be submitted to the Supreme Court of the United States.

4. The reëstablishment of all the Federal Courts in the several States, with powers as defined by the Constitution of the United States and of the States respectively.

5. The people and inhabitants of all the States to be guaranteed, so far as the Executive can, their political rights and franchises, as well as their rights of person and property, as defined by the Constitution of the United States and of the States respectively.

6. The Executive authority of the Government of the United States not to disturb any of the people by reason of the late war, so long as they live in peace and quiet, abstain from acts of armed hostility, and obey the laws in existence at the place of their residence.

7. In general terms — the war to cease; a general amnesty, so far as the Executive of the United States can command, on condition of the disbandment of the Confederate armies, the distribution of the arms, and the resumption of peaceful pursuits by the officers and men hitherto composing said armies.

Not being fully empowered by our respective principals to fulfill these terms, we individually and officially pledge ourselves to promptly obtain the necessary authority, and to carry out the above programme.

W. T. Sherman, *Major-General,*
Commanding Army of the United States in North Carolina.

J. E. Johnston, *General,*
Commanding Confederate States Army in North Carolina (pp. 356–57).

to carry out the terms (p. 355). General Sherman explained that Mr. Breckenridge was present at the conference and satisfied him of General Johnston's ability to "carry out to their full extent the terms of this agreement" (p. 355).

General Sherman's action was not satisfactory to his superiors in Washington. The Secretary of War notified General Grant that the memorandum or basis of agreement had been disapproved by the President, and instructed him to "proceed immediately to the headquarters of Major-General Sherman and direct operations against the enemy" (p. 359).

General Sherman's subordinates were instructed to "pay no regard to any truce or orders of General Sherman respecting hostilities, on the ground that Sherman's agreement could bind his command only, and no other" (p. 372).

General Grant reached Sherman on April 24, at 6 A.M., and informed him that his terms had been disapproved (p. 358), though he did not inform him that he had been ordered to replace him in command.[1] Acting under Grant's instructions, General Sherman immediately telegraphed to have a messenger sent with the following notice to General Johnston:

> "You will take notice that the truce or suspension of hostilities agreed to between us will cease in forty-eight hours after this is received at your lines, under the first of the articles of agreement.
>
> "W. T. SHERMAN, *Major General.*"

[1] General Grant was further instructed that General Sherman was to conform in his negotiations with General Johnston to the instructions which, under President Lincoln's instructions, Secretary Stanton had telegraphed to General Grant on March 3, as follows:

"The President directs me to say to you that he wishes you to have no conference with General Lee, unless it be for the capitulation of Lee's army or on solely minor and purely military matters.

"He instructs me to say that you are not to decide, discuss, or confer upon any political question; such questions the President holds in his own hands, and will submit them to no military conferences or conventions.

"Meantime you are to press to the utmost your military advantages" (pp. 359–60).

Sherman remarks: "Which dispatch, if sent me at the same time (as should have been done), would have saved a world of trouble" (p. 359).

In a letter addressed to Grant, General Sherman made a vigorous defense of his action (pp. 365–67). Compare also the letters on pp. 360–62.

At the same time he wrote another short notice to General Johnston:

> "I have replies from Washington to my communications of April 18th. I am instructed to limit my operations to your immediate command, and not to attempt civil negotiations. I therefore demand the surrender of your army on the same terms as were given to General Lee at Appomattox, April 9th instant, purely and simply" (p. 358).

Two days later General Sherman and General Johnston met to discuss the terms of surrender. General Johnston was not even aware of General Grant's presence. As soon as they met General Johnston, without hesitation, wrote out the terms of his surrender. After they had been signed by the two generals they were, at General Sherman's request, approved by General Grant, and the original copy sent to Washington (p. 363).

(Pieced together almost in Sherman's identical words from his *Memoirs* [New York, 1875], vol. II, to the pages of which the references are given.)

(c) Tacit agreements

GENERALS BEAUREGARD AND GILLMORE MAKE COUNTER-ACCUSATIONS OF BAD FAITH (1863)

HEADQUARTERS DEPARTMENT OF THE SOUTH,
IN THE FIELD, MORRIS ISLAND, S.C., *August 5, 1863.*

General G. T. Beauregard,
Commanding Confederate Forces, Charleston, S.C.:

General: Your two letters of the 22d ultimo, one of them being in reply to mine of the 18th, have been received.

You express yourself at a loss to perceive the necessity for my statement that I should expect full compliance on your part with the usages of war among civilized nations, "in their unrestricted application to all the forces under my command."

At that time I considered my remarks as pertinent and proper. Events that have since transpired show them to have been emi-

nently so, for, after having entered into a solemn agreement with me for mutually paroling and returning to their respective commands the wounded prisoners in our hands, you declined to return the wounded officers and men belonging to my colored regiments, and your subordinate in charge of the exchange asserted that that question had been left for after-consideration. I can but regard this transaction as a palpable breach of faith on your part, and a flagrant violation of your pledges as an officer.

In your second letter of the 22d ultimo, you request me to return to you Private Thomas Green, of Company H, First [Regular] Regiment South Carolina Volunteers, for the alleged reason that he left your lines on the 19th, during the suspension of hostilities under a flag of truce.

I beg leave to state that you are laboring under a misapprehension. Private Green did not enter my lines during the existence of a flag of truce. It is true that, under a flag of truce on the day referred to, I requested permission of the officer in command of Fort Wagner to receive and bury my own dead, a request which was refused me, and then the truce ended. I refrained from opening my batteries on that day because some of my own wounded were seen lying just outside the fort, in plain view, exposed to a burning sun throughout the entire day.

Very respectfully, your obedient servant,

Q. A. GILLMORE,
Brigadier-General, Commanding.

HDQRS. DEPT. SOUTH CAROLINA, GEORGIA, AND FLORIDA,
CHARLESTON, S.C., *August 18, 1863.*

General Q. A. Gillmore,
Commanding U. S. Forces, Morris Island:

Sir: Your letter of the 5th was not received at these headquarters until the 8th instant.

I cannot bandy allegations with you, and much less shall I emulate the temper and spirit in which your communication was conceived, but will simply confine myself to showing how groundless is your imputation of bad faith on my part in connection with the return of wounded prisoners of war.

You knew that there existed an order of the President of my

Government, and possibly were aware of an act of the Congress of the Confederate States, which expressly exclude armed negroes from recognition by Confederate States officers as legitimate means of war. You know, moreover, that in accordance with this position of the constituted authorities of my people, as in duty bound, I had uniformly refused to receive or communicate in this department with flags of truce borne by officers or escorted by men of negro regiments in your service.

You had thus due notice of my views and of my practice, and could have no right to expect me to deviate from either on such an occasion. Indeed, you must have felt assured of the fact that I could not assent to any course which, in effect, placed negroes taken in arms in the State of South Carolina on the same footing with recognized soldiers. Therefore, if not prepared to yield your consent, or obliged to exact an acquiescence on our side in the pretension of the United States, but recently set up after two years of war, to employ negro soldiers, you were surely bound to demand definitively that negroes should be included in the proposed arrangement, but you did not demand it.

The fact is, you were well satisfied of what would be my course had you attempted to make such conditions, and, bearing in mind that I had many more of your wounded than you had of mine, you chose, sir, to ignore your negro ally after having given him the right or head of your storming column on the 18th of July. This, sir, will be the record of history, I dare to say, even as made up by your own countrymen.

Certain papers herewith, I trust, will satisfy you that I had no idea of leading you to expect me to disregard the orders of my Government and my usage in respect to armed negroes. Brigadier-General Hagood's report (marked B) shows, I submit, the understanding of the officer who bore the flag from you, to wit, Brigadier-General Vogdes, of your service.

While I may not descend to recriminations, I must submit for your consideration whether your course was legitimate in permitting men of my command to be retained and not returned under the cartel, on the ground that they had declined to return and had taken an oath of allegiance to the United States. I apprehend that under no usage of war were you warranted in permitting

such an act, the aspect of which is by no means improved by the fact that in this way you increased the inequalities of the transaction to your own advantage, and were enabled to return but 39 Confederate non-commissioned officers and privates, in exchange for 104 officers, non-commissioned officers, and privates of your own service.

You are, of course, aware that the men whom you have thus retained on their taking the oath of allegiance, according to the laws of war, are incontestably deserters, subject to the punishment set by law for that crime.

In connection with the deserter, Green, I am led to infer that you rest your refusal to surrender him on a denial of the fact that a truce existed on the 19th of July at such times as our respective subordinates (Generals Hagood and Vogdes) were not in direct communication under flags of truce between the two forces. Of course I cannot hope to change your views by argument, and shall not attempt it, but will refer you to the report of Brigadier-General Hagood herewith, marked C, which, I believe, will show that there was a truce *de facto* and substantial between the belligerent forces on Morris Island, during the whole of the 19th of July, and during which my men were chiefly engaged in giving burial to 600 officers and men of your troops, and removing the wounded of both forces.

Further, it is confidently believed that at the time Green entered your lines, Generals Hagood and Vogdes were in conference and the white flag was actually flying. Be that as it may, there was an absolute truce or suspension of hostilities which all soldiers observant of the usages of civilized war would acknowledge, without reference to any lack of a mere symbol, such as a white flag.

In conclusion, I have further to say that no wounded officer of the Fifty-fourth Massachusetts Negro Regiment was returned. If any of the officers of that regiment were captured they have assumed false names and regiments.

Respectfully, your obedient servant,

G. T. Beauregard,
General, Commanding.

(*Official Records of the Union and Confederate Armies*, Series 1 (Serial No. 47), pp. 37–38, 45–46.)

SURRENDER OF SOME BRITISH TROOPS TO THE BOERS, AT SPION-KOP, JANUARY 24, 1900

. . . And now the Boer reinforcements, headed by a party of Pretorians under Commandant Opperman and Field-Cornet Zeederberg, began to press closer upon them. At last the *morale* of the men [British] gave way, and the disaster that had for some time seemed inevitable took place. Handkerchiefs were held over the trench. The Boers ceased firing, and one or two showed themselves. They were immediately shot down by men who had not seen [1] the white flag, and the firing was renewed as fiercely as ever. Again the signal of submission fluttered over the parapet. "Come out!" yelled the Boers, but no one stirred. Jan Celliers, of the Pretoria commando, boldly ran forward and leaped over the parapet into the trench, shouting, "Who is your officer?" Other Boers followed, waving handkerchiefs. The firing ceased and the men in the trenches stood up, holding up their hands. At this moment a sergeant [British] of the T. M. I. came up. A private wrenched his rifle out of his hand and said, "You are a prisoner." "No, no," said the sergeant, not fully comprehending what was happening; "they 're surrendering to us. The reinforcements have come." Then, suddenly realizing the truth, he rushed to find his colonel. Thorneycroft was near the angle of the trench, too intent on maintaining his own portion of the defense to notice what was going on elsewhere. Calling to the remnant of men left with him to follow and do exactly as he did, he rushed up to the Boers, a great, burly, limping figure, and shouted, "I 'm commandant here; take your men back to hell, sir! There 's no surrender." But there was surrender. The men made no attempt to rally. The Boers were already swarming on the summit. Delay was fatal. Shouting to his little band to follow, Thorneycroft rushed across back the plateau to shelter behind the rocks above the dressing-station at the southern edge, while promiscuous firing opened at point-blank range (1 P.M.).

For a few minutes the Boers were too busy disarming and passing back their prisoners — 167, according to Boer accounts, be-

[1] Note discussing this omitted to avoid appreciation of the action taken. — *Ed.*

longing to the different Lancashire battalions — to use their opportunity and rush the little handful of men firing from the rocks in front of them. But more Boers were coming up every minute. It was a desperate moment. But for the Boers it had come just too late. The British reinforcements were arriving. One company of the Middlesex had already reached the trenches on the left before noon. Another on the right had pushed round past the dressing-station and worked along the eastern slope to a broken-down sheep kraal. From here Major Savile had led forward a section with fixed bayonets to stop the surrender at the same moment that Thorneycroft came from the other side. In the promiscuous firing that ensued he was wounded and his men driven back. Another company was just coming forward. Thorneycroft picked them up, re-formed his own men, and then, with an irresistible rush, swept his yelling line across the plateau and upon the Boers. Down the hill fled the Boers and with them ran the rest of their demoralized prisoners. The charge spent itself on the crest, where the men stood pouring volleys upon the retreating enemy. But the Boer gunners, who had ceased firing to enable their men to reach the trench, reopened again with a crash and drove Thorneycroft and his triumphant men back to the cover of the trench.

(Extract from *The Times History of the War in South Africa, 1899–1902* [London, 1905], vol. III, pp. 268–70.)

(*d*) The white flag

"ABUSE OF THE WHITE FLAG" (1914).

"CASES of this kind are numerous. It is possible that a small group of men may show a white flag without authority from any proper officer, in which case their action is, of course, not binding on the rest of the platoon or other unit. But this will not apply to the case of a whole unit advancing as if to surrender, or letting the other side advance to receive the pretended surrender, and then opening fire. Under this head we find many depositions by British soldiers and several by officers. In some cases

the firing was from a machine gun brought up under cover of the white flag.

"The depositions taken by Professor Morgan in France strongly corroborate the evidence collected in this country.

"The case numbered (h 70) may be noted as very clearly stated. The Germans, who had put up a white flag on a lance and ceased fire, and thereby induced a company to advance in order to take them prisoners, dropped the white flag and opened fire at a distance of one hundred yards. This was near Nesle, on September 6, 1914. It seems clearly proved that in some divisions at least of the German army this practice is very common. The incidents as reported cannot be explained by unauthorized surrenders of small groups.

"There is, in our opinion, sufficient evidence that these offenses have been frequent, deliberate, and in many cases committed by whole units under orders. All the acts mentioned in this part of the Report are in contravention of the Hague Convention, signed by the Great Powers, including France, Germany, Great Britain, and the United States, in 1907, as may be seen by a reference to Appendix D, in which the provisions of that Convention relating to the conduct of war on land are set forth."

(Extract from the *Bryce Committee Report*, p. 60.)

DE WET MAKES USE OF A WHITE FLAG (1900)

De Wet, in describing his retreat before the British into the Transvaal, recounts the following incident which occurred August 11, 1900:

"General Liebenberg took possession of the position to the west, near Rustenburg; but hardly had he done so, before the English made their appearance, coming over another part of the mountain. He sent me a report to this effect, adding that he was unable to remain where he was stationed.

"Thus again we had to retreat, and I was unable to give my animals the rest I had intended to give them.

"We now took the road from Rustenburg to Pretoria, and ar-

rived the following evening close to Commandonek, which we soon found was held by an English force.

"I left the laager behind and rode on in advance with a horse-commando. When I was a short distance from the enemy, I sent a letter to the officer in command, telling him that, if he did not surrender, I would attack him.[1] I did this in order to discover the strength of the English force, and to find out if it were possible to attack the enemy at once, and, forcing our way through the Nek, get to the east of the forces that were pursuing me.

"My dispatch rider succeeded in getting into the English camp before he could be blindfolded. He came back with the customary refusal, and reported that although the enemy's force was not very large, still the positions held were so strong that I could not hope to be able to capture them before the English behind me arrived.

"I had therefore to give up the thought of breaking through these and flanking the English. Thus, instead of attacking the enemy, we went in the direction of Zoutpan, and arrived a few hours later at the Krokodil River.

"I had now left the English a considerable distance behind me; and so at last — we were able to give ourselves a little rest."

(Extract from De Wet: *Three Years' War* [New York, 1902], p. 142.)

A WHITE FLAG FROM VICKSBURG (1863)

GRANT, in his *Personal Memoirs*, relates the following incident which occurred while he and Admiral Porter were making their preparations for running the batteries at Vicksburg in the spring of 1863:

"Porter's fleet was on the east side of the river above the mouth of the Yazoo, entirely concealed from the enemy by the dense forests that intervened. Even spies could not get near him, on account of the undergrowth and overflowed lands. Suspicions of

[1] The *Times History of the War in South Africa*, vol. IV, p. 430, has the following note on this incident:

"De Wet, after passing through Olifant's Nek, had for a moment meditated a raid on Pretoria, but afterwards, on finding that Baden-Powell was holding Commando Nek, he contented himself with a humorous suggestion that he should surrender, and then went off north towards the bushveld."

some mysterious movements were aroused. Our river guards discovered one day a small skiff moving quietly and mysteriously up the river near the east shore, from the direction of Vicksburg, towards the fleet. On overhauling the boat they found a small white flag, not much larger than a handkerchief, set up in the stern, no doubt intended as a flag of truce in case of discovery. The boat, crew, and passengers were brought ashore to me. The chief personage aboard proved to be Jacob Thompson, Secretary of the Interior under the administration of President Buchanan. After a pleasant conversation of half an hour or more I allowed the boat and crew, passengers and all, to return to Vicksburg, without creating a suspicion that there was a doubt in my mind as to the good faith of Mr. Thompson and his flag."

(Extract from U. S. Grant: *Personal Memoirs* [New York, 1885], vol. I, pp. 461–62.)

(*e*) Ruses or stratagems

MARSHAL LANNES DUPES PRINCE AUERSPERG (1805)

"THE city of Vienna stands on the right bank of the Danube. A small branch of the great river flows through the town, from which the main stream is more than half a league distant. At this point the Danube forms a number of islands, connected by a long series of wooden bridges, the last of which crosses the largest arm and rests on the left bank at a place called Spitz. Over this long series of bridges runs the road to Moravia. When the Austrians defend the passage across a river, they have the very bad habit of keeping up the bridges till the last moment, in order to retain the power of making counter-attacks. The enemy seldom allows them time to do this, and carries by assault the bridges which they have omitted to burn. The French treated them thus in the campaign of 1796, in the memorable actions of Lodi and Arcola. Even these warnings could not cure the Austrians of the habit. After abandoning Vienna, which was not capable of defense, they retired

across the Danube without destroying one of the bridges traversing that mighty stream, and confined themselves to distributing inflammable materials on the flooring of the great bridge, in order to set it on fire when the French appeared. Besides this, they had established on the left bank, at the further end of the bridge of Spitz, a strong battery of artillery and a division of 6000 men, under the command of Prince Auersperg, a brave soldier, but not a man of much ability. I should mention that a few days before the entry of the French into Vienna, the Emperor had received the Austrian general, Count Gyulai, who came with a flag of truce to make proposals for peace. These had no results; but as soon as the advanced guard had taken possession of Vienna, and Napoleon was established in the royal palace of Schönbrunn, General Gyulai returned and passed more than an hour alone with the Emperor. Thereupon the rumor that an armistice was about to be concluded spread not only among the French regiments as they entered Vienna, but among the Austrian troops who were leaving the town to go across the Danube.

"Murat and Lannes, whom the Emperor had ordered to try and make themselves masters of the passage of the river, marched towards the bridge, posted Oudinot's grenadiers in rear of the thick plantations, and then went forward accompanied only by some officers who could speak German. The weak pickets fell back firing on them; the two marshals cried out to the Austrians that there was an armistice, and, continuing to advance, they crossed all the little bridges without hindrance, and having reached the large one, they made the same statement to the officer in command at Spitz. He did not venture to fire upon two marshals, who came almost alone, asserting that hostilities were suspended; but before letting them pass he wished to go himself to General Auersperg and get his orders. While he was gone, leaving the post in charge of a sergeant, Lannes and Murat persuaded the latter that as a condition of the armistice was that the bridge should be given up to them, he with his soldiers must go and rejoin his officer on the left bank. The poor sergeant hesitated; they pushed him gently back, talking to him all the time, and by a slow but uninterrupted movement reached the further end of the great bridge. There an Austrian officer was about to set a light to the inflammable matter;

his match was snatched from his hands, and he was told that if he committed such a crime it would be the worse for him. Meantime the column of Oudinot's grenadiers appeared, and got well on to the bridge; the Austrian gunners were about to fire; the French marshals ran towards the commander of artillery and repeated their assurance that an armistice had been concluded; then, sitting down on the guns, they begged the artillerymen to inform General Auersperg of their presence. In course of time he came up, and was on the point of giving the order to fire, although the French grenadiers were by this time surrounding the Austrian batteries and battalions. But the two marshals assured him there was a treaty, and that its first condition was that the French should occupy the bridges. The unhappy general, fearing to get himself into trouble if he shed blood needlessly, lost his head so far as to withdraw, taking with him all the troops which had been given to him to defend the bridges. Without this blunder on the part of General Auersperg, the passage of the Danube would certainly not have been executed without great difficulty; it might even have turned out impracticable; in which case, Napoleon would have been unable to follow the Russian and Austrian armies into Moravia, and his campaign would have failed. He certainly thought so then, and his opinion was confirmed four years later, when, in 1809, the Austrians did burn the bridges over the Danube, and to win the passage of the river we were compelled to fight the two battles of Essling and Wagram at a cost of more than 30,000 men; while in 1805 Marshals Lannes and Murat carried the bridges without having a man wounded. But was the stratagem which they employed permissible?"

(Extract from *Memoirs of Baron de Marbot* [translation by Arthur John Butler, London, 1903], Vol. I, pp. 149–51.)

THE SURRENDER OF THE SPANISH TROOPS AT SAN LUIS AND PALMA, JULY 22, 1898

SEVERAL days after General Toral at Santiago de Cuba had surrendered to General Shafter, the latter sent the following report:

SANTIAGO DE CUBA, *July 22, 1898, 1.22* P.M.

H. C. Corbin, Adjutant-General, Washington:

Sent two troops of cavalry with Spanish officers and Lieutenant Miley to receive surrender of Spanish troops at San Luis and Palma. They had not heard of loss of Cervera's fleet or of Toral's surrender; they declined to surrender unless they could come in and see for themselves. A detachment of officers and men came in last night and returned this morning apparently satisfied.

SHAFTER, *Major-General, Commanding.*

(Extract from *Correspondence Relating to the War with Spain* [Washington, 1902], vol. I, p. 171.)

THE *EMDEN* AT PENANG (1914)

[EXTRACT from the account of the New York *Times* correspondent in Penang, written from his personal observation and investigation at the time, published in the New York *Times* December 20, 1914.]

"PENANG, STRAITS SETTLEMENTS, *Oct. 29.* The German cruiser *Emden* called here yesterday and departed, leaving death and destruction behind her. . . .

"For those who do not know, the city of Penang lies on the western coast of the Malay Peninsula, just below the Siamese border. It is the shipping point of the Federated Malay States, where sixty-five per cent. of the world's tin is produced, as well as a great amount of rubber and copra. With a population of 246,000, it is growing by leaps and bounds and gives every indication of soon becoming one of the largest ports in the Far East.

"The thing that makes this city a point of importance in the present war is the fact that it is the last port of call for ships going from China and Japan to Colombo and Europe. As a result, it has been made more or less of a naval base by the English Government. Large stores of Admiralty coal have been collected and all vessels have been commanded to stop here for orders before crossing the Bay of Bengal.

"It was probably with the idea of crippling this base from which her pursuers were radiating that the *Emden* made her raid here. Had she found it temporarily undefended she could, at one blow, seriously have embarrassed the English cruisers patrolling these waters and at the same time caused a terrific loss to English commerce by sinking the many merchantmen at anchor in the harbor.

"It was early on Wednesday morning that the *Emden*, with a dummy fourth funnel and flying the British ensign, in some inexplicable fashion sneaked past the French torpedo boat *Mosquet*, which was on patrol duty outside, and entered the outer harbor of Penang. Across the channel leading to the inner harbor lay the Russian cruiser *Jemtchug*. Inside were the French torpedo boats *Fronde* and *Pistolet* and the torpedo boat destroyer *D'Iberville*. The torpedo boats lay beside the long Government wharf, while the *D'Iberville* rode at anchor between two tramp steamers.

"At full speed the *Emden* steamed straight for the *Jemtchug* and the inner harbor. In the semi-darkness of the early morning the Russian took her for the British cruiser *Yarmouth*, which had been in and out two or three times during the previous week and did not even "query" her. Suddenly, when less than four hundred yards away, the *Emden* emptied her bow guns into the *Jemtchug* and came on at a terrific pace, with all the guns she could bring to bear in action. When she had come within two hundred and fifty yards she changed her course slightly, and as she passed the *Jemtchug*, poured two broadsides into her, as well as a torpedo, which entered the engine room, but did comparatively little damage.

"The Russian cruiser was taken completely by surprise and was badly crippled before she realized what was happening. The fact that her captain was spending the night ashore, and that there was no one on board who seemed capable of acting energetically, completed the demoralization. She was defeated before the battle began. However, her men finally manned the light guns and brought them into action.

"In the meantime the *Emden* was well inside the inner harbor and among the shipping. She saw the French torpedo boats there, and apparently realized at once that unless she could get out before they joined in the action her fate was sealed. At such close

quarters (the range was never more than four hundred and fifty yards) their torpedoes would have proved deadly. Accordingly, she turned sharply and made for the *Jemtchug* once more.

"All the time she had been in the harbor the Russian had been bombarding her with shrapnel, but owing to the notoriously bad marksmanship prevalent in the Czar's navy had succeeded for the most part only in peppering every merchant ship within range. As the *Emden* neared the *Jemtchug* again both ships were actually spitting fire. The range was practically point-blank. Less than one hundred and fifty yards away the *Emden* passed the Russian, and as she did so torpedoed her amidships, striking the magazine. There was a tremendous detonation, paling into insignificance by its volume all the previous din; a heavy black column of smoke arose and the *Jemtchug* sank in less than ten seconds, while the *Emden* steamed behind the point to safety.

"No sooner had she done so, however, than she sighted the torpedo boat *Mosquet*, which had heard the firing and was coming in at top steed. The *Emden* immediately opened up on her, thereby causing her to turn around in an endeavor to escape. It was too late. After a running fight of twenty minutes the *Mosquet* seemed to be hit by three shells simultaneously and sank very rapidly. The German had got a second victim.

"It was here that the chivalrous bravery of the *Emden's* captain, which has been many times in evidence throughout her meteoric career, was again shown. If the French boats were coming out, every moment was of priceless value to him. Nevertheless, utterly disregarding this, he stopped, lowered boats, and picked up the survivors from the *Mosquet* before steaming on his way.

"The English here now say of him admiringly, 'He played the game.'

"Meantime, boats of all descriptions had started toward the place where the Russian cruiser had last been seen. The water was covered with *débris* of all sorts, to which the survivors were clinging. They presented a horrible sight when they were landed on Victoria Pier, which the ambulance corps of the Sikh garrison turned into a temporary hospital. Almost all of them had wounds of one sort or another. Many were covered with them. Their

blood-stained, and, for the most part, naked, bodies, were enough to send shivers through even the most cold-blooded person. It was a sight I shall not forget for many a day. Out of a crew of three hundred and thirty-four men, one hundred and forty-two were picked up wounded. Only ninety-four were found practically untouched. Ninety-eight were "missing." It is not yet known how many of the crew of seventy-eight of the *Mosquet* were rescued by the *Emden*."

"AUSTRIA TRICKED BY MONTENEGRO IN PEACE PARLEYS" (1916)

[The following account is taken from a dispatch of Mr. Lincoln Eyre, staff correspondent of the New York *World*, dated February 4, 1916, from Lyons, France.]

"Partly as a result of a long conversation with the Prime Minister of Montenegro, partly from other informants familiar with the matter, I have been able to get at the truth about the Montenegrin mystery. Both Entente and Teutonic censors have bottled up the facts about Montenegro's collapse, because the facts are not wholly creditable to either side. . . .

" . . . The explanations about the much-discussed treaty of peace between Austria-Hungary and the Montenegrin Government, which the Prince and his companions have certainly provided, have never been printed in any German or Austrian newspaper.

"Broadly, the facts about the Montenegrin mystery are as follows: The Quadruple Entente, and particularly Italy, found itself unable to do for Montenegro all that the Montenegrin Government felt it should have done. Italy decided it was wiser not to risk her warships in the Austrian submarine zone, and therefore did not send across the Adriatic the supplies of which the Montenegrins stood in dire need.

"Feeling herself in an impossible position, Montenegro asked for an armistice, primarily with the object of getting her troops to a point of safety. The Austrian generals readily consented and negotiations began which the Austrians felt certain would lead to

peace. They were tricked, however, to the extent that the King and most of his advisers suddenly escaped from the country, thus breaking off the negotiations.

"It is not unlikely, however, that had the Austrians been ready to offer less rigorous terms Montenegro would have capitulated finally. It is this slip-up on their part — after they had announced the conclusion of a peace treaty — that so irritated the Austrians and that led the Teutonic censorship to shut down on Montenegrin news. . . ."

M. Miouchekovitch, Prime Minister of Montenegro, is quoted by Mr. Erye as having given the following account of the incident:

"Finally the Austrians began their furious attack on Mount Lovchen. The bombardment was terrific, and Lovchen is not, as has been stated, impregnable — particularly when it is defended by men whose ammunition is running low, who are without heavy guns and who are insufficiently fed.

"To gain time we began to talk of peace. The Austrians were quite ready to join in that talk, but the terms they proposed — such as taking from us the hereditary arms carried by every Montenegrin peasant at all times and delivering to them the Serbian troops in our midst — were quite impossible. However, we discussed an armistice and thus gained a week, for while the negotiations were in progress the Austrians' advance ceased.

"Then it was decided that the royal family must leave. I started off one day with the Queen, Prince Danilo and his consort, and the princesses. The diplomatic corps left the same day and met us at St. Jean de Medua. The King, who wanted to have a final conference with his generals, followed the next day. That is all there is to the much debated separation of King Nicholas and the diplomats accredited to his court."

(New York *World*, February 22, 1916.)

(*f*) Spies

THE CAPTURE OF MAJOR ANDRÉ (1780)

Sir Henry Clinton, in command of the British forces at New York in September, 1780, relates: "About eighteen months before the present period (September, 1780), Mr. Arnold (a major-general in the American service) had found means to intimate to me that . . . he was desirous of quitting them and joining the cause of Great Britain, could he be certain of personal security and indemnification for whatever loss of property he might thereby sustain. . . . A correspondence was after this opened between us under feigned names; in the course of which he from time to time transmitted to me most material intelligence; and, with a view (as I supposed) of rendering us still more essential service, he obtained in July, 1780,[1] the command of all the enemy's forts in the Highlands,[2] then garrisoned by about 4000 men. The local importance of these posts has been already very fully described;[3]

[1] Arnold was appointed to the command of West Point and its dependencies on August 3, 1780, but almost a month earlier he seems to have been able to predict it as probable to Clinton. (Sargent: *The Life and Career of Major André* [Boston, 1861], pp. 251, 258–59.)

[2] Particularly West Point on the Hudson River fifty miles north of the city of New York and on the opposite bank.

[3] "The reduction of West Point had long been the hope of the enemy [the British]; but to accomplish it without loss of life would indeed have been a triumph for Clinton and a most brilliant conclusion to the campaign. Mr. Sparks has clearly mapped out the advantages he must have contemplated in this contingency. In the first place, the mere acquisition of a fortress so important, with all its dependencies, garrisons, stores, magazines, vessels, etc., was an achievement of no secondary magnitude. The supplies gathered here by the Americans were very great, and once lost could not have been readily, if at all, restored. The works were esteemed our tower of salvation; an American Gibraltar, impregnable to an army 20,000 strong. Even though yet unfinished, they had cost three years' labor of the army and $3,000,000; and were thought an unfailing and secure resort in the last emergency. But the ulterior consequences of its possession were of even greater importance. It would enable Sir Henry to have checked all trade between New England and the central and southern states. It was, in Washington's eyes, the bolt that locked this communication. The eastern states, chiefly dependent for their corn-stuffs on their sisters in the union, were commercial rather than agricultural communities; and the power that at once commanded the seaboard and the Hudson might easily bring upon them all the horrors of famine. . . . But even these advantages were of less moment than those more immediate. . . . It was shrewdly and correctly suspected

. . . it is therefore scarcely necessary to observe here that the obtaining possession of them at the present critical period would have been a most desirable circumstance; and that the advantages to be drawn from Mr. Arnold's having the command of them struck me with full force the instant I heard of his appointment. .

"Wishing to reduce to an absolute certainty whether the person I had so long corresponded with was actually Major-General Arnold commanding at West Point, I acceded to a proposal he made me to permit some officer in my confidence to have a personal conference with him, when everything might be more explicitly settled between us than it was possible to do by letter, and as he required that my adjutant-general, Major André, who had chiefly conducted the correspondence with him under the signature of John Anderson, should meet him for this purpose on neutral ground, I was induced to consent to his doing so from my great confidence in that officer's prudence and address." (Sir Henry Clinton's MS. *History of the War*, vol. II, p. 43, published in Winthrop Sargent, *The Life and Career of Major John André* [Boston, 1861], pp. 415–16.)

The first meeting planned was not effected, and a second was arranged for September 20, Arnold writing under date of September 15 to John Anderson (Major André): "I will send a person in whom you can confide by water to meet you at Dobbs Ferry [1] at the landing on the east side, on Wednesday the 20th instant, who will conduct you to a place of safety, where I will meet you. It will be necessary for you to be disguised." (Sargent, *op. cit.*, pp. 273–74.) Sir Henry Clinton, however, specially counseled André against disguise as well as against entering the American lines,

by Clinton that the allies meditated a combined attack on New York. . . . To meet and counteract this scheme, Clinton intended to receive the surrender of West Point in the very moment when Washington should have . . . gathered all his necessary stores into West Point and set his troops in motion. . . . 'General Arnold surrendering himself,' wrote Clinton in a dispatch of October 11, 1780, 'the forts and garrisons, at this instant, would have given every advantage which could have been desired: Mr. Washington must have instantly retired from King's Bridge, and the French troops upon Long Island would have been consequently left unsupported, and probably would have fallen into our hands. The consequent advantage of so great an event I need not explain.'" (Sargent, *op. cit.*, pp. 254–57.)

[1] Dobbs Ferry is on the opposite side from West Point and about half the distance from New York City.

and according to André's own statement, it was his intention to do neither.[1] He left New York September 20 and at about seven that night went on board the *Vulture*, a British man-of-war at that time lying off Teller's Point, to the north of Dobbs Ferry. There he received intelligence which made it seem more probable that Arnold would come there for the interview instead of sending to Dobbs Ferry. (André to Clinton, September 21, 1780, André's Statement, in Sargent, *op. cit.*, pp. 278, 349; see also Arnold's letter to Robinson of September 18, 1780. Jared Sparks: *The Writings of Washington* [Boston, 1835], vol. VII, pp. 526–27.)

"No boat, however, came off," according to André's statement, "and I waited on board until the night of the 21st. During the day, a flag of truce was sent from the *Vulture* to complain of the violation of a military rule in the instance of a boat having been decoyed on shore by a flag, and fired upon.[2] The letter was ad-

[1] On September 29, after his capture, André wrote to Sir Henry Clinton: "I have obtained General Washington's permission to send you this letter; the object of which is, to remove from your breast any suspicion that I could imagine I was bound by your Excellency's orders to expose myself to what has happened. The events of coming within an enemy's posts, and of changing my dress, which led to my present situation, were contrary to my own intentions, as they were to your orders; and the circuitous route, which I took to return, was imposed (perhaps unavoidably) without alternative upon me." (*Minutes of a Court of Inquiry upon the Case of Major John André* [Albany, 1865], p. 24; see also André's statement, Sargent, *op. cit.*, p. 350). In his letter to Washington of September 24 André wrote: "I agreed to meet, upon ground not within posts of either army, a person who was to give me intelligence." (*Minutes of a Court of Inquiry*, p. 12.)

[2] André in his letter to Clinton of September 21 speaks of this same incident: "Yesterday the pretence of a flag of truce was made to draw people from the *Vulture* on shore. The boat was fired upon in violation of the customs of war. Capt. Sutherland with great propriety means to send a flag to complain of this to General Arnold. . . . I shall favor him with a newspaper containing the Carolina news, which I brought with me from New York for Anderson, to whom it is addressed on board the *Vulture*." (Sargent, *op. cit.*, p. 278.)

Sargent gives a traditional account of the incident: "Traditional history," he says, "relates that on the 20th of September, some young men with their guns came to a farmer who was pressing cider, and called for a draught from the mill. Perhaps to get rid of them, they were told that the *Vulture* was anchored in the stream hard by. They went on to the shore, and finding it even so, concealed themselves behind the rocks, while a white flag, or its semblance, was so displayed on the strand as to invite the attention of the ship. A boat with a responsive ensign was dispatched — doubtless through Robinson's mediation, and in hope of communication with Arnold — to see what was wanted. So soon as it was within range it was fired on by the ambuscade that had adopted this treacherous mode of assailing the enemy, and which was enabled by its position to fly to places of security on the first sign of pursuit. It is occasion of shame to an American to be compelled to relate how trea-

dressed to General Arnold, signed by Captain Sutherland [of the *Vulture*], but written in my hand and countersigned 'J. Anderson, Secretary.' Its intent was to indicate my presence on board the *Vulture*. In the night of the 21st a boat with Mr. [Joshua Hett Smith] and two hands came on board, in order to fetch Mr. Anderson on shore." [1] (Sargent, *op. cit.*, p. 349.) André, "in a dress equipped for the purpose, wearing boots, and a large blue great coat" (Joshua Hett Smith: *An Authentic Narrative of the Causes which led to the Death of Major André* [London, 1808], p. 29) over his uniform,[2] entered the boat and was rowed to the western shore where, Smith relates (*op. cit.*, p. 31), Arnold was "hid among firs."

son was thus blindly fought by treason; since it was through this unjustifiable affair that the interview between André and Arnold was induced, and their consequent detection occasioned." (Sargent, *op. cit.*, p. 279.)

[1] Arnold in his letter of September 18 to Colonel Robinson, in which he made arrangements for this interview, wrote that he would send "a boat and a flag of truce" (Sparks, *op. cit.*, pp. 526–27), and later in letters to Clinton and Washington insisted that a flag of truce had been sent. (*Minutes of a Court of Inquiry*, pp. 21, 33.) The same claim was made (Sir Henry Clinton: *Minutes of a Court of Inquiry*, p. 20) by Colonel Robinson who was on board the *Vulture* on the night of September 21 (*Minutes of a Court of Inquiry*, pp. 19–20) and by Captain Sutherland of the *Vulture*, who bears witness beside to Smith's having refused to be towed by one of the *Vulture's* boats "as it might be deemed . . . an infringement of the flag." (Sargent, *op. cit.*, p. 388.) Sargent (*op. cit.*, p. 284) states that the "oarsmen as well as their passenger [Smith] testify that they were told by Arnold and actually considered it was a flag-boat to the *Vulture*." Smith himself in his narrative relates that when ordered to bring to by the sentinel on deck of the *Vulture* and questioned whither bound? he answered "with a flag of truce to the *Vulture*, *sloop of war*," and that coming on deck he was asked how he "could presume to come on board his Majesty's ship under color of a flag of truce at night?" (Smith, *op. cit.*, pp. 26–27.) Sargent, (*op. cit.*, p. 284), however, says that "no flag was displayed," and it was this argument which "held long" in the interview of October 1 between the British general, Robertson, and the American general, Greene; Greene asserting, according to Robertson's account, that "they would believe André in preference to Arnold," Robertson maintaining that "whether a flag was flying or not was of no moment." (Sargent, *op. cit.*, p. 378.) André's own "conception of his coming on shore under the sanction of a flag" was given in response to a question put to him during his trial by the board of general officers. "He said that it was impossible for him to suppose he came on shore under that sanction; and added, that if he came on shore under that sanction, he certainly might have returned under it." (*Minutes of a Court of Inquiry*, p. 17.) The minutes of the board of general officers submit "that the boat he came on shore in carried *no flag*." (*Minutes of a Court of Inquiry*, pp. 13–14.)

[2] Captain Sutherland of the *Vulture* wrote Sir Henry Clinton October 5: "On my first learning from Major André that he did not intend going on shore in his own name, it immediately occurred to me that an alteration of dress might likewise be necessary; and I offered him a plain blue coat of mine for that purpose, which he declined accepting, as he said he had the Commander-in-Chief's direction to go in his uniform, and by no means to give up his character." (Sargent, *op. cit.*, p. 388.)

The interview between Arnold and André lasted until nearly dawn. "Being there," André wrote Washington September 24, "I was told that the approach of day would prevent my return, and that I must be concealed until the next night. I was in my regimentals and had fairly risked my person. Against my stipulation, my intention and without my knowledge beforehand, I was conducted within one of your posts. Your Excellency may conceive my sensation on this occasion and will imagine how much more I must have been affected by a refusal to reconduct me back the next night as I had been brought. Thus become a prisoner, I had to concert my escape." (*Minutes of a Court of Inquiry*, p. 12.)

On Arnold's insistence André concealed the papers which Arnold had given him between his stockings and his feet (Sargent, *op. cit.*, p. 350) and quitting his uniform,[1] as he wrote to Washington September 24, "was passed another way in the night without the American posts to neutral ground, and informed" he was "beyond all armed parties and left to press for New York." "I was taken," he wrote, "at Tarrytown by some volunteers. Thus, as I have had the honor to relate, was I betrayed (being adjutant-general of the British Army) into the vile condition of an enemy in disguise within your posts." (*Minutes of a Court of Inquiry*, p. 12.) André had been equipped by Arnold with a passport for "Mr. John Anderson," but believing the volunteers[2] to be of his

[1] Smith's narrative (*op. cit.*, p. 36) says that Arnold borrowed for André one of Smith's coats; "the other part of his dress," Arnold said, "did not require change." Arnold, writing to Washington October 1, 1780, says: "André came on shore in his uniform (without disguise) which with much reluctance, at my particular and pressing instance, he exchanged for another coat." (*Minutes of a Court of Inquiry*, p. 33.) Lieutenant King of the Dragoons, into whose charge André was given on the morning of September 24, says: "He looked somewhat like a reduced gentleman. His small clothes were nankeen, with handsome white-top boots — in fact his undress military clothes. His coat purple, with gold lace, worn somewhat threadbare, with a small-brimmed tarnished beaver on his head." (Sargent, *op. cit.*, pp. 323–24.)

Interesting data and a discussion of the costume worn by André will be found in the New York *Evening Post*, September 6 and October 2, 1879.

[2] "It so happened that one of these three young men, John Paulding by name, who had been a prisoner of war in New York, had escaped from that city only three days previously in the clothes of a Hessian Chasseur; and he still had them on when he emerged from his hiding place, and confronted André. Deceived by the well-known green uniform, and glad to be done with pretence, and to appear before friends in his true character, André disclosed that he was a British officer, 'out in the country on particular business.'" (Sir George Otto Trevelyan: *George the Third and Charles Fox*, vol. 1, pp. 284–85.)

own party, he had immediately confessed to being a British officer. (Sargent, *op. cit.*, pp. 298, 313–47.) André was brought by the volunteers to a division of the regular American army. The papers which had been found on his person were sent to Washington and a report of his arrest was sent to Arnold, who was thus enabled to escape (September 25) on the *Vulture* several hours before the news of his defection reached Washington, although the latter was in the immediate vicinity.[1] (Sargent, *op. cit.*, pp. 321–33.)

As soon as it was known to the British that André had been taken, efforts were made to obtain his release. Colonel Robinson addressed a letter to Washington from the *Vulture* September 25 (the day of André's escape), in which he said that inasmuch as André "went up with a flag at the request of General Arnold and had his permit to return to New York," he could not be detained "without the greatest violation of flags, and contrary to the custom and usage of all nations." (*Minutes of a Court of Inquiry*, pp. 19–20.) The following day Clinton wrote to Washington using the same argument and enclosing a letter of Arnold's to the same effect: "I commanded at the time at West Point, had an undoubted right to send my flag of truce for Major André, who came to me under that protection; and . . . I directed him to make use of the feigned name of John Anderson . . . and gave him my passport to go to the White Plains on his way to New York . . . all which I had then a right to do, being in the actual service of America, under the orders of General Washington, and commanding general at West Point and its dependencies." (*Minutes of a Court of Inquiry*, pp. 21–22.)

Washington's answer to Clinton, however, dated September 30, pointed out that "Major André was employed in the execution

[1] It was not until the following day (September 26) that official announcement was made by General Greene of Arnold's treason and the capture of André, "as a spy." (Sargent, *op. cit.*, pp. 342–43.) Public feeling ran high. "On the 30th," says Sargent (p. 339), "the press controlled by the party that had so strongly opposed Arnold in Philadelphia, the seat of Congress, loudly directed public opinion to those who as senators or in social life were his friends, as sharers of his guilt; and pointed to Mrs. Arnold as an accomplice. On the same day, with Arnold's effigy those of André and Smith were borne through the streets, hanging from a gallows: 'The Adjutant-General of the British Army and Joe Smith; the first hanged as a spy and the other as a traitor to his country.'"

of measures very foreign to the objects of flags of truce, and such as they were never meant to authorize or countenance in the most distant degree," and referred to André's own confession " 'that it was impossible for him to suppose that he came on shore under the sanction of a flag.'" The letter also stated that though "the most summary proceedings" would have been justified against André, his case had been referred to a board of general officers who had met and rendered a report based on André's "free and voluntary confession and letters." (*Minutes of a Court of Inquiry*, p. 26.)

This distinguished board,[1] made up of fourteen[2] general officers in the American army, had met the preceding day, September 29, and "having maturely considered" the facts had reported "to his excellency, General Washington, that Major André, Adjutant-General to the British army, ought to be considered as a spy from the enemy, and that agreeable to the law and usage of nations, it is their opinion he ought to suffer death." (*Minutes of a Court of Inquiry*, pp. 22–23.)

[1] Lord Cornwallis observes that "among the members of the Court by which he was tried were two foreigners ignorant of the English language, and several of the coarsest and most illiterate of the American generals." (Sargent, *op. cit.*, p. 420.) This charge was substantially repeated by Lord Mahon in the middle of the nineteenth century. (*History of England*, 7 vols. [5th ed., revised, London, 1858], vol. VII, p. 70. For data refuting these charges consult Sargent, *op. cit.*, pp. 423–34, and Charles J. Biddle: *The Case of Major André, with a Review of the Statement of it in Lord Mahon's History of England*, in *Memoirs of the Historical Society of Pennsylvania* [Philadelphia, 1815], vol. VI, pp. 319–416.) The members of the board were Greene, Stirling, St. Clair, Lafayette, Howe, Steuben, Parsons, Clinton, Knox, Glover, Patterson, Hand, Huntington, Starke. John Lawrence acted as judge-advocate general.

Cornwallis's inaccurate statement, with others relating to the circumstances of André's case, are reproduced in Sherston Baker's recent 4th edition (London, 1908) of Halleck's *International Law*, vol. I, p. 630. Similar inaccuracies abound in the accounts given by other authorities usually trustworthy.

Other English historians have taken a fairer view. Sir George Otto Trevelyan criticizes the views expressed by Lord Stanhope, and says: "Major André's fate was determined by a Board of Generals assembled in the Old Dutch Church at Sleepy Hollow, within the precincts of Tappan Camp. Greene acted as President of the tribunal, which consisted of Baron Von Steuben, the Marquis de Lafayette, and twelve American generals and brigadiers. No Court-Martial on record has been composed of more respectable elements; and none, however constituted, could honestly have returned a different verdict." (*George the Third and Charles Fox* [New York, 1915], vol. I, p. 289.) Trevelyan's account may be profitably consulted for information about other details of André's capture.

[2] Not including the judge-advocate general, John Lawrence.

Washington's *Orderly Book*, under date of October 1, records the decision of the board and adds: "The Commander-in-Chief directs the execution of the above sentence in the usual way, this afternoon at five o'clock." (*Washington's Orderly Books, American Historical Record*, vol. III, p. 116.) It must have been after the writing of this order that Clinton's letter of September 30 arrived, urging delay in the execution of the sentence until presentation might be made "of all the circumstances on which a judgment ought to be formed." To this end Clinton said that he would send Lieutenant-General Robertson and two other gentlemen to Dobbs Ferry on October 1 to meet Washington or whomever he might appoint. (*Minutes of a Court of Inquiry*, pp. 28–29.) "After orders" in Washington's *Orderly Books* (*op. cit.*, p. 117), October 1, notes: "The execution of Major André is postponed till to-morrow."

Washington in his letter to Congress of October 7 states that only General Robertson was permitted to come on shore, that he was met by General Greene, and that he mentioned substantially what he afterward wrote to Washington himself on October 2. (George Washington: *Writings* [ed. by Worthington Chauncey Ford, New York and London, 1890], vol. VIII, pp. 473–74.) The argument in regard to the flag of truce and the authorization of Arnold for all André's acts was again urged in this interview, and it was suggested that "disinterested gentlemen of knowledge of the law of war and nations might be asked their opinion on the subject," the names of Monsieur Knyphausen and General Rochambeau being mentioned; it was related that "a Captain Robinson had been delivered to Sir Henry Clinton as a spy, and undoubtedly was such, but that it being signified to him that" Washington was "desirous that this man should be exchanged, he had ordered him to be exchanged"; engagement was made to have "any person" Washington "would be pleased to name set at liberty"; and the plea closed with the reminder that "Sir Henry Clinton had never put to death any person for a breach of the rules of war," though he had even then "many in his power," and that "under the present circumstances, much good" might "arise from humanity, much ill from the want of it." (*Minutes of a Court of Inquiry*, pp. 30–32.) In his report to Clinton of the

interview Robertson adds: "Greene now with a blush, that showed the task was imposed and did not proceed from his own thought, told me that the army must be satisfied by seeing spies executed. But there was one thing that would satisfy them — they expected that if André was set free, Arnold should be given up. This I answered with a look only, which threw Greene into confusion." [1] Robertson adds, "I am persuaded André will not be hurt." (Sargent, *op. cit.*, p. 379.)

Washington, however, found nothing in this interview to cause him to alter his determination (Sparks, *op. cit.*, p. 541), and in accordance with his evening orders, Major André was the next day (October 2) hanged. (Washington's *Orderly Books*, *American Historical Record*, vol. III, p. 117, March, 1874.) André had, in a letter to Washington of October 1, asked to be shot (*Minutes of a Court of Inquiry*, p. 35), but "the practice and usage of war, circumstanced as he was, were against the indulgence." (Washington to the President of Congress, October 7, 1780, in Ford, *op. cit.*, vol. VIII, p. 473.) In a letter of October 10 to Rochambeau Washington wrote: "Your excellency will have heard of the execution of the British adjutant-general. The circumstances he was taken in justified it, and policy required a sacrifice; but as he was more unfortunate than criminal in the affair, and, as there was much in his character to interest, while we yielded to the necessity of rigor, we could not but lament it." (Ford, *op. cit.*, vol. VIII, p. 473 *n.*)

(The preparation of this case is mainly the work of Miss Helen C. Nutting, who made an exhaustive study of the accessible sources, among the most important of which are the following: Winthrop Sargent: *The Life and Career of John André* [Boston, 1861]; *Official Letters and Other Papers relating to the Treason of Arnold*, in *The Writings of George Washington* [edited by Jared Sparks, 12 vols., Boston, 1835], vol. VII, pp. 520–52; *Minutes of a*

[1] This seems to have been the third proposal to exchange André for Arnold. A British officer, Simcoe, relates that among the letters between the generals, a paper was slipped in unsigned, but in Hamilton's writing, saying "that the only way to save André was to give up Arnold." And on September 30 Captain Ogden was dispatched to the British post at Powles Hook with the same message. It is related also that overtures to this end were made to André himself; also that Arnold proposed to Clinton his own surrender in exchange. (Sargent, *op. cit.*, pp. 364, 366–67, 375.)

Court of Inquiry upon the case of Major John André [Albany, 1865]; Joshua Hett Smith: *An Authentic Narrative of the Causes which led to the Death of Major André* [London, 1808]; *Washington's Orderly Books*, in *American Historical Record*, vol. III, March, 1874; George Washington: *Writings* [edited by W. C. Ford, 11 vols., New York, 1889–91], vol. VIII; Mahon: *History of England from the Peace of Utrecht to the Peace of Versailles* [5th ed., 7 vols., London, 1858], vol. VII; Charles J. Biddle: *The Case of Major André, with a Review of the Statement of it in Lord Mahon's History of England*, in *Memoirs of the Historical Society of Pennsylvania* [Philadelphia, 1858], vol. VI; Charles A. Campbell: *Bibliography of Major André*, in *Magazine of American History*, vol. VIII, January, 1882; Sir George Otto Trevelyan; *George the Third and Charles Fox* [New York, 1915] vol. I.)

THE CAPTURE OF TWO UNION SPIES (1865)

General John B. Gordon, of the Confederate army, gives the following account of the capture of two Union spies:

"On the night of the 6th of April, three days before the final surrender, my superb scout, young George of Virginia, who recently died in Danville, greatly honored and loved by his people, brought to me under guard two soldiers dressed in full Confederate uniform, whom he had arrested on suspicion, believing that they belonged to the enemy. About two months prior to this arrest I had sent George out of Petersburg on a most perilous mission. All of his scouting was full of peril. I directed him to go in the rear of General Grant's lines, to get as close as he could to the general's headquarters, and, if possible, catch some one with dispatches, or in some way bring me reliable information as to what was being done by the Union commander. George was remarkably conscientious, intelligent, and accurate in his reports. He always wore his Confederate gray jacket, which would protect him from the penalty of death as a spy if he should be captured. But he also wore, when on his scouting expeditions, a pale blue overcoat captured from the Union army. A great many of our soldiers wore these overcoats because they had no others.

"On this particular expedition George was hiding in the woods not far from General Grant's headquarters, when he saw passing near him two men in Confederate uniform. It was late in the evening, nearly dark. He at once made himself known to them, supposing that they were scouting for some other corps in Lee's army. But they were Sheridan's men, belonging to his 'Jessie scouts,' and they instantly drew their revolvers upon George and marched him to General Grant's headquarters. He was closely questioned by the Union commander; but he was too intelligent to make any mistakes in his answers. He showed his gray jacket, which saved him from execution as a spy, and he was placed in the guard-house. His opportunity for escape came late one night, when he found a new recruit on guard at his prison door. This newly enlisted soldier was a foreigner, and had very little knowledge of the English language; but he knew what a twenty-dollar gold piece was. The Confederacy did not have much gold, but our scouts were kept supplied with it. George pulled out of the lining of his jacket the gold piece, placed it in the foreigner's hand, turned the fellow's back to the door, and walked quickly out of the guard-house. George would not have dared to attempt such a programme with an American on guard.

"He reached our lines, and reported these details only a few days before our last retreat was begun. During that retreat on the night of April 6, 1865, as I rode among my men, he brought two soldiers under guard to me, and said: 'General, here are two men who are wearing our uniforms and say they belong to Fitzhugh Lee's cavalry; but I believe they are Yankees. I had them placed under guard for you to examine.'

"I questioned the men closely, and could find no sufficient ground for George's suspicions. They seemed entirely self-possessed and at ease under my rigid examination. They gave me the names of Fitzhugh Lee's regimental and company commanders, said they belonged to a certain mess, and gave the names of the members, and, without a moment's hesitation, gave prompt answer to every question I asked. I said to George that they seemed to me all right; but he protested, saying: 'No, general, they are not all right. I saw them by the starlight counting your files.' One of them at once said: 'Yes; we were trying to get

some idea of your force. We have been at home on sick-leave for a long time, and wanted to know if we had any army left.' This struck me as a little suspicious, and I pounded them again with questions. 'You say that you have been home on sick-leave?'

"'Yes, sir; we have been at home several weeks, and fell in with your command to-night, hoping that you could tell us how to get to General Fitzhugh Lee's cavalry.'

"'If you have been at home sick, you ought to have your furloughs with you.'

"'We have, sir. We have our furlough papers here in our pockets, signed by our own officers, and approved by General R. E. Lee. If we had a light you could examine them and see that they are all right.'

"George, who was listening to this conversation, which occurred while we were riding, again insisted that it did not matter what these men said or what they had; they were Yankees. I directed that they be brought on under guard until I could examine their papers.

"We soon came to a burning log heap on the roadside, which had been kindled by some of the troops who had passed at an earlier hour of the night. The moment the full light fell upon their faces, George exclaimed: 'General, these are the two men who captured me nearly two months ago behind General Grant's headquarters.'

"They ridiculed the suggestion, and at once drew from their pockets the furloughs. These papers seemed to be correct, and the signatures of the officers, including that of General Lee, seemed to be genuine. This evidence did not yet satisfy George nor shake his convictions. He said that the signatures of our officers were forged, or these men had captured some of our men who had furloughs, and had taken the papers from them, and were now personating the real owners. He asked me to make them dismount, that he might 'go through them,' as he described his proposed search. He fingered every seam in their coats, took off their cavalry sabres, and searched their garments, but found nothing. At last he asked me to make them sit down and let him pull off their boots. One personated a Confederate private; the other wore the uniform of a lieutenant of cavalry. George drew

the boots from the lieutenant's feet, and under the lining of one he found an order from General Grant to General Ord, directing the latter to move rapidly by certain roads and cut off Lee's retreat at Appomattox. As soon as this order was found, the young soldier admitted the truth of George's statement — that they were the two men who captured him behind Grant's lines. I said to them: 'Well, you know your fate. Under the laws of war you have forfeited your lives by wearing this uniform, and I shall have you shot at sunrise tomorrow morning.'

"They received this announcement without the slightest appearance of nervousness. The elder could not have been more than nineteen or twenty years of age, while his companion was a beardless youth. One of them said with perfect composure: 'General, we understand it all. We knew when we entered this kind of service, and put on these uniforms, that we were taking our lives in our hands, and that we should be executed if we were captured. You have the right to have us shot; but the war can't last much longer, and it would do you no good to have us killed.'

"I had no thought of having them executed, but I did not tell them so. I sent the captured order to General Lee, and at four o'clock on the morning of the seventh he wrote me in pencil a note which was preserved by my chief of staff, Major R. W. Hunter, now of Alexandria, Virginia. It was sent, a few years ago, to Mrs. Gordon, to be kept by her as a memento of this most remarkable incident. Unhappily, it was lost in the fire which, in 1899, consumed my home. In that brief note, General Lee directed me to march by certain roads toward Appomattox as rapidly as the physical condition of my men would permit. Thus, by General Lee's direction, my command was thrown to the front, that we might thwart, if possible, the purpose of the Union commander to check at Appomattox our retrograde movement.

"General Lee approved my suggestion to spare the lives of Sheridan's captured 'Jessie scouts,' and directed me to bring them along with my command. This incident closed with my delivery of the young soldiers to General Sheridan on the morning of Lee's surrender."

(Extract from Gordon: *Reminiscences of the Civil War* [New York, 1903], pp. 424–28.)

MR. WORTH, CAPTURED WHILE ATTEMPTING TO ESCAPE FROM PARIS IN A BALLOON (1870)

THE capture of Mr. Worth by the Prussian authorities, October 27, 1870, at once attracted the attention of the British Government. Earl Granville, Secretary of State for Foreign Affairs, instructed the British representatives at Berlin and Versailles to appeal to the Prussian authorities in an effort to secure from him as favorable a treatment as possible. The continued confinement of Mr. Worth was the subject of comment in the press. People of prominence wrote the Foreign Office in his behalf. On November 30 Mr. Littlewood, at the head of a deputation from the House of Commons, waited upon Lord Granville in the interest of Mr. Worth. Mr. Littlewood had recently returned from a visit to Cologne where he had not been permitted to see the prisoner. The second secretary of the embassy, who proceeded to Cologne early in December, reported that Mr. Worth would probably be accused of an act of spying or of being directly or indirectly an agent of the French Government. The nature of the suspicions as gathered by the secretary appears from the following extracts from his report: —

"As regards the first of these accusations, I pointed out that there was no precedent for holding that the mere passage of a man in a balloon at the sole direction of the wind over the lines of an army was an act of spying; and I urged that, if it were desirable to stretch the usual laws of war so as to include amongst acts of spying the escape of individuals in balloons from a beleaguered city, it would be necessary and just on investing a city to publish a warning to that effect. But, I added, in the case of Mr. Worth, I could see no sufficient and just reason for dealing with the fact alone of his escape from Paris in a balloon as proof of an act of spying. The Governor acknowledged that there was diversity of opinion on that point, but he was personally of opinion that the act of escaping in an unauthorized manner from a beleaguered city did not constitute an act of spying. I admitted that, as persons passing over the lines of an army might obtain information which might be used by the enemy, there might exist good military

reasons for detaining, with exclusion from all intercourse, such persons, until the information could no longer be useful; and I expressed the hope that this was the chief cause of the detention of Mr. Worth.

"His Excellency did not confirm this hope, but stated his moral impression to be that, if there were only this first accusation against him, Mr. Worth would eventually be liberated.

"As regards the second accusation, it is not clear on what grounds Mr. Worth can be charged with being an agent of the French Government. It appears that he and three Frenchmen (also in Cologne for trial) were captured, whilst a fourth Frenchman escaped in a balloon with the dispatches of the French Government. The aeronaut, who escaped, would have been the chief defendant. In his absence, it will probably be difficult to prove any complicity between him and the captured passengers of the balloon. Moreover, I cannot find that any compromising correspondence has been found upon Mr. Worth or his companions. If, therefore, this accusation be founded on no better grounds than are now visible, the case will resolve itself into the fact of Mr. Worth escaping in an unauthorized manner from a disagreeable residence and possible famine in Paris. But, although I have not yet obtained direct official confirmation of the fact of the existence of a letter compromising Mr. Worth as an agent of the French Government, either as principal or accessory, in procuring arms for the French army, various rumors, in this city as to the existence of a compromising letter have now taken the form of the allegations that such a letter, referring to Mr. Worth as having given an address to a French agent for procuring arms in England, exists; that it has been laid by the prosecution before Mr. Worth, and that he has explained that he merely gave the address, like any other address, to a Frenchman who called at his place of business. I cannot say whether or not the rumor has any kernel of truth in a shell of fiction, but unless such a letter, supposing it to exist, contain only evidence of some proceeding as little reprehensible as giving an address out of a post-office directory, Mr. Worth may run great risk of being condemned to death by a court-martial" (p. 203).

The report closes as follows:

" . . . In my ignorance of the laws of war, and of the varieties of offence and penalty therein set forth, I did not feel myself competent to discuss the lightness or the gravity of the guilt which might attach to Mr. Worth as an agent of the French Government. But I am informed that to supply arms to or aid in procuring arms for the enemy is an offense punishable with death, and an offense of an aggravated character when committed by a neutral.

"I am addressing to Mr. Worth a letter, of which I beg to inclose a copy" (p. 204).

The Foreign Office on December 17 considered that Mr. Worth's friends need entertain no apprehension about his life, and on December 18 Mr. Worth's mother was informed that her son's life was perfectly safe.

On January 26 the secretary of embassy reported further from Cologne:

"The letter which so gravely compromised Mr. Worth, and to which I referred in my letter of the 8th December last, has been acknowledged by Mr. Worth to be in his handwriting. It is signed by him, is addressed to Mr. Littlewood, and contains a direct order for arms for the French Government. If this letter had been found on Mr. Worth, it appears that the laws of war would have permitted him to be forthwith shot by his captors. Luckily for Mr. Worth the letter was captured in another balloon about four weeks before he was himself captured. Of this fact Mr. Worth made use in his defense.

"The necessary court-martial has already been held upon Mr. Worth, and a judgment passed. This judgment has been referred to Versailles for revision.

"The Governor offered Mr. Worth the services of Herr Fischer, cle[rk] and experienced lawyer of Cologne, who is acquainted with the laws and procedure of military justice, and who is now acting as a Landwehr Adjutant. Mr. Worth accepted Herr Fischer for his defending counsel. The chief plea raised in the defense was that Mr. Worth had endeavored soon after writing the letter to obtain repossession of it, but that the holder of it caused it to be sent out of Paris by balloon post, refusing to give it up. Others were the absence of proof that Mr. Worth had in any way actu-

ally contributed to the supply of any arms to the French Government, and also the absence of proof that he had himself dispatched the letter written during a momentary absence of reflection" (p. 212).

On February 9 Mr. Odo Russell reported:

"I have never ceased to appeal to Count Bismarck in behalf of Mr. Worth, ever since I have been at Versailles; and I have obtained a promise that his life would be spared, and assurances that he would be pardoned by the King, and released after his trial was over. Beyond that, all my exertions have failed, to my deep regret" (p. 214).

In the same dispatch was enclosed the following from Count Bismarck to Baron Thile:

"With reference to my communication of the 23rd of last month respecting the English prisoner Worth, I have the honor to communicate to your Excellency the following particulars, which have been supplied to me by the military authorities:

"The British subject in question, inasmuch as he was captured in a balloon by which illicit correspondence, punishable in time of war, was forwarded, has brought upon himself, as well as the other passengers, the suspicion of being the bearer of such dispatches.

"The investigation which is about to be instituted against Worth on suspicion of spying and rendering secret services to the enemy will determine if he has been guilty of this offense or not. However, even if the above-mentioned suspicions regarding Worth should not be proved, if, for instance, illicit correspondence had not been found in the balloon, still his arrest and the judicial inquiry would have been justified, because he had spied out and crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained to our prejudice.

"That such a proceeding cannot be tolerated by any power at war requires no further explanation.

"In order, however, to show the good-will of the Government towards a friendly power, His Majesty has been pleased to command that the result of the inquiry respecting Worth should be communicated to him before the sentence is carried out, and the necessary instruction has been conveyed to the Governor of Cologne.

"I request your Excellency to be so good as to bring the foregoing to the knowledge of Lord A. Loftus" (p. 215).

Mr. Worth was liberated on February 20. On his return to London he had an interview with Lord Granville, after which he wrote him as follows:

"In accordance with your Lordship's request I now beg to state in writing the facts which I verbally communicated on the 18th instant, and these facts will prove to your Lordship's satisfaction that my case merits particular consideration on the part of Her Majesty's Government.

"I will commence by stating that I carry on a business both in Paris and London, but by far the greater part of my fortune and interests are in the former city, and at the commencement of September last my presence there became actually necessary, as my partner was almost entirely occupied with his enforced military duties. Up to the moment of the investment of Paris by the Prussian armies I had been unable to leave, but I had not anticipated, nor had I seen any notice emanating from the British Embassy, that it would be impossible for English subjects to get out of the besieged city.

"At the end of September, however, I began to get anxious, especially as I was given to understand that no foreign residents would be allowed to leave, and that from the disposition of the Parisians the siege appeared as if it would last longer than had been generally thought. I knew I should shortly be required in London to attend to business there, to meet payments, and to arrange painful family matters. I therefore decided to leave, although I was at a loss to know by what means.

"After trying to get out in various manners, but without success, I heard that a private balloon was about to leave, and, after some difficulty, I obtained the promise of a place. I then went to the British Embassy, and told our ambassador's representative, Mr. Wodehouse, that I was about to start in a balloon, and said that if he or his friends had any letters for England I should be happy to take them. I was totally unaware, for my part, that I was leaving Paris in an unauthorized manner. Mr. Wodehouse availed himself of my offer, and several closed letters were sent

me. I enclose copy of a note from this gentleman, dated 12th October, 1870. No mention was made to me of the possibility of being able to leave with the British residents.

"An accident happened to this balloon, and I was unable to leave in it, and I of course despaired of getting out in any other manner. Consequently, I considered myself at that moment very fortunate indeed to be able to get a place, about the middle of October, for £100 in another private balloon, which was to have started immediately. The departure was, however, daily postponed; and had there been any other means available I should certainly have taken advantage of them. I tried to get out with two or three foreign ministers, without success.

"On the 26th October the balloon had not yet left, and by accident I heard the same evening that the English were going out the following morning. At this I was very much astonished, as Mr. Wodehouse's letter was dated the 14th October, and he had made no mention to me either before or after that date of the proposed departure on the 27th October, nor had I seen any notice whatever respecting it; otherwise I should most certainly have availed myself of the opportunity in preference to the manner in which I left.

"The same evening I used every effort possible to find either Mr. Wodehouse or Colonel Claremont, and it was not until 11 o'clock that I gave up all hopes of leaving with my countrymen, on being informed at the Colonel's private residence that he had left Paris for Charenton. I called several times at the Embassy, hoping to find some one, and was at last informed there by the porter that even if I got my name put down on the list it would be useless, as there was no time for its approval by Count Bismarck.

"The day following I left in the balloon, as this was the only course now left open to me: the evening of the same day, the 27th October, I was captured by the Prussians. I at once informed them that I was a British subject; my passport, together with all my papers and letters, were taken from me, including those sent through Mr. Wodehouse. I stated that I had no political mission, and that I left Paris on purely personal matters. At Verdun, where the balloon fell, I was, with the two Frenchmen who were my fellow-travelers, in hourly expectation of being shot, as it was evident that we were treated as spies, and it subsequently ap-

peared that we had a very narrow escape. Whilst here I managed to have a letter sent to my mother, informing her of my position. From Verdun we were, however, sent to Versailles, where we arrived on the 5th November, and there separately confined in criminal cells, without any possibility of communicating with the outside world. After having been there three or four days I received a visit from Colonel Walker, to whom I had managed surreptitiously to have a note conveyed, informing him of my position: when he came to see me he said that he had received a telegram from Her Majesty's Government respecting me, and consequently I was persuaded that I should immediately be set at liberty.

"I informed Colonel Walker of the exact circumstances of the case, and complained strongly of being treated as a criminal and a spy. He ameliorated my pitiable condition in the cell by requesting the Prussian authorities that better food might be sent, with which request they complied. He also supplied me with a little money (100 francs) and some necessary clothing; in his private capacity he acted as kindly as he was permitted to do.

"To my terrible disappointment I was neither liberated nor even questioned in any way at Versailles, and during the ten days of confinement there, the only Prussian authority I saw was a police official, who minutely searched me, expecting, I presume, to find something of a compromising nature.

"On the 13th November I was told I was to be sent the following morning into Germany, and on hearing this I was naturally very much upset. I sent word through a Frenchman, an attendant in the prison, to Colonel Walker, begging him to come and see me: this he did, and reassured me somewhat by saying that he had no doubt but that I should be liberated immediately on arrival in Germany.

"I may mention that Colonel Walker informed me that the English had not then arrived from Paris, so whether they left at the stated date, the 27th October, I am unable to say.

"On the 14th November we were sent off from Versailles on foot, in company with French soldiers, and *en route* another large batch of peasant prisoners was added to our number. I was ill in the prison with fever and diphtheria, and was not in a condition to

walk; but I need not give a catalogue of my sufferings, which were of an extremely painful nature: suffice it to say that on the first day's march I was compelled to walk some thirty miles, of which twenty miles with naked feet, as I was unable to wear my boots owing to the inflammation which had come on in prison, and also that I was shut up with between thirty and forty prisoners during three days and three nights in a cattle-truck, with hardly any ventilation.

"Nearly one month after capture we arrived at Cologne and were then incarcerated in cells. The food was bad, and, worse than all, the moral suffering in this solitary confinement was unbearable.

"We petitioned the Governor to allow us a room in the prison, which he accorded at the expiration of a week.

"We received permission to write and receive open letters, subject to the discretion of the authorities.

"I wrote to Lord A. Loftus at Berlin, but was informed that my letter would not be forwarded.

"As the days and weeks passed slowly away, I began to fear that no steps were being taken on my behalf, and I did not know what my imprisonment might result in, i.e., whether I should be liberated or disposed of in a summary manner.

"In December I received a letter from Mr. Harriss-Gastrell, one of the secretaries at the British Embassy at Berlin, stating that he was not allowed to see me, but that he felt sure that my trial would be justly conducted, and that I should have three weeks to prepare my defense. This letter was not at all reassuring, as I had expected to be liberated, or, at any rate tried if it were necessary, immediately after capture, and nearly two months had already passed by. It was not until the 18th January, nearly three months after capture, that myself and fellow-prisoners were tried, at the same time, by a summary and secret court-martial; the Prussian authorities procured us an advocate who had four days to prepare our defense, but it was not until a month later, on the 20th February, that we were informed of the result of this trial. This result was that we had all been found innocent and acquitted by the court-martial held on the 18th January.

"On the 20th February, after having undergone a secret imprisonment of four months, and having been declared innocent by

the Prussians one month prior to this date, we were set at liberty. During the whole term of our long detention we did not know what our fate might be.

"I have given to your Lordship a simple narrative of the facts as they took place, from which you will conclude that my sufferings, both morally and physically, were very great; my business, moreover, which required my presence in London was, as Mr. Littlewood said in his letter to your Lordship of the 19th January, completely ruined on account of my absence. It will be admitted that, as a matter of justice, I am fairly entitled to an indemnity.

"I shall be happy to give your Lordship any further information that you may consider necessary" (pp. 218–20).

On April 3 Mr. Worth was informed by the Foreign Office that Earl Granville regretted that after consultation with the proper law advisor of the Crown he did not feel justified in placing such a claim on his behalf before the German Government.

(See *Correspondence Respecting the Imprisonment of Mr. Worth by the Prussians. Parliamentary Papers* [1871], vol. LXXII, pp. 179–221.)

(g) Treachery and criminal warfare

RUSSIAN FORCES NEAR LIAO-YANG HOIST A JAPANESE FLAG (1904)

ANOTHER instance of the Russian abuse of our flag occurred during the recent engagement near Liao-yang. At noon on the 25th of September, 1904, our troops were advancing on one of the enemy's forts, when firing suddenly ceased, and the Japanese flag was seen flying from the fort. This was, however, a ruse. Our force on approaching the fort, thinking that it had already fallen into our hands, was received by a severe fire, which almost annihilated one of our companies. Fortunately, however, reinforcements arrived, and the enemy was finally dislodged from his position.

(Extract from Takahashi: *International Law applied to the Russo-Japanese War* [New York, 1908], p. 162.)

§ 5. CONVENTIONAL RESTRICTIONS IN THE EVENT OF WAR

(*a*) The codification of existing customary law

THE BOMBARDMENT OF SAN-SHAN ISLAND (1904)

In an official note addressed to the Imperial Minister for Foreign Affairs, under date of March 24 [1904], the French Minister at Tokyo stated that a communication had been received by his Government from the Russian Government, to the effect that on March 10 [1904] a Japanese squadron, steaming off the east of San-shan Island, fired fifty shots at the quarantine station on the island, causing serious damage to the buildings. At the request of the St. Petersburg Government, M. Harmand called the attention of Baron Komura to the matter, as the bombardment of the quarantine station constituted an infraction of Art. XXV of the Appendix of The Hague Convention.

In answer to the communication, Baron Komura stated that the Imperial Government had not yet received any report on the subject from the commander of the Japanese fleet, but the Government was of the opinion that the Article in question referred only to land operations, and was not intended to cover the actions of war-vessels.

(Extract from Takahashi: *International Law applied to the Russo-Japanese War* [New York, 1908], p. 411.)

(*b*) The enactment of rules of generally recognized advantage to all belligerents

THE *PAKLAT* (1915)

The London *Times* of April 20, 1915, prints the following exchange of notes between the British Foreign Office and the American Ambassador in London in regard to the seizure of the German steamer *Paklat* as communicated through the Press Bureau: —

Note Verbale forwarded through the American Embassies in Berlin and London, dated March 8, 1915

"Before the siege of Tsing-tau was started, the German steamer *Paklat* had been ordered by the Governor of Tsing-tau to transport the women and children from there to Tientsin. The steamer was given a certificate by the Governor as to the purpose of her trip, and she was carrying the white flag. None the less, she was stopped during her voyage by British men-of-war and was brought to Wei-hai-wei. At the latter place, the women and children had to embark on a small freight steamer, while the steamer *Paklat* was taken to Hong-kong, where the Prize Court there has pronounced her confiscation.

"This procedure against the ship involves a serious violation of the international law, according to which vessels entrusted with humanitarian missions are exempt from seizure by hostile marine forces (see also Art. 4[1] of the Eleventh Convention of The Hague concerning certain restrictions in the exercise of the right of capture in maritime war, of October 18, 1907).

"The German Government energetically protest against the violation of this rule of international law which is in the interest of humane warfare, and ask the speedy release of the steamer *Paklat.*

"It would be grateful to the American Embassy if the latter would cause the foregoing to be brought to the attention of the British Government."

Sir Edward Grey's reply of March 30th, transmitted through the American Ambassador in London

"I duly received the Note which you were good enough to address to me on the 18th instant, transmitting a Note Verbale from the German Government, in which they protest against the seizure and condemnation of the German S.S.

[1] The terms of this Article are as follows: "Vessels employed on religious, scientific, or philanthropic missions are likewise exempt from capture."

Paklat, as being in contravention of Article 4 of Convention No. XI, signed at The Hague in 1907.

"So far as His Majesty's Government are aware judgment on the vessel has not yet been pronounced by the British Prize Court at Hong-kong, before which she was brought for adjudication on the 2d December last. The further hearing of the case was then adjourned on the application of the owners of the ship, in order to permit of a full consideration of their contention that she was exempt from condemnation in virtue of the provisions of the Convention quoted above.[1]

"His Majesty's Government are of opinion that the ship is liable to condemnation, since Article 4 of the Convention to which the German Government refer does not apply to such cases as that now under consideration. This appears to be made clear by the extract from the Report on the labors of the Fourth Commission (sub-Annexe 10 to Protocol of Seventh Plenary meeting), of which I have the honor to enclose a copy.[2] In the view of His Majesty's Government the con-

[1] Rees-Davies, Chief Justice in the Supreme Court of Hong-kong (in Prize, delivered, April 15, 1915, the opinion of the court condemning the *Paklat*, in which he held that the ship was not engaged in a "philanthropic mission" within the meaning of Art. 4 of the Eleventh Hague Convention, 1907, so as to be exempt from capture. He remarked that "to construe 'philanthropic mission' as suggested might lead to serious consequences which clearly could not have been contemplated by the article, and it might enable an enemy vessel to escape to a neutral port under any similar professed act of philanthropy. If it were intended to cover such an act as the conveyance of non-combatants under such conditions to a neutral port, the Convention would not have left it in such vague and indefinite language; and some such system as safe conducts furnished in advance would presumably have been contemplated, as, I understand, has often been the custom in the case of expeditions dispatched for the purpose of science or religion and in the case of cartel ships.

"I may add that, assuming the blockade had existed at Tsing-tau (which, I understand, in fact did not exist until August 27) no rule of law exists which obliges a besieging force to allow all non-combatants, or only women, children, the aged, sick and wounded, or subjects of neutral Powers, to leave the besieged locality unmolested. Although such permission is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender — see Oppenheim's *International Law*, vol. II, p. 193. This being the case, if the Convention ever contemplated such a 'philanthropic mission,' which in the case of a blockaded port would come directly in conflict with the custom I have stated, it would have provided for it in express and unequivocal language." (E. C. M. Trehern, *British Prize Cases* London, 1916], vol. I, pp. 517–18.)

[2] The terms of this article, which originated in a motion by the Italian delegates,

veyance of women and children from a fortress which was about to be besieged (an action which would have the effect of increasing the power of resistance of the fortress) cannot be regarded as a philanthropic mission within the meaning of the Article; and it would indeed appear that the *Paklat* might more properly be considered as being employed on a service connected with the operations of war, which would, as the Report points out, be sufficient to deprive a vessel of any privileges which she might otherwise be entitled to under the Article in question. The question whether the ship is exempt from condemnation in virtue of these provisions is, however, essentially one for the Prize Court to determine after due consideration of the circumstances of the case.

"I must confess that I have received the protest of the German Government in this case with considerable astonishment. It will be within your Excellency's recollection that the French vessel *Amiral Ganteaume*, which was conveying refugees to England, was torpedoed by a German submarine in the English Channel some months ago. No opportunity was given to the passengers to escape in the ship's boats, and it was not owing to any act of the commander of the submarine that the lives of all on board were not lost.

"I cannot refrain from calling your Excellency's attention to the difference in treatment accorded to these two vessels. The *Paklat* was taken into a British port and the refugees on board forwarded to their destination, the vessel being brought for adjudication before a British Prize Court, where the owners are being afforded every opportunity of putting forward their claim to exemption from condemnation; the *Amiral*

are in conformity with the usage for which the La Pérouse Expedition furnishes one of the best-known precedents. The consecration of the principle of immunity could not give rise to any objections and was adopted unanimously. It did not appear necessary to state afresh in the text the conditions upon which enjoyment of this immunity depends. It is clear that this favor is granted only on condition of non-participation in operations of the war; in order to avoid all difficulties the State whose flag is flown by the ship in question will have to abstain from implicating it in any service of a warlike nature. The favor granted to the vessel confers upon it a sort of neutral character, which continues until the end of hostilities, and debars it from changing its destination.

(Translation of the French text of the extract from the Second Hague Convention, in interpretation of Article 4, appended to Sir Edward Grey's reply.)

Ganteaume was torpedoed at sight without any regard to the laws of war or the dictates of humanity.

"In view of the protest of the German Government their contention would appear to be that they are entitled to sink without notice a French merchant ship carrying refugees and at the same time to protest against the validity of the capture of a German ship engaged on a similar errand being investigated and decided by a Prize Court. I am content to leave this contention without further comment."

(From the London *Times* of April 20, 1915, with partial rearrangement of headings, etc., of the extracts.)

(c) Conventional limitations placed upon the freedom of military action: neutralization of territory; certain restrictions upon the seizure of private property; prohibitions against the employment of certain specified means or methods of warfare

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THE NEUTRALIZATION OF LUXEMBURG (1867)

ARTICLES II and III of the Treaty signed at London May 11, 1867, by the representatives of the powers, and duly ratified, are as follows:

Article II. The Grand Duchy of Luxemburg, within the limits determined by the Act annexed to the treaties of the 19th of April, 1839, under the guarantee of the courts of Great Britain, Austria, France, Prussia, and Russia, shall henceforth form a perpetually neutral state.

It shall be bound to observe the same neutrality towards all other states.

The high contracting parties engage to respect the principles of neutrality stipulated by the present article.

That principle is and remains placed under the sanction of the collective guarantee of the powers signing parties to the present treaty, with the exception of Belgium, which is itself a neutral state.

Article III. The Grand Duchy of Luxemburg being neutral-

ized, according to the terms of the preceding article, the maintenance or establishment of fortresses upon its territory becomes without necessity as well as without object.

In consequence, it is agreed by common consent that the City of Luxemburg, considered in time past, in a military point of view, as a Federal fortress, shall cease to be a fortified city.

His Majesty the King Grand Duke reserves to himself to maintain in that city the number of troops necessary to provide in it for the maintenance of good order.[1]

(Edward Hertslet, *The Map of Europe by Treaty*, vol. III, pp. 1803–04.)

THE *MOEWE*

The High Court of Justice, in Prize, November 9, 1914

AFTER hearing the arguments of counsel on both sides, October 29, Sir Samuel Evans, president of the Admiralty Court, in prize, took the case under advisement. In delivering the opinion of the court, November 9, 1914, the President first stated the facts as follows:

"This was a merchant sailing vessel of the port of Rhandermoor, in Germany. Her master was Harm Schier, a German subject. He was also the sole owner of the vessel. She was captured by H.M.S. *Ringdove* on August 5 last in the Firth of Forth and taken into Leith. Her ship's papers showed that she was a German vessel, and had sailed from Norderney in Germany, and that her destination was Bo'ness, in the Forth. The master in an affidavit deposed that he was bound for Morrison's Haven for coal. That statement is not accurate, but in the circumstances it is not material to any issue. He arrived near Morrison's Haven somewhere between 7 and 9 P.M. on August 4. At this time hostilities between this country and Germany had not begun. The declaration of war was made from 11 P.M. on that day. He came to anchor about a mile off the creek of Morrison's Haven. He had a conversation with the officer of Customs of this place;

[1] A discussion of the neutralization of Luxemburg and of Belgium will be found in Stowell: *Diplomacy of the War of 1914*, vol. I, pp. 271–456.

his account of it differs from that of the Customs officer. Again, this is not material to any question in issue. If it were, I accept the latter's account. The master in his affidavit seems to make some point of what he alleged took place, but no argument was based upon this at the trial. Early in the morning of August 5 he weighed anchor and proceeded under way, according to his account, for Granton, a port about eight miles higher up the Firth of Forth than Morrison's Haven. After being under way for about an hour, the vessel was captured as prize by H.M.S. *Ringdove*, when, to use the words in the affidavit of her master, 'she was in British territorial waters between Morrison's Haven and Granton.' In a subsequent paragraph he said the vessel was 'taken at sea.' It was not shown that the master knew of the outbreak of war when the vessel was captured, and for the purposes of this case it is assumed that he did not know. An appearance was entered in these prize proceedings by Harm Schier 'as owner of the vessel.'"

Sir Samuel Evans then reviewed the British, American, and Japanese cases and practice and approved the Attorney-General's proposition based upon the authorities in the court to the effect that "where an owner avowed his enemy character without qualification, he had not a *persona standi in judicio* [person having a right to appear in court], and was not a person who had a right to be heard." The President of the court likewise considered as well founded and accurate the second proposition which the Attorney-General submitted; namely, that "where a person avowed that he was a subject of the enemy state in general, but had ground for urging that *pro hac vice* [in the particular instance] he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard; and that the real question was under which of these two rules a German owner should be regarded when he came before the court." Upon this second proposition and the other points necessary for the decision of the case, Sir Samuel Evans said:

" . . . Under The Hague Convention No. VI, the attitude which the owner in the present case must take may shortly be stated in these terms: 'I admit I am an alien enemy; and therefore that my ship was lawfully captured, or seized, as being enemy property; but I wish to appear to put forward and argue my

claim that in the circumstances of my case the ship is not confiscable, and cannot be condemned; but can only be detained during the war, to be restored to me after the war.'

. . . . . .

"As before indicated," the President continued, "I desire to say a word as to whether The Hague Convention No. VI is operative and applicable. I cannot close my eyes to the provision in article 6 of the Convention, which reads as follows: 'The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.' By articles 7 and 9 the Convention requires to be ratified by the signatory Powers, and by article 8 non-signatory Powers may accede to the Convention. Similar articles appear in the other Conventions enumerated hereafter.

"Of the belligerents in the present war at the time of the capture of the vessel, Germany and Austria-Hungary, and Belgium, France, Great Britain, Japan, and Russia had ratified the Convention (Germany and Russia making reservations of article 3 and part of article 4). Of the other belligerents, Montenegro and Serbia (whose representatives signed the Convention) have not ratified it. Turkey, who is now also a belligerent, has not ratified it. None of these States were non-signatory Powers, so there has been no accession on the part of any of them. In strictness, therefore (apart entirely from the question whether the enemies of this country are acting under or in accordance with the Convention), it is not clear that the Convention is binding or applicable.

"It is not my function or province to do anything more than to declare the law. But I trust to be forgiven for a humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international objects.

"I am not required finally to determine the effect or the binding character of the Conventions. This Court would be mainly concerned with the sixth, seventh, tenth, and eleventh of them as dealing more directly with maritime concerns, although, incidentally, others of them — for example, the third, eighth, and

thirteenth — might come under consideration in proceedings before it. Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine; it has a coastline, but only of about thirty miles; and Serbia is a purely inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the maritime Conventions; and it may be that the counsellors who have the responsibility of advising the Crown may deem it fit to advise that by proclamation or otherwise this country should declare that it will give effect to the Conventions, whether by the literal terms thereof they are strictly binding or not.

"Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under The Hague Conventions, assuming, as was done during the argument, that they are operative. Under some of the Conventions some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports; for example, under the sixth Convention the consequences of seizure or capture are minimized and limited in certain cases, although complete immunity is not afforded. Under others of the Conventions some vessels are entirely exempted from capture. For instance, under the tenth Convention, hospital ships are free from capture, except in certain specified circumstances; and under the eleventh Convention certain coast fishing vessels and local trading boats, as well as those employed on religious, scientific, or philanthropic missions, are similarly exempted. With regard to vessels comprised within the tenth and eleventh Conventions, the cases which might arise would approach nearly to those of vessels which came within the protection afforded by the Order in Council of 1854.

"Dealing with The Hague Conventions as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise.

"Mr. Holland argued that this is a matter not of International Law, but of the practice of this Court. That view is correct. I

think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned.

"Moreover, by Order XLV of the Prize Court Rules, 1914, it is laid down that 'In all cases not provided for by these Rules, the practice of the late High Court of Admiralty in England in prize proceedings shall be followed, or such other practice as the President may direct.' The Rules do not provide for the case now arising. I therefore assume that as President of this Court I can give directions as to the practice in such cases as that with which the Court is now dealing.

"The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behooves a court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the sea, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a Court of justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

"A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn Conventions dealing with a state of war, like those formulated at The Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position. It is to be remembered also that, in the international commerce of our day, the ramifications of the shipping business are manifold, and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy), the case for a seized or captured

vessel were permitted to be independently placed before the Court.

"For the considerations to which I have adverted, and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filed by Order III, rule 5 of the Prize Court Rules, 1914.

"I will now proceed to deal with the substance of the claim of the owner in the present case. He contends that his vessel cannot be condemned as prize. Was his vessel captured at sea, or seized in port? It was argued for him that she was seized in port, and therefore ought only to be detained during the war. For the Crown, on the other hand, it was contended that the vessel was captured at sea, and ought to be condemned. I have sufficiently stated the facts.

"It was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not 'on the high seas,' and therefore is not confiscable. See article 3 of the sixth Hague Convention, to which Germany did not agree, and under which her citizens cannot benefit.

"In this Convention I am of opinion that the word 'port' must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. It does not mean the fiscal port. The ports of Morrison's Haven, Granton, and Bo'ness, I was informed, are within the fiscal port of Leith, but they are all separate ports in the ordinary sense. The vessel was not seized in any of such 'ports' as the term is so understood, and as it seems to me to be used in the Convention. She was not in a port from which, if days of grace had been arranged, she could be said to 'depart' (*sortir*). Alternatively, it was

alleged but not proved that she was taken in 'territorial waters,' and that therefore she was not captured on the high seas. But I will assume that she was within territorial waters when the capture was made. In my view that is wholly immaterial. The sixth Hague Convention does not refer to 'territorial waters.' A vessel might be in territorial waters for scores of miles, either innocently or nefariously, and pass numerous ports, without any intention to enter any of them. It is idle to say that on this account she would be free from capture. Where The Hague Conventions intended to deal with territorial waters they are expressly mentioned as distinguished from 'port' — for example, in Convention XII, arts. 3 and 4, and Convention XIII, arts. 2, 3, 9, 10, etc., the words '*les eaux territoriales*' are used in contradistinction to *les ports*. (Cf. also the Declaration of London, art. 37, where territorial waters are described as *les eaux des belligérants*.) *En mer*, which is the phrase used in article 3 of the sixth Convention, is also inapt to indicate 'territorial waters.'

"Then it was contended that the vessel could not be condemned because she was not captured on 'the high seas.' The words 'encountered on the high seas,' in article 3, are not an accurate rendering of the authoritative French, *rencontrés en mer*. Where the Conventions intend to describe 'upon the high seas,' the appropriate phrase *en pleine mer* is used. See Convention VII, recital. Another phrase, *en haute mer*, is used in the Declaration of London, art. 37, to signify the same thing.

"To illustrate the meaning of the word 'port' in the Conventions I would further observe that the word 'ports' is used in various places in conjunction with, but in contradistinction to, roadsteads, and to territorial waters. See Convention XIII, where the words, *les ports, les rades, ou les eaux territoriales* are frequently used.

"In my view the claimant in his affidavit was accurate when he said his vessel was 'taken at sea.' The words of article 3, *rencontrés en mer*, are exactly applicable to this case. And I have no hesitation in finding that she was captured at sea, and not seized in port. I therefore decree that the vessel be condemned as lawful prize."

(Extract from the opinion as given in E. C. M. Trehern's *Prize Cases* [London, 1916], pp. 63–74.)

§ 6. UNNECESSARY CRUELTY

THE DIPLOMATIC CORPS PROTESTS AGAINST THE BOMBARDMENT OF PARIS WITHOUT NOTIFICATION (1871)

Communication of the Diplomatic Corps to Count Bismarck

PARIS, *January 13, 1871.*

His Excellency the Count Bismarck-Schönhausen,
Chancellor of the North German Confederation, Versailles.

Sir: For some days past a large number of shells, coming from positions occupied by the besieging troops, have entered the interior of Paris.

Women, children, and sick persons have been struck. Among the victims there are many who belong to neutral states. The lives and property of persons of all nationalities, residing in Paris, are in constant danger.

These things have happened without the undersigned (the greater part of whom have no other mission for the present at Paris, except to watch over the security and interests of their countrymen) having been enabled by a preliminary notice to warn against the dangers which menaced them, those of their countrymen who had been hitherto prevented by "force majeure," and especially by the impediments placed in the way of their departure by the belligerents, from placing themselves in safety. In presence of events of so grave a character, the members of the diplomatic corps present at Paris, with whom are associated in the absence of their respective embassies and legations, the undersigned members of the consular corps, have thought it necessary, with a full sense of their responsibility toward their respective governments, and of their duties toward their fellow-countrymen, to concert upon the measure to take.

Their deliberations have led the undersigned to the unanimous resolution to request that, in accordance with the recognized principles and usages of the law of nations, steps be taken to per

mit their countrymen to place themselves and their property in safety.

Expressing with confidence the hope that your excellency will interpose your good offices with the military authorities, in accordance with the object of this request, the undersigned take this opportunity to beg you will receive the assurances of their very high consideration.

[Here follow the signatures of the diplomatic corps present in Paris.]

Count Bismarck replied in a note dated January 17. He placed the responsibility for the attack upon Paris upon those who had converted the city into a great fortress. He referred to the ample warning of the approaching siege and military operations, and cited Vattel as authority for the employment of extreme measures when necessary to reduce a besieged city. As for the diplomatic corps, he pointed out that they had been authorized to pass through the lines, and that if they were detained they should address their complaints to the French authorities. In regard to the bombardment of Paris, Bismarck declared that in view of the scrupulous manner in which the obligations of the Geneva Convention had been observed it was unnecessary to state that women, children, and hospitals had not been intentionally injured.

On January 23, the Swiss Minister, acting for the diplomatic corps and with the unanimous approval of all the signers of the previous note, drew attention to certain inaccuracies in Count Bismarck's answer to the protest of the diplomatic corps, and declared that their egress from Paris had been prevented by the action of the German military authorities. As regards the substance of their request the Minister stated that it appeared "to the signers of the 'note' of January 13 that the point of view in which the German military authorities have placed themselves is too widely different from their own, and that the refusal is conceived in too positive terms to permit that any further argument upon the principles and usages of the law of nations should reach the desired conclusion. They cannot, however, omit to observe that your excellency principally endeavors to show, invoking the authority of Vattel, that the laws of war authorize, as a last extremity, the bombardment of a fortified city. The intention of the

signers of the 'note' of January 13 was not to contest this extreme right. They confine themselves to affirming, and they believe that they can maintain, in accord with the best authorities on modern international law, and with the precedents of the different periods, the rule that the bombardment of a fortified city should be preceded by notice.

"There remains, therefore, only to the diplomatic and consular representatives of the neutral states, in consequence of the duties which are imposed upon them by the gravity of the situation, and of the importance of the interests at stake — the duty to communicate to their respective governments the correspondence exchanged with your excellency, while always insisting upon the substantial foundation of their request.

"It may be permitted me, in conclusion, to express, in the name of the signers of the 'note' of January 13, as well as in my own, my lively and sincere regret that the German military authorities could not resolve to reconcile the necessities of war with the wish to diminish the sufferings of the civil population of every nationality residing in Paris."

(*Foreign Relations of the United States, 1871*, pp. 282, 292–95; Cf. *ibid., 1870*, pp. 127–29.)

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§ 7. INVENTIONS

IMPLEMENTS OF WAR (*Halleck*)

THE implements of war, which may be lawfully used against an enemy, are not confined to those which are openly employed to take human life, as swords, lances, firearms, and cannon; but also include secret and concealed means of destruction, as pits, mines, etc. So, also, of new inventions and military machinery of various kinds; we are not only justifiable in employing them against the enemy, but also, if possible, of concealing from him their use. The general effect of such inventions and improvements is thus described by a distinguished American statesman: "Every great discovery in the art of war has a life-saving and

peace-promoting influence. The effects of the invention of gunpowder are a familiar proof of this remark, and the same principle applies to the discoveries of modern times. By perfecting ourselves in military science — paradoxical as it may seem — we are therefore assisting in the diffusion of peace, and hastening the approach of that period when 'swords shall be beaten into ploughshares, and spears into pruning-hooks; when nation shall not lift up sword against nation, neither shall they learn war any more.'" The same views are expressed by Ortolan and other recent writers on the laws and usages of war. At one period, however, it was considered contrary to the rules of military honor and etiquette to make use of unusual implements of war. Thus, the French vice-admiral, Marshal Conflans, issued an order of the day, on the 8th of November, 1759, forbidding the use of hollow shot against the enemy, on the ground that they were not generally employed by polite nations, and that the French ought to fight according to the rules of honor. The same view was taken of the use of hot shot, grape, chain-shot, split balls, etc.

(Extract from H. W. Halleck: *Elements of International Law and Laws of War* [abridged ed., Philadelphia, 1872], p. 178.)

THE HISTORY OF WARLIKE INVENTIONS (*Maine*)

. . . One of the most curious passages of the history of armament is the strong detestation which certain inventions of warlike implements have in all centuries provoked, and the repeated attempts to throw them out of use by denying quarter to the soldiers who use them. The most unpopular and detested of weapons was once the crossbow, which was really a very ingenious scientific invention. The crossbow had an anathema put on it, in 1139, by the Lateran Council, which anathematized *artem illam mortiferam et Deo odibilem.*[1] The anathema was not without effect. Many

[1] From information furnished by Professor William Walker Rockwell we give the correct text of the canon as follows: "*Artem* [*autem*] *illam mortiferam et* [*Deo*] *odibilem ballistariorum et sagittariorum adversus Christianos et catholicos exerceri de cetero sub anathemate prohibemus.*" (The words in brackets have been restored by Friedberg in his edition of the *Corpus Juris Canonici*, vol. II [Leipzig, 1881], p. 805.) This Professor Rockwell translates as follows: "That art [moreover], death-dealing

princes ceased to give the crossbow to their soldiers, and it is said that our Richard I revived its use with the result that his death by a crossbow bolt was regarded by a great part of Europe as a judgment. It seems quite certain that the condemnation of the weapon by the Lateran Council had much to do with the continued English employment of the older weapon, the longbow, and thus to the English successes in the wars with France. But both crossbow and longbow were before long driven out of employment by the musket, which is in reality a smaller and much improved form of the cannon that at an earlier date were used against fortified walls. During two or three centuries all musketeers were most severely, and as we should now think most unjustly, treated. The Chevalier Bayard thanked God in his last days that he had ordered all musketeers who fell into his hands to be slain without mercy. He states expressly that he held the introduction of firearms to be an unfair innovation on the rules of lawful war. Red-hot shot was also at first objected to, but it was long doubtful whether infantry soldiers carrying the musket were entitled to quarter. Marshal Mont Luc, who has left Memoirs behind him, expressly declares that it was the usage of his day that no musketeer should be spared.

The bayonet also has a curious history. No doubt it must be connected by origin in some way with the town of Bayonne, but the stories ordinarily told about its invention and early use seem to be merely fables. No invention added more to the destructiveness of war, as the bayonet turns the musket into a weapon which is at once a firearm and a lance. The remarkable thing about it is, that though known it remained for so long unused. It was Fred-

and hateful [to God], of crossbowmen and archers, we prohibit to be employed against Christians and Catholics, and that under pain of anathema."

This legislation was adopted at the Second Council of the Lateran convened by Innocent II in 1139 (canon 29), and was included in the first papal codification of the canon law, published by Gregory IX in 1234. The meaning is given in the so-called *summa* (a later, non-official addition) as "*Excommunicandus est sagittarius et ballistarius contra Christianos.*" Shortly after the publication of the *Decretales Gregorii IX*, opinion seems to have changed; for the *glossa ordinaria* (by Bernardus Parmensis, died 1263) interprets the canon to mean that one may use the crossbow even against Catholic Christians, provided only one's cause be just. This position evidently prevailed, for it is reiterated by the celebrated Italian canonist Angelus de Clavasio, who died in 1495 (*Summa Angelica de casibus conscientiæ* [Hagenau, 1509], s.v. *ars balistariorum*).

erick the Great who is said first to have used it generally or even universally among his soldiers. The probability is that the fear of exposing infantry to deprivation of quarter if taken prisoners caused this hesitation in using it.

(Extract from Sir Henry S. Maine: *International Law* [2d ed., London, 1894], pp. 138–40.)

THE USE OF ASPHYXIATING GASES

The 14th Report of the Belgian Commission of Inquiry, Havre, April 24, 1915

THE Commission of Inquiry has the honor to submit the following report relative to the use of asphyxiating gases by the German army, contrary to the stipulations contained in the declaration signed at The Hague July 29, 1899, according to the terms of which the contracting powers, among whom is Germany, agree to "abstain from the use of projectiles, the sole object of which is the diffusion of asphyxiating or deleterious gases."

On April 22, 1915, the Germans prepared an attack upon Steenstraat-Langemarck by means of asphyxiating gases. Clouds of gas were liberated and descended upon the trenches occupied by the allied troops.

The gas had the appearance of a low-lying cloud of about 100 metres in height, of a deep green color, changing as it passed by to light green at the top. These fumes seemed to be composed of several gases: chlorine, vapors of formaldehyde and nitric oxide, sulphur dioxide, and other gases not yet identified.

The Germans employ the following means for projecting the gas:

(*a*) Fires made in front of the trenches. The gas thus formed is carried by the wind in the direction of the enemy's lines.

(*b*) Grenades thrown into the trenches either by hand or by means of machines.

(*c*) Tubes liberating the gases.

(*d*) Shells containing asphyxiating gases.

The effect of the gas used by the Germans is described as extending over a distance of about two miles, and causing vomiting

and spitting of blood after a minute and a half, with irritation of the eyes and mucous membranes. The victims are affected with a sort of stupor which lasts three or four hours, or even longer.

The Germans have been for a long while engaged in preparations for the use of this barbaric means of warfare prohibited by the laws of war.

The Belgian authorities were warned of these preparations several weeks ago, and knew that asphyxiating shells had been tested on dogs in the shooting range at Taelen near Hasselt. They were also aware that grenades containing the deleterious gases had been transported to the front, and that thousands of mouth-protectors had been manufactured for the purpose of protecting the assailants from the effects of the gas.

March 30 a German prisoner belonging to the Fifteenth Army Corps made the following statement:

"In the region of Zillebeke, along the whole front, grenades have been stacked to the height of 1 metre 40 centimetres piled up in bomb-proofs. They contain asphyxiating gases which have not yet been used. The trenchmen have been instructed how to point the grenades toward the enemy. The pressure behind drives the gas in advance. A favorable wind is required. The operator has a special contrivance on his head, and all the men have their nostrils covered with a cloth."

April 15 a prisoner from the Twenty-sixth Army Corps confirmed this information. He said:

"Gas grenades 80 centimetres high are to be found along the whole front of the Twenty-sixth Army Corps. There is a battery of 20 tubes every 40 metres."

The Germans only awaited a favorable opportunity which was found when the wind blew from the northeast, toward the allied armies.

The Commission of Inquiry believes that it ought to call public attention (*conscience publique*) to this new and long premeditated transgression which has been committed by the German forces, after so many other violations of the laws of war.

(Freely translated from the original French of the *Report. Ed.*)

§ 8. THE STATUS AND TREATMENT OF NON-COMBATANTS: NON-INTERCOURSE, GUIDES, HUMAN SCREENS, LEVÉES EN MASSE

TREATMENT OF CIVILIANS IN BELGIUM (1914)

"DOUBTLESS the German soldiers often believed that the civilian population, naturally hostile, had in fact attacked them. This attitude of mind may have been fostered by the German authorities themselves before the troops passed the frontier, and thereafter stories of alleged atrocities committed by Belgians upon Germans, such as the myth referred to in one of the diaries relating to Liège, were circulated amongst the troops and roused their anger.

"The diary of Barthel when still in Germany on the 10th of August shows that he believed that the Oberburgomaster of Liège had murdered a surgeon-general. The fact is that no violence was inflicted on the inhabitants at Liège until the 19th, and no one who studies these pages can have any doubt that Liège would immediately have been given over to murder and destruction if any such incident had occurred.

"Letters written to their homes which have been found on the bodies of dead Germans, bear witness, in a way that now sounds pathetic, to the kindness with which they were received by the civil population. Their evident surprise at this reception was due to the stories which had been dinned into their ears of soldiers with their eyes gouged out, treacherous murders, and poisoned food, stories which may have been encouraged by the higher military authorities in order to impress the mind of the troops as well as for the sake of justifying the measures which they took to terrify the civil population. If there is any truth in such stories, no attempt has been made to establish it. For instance, the Chancellor of the German Empire, in a communication made to the press on September 2 and printed in the *Nord Deutsche Allgemeine Zeitung*, of September 21, said as follows:

"'Belgian girls gouged out the eyes of the German wounded. Officials of Belgian cities have invited our officers to dinner and shot and killed them across the table. Contrary to all international law, the whole civilian population of Belgium was called out, and after having at first shown friendliness, carried on in the rear of our troops terrible warfare with concealed weapons. Belgian women cut the throats of soldiers whom they had quartered in their homes while they were sleeping.'

"No evidence whatever seems to have been adduced to prove these tales, and though there may be cases in which individual Belgians fired on the Germans, the statement that 'the whole civilian population of Belgium was called out' is utterly opposed to the fact.

"An invading army may be entitled to shoot at sight a civilian caught red-handed, or any one who, though not caught red-handed, is proved guilty on inquiry. But this was not the practice followed by the German troops. They do not seem to have made any inquiry. They seized the civilians of the village indiscriminately and killed them, or such as they selected from among them, without the least regard to guilt or innocence. The mere cry *Civilisten haben geschossen* [Civilians have fired upon us] was enough to hand over a whole village or district and even outlying places to ruthless slaughter."

(Extract from *Bryce Committee Report*, pp. 41–42.)

AN ENFORCED GUIDE (1914)

"Thus the General, wishing to be conducted to the Town Hall at Lebbeke, remarked in French to his guide, who was accompanied by a small boy: 'If you do not show me the right way I will shoot you and your boy.' There was no need to carry the threat into execution, but that the threat should have been made is significant."

(Extract from *Bryce Committee Report*, p. 52.)

"THE MOST ATROCIOUS THING OF ALL" (1915)

"THE most atrocious thing of all was the order of the highest Russian military authority, found on a high Russian officer, which directed that all male inhabitants over ten years of age should be driven before the attacking troops; this monstrous order, which has blackened the name of the Russian Commander-in-chief forever, was apparently issued with the intention that German soldiers in repulsing the Russians would be compelled to fire on their own people."

(Extract from English translation of *Memorial of the German Government on Atrocities committed by Russian Troops upon German Inhabitants and German Prisoners of War*, issued at Berlin, March 25, 1915.)

PRISONERS USED TO SCREEN A PONTOON BRIDGE (1914)

"AFTER this came the general sack of the town. Many of the inhabitants who escaped the massacre were kept as prisoners and compelled to clear the houses of corpses and bury them in trenches. These prisoners were subsequently used as a shelter and protection for a pontoon bridge which the Germans had built across the river and were so used to prevent the Belgian forts from firing upon it."

(Extract from *Bryce Committee Report*, p. 16.)

"THE BELGIAN PEOPLE'S WAR" (1914)

"THE warfare of the Belgian civilian population was in complete violation of the universally recognized rules of international law, as expressed in the Hague Regulations respecting the Laws and Customs of War on Land, which have also been accepted by Belgium. These rules distinguish between an organized and an unorganized people's war. In the organized people's war (Art. I) the militia and the volunteer corps, in order to be recognized as

belligerents, have to conform with the following four conditions: they must have responsible leaders at their head, they must wear a certain distinctive emblem recognizable at a distance, they must carry their arms openly and they must observe the laws and customs of war. The unorganized people's war (Art. 2) is free from the first two conditions, that is to say the responsible leaders and the military emblems, but is, on the other hand, bound to two other conditions: it may only be waged in the territory not yet occupied by the enemy and there must have been lack of time to organize the people's war.

"The two special conditions established for the organized people's war were doubtlessly not fulfilled by the Belgian francs-tireurs. For according to the consensus of reports from the German military commands, the civilians who were found fighting had no responsible leaders at their head, nor did they wear any kind of distinctive emblems. (Annexes 6, C 4, 5, 15; D.) The Belgian francs-tireurs may therefore not be regarded as organized militia or volunteer corps as understood by the laws of war, this notwithstanding the fact that apparently also Belgian military persons and members of the 'Garde civique' took part in their undertakings. For as these persons likewise did not wear any distinctive emblems but, in civilian clothes, mingled with the fighting citizens (Annexes 6; A 3; D 1, 30, 45, 46) the rights of belligerents can be accorded to them as little as to the civilians.

"It results that the entire Belgian people's war can only be viewed as an unorganized armed resistance of the civilian population. As such is only allowed in unoccupied territory it doubtless was in violation, for this reason alone, of the law of nations in all those places which were already in possession of the German troops, more particularly in Aerschot, Andenne, and Louvain. But also in places not yet occupied by the German troops, especially in Dinant and its environments, was the people's war not allowable, because the Belgian Government had not sufficient time for organizing the people's war in accordance with international law. The Belgian Government since years has counted on being drawn into the warlike events in case of a Franco-German War; the preparations for its mobilization can be proven to have set in at least a week before the invasion of the German

army. The Government was, therefore, perfectly in a position to supply the civilian population, as far as their employment in possible fighting was intended, with military emblems and to appoint responsible leaders for them. The Belgian Government in a communication addressed to the German Government through the medium of a neutral power has asserted that it had taken corresponding measures. In stating this the Belgian Government only proves that it could have fulfilled the above-mentioned conditions; but such measures were, at any rate, not put into practice in the territories passed by the German troops.[1]

"Not only were, thus, the premises lacking which are provided by international law also for the unorganized people's war, but this war was also conducted in a manner which alone would have sufficed to place its participants outside the laws of war. For the Belgian francs-tireurs made it a rule not to carry their weapons openly, nor did they respect any of the laws and customs of war."

(Extract from the *Memorial published by the German Foreign Office*, May 10, 1915 [English edition, New York, July, 1915], pp. 6–7.)

"NON-RECOGNITION OF THE RUMANIAN LEGIONS AS BELLIGERENTS" (1915)

The Austro-Hungarian Ministry for Foreign Affairs to the representatives of the Neutral States accredited to the Austro-Hungarian Court. Translation from the French. Circular Verbal Note.

"VIENNA, *January 23, 1915.*

"By circular verbal note of September 30th, 1914, the Austro-Hungarian Ministry of Foreign Affairs lodged a protest with the neutral powers against Russia's refusal to recognize the Polish Legions as belligerents.

"As shown by trustworthy information received by the Austro-

[1] The Belgian Government has since (May 1, 1916) published a Third *Gray Book* in answer to the charges contained in the German *White Book* published May 10, 1915.

Hungarian Government, Russian troops likewise refuse to regard the members of the Rumanian Legions as belligerents. They hang them whenever they catch them.

"This action constitutes a flagrant violation of international law. The Rumanian Legions, which consist of Austrians of Rumanian race, are commanded by Austro-Hungarian army officers under the authority of army headquarters. Their members have taken the oath of allegiance, and wear a black-and-yellow badge on their arms as a token of distinction.

"The Rumanian Legions, therefore, not less than the Polish Legions, comply not only with all the requirements of The Hague Convention in regard to volunteer corps, but form a part of the army itself.

"The Austro-Hungarian Government, therefore, is compelled to protest formally against the attitude taken by the Imperial Russian Government with regard to the Rumanian Legions.

"The Embassy (Legation) is requested to bring the above to the knowledge of its government."

(From the *Collection of Evidence* [Concluded on January 31, 1915] published by the Austro-Hungarian Ministry of Foreign Affairs [English edition], pp. 71–72.)

THE EXECUTION OF CAPTAIN FRYATT (1916)

[The following account, taken from the *Evening Mail* of July 28, 1916, appeared in other newspapers of that date:]

Berlin, July 28 (by Wireless). — Captain Charles Fryatt, of the Great Eastern Railway steamship *Brussels*, which vessel was captured by German destroyers last month and taken into Zeebrugge, has been executed by shooting after trial before a German naval court-martial.

The death sentence was passed upon Captain Fryatt because of his alleged action in attempting previously to ram a German submarine.

Testimony was presented at the court-martial to show that although Captain Fryatt did not belong to the armed forces he had

attempted on March 28, 1915, while near the Maas lightship, to ram the German submarine *U-33*.

Captain Fryatt and the first officer and the first engineer of the *Brussels* received from the British Admiralty gold watches for "brave conduct" and were mentioned in the House of Commons.

The submarine *U-33*, according to the official account of the trial, had signaled to the British steamer to show her flag and to stop, but Captain Fryatt did not heed the signal, and, it is alleged, turned at high speed toward the submarine, which only escaped by diving immediately several yards below the surface.

Captain Fryatt, the official statement says, admitted that he had followed the instructions of the British Admiralty.

Sentence was confirmed and the captain was executed and shot for a "Franc-tireur crime against armed German sea forces." The trial was held at Bruges, Belgium, yesterday.[1]

When captured by German torpedo boats on June 24, Captain Fryatt was piloting the steamship *Brussels* from Rotterdam to Tilbury.

Several German warships dashed out of the naval base at Zeebrugge and escorted the *Brussels* back to the Belgian harbor. . . .

[The following notes were included in the correspondence published by the Foreign Office, July 29, 1916, and reprinted in the New York *Sunday Times Magazine*, August 20, 1916:]

[1] The text of the German *communiqué* sent to Amsterdam July 28, was as follows:

"On Thursday, at Bruges, before the court-martial of the Marine Corps, the trial took place of Captain Charles Fryatt of the British steamer *Brussels*, which was brought in as a prize. The accused was condemned to death because, although he was not a member of a combatant force, he made an attempt on the afternoon of March 20, 1916, to ram the German submarine *U-33* near the Maas lightship. The accused, as well as the first officer and the chief engineer of the steamer, received at the time from the British Admiralty a gold watch as a reward of his brave conduct on that occasion, and his action was mentioned with praise in the House of Commons.

"On the occasion in question, disregarding the U-boat's signal to stop and show his national flag, he turned at a critical moment at high speed on the submarine, which escaped the steamer by a few meters only by immediately diving. He confessed that in so doing he had acted in accordance with the instructions of the Admiralty.

"The sentence was confirmed yesterday (Thursday) afternoon and carried out by shooting.

"One of the many nefarious *franc-tireur* proceedings of the British merchant marine against our war vessels has thus found a belated but merited expiation." (As printed in the New York *Sunday Times Magazine*, August 20, 1916.)

Foreign Office, July 25, 1916.

Immediate.

The Secretary of State for Foreign Affairs presents his compliments to the United States Ambassador and has the honor to refer to Sir E. Grey's note of the 20th instant respecting the reported trial of Captain Fryatt of the S.S. *Brussels*.

Sir E. Grey would be greatly obliged if the United States Ambassador at Berlin could be informed that should the allegations on which the charge against Captain Fryatt is understood to be based be established by evidence, His Majesty's Government are of opinion that his action was perfectly legitimate.

His Majesty's Government consider that the act of a merchant ship in steering for an enemy submarine and forcing her to dive is essentially defensive and precisely on the same footing as the use by a defensively armed vessel of her defensive armament in order to resist capture, which both the United States Government and His Majesty's Government hold to be the exercise of an undoubted right.

July 29, the day after the receipt of the news of Captain Fryatt's execution, the Foreign Office, in a communication to the American Ambassador, referring to the German *communiqué*, expressed the following opinion:

"His Majesty's Government find it difficult to believe that a master of a merchant vessel who, after German submarines adopted the practice of sinking merchant vessels without warning and without regard for the lives of passengers or crew, took a step which appeared to afford the only chances of saving not only his vessel, but the lives of all on board, can have been deliberately shot in cold blood for this action.

"If the German Government have in fact perpetrated such a crime in the case of a British subject held prisoner by them, it is evident that a most serious condition of affairs has arisen.

"The Secretary of State for Foreign Affairs is therefore obliged, on behalf of His Majesty's Government, to request that urgent inquiry be made by the United States Embassy at Berlin whether the report in the press of the shooting of Captain Fryatt is true, in order that His Majesty's Government may have without delay a full and undoubted account of the facts before them."

"*July 29, 1916.*

"The American Ambassador presents his compliments to His Majesty's Secretary of State for Foreign Affairs, and, with reference to the notes which Lord Grey was good enough to address to Mr. Page on the 18th and 20th instant, respectively, has the honor to enclose herewith a paraphrase of a telegram regarding the case of Captain Fryatt, of the S.S. *Brussels*, which has been received from the Ambassador at Berlin:

"'BERLIN, *July 27* (5 P.M.)

"'Referring to your telegrams Nos. 821 and 824, I brought the case of Fryatt, Captain of the S.S. *Brussels*, to the attention of the Imperial Foreign Office in writing on the 20th and 22nd, and requested an opportunity to engage counsel. A verbal reply was made yesterday, stating that the trial was fixed for today at Bruges. It was added that the Foreign Office had requested a postponement if possible.

"'I have today received a written reply stating that it is impossible to grant a postponement, inasmuch as German submarine witnesses could not be further detained.

"'Major Neumann has been appointed by the German authorities to defend Fryatt. He is in civil life an attorney and justizrat.'"

PORTER *v.* FREUDENBERG
KREGLINGER *v.* S. SAMUEL AND ROSENFELD
In Re MERTEN'S PATENT

Court of Appeal, January 19, 1915

THE hearings on these important cases were before the Lord Chief Justice of England, the Master of the Rolls, Lord Justice Buckley, Lord Justice Swinfen Eady, Lord Justice Phillimore, and Lord Justice Pickford (as reported in the London *Times* of November 20, 25, 26, December 8; see also *Times Law Reports*, vol. XXXI, pp. 162–71). On January 19, the

Lord Chief Justice read the opinion of the Court, in the course of which he entered into a thorough review and discussion of the

cases and of the views expressed by the authorities. After accepting as accurate Professor Dicey's

definition of an alien enemy as including "not only the subject of any State at war with us, but also any British subjects or the subjects of any neutral States *voluntarily* resident in a hostile country" (Dicey: *Treatise on Parties to an Action*, p. 3),

the *Lord Chief Justice*, speaking for the Court, considered that according to the common law of England

he (an alien enemy) "cannot enforce his civil rights and cannot sue or proceed in the civil courts of the realm," except in certain cases (as when registering under the Aliens Restriction Act, 1914) where he is considered to have a tacit permission to reside in the realm.

It then became necessary to decide whether this rule of law had been modified by Article 23 (h) of the Hague Convention signed October 18, 1907, Respecting the Laws and Customs of War on Land. For the purpose of ascertaining the intentions of the contracting parties the Lord Chief Justice did not consider as material the views expressed by the German delegates who proposed the article,[1] but he declared

the Court must interpret the article as it now stands in the ratified Convention.

Nevertheless, the presiding Justice did enter into some discussion of the history of the proposal and drafting of the article in question.

Basing itself upon (1) the words of the original French text, (2) the situation of the article among a group of provisions relating to the conduct of the commander in the field, and (3) the requirement contained in Article I of the Convention,[2] the Court held that

[1] The Court admitted that General von Gündell, a German Delegate [at The Hague], and Herr Göppert, another German delegate, "undoubtedly stated in reference to it that the intention of the proposed clause was to prohibit all legislative measures which in time of war would place the subject of an enemy State in the position of inability to enforce the execution of a contract by recourse to the tribunals of the State in regard to which he is an alien enemy."

[2] Relative to the obligation of Article I (to which the contracting governments subscribed) to issue regulations to their armed land forces, in accordance with the articles annexed to the Convention, among which was Article 23 (h). The Court seemed to consider that this implied a limitation of the effects of article 23 (h)

article 23 (h) was in its judgment to be read "as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their Courts of Law in order to assert or to protect their civil rights."

The Court admitted that article 23 (h) had given rise to difference of opinion in regard to its interpretation, but considered that the English rule and the probability of its enforcement in the present war had been made public to the world, and that it was perfectly well understood by the German Government (to which nationality the alien enemies in the cases under discussion belonged). In support of this belief the Court referred to a published letter of March 27, 1911, from the Foreign Office (answering an inquiry from Professor Oppenheim) which contained "a powerfully reasoned exposition of the view that this paragraph has no concern with the municipal law, but relates to the conduct of those who are in command of an army in occupation of the territory of the enemy."

The court further referred to an incident of a diplomatic character — namely:

"On the eve of the outbreak of the present war the German Ambassador in London addressed a communication to our Foreign Office to this effect: 'In view of the rule of English law the German Government will suspend the enforcement of any British demands against Germans unless the Imperial [German] Government receives within 24 hours an undertaking as to the continued enforceability of German demands against Englishmen. No arrangement was arrived at."

Accordingly the Court reiterated its opinion that Article 23 (h) "has not the extended meaning claimed for it, and does not affect the ancient rule of the English Common Law that an alien enemy

to such regulations as could be issued by the War Department to the British army.

The Court also argued that the article by its very terms was inoperative in regard to Great Britain, since it prohibits the government from making a "declaration," whereas by the existing law of Great Britain "the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of the outbreak of the war any alien enemy may possess." The court found support for its opinion in the views expressed by Professor Sieveking, "an eminent German jurist," in regard to this particular point.

unless with special license or authorization of the Crown has no right to sue in our Courts during the war."

In conformity with the principles of the Common Law held to be in force, the Court further stated that

an alien enemy might be sued or proceeded against during the war. As a consequence of this liability to suit it followed that he could appear and be heard in his defense, and might take all such steps as might be deemed necessary for the proper presentment of his defense, and that equally the appellate courts were open to him as much as any other defendant if judgment proceed against him.

In the case of an alien enemy, who before the outbreak of the war was a plaintiff in a suit, and then who by virtue of his residence or place of business became an alien enemy, the Court held that he could not proceed with his action during the war. If judgment had been pronounced against him before the war in the suit in which he was plaintiff, the Court held that he could not present an appeal to the appellate courts, since they saw no reason to distinguish in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil suit in the court of the first instance and an alien enemy seeking to enforce such right by recourse to the appellate courts.

(Prepared from the decision in the cases as reported in the London *Times*, January 20, 1915; see also *Times Law Reports*, vol. XXXI, pp. 162–71.)

TRADING WITH THE ENEMY (EXTENSION OF POWERS) ACT (1915)

Ambassador W. H. Page to the Secretary of State

[Telegram]

AMERICAN EMBASSY,
LONDON, *January 19, 1916.*

TRADING with the enemy (extension of powers) act 1915. An act to provide for the extension of the restrictions relating to trading with the enemy to persons to whom, though not resident or carrying on business in enemy territory, it is by reason of their enemy nationality or enemy associations expedient to extend such restrictions (23d December, 1915). Be it enacted by the King's

Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) His Majesty may by proclamation prohibit all persons or bodies of persons, incorporated or unincorporated, resident carrying on business or being in the United Kingdom, from trading with any persons or bodies of persons not resident or carrying on business in enemy territory or in territory in the occupation of the enemy (other than persons or bodies of persons, incorporated or unincorporated, residing or carrying on business solely within His Majesty's dominions), wherever by reason of the enemy nationality or enemy association of such persons or bodies of persons, incorporated or unincorporated, it appears to His Majesty expedient so to do; and if any person acts in contravention of any such proclamation he shall be guilty of a misdemeanour, triable and punishable in like manner as the offence of trading with the enemy; (2) any list of persons and bodies of persons, incorporated or unincorporated, with whom such trading is prohibited by a proclamation under this act, may be varied or added to by an order made by the Lords of the Council on the recommendation of a Secretary of State; (3) the provisions of the trading with the enemy acts, 1914 and 1915, and of the customs (war powers) (Number 2) act, 1915, and all other enactments relating to trading with the enemy shall, subject to such exceptions and adaptations as may be prescribed by Order in Council, apply in respect of such persons and bodies of persons as aforesaid, as if for references therein to trading with the enemy there were substituted references to trading with such persons and bodies of persons as aforesaid, and for references to enemies there were substituted references to such persons and bodies of persons as aforesaid, and for references to offences under the trading with the enemy acts 1914 and 1915, or any of those acts there were substituted references to offences under this act; (4) for the purpose of this act a person shall be deemed to have traded with a person or body of persons to whom a proclamation issued under this act applies if he enters into any transaction or does any act with, to, on behalf of, or for the benefit of such a person or body of persons, which, if

entered into or done with, to, on behalf of, or for the benefit of an enemy, would be trading with the enemy.

2. This act may be cited as the trading with the enemy (extension of powers) act 1915.

PAGE.

(*White Paper* communicated by the Department of State.)

GERMAN MERCHANTS IN JAPAN (1915)

THE special correspondent of the New York *Sun*, writing from Tokio January 5, reports that:

"When Japan sent her ultimatum to Germany the Foreign Minister, Baron Kato, publicly invited German merchants in Japan to remain in the country and carry on their business as before. At the same time he asked individual Japanese to show no hostility to individual Germans. Mr. Ozaki, the Minister of Justice, stated that German residents might rely on full protection of person and property, and the head of the police department issued the necessary instructions to all prefectural governments to secure the safety of Germans throughout the empire. Finally, the Premier and Minister for Home Affairs, Count Okumo, issued a message to the provincial governors, ending with the words:

> "'It is the desire of the Government to afford every possible protection to German subjects, in view of the friendship which has existed between Japan and Germany, unless their actions bring them into conflict with the law. All Japanese should keep the spirit of these injunctions in mind and act with good grace and liberality toward German subjects resident in Japan.'

"In the utterances of the three Ministers is evidence that the Government has deliberately adopted a policy toward Germans within the Japanese Empire. That policy has been consistently and thoroughly carried out. German firms are carrying on their business in Tokio and the ports exactly as before the war, except of course for the handicap that they cannot obtain goods from Germany.

"The law courts are open to them. Last week a German firm successfully sued a Japanese concern for an unpaid bill. In the first week of the war, however, a Japanese merchant, sued for money owing, by a German in Tokio, put forward the plea that the war absolved him from paying money to an enemy subject. Bench and bar laughed at the idea and the case went on in the ordinary course. Germans are not required to report themselves to the police and are under no special restrictions as to residence or movements. Only one German has been expelled. He was the editor of a German owned evening newspaper and of a German telegraphic news agency." [1]

(Extract from the New York *Sun*, January 31, 1915.)

§ 9. PRIVATE PROPERTY

MANY of the most interesting cases concerning private property arise in relation to the rights of neutrals, since neutrals are generally in an advantageous position to appeal to the rules of international law in as far as they afford protection. A selection of cases of this nature will be found in Part II, under Chapter XI. Still other cases are given under §§ 10 and 11.

THE SEQUESTRATION ACT OF THE CONFEDERATE STATES (1861)

NOVEMBER 18, 1861, Lord Lyons, British Minister to the United States, forwarded to Lord Russell, British Minister for

[1] It is interesting to compare the action of Japan in the present war with the course pursued in 1904–05. Professor Takahashi, in his valuable work, *The Russo-Japanese War* (chap. v, pp. 82–88), gives an interesting discussion of the two opposed systems in regard to trading with the enemy. After weighing the arguments on both sides he considers (p. 88) that "it must be practically imprudent for Japan to insist on trading freedom in view of the English prohibition policy." Because of the English Alliance and the probability of complication "in case England and Japan come some day to fight against a common enemy," he concludes that "our [Japanese] maritime trade should be regulated by the same prohibition policy as the English; limiting our [Japanese] subjects' trading with the enemy to certain places, articles, and persons."

Foreign Affairs, the following communication which he had received from Acting Consul Cridland at Richmond in regard to the sequestration act of the so-called Confederate States:

"I have the honor to report, for the information of your Lordship, the following proceedings now going on in the District Court of the Confederate States of America for the Eastern District of Virginia, in regard to a case in which perhaps British interests may be involved.

"In the aforesaid court, now sitting in this city, I learn that the receiver, acting under the requisitions of the Sequestration Act of the Confederate Congress, has filed a petition against 2500 hogsheads of tobacco in the hands of Mr. John Jones, probably a warehouseman of this city, and purporting to belong to Auguste Belmont and Co., of New York.

"The value is estimated at $250,000. The alleged owners have apparently no counsel here, and it is supposed that the firm may consist of Mr. Belmont, in New York, and the Messrs. Rothschild, of London.

"Under the General Consular Instructions I have taken no proceedings in the case, for want of any proof of the said tobacco being British property, but I concluded that it would be proper to respectfully represent the case to your Lordship and await instructions."

This dispatch reached the Foreign Office December 2, and four days later Lord Russell sent the following instructions to Acting Consul Cridland:

"Lord Lyons has transmitted to me a copy of your dispatch of the 19th of October respecting certain proceedings which have been instituted in the District Court of the Confederate States of America for the Eastern District of Virginia, for putting into operation the Sequestration Act of the Confederate Congress in regard to certain merchandise supposed to be owned by a foreign house at New York, and in which Messrs. Rothschilds of London are also considered to be interested.

"The Congress of the Confederate States appears to have enacted by an Act of the 21st of August last, that property of whatever nature, except public stocks and securities, held by an alien enemy since the 21st of May, 1861, shall be sequestrated and

appropriated in the manner pointed out in the Act; and the Attorney-General of the Confederate States has distinctly laid down in an instruction dated September 12, that all persons who have a domicil within the States with which the Government of the Confederate States is at war, no matter whether they be citizens or not of such Government, are subject to the provisions of the Act.

"Her Majesty's Government have received urgent representations from parties in this country connected in business with, and having establishments in, the Northern States of America, of the hardship and injustice which this Act of the Confederate States, if applied to British subjects domiciled in the United States, cannot fail to inflict upon them.

"Now, whatever may have been the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the Act of the Confederate Congress, in modern and more civilized times, are so rare and have been so generally condemned that it may almost be said to have become obsolete. The conclusion expressed by Wheaton on the subject (*Elements*, 6th edition, p. 369) is as follows:

> "'It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of the belligerent State, or debts due to his subjects by the Government or individuals at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced it cannot be considered as an inflexible, though an established, rule. The rule, as it has been beautifully observed, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign: it is a guide which he follows or abandons at his will, and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations which may continually vary.'

"The observations of Wheaton which I have cited apply to the existence of an ordinary state of war between two independent

and foreign nations. But in the present case they apply with still more force against the exercise of the right in question; for the present is a case of civil war between the different parts of one confederation, during whose union the subjects of foreign states were invited and induced to settle indiscriminately in its various states, without any ground for contemplating such a disruption as has now occurred. No notice has been given to them, nor time allowed, which would enable them to prepare for such an emergency, or to separate their affairs from those of the citizens of either belligerent; and though technically they are liable to be considered enemies by one or other of the belligerents, as the case may be, it is impossible to treat them as such without gross injustice and a breach of that faith to which every State of the American Union was originally a party.

"Under these circumstances I have to instruct you to remonstrate strongly with the Secretary of State of the so-called Confederate States on the hardship and injustice of confiscating the property of neutrals under the Sequestration Act of the Confederate Congress."

Lord Russell transmitted copies of this dispatch to the other British consuls in the Confederate States with the following explanatory instructions:

"I transmit to you herewith, for your information and guidance, a copy of an instruction which I have addressed to Her Majesty's Acting Consul at Richmond, in Virginia, respecting the Sequestration Act of the Confederate Congress of the 21st of August last; and I have to instruct you, if the necessity for doing so should arise, to protest, on the grounds stated in that instruction, against the confiscation of British property in your district under the Act in question."

(See *Parliamentary Papers: Correspondence Relative to the Civil War in the United States of North America; North America*, No. 1 [1862], pp. 108–09.)

GENERAL BEAUREGARD'S PROTEST (1863)

HDQRS. DEPT. SOUTH CAROLINA, GEORGIA, AND FLORIDA,
CHARLESTON, S.C., *July 4, 1863.*

Brig. Gen. Q. A. Gillmore,
Commanding U. S. Forces, Port Royal, S. C.:

General: In the interest of humanity, it seems to be my duty to address you, with a view of effecting some understanding as to the future conduct of the war in this quarter.

You are aware, of course, of the fact that on or about the 2d ultimo an expedition, set on foot by your predecessor in command, Major-General Hunter, entered the Combahee River, in South Carolina, and seized and carried away a large number of negro slaves from several large plantations on that stream. My present object, however, is not to enter upon a discussion touching that species of pillaging, but to acquaint you formally that more than one of the large plantations thus visited and ravaged were otherwise and further pillaged, and their private dwellings, warehouses, and other buildings wantonly consumed by the torch. All this, be it observed, rendered necessary by no military exigency; that is, with no possible view to the destruction of that which was being used for military purposes, either of offense or defense, or in near vicinage to batteries or works occupied by your adversary, or which, if left standing, could endanger or in any military way affect the safety of your forces or obstruct your operations, either present or future, and, finally, the owners of which were men not even bearing arms in this war.

A day or two later, another expedition burned about two-thirds of the village of Bluffton, a summer resort of the planters of the sea-coast of South Carolina, an undefended and indefensible place. The best houses were selected for destruction, and for the act no possible provocation may be truthfully alleged.

Later yet, the 11th of June, the village of Darien, in the State of Georgia, was laid waste by your soldiers, and every building in it but one church and three small houses burned to the ground; there, as at Bluffton, no defense having been made, or any act of provocation previously committed, either by the owners of the

devastated place or by the soldiery of the Confederate States there or in any part of this department.

Again, as far back as the last of March, when evacuating Jacksonville, in East Florida, your troops set on fire and destroyed the larger part of that town, including several churches, not, assuredly, to cover their embarkation, but merely as a measure of vindictive and illegitimate hostility.

You have, of course, the right to seize and hold our towns and districts of country, if able to do so, that is, to exercise for the time the privilege of eminent domain, but not to ravage and destroy the houses or other property of the individuals of the country. The eminent domain and the property of the Government are legitimate objects of "conquest," but private property and houses, movable and immovable, are not. You may appropriate the spoils of the battle-field, or the booty of a camp which you have captured, or even, in extreme cases, when aggravated by an improper defense, may sack a town or city carried by storm. But the pillage of the open country and of undefended places has long ago been given up as a usage or legitimate measure of war. At most, contributions can be levied upon and collected of the people; and these, even, says Vattel, must be moderate, if the general who resorts to them wishes to enjoy an unsullied reputation and escape the reproach of cruelty and inhumanity.

You may, indeed, waste and destroy provisions and forage which you cannot carry away, and which, if left, would materially assist the operations of your enemy. But Vattel prescribes that even this must be done with "moderation and according to the exigency of the case." "Those who tear up the vines and cut down the fruit-trees are looked upon as savage barbarians, unless they do it with a view to punish the enemy for some gross violation of the laws of nations."

You cannot legitimately devastate and destroy by fire, or ravage the country of your enemy, except under the stress of stern necessity; that is, as measures of retaliation for a brutal warfare on his part. If you do so without an absolute necessity, such conduct is reported as the "result of hatred and fury." "Savage and monstrous excess," Vattel terms it.

Ravaging and burning private property are acts of "licentious-

ness, unauthorized by the laws of war, and the belligerent who wages war in that manner must justly," says Vattel, "be regarded as carrying on war like a furious barbarian."

The pillage and destruction of towns, the devastation of the open country, setting fire to houses, the same publicist expressly declares to be measures "no less odious and detestable when done without absolute necessity." This, Vattel expressly says, "is equally applicable to the operations of a civil war, the parties to which are bound to observe the common laws of war." Even the Duke of Alva was finally forced to respect these laws of war in his conduct toward the "confederates in the Netherlands."

Wheaton is no less explicit than Vattel on all these points. He declares that private property and land can only be taken in special cases; that is, when captured on the field or in besieged places and towns, or as military contributions levied upon the inhabitants of hostile territory. (See page 395, *Law of Nations.*)

The pages of the American publicist furnish the most striking condemnation of the acts of your soldiery on the Combahee, and at Jacksonville, Bluffton, and Darien, in connection with the burning, by the British, of Havre de Grace, in 1813, the devastations of Lord Cochrane on the coast of Chesapeake Bay, and in relation to some excesses of the troops of the United States in Canada.

The destruction of Havre de Grace was characterized at the time by the Cabinet at Washington as "manifestly contrary to the usages of civilized warfare." That village, we are told, was ravaged and burned, to the "astonishment" of its unarmed inhabitants, at seeing that they derived no protection to their property from the laws of war.

Further, the burning of the village of Newark, in Canada, and near Fort George, by the troops of the United States, in 1813, though defended as legitimate by the officers who did it, on the score of military necessity, yet the act was earnestly disavowed and repudiated by the Government of the United States of that day. So, too, was the burning of Long Point, concerning which a military investigation was instituted. And for the destruction of Saint David's by stragglers, the officer who commanded on that occasion was dismissed the service without trial for permitting it. (Wheaton on the *Law of Nations*, p. 399.)

The Government of the United States, then under the inspiration of southern statesmen, declared that it "owed to itself, and to the principles it ever held sacred, to disavow any such wanton, cruel, and unjustifiable warfare"; which it further denounced as "revolting to humanity and repugnant to the sentiments and usages of the civilized world."

I shall now remark that these violations of long and thoroughly established laws of war may be chiefly attributed to the species of persons employed by your predecessor in command in these expeditions, and should have been anticipated in view of the lessons of history; that is, negroes, for the most part, either fugitive slaves, or who had been carried away from their masters' plantations. So apparent are the atrocious consequences which have ever resulted from the employment of a merciless, servile race as soldiers, that Napoleon, when invading Russia, refused to receive or employ against the Russian Government and army the Russian serfs, who, we are told, were ready on all sides to flock to his standard if he would enfranchise them. He was actuated, he declared, by a horror of the inevitable consequences which would result from a servile war. This course one of your authors, Abbott, contrasts to the prejudice of Great Britain in the war of 1812 with the United States, in the course of which were employed "the tomahawk and the scalping-knife of the savage" by some British commanders.

In conclusion, it is my duty to inquire whether the acts which resulted in the burning of the defenseless villages of Darien and Bluffton, and the ravages on the Combahee, are regarded by you as legitimate measures of war, which you feel authorized to resort to hereafter.

I inclose two newspaper accounts, copied from the journals of the United States, giving relations of the transactions in question.

Respectfully, general, your obedient servant,

G. T. BEAUREGARD,
General, Commanding.

(*Official Records of Union and Confederate Armies*, series I, vol. XXVIII, pt. II [Serial No. 47], pp. 11–13.)

LINCOLN'S LETTER (1861)

Letter to O. H. Browning

(Private and confidential)

EXECUTIVE MANSION, *September 22, 1861.*

My dear Sir: Yours of the 17th is just received; and coming from you, I confess it astonishes me. That you should object to my adhering to a law which you had assisted in making and presenting to me less than a month before is odd enough. But this is a very small part. General Frémont's proclamation as to confiscation of property and the liberation of slaves is purely political and not within the range of military law or necessity. If a commanding general finds a necessity to seize the farm of a private owner for a pasture, an encampment, or a fortification, he has the right to do so, and to so hold it as long as the necessity lasts; and this is within military law, because within military necessity. But to say the farm shall no longer belong to the owner, or his heirs forever, and this as well when the farm is not needed for military purposes as when it is, is purely political, without the savor of military law about it. And the same is true of slaves. If the general needs them, he can seize them and use them; but when the need is past, it is not for him to fix their permanent future condition. That must be settled according to laws made by law-makers, and not by military proclamations. The proclamation in the point in question is simply "dictatorship." It assumes that the general may do anything he pleases — confiscate the lands and free the slaves of loyal people, as well as of disloyal ones. And going the whole figure, I have no doubt, would be more popular with some thoughtless people than that which has been done! But I cannot assume this reckless position, nor allow others to assume it on my responsibility.

You speak of it as being the only means of saving the Government. On the contrary, it is itself the surrender of the Government. Can it be pretended that it is any longer the Government of the United States — any government of constitution and laws — wherein a general or a president may make permanent rules of

property by proclamation? I do not say Congress might not with propriety pass a law on the point, just such as General Frémont proclaimed. I do not say I might not, as a member of Congress, vote for it. What I object to is, that I, as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the Government.

So much as to principle. Now as to policy. No doubt the thing was popular in some quarters, and would have been more so if it had been a general declaration of emancipation. The Kentucky Legislature would not budge till that proclamation was modified; and General Anderson telegraphed me that on the news of General Frémont having actually issued deeds of manumission, a whole company of our volunteers threw down their arms and disbanded. I was so assured as to think it probable that the very arms we had furnished Kentucky would be turned against us. I think to lose Kentucky is nearly the same as to lose the whole game. Kentucky gone, we cannot hold Missouri, nor, as I think, Maryland. These all against us, and the job on our hands is too large for us. We would as well consent to separation at once, including the surrender of this capital. On the contrary, if you will give up your restlessness for new positions, and back me manfully on the grounds upon which you and other kind friends gave me the election and have approved in my public documents, we shall go through triumphantly. You must not understand I took my course on the proclamation because of Kentucky. I took the same ground in a private letter to General Frémont before I heard from Kentucky.

You think I am inconsistent because I did not also forbid General Frémont to shoot men under the proclamation. I understand that part to be within military law, but I also think, and so privately wrote General Frémont, that it is impolitic in this, that our adversaries have the power, and will certainly exercise it, to shoot as many of our men as we shoot of theirs. I did not say this in the public letter, because it is a subject I prefer not to discuss in the hearing of our enemies.

There has been no thought of removing General Frémont on any ground connected with his proclamation, and if there has been any wish for his removal on any ground, our mutual friend Sam

Glover can probably tell you what it was. I hope no real necessity for it exists on any ground. Your friend, as ever,

A. LINCOLN.

(Nicolay and Hay: *Works of Abraham Lincoln*, vol. VI, pp. 357–61.)

THE FORCED COLLECTION OF AN INSURGENT DRAFT (1899)

ON January 23, 1899, a draft for $100,000 on Smith, Bell & Co., a British banking firm in Manila, was sold by its branch house at Legaspi, Luzon, and drawn in favor of Mariano Trias, Treasurer of the insurgents.

Although the draft had not been presented to Smith, Bell & Co., or any of its branches for payment, when the military authorities of the United States called upon the Manila office to require them to pay over the amount of the draft, Smith, Bell & Co. complied under protest, and applied to the British Government to secure relief, representing that they had agencies in a number of places in the island of Luzon, "where its agents were in the power of the natives, and might be compelled by force to deliver $100,000 to the insurgents if the draft were presented for payment."

The British Government desired to afford Smith, Bell & Co. such protection and relief as was possible. The matter was investigated by the War Department, and a report prepared, which quoted from Major-General Otis's detailed report [1] of the circumstances, and continued:

[1] The extract quoted from General Otis's report was as follows:

"Respectfully returned to the honorable the Secretary of War, Washington, D.C. Attention invited to my cablegram of June 27. The inclosed copy of letter of General Hughes contains some errors. He acted under my verbal directions in the matter, and my information at the time was that the draft in question was drawn for $146,000 instead of $100,000. Inclosed and attached hereto is a true copy of the accepted and outstanding draft. It will be seen that it is drawn in favor of Mariano Trias, for funds received from General Luckban. It was accepted, and made payable February 19, and on February 3, at Malolos, was indorsed to Sylvester Legaspi. Luckban was at the time and is still an insurgent general, commanding in the southeastern portion of Luzon and the islands of Samar and Leyte, where he has robbed and is still robbing the people without mercy. Trias was at the time the draft was drawn treasurer of the insurgent government, and he is now the gen-

"It is conceded that the fund seized was intended to be used for promoting the insurrection and that the insurgents sought to utilize the bank as a means of transfer for said funds.

"Under the laws and usages of war the United States may lawfully seize and retain such funds, and to that end may compel the person having such funds in his possession to pay over the same to the military authorities.

"The most favorable view of the conduct of the bank in attempting to perform the service rendered the insurgents herein, is to consider the obligation assumed by the bank as creating an indebtedness to the persons associated in the insurrection and the draft as an evidence thereof. Such indebtedness may properly be collected by the United States as a military measure calculated to weaken the insurrection.

"The real question involved appears to be as to the legality of said enforced collection, when the United States was not in possession of the written evidence of the indebtedness and therefore unable to surrender said writing to the debtor. Upon authority of the determination made of such question in the instance of the debts due the elector of Hesse-Cassel and collected by Napoleon, it may confidently be asserted that the action of the United States was lawful.

"The elector of Hesse-Cassel was accustomed to sell the valor of his soldiers (Hessians) to other sovereigns. The money he received therefor he loaned to his subjects and to citizens of other German States on notes secured by real estate mortgages, payable to himself. After the battle of Jena he was forced to leave his principality, and on doing so carried away these notes and mortgages and thereafter retained possession of them. He entered the military service of Prussia, then at war with Napoleon. Hesse-Cassel was governed by the laws of military occupation until it was incorporated into the kingdom of Westphalia, over which

eral commanding the insurgent troops of southern Luzon. Legaspi succeeded him as insurgent treasurer.

"The original draft is now in this city and will not be further negotiated. The party holding it has been informed that if he attempts to collect it or lets it pass out of his possession his house and lands will be confiscated to the United States, and he is thoroughly aware of this fact. The draft has already passed through the hands of several influential Filipinos, and it required some time to locate it."

Napoleon made his brother Jerome king, and remained a part of that kingdom until 1813. During this period the Bonapartes, both Napoleon and Jerome, collected the amounts due on said notes and mortgages made payable to the elector, and carried away by him. This seizure was justified upon the ground that the property was that of a person remaining in arms against the legitimate sovereign of the State. The Bonapartes had no difficulty in collecting such of these debts as were due from their subjects; but where the debtors resided in other States force could not be resorted to. To induce voluntary payment a portion of the debt was remitted. Upon the elector being again installed as ruler over Hesse-Cassel, he attempted to compel a second payment of the debts so paid to the Bonapartes. The question was, Whether debts owing to the elector were validly discharged by a payment to Napoleon and receiving from him a quittance in full? This question was finally determined in the affirmative." [1]

(A condensed statement of facts, with extract from the report, as given in Magoon's *Law of Civil Government under Military Occupation* [Washington, 1903], pp. 261–63.)

THE DEVASTATION OF EAST PRUSSIA (1915)

"THE whole world knows that in consequence of the Russian barbarous manner of waging war, previously flourishing districts of East Prussia now present a picture of hopeless devastation; that entire villages have been burned down and laid waste; that the peaceful inhabitants have been compelled to flee in order to escape being robbed and murdered, leaving behind them all their belongings. According to official investigations thousands of men, women and children were dragged away, other thousands mur-

[1] The report cites the following authorities:

"They rejected the doctrine that because the prince had retained possession of the instruments containing the written acknowledgments of the debtors he therefore had constructive possession of the debts." (Phillimore, *Int. Law*, vol. III, p. 841.)

"They rejected the consideration of the justice or injustice of the war, . . . nor did they attach any importance to the fact that the prince had carried away with him and retained possession of the instruments containing the written acknowledgment of the debtor." (Halleck, *Int. Law* [3d ed.], chap. 34, sec. 29; see also Hall, *Int. Law* [4th ed.], p. 588; Snow, *Cases in International Law*, p. 381.)

dered, about 200,000 buildings were destroyed or burned during the first and second Russian invasion of East Prussia. During the second invasion alone 80,000 dwellings were plundered and desolated."

(Extract from English translation of the *Memorial on Atrocities committed by Russian Troops upon German Inhabitants and German Prisoners of War,* issued by the German Government at Berlin, March 25, 1915.)

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§ 10. OCCUPATION

(*a*) The nature of occupation

UNITED STATES *v.* RICE

The Supreme Court of the United States, 1819

DURING the latter part of the War of 1812, British forces occupied the port of Castine, in Maine, and remained in possession until the treaty of peace was ratified in February, 1815. The administration of the territory occupied passed to the military authorities and duties on imports were paid to a collector of customs appointed by the British Government. Under this régime certain goods were imported by a firm of American citizens doing business at Castine and duties paid upon them. On April 15, after the restoration of the port to the United States, the goods were purchased by the defendant, Rice, who was immediately called upon to pay or to secure to the United States the same duties "as though they had been imported into the said United States from a foreign port or place . . . in a ship or vessel not of the United States." The defendant pleaded previous payment by the importers to the regularly constituted authorities of the port at the time.

The Court held, in part, as follows, *Judge Story* delivering the opinion:

"Under these circumstances, we are of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over

that place. The sovereignty of the United States over the territory was, of course, suspended and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they are [were not] so liable at the time of importation, is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority."

(Wheaton: *United States Reports*, vol. IV, pp. 246–55.)

THE EXEQUATURS OF CONSULS IN BELGIUM (1914)

After the greater part of Belgium had been occupied, the German Government, in a note of November 30, 1914, stated its opinion that the exequaturs of the consuls formerly permitted to act

in the districts occupied had expired. Not considering it advisable to issue formal exequaturs, the German Government proposed to grant the consuls whose names should be communicated to the Foreign Office a "temporary recognition to enable them to act in their official capacity, . . ." Exception was made of those districts where military operations were still in course.

The Belgian Government made the following protest against this action:

[Enclosure 2 — Translation]

Note Verbale

Germany claimed, in her communication of December 5, that the occupant of an invaded country had the right to regard as "annulled" all exequaturs previously issued to Consuls in office by the lawful power of that country.

The claim is untenable.

By reason of the character of the occupant's power which flows from mere possession and is in no wise final, Article 43 of the Fourth Convention of The Hague sanctions, in principle, the continuance of civil and administrative laws and, consequently, of existing conditions.

It is idle for Germany to invoke, in her note of January 3, military and administrative considerations. These both may justify the withdrawal of the exequatur of a consul who should indulge in hostile acts or behave in a manner inconsistent with the duties of his office. But they cannot warrant either a general right of cancellation as claimed by Germany nor her assuming to upset the whole Consular organization to reduce the number of consuls to three for each nation and to bar from consulates, on the sole ground that they are Belgians, men who have committed no act antagonistic to military interests and honestly acknowledged the occupant's rights as defined by the Hague Convention.

The German proposition, if accepted, would carry the consequence of throwing into a state of disastrous uncertainty the Consulates established in parts that are occupied one day and retaken the next.

The German Government, in a note of January 3, 1915, answered as follows:

"Article 42 [43] of the Fourth Convention of The Hague, in particular does not support the views of the Belgian Government. Under that article the occupant power is bound to maintain, as far as possible, public order in the occupied area; the article in no wise binds it to continue all officials in office. This, on the contrary, could only be done within the measure allowed by the military considerations of occupation and not on the mere condition that those officials will be ready to yield to the authority of the occupant Government. Those principles apply to neutral consuls, and those officers can only discharge their public duties if and as far as the occupant power agrees, as the enemy's exequatur is not binding on that power.

"The circular note of the Imperial Government concerning consuls does not in any way touch upon the rights of the Belgian Government; it merely deals with the rights of Imperial Government which claims it as its inborn right and undisputable duty to regulate the consular protection of neutral subjects for the term of occupation. This new rule furthermore and foremost is required for the good of the neutral subjects themselves. Inasmuch as three hundred representatives at least of the allied or neutral states were recognized in Belgium, most of them of Belgian nationality, many of them having left the country, it is plain that in the interest of the neutral subjects themselves it would not be well for the Imperial Government to delay giving its attention to assured and effective regulations for their protection."

In a note of January 21, 1915, Secretary Bryan acquiesced in the action taken by the German Government as follows:

"The Government of the United States, in view of the fact that consular officers are commercial and not political representatives of a government and that permission for them to act within defined districts is dependent upon the authority which is in actual control of such districts irrespective of the question of legal right, and further, in view of the fact that the consular districts, to which reference is made in the Note Verbale of the Imperial Government, are within the territory now under German military occupation, is not inclined at this time to question the right of the Imperial Government to suspend the exequaturs of the consular officers of the United States within the districts which are occupied by the

military forces of the German Empire and subject to its military jurisdiction."

The course adopted in Belgium served as a precedent and was followed when portions of Serbia and Poland were later occupied by the Central Powers.

(See *White Book, No. 3,* issued by the Department of State [August 12, 1916], pp. 359–69.)

PROTEST AGAINST THE MODIFICATION OF BELGIAN LAWS

Note of the Belgian Government, April 9th, 1915

It has been brought to the knowledge of His Majesty's Government that divers Decrees issued by the German authorities occupying the country are of a nature to change unnecessarily the internal legislation of the country. Moreover, Decrees have been issued recently with the object of giving special privileges to German and Austrian subjects who were in the country at the commencement of hostilities by modifying the law of 10th Vendémiaire, year IV, relating to the responsibility of Communes, by modifying the legislation in regard to contracts for rents, and by creating special jurisdictions for the application of these new regulations. These measures show an absolute disregard for the principles of international law, treaty stipulations and the laws and customs of war.

According to the recognized principles of international intercourse, occupation of territory, by reason of being merely a provisional and *de facto* possession, does not confer upon the occupant any right to abolish or modify existing civil legislation, or to abolish or change the jurisdiction of the courts, unless compelled by military necessity.

Article 43 of the Fourth Hague Convention, signed and ratified by Germany, stipulates that 'the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

Up to the present time the German military authorities had never contested this principle. The treatise on the laws of continental warfare, published by the German General Staff in 1902, states as follows:

> "The occupant, being merely the substitute of the real sovereign, continues to administer in accordance with the existing laws and regulations. He should avoid the introduction of new laws, also the suppression or modification of the old laws, and all acts of a similar nature, unless compelled to act otherwise by irresistible military necessity which alone gives the right to legislate beyond the temporary needs of the Administration of the moment."

The Council of the Bar Association of the Court of Appeals of Brussels, at a meeting on the 19th of February, 1915, protested against such a flagrant violation of the principles of international law, and adopted a Resolution "forbidding any advocate, or licentiate in law, to take part, in any manner whatever, even by the simple drawing-up of summonses, decisions, memoranda or notes, in the functioning of the special jurisdictions instituted by the decrees of the German Government under date of February 3rd, 1915, (modifying the decree of 10th Vendémiaire, year IV), and by decrees of the German Government under date of February 10th, 1915 (creating a court of arbitration for disputes in regard to rents).

The President of the Bar Association (*Batonnier de l'Ordre des Avocats*), under date of February 22, 1915, communicated the above decision to the German Administration, together with a letter explaining the motive and import of the Resolution.

(As communicated by the Belgian Minister.)

BELGIAN PROTEST REGARDING THE REMOVAL OF RAILWAYS (1915)

Note

It has come to the knowledge of His Majesty's Government that the German authorities in Belgium have informed the National District Railways Company (La Société Nationale des Chemins de Fer Vicinaux) that they are about to take up and

remove the following lines of local railways, viz.: [List of names of 14 lines which follows omitted. — *Ed.*].

Other lines are to share the same fate later.

According to the terms of Articles 43 and 55 of the Fourth Hague Convention, military occupation confers upon the occupying State merely *de facto* possession of the invaded territory:

> "Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."
>
> "Article 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct."

In accordance with Article 53 of the same Convention, the occupying State has the right to seize the railways of the occupied country, whether belonging to the State or to private companies, and to run them for military or commercial purposes; but it does not acquire ownership of the properties. Consequently, it does not acquire, by virtue of its *de facto* and provisional title, any right to alienate the properties; still less does it acquire any right to destroy them, especially when the material of these railways could not aid the military operations of the enemy.

This restriction upon the powers of the occupying State is also found in the second paragraph of the above-cited Article 53, where it is said, that "all appliances adapted to the transport of persons may be seized, even if they belong to private individuals, but must be restored."

This restriction is also set forth in the German Manual of War, which says: "The Administration of the Army takes over the railways of the hostile State, but possesses in these objects only a right of use and is obliged to restore the material at the end of the war."

The occupant is only a temporary usufructuary. His powers

cease with the causes which have given birth to them, and, as far as railways are concerned, he has no right of alienation.

The action in regard to the Belgian railways announced by the German Military Authorities will place a serious restriction on commerce, the intercourse and the transactions of a considerable part of the population. It constitutes an abuse of the rights of occupation, a new violation of the Laws and Customs of War, a violation against which His Majesty's Government enters a vigorous protest.

(As communicated by the Belgian Minister.)

(*b*) Requisitions and contributions

"TREATMENT OF BELGIAN WORKMEN BY THE GERMAN AUTHORITIES AT LUTTRE" (1915)

Note Communicated by Belgian Legation to State Department, September 22, 1915

ARTICLE 52 of the Regulations respecting the Laws and Customs of War on Land, attached to the Fourth Hague Convention, forbids an Army of occupation to demand, from municipalities or inhabitants of the occupied territory, requisitions in kind or services which involve the inhabitants in the obligation of taking part in military operations against their own country.

This Regulation is systematically disregarded by the German authorities in Belgium who employ all means of pressure and constraint in their power to force our population to work for the German armies.

Since the commencement of hostilities the German authorities have, on many occasions, compelled the inhabitants to lend their aid in constructing trenches; similar pressure has been used in matters of industrial work.

At the present time the principal effort of the Germans is in the direction of securing men to work on the railroads. If they could succeed in making Belgian railway employés return to work, they would release from that occupation a large number of Germans (equivalent to an Army Corps) who are employed in transportation service on the lines of the Belgian railway system; they would

thus also considerably facilitate traffic and the transportation of troops over the railway system, as, on account of the inexperience of the German operatives, numerous accidents have happened which have forced them to make only partial use of our railway system, especially on those lines which are constructed on an inclined plane.

The Belgian railway men, in view of the nature of the work required of them, have for the past eleven months (in spite of their material distress) steadfastly refused to lend their aid to the German authorities. Not only have they refused offers of the most tempting wages (at Liège machinists experienced in operating the inclined plane of Haut Pré were offered as much as fifty francs a day) but, rather than serve even indirectly against their country, they have suffered the most odious persecution. This persecution extends throughout Belgium. Did not Mr. Hulzebush, the Secretary-General at Brussels of the Imperial German Railways, declare that by starvation (by preventing the Relief Committees from helping the men) he would succeed in driving our men everywhere to work upon the railway lines and in the arsenals?

We have exact information in regard to incidents which have recently taken place at Luttre and at Malines.

About the end of April the German authorities called together about thirty workmen of the Central Workshop and Car Shops of Luttre, and invited them to return to work, promising them high wages. Ordinary workmen were offered 5, 6, and 7 marks a day; machinists were offered as high as 20 marks a day. Upon receiving an energetic refusal from the workmen, the Germans locked them in the railroad cars and told them that they would not be liberated until they had consented to go to work. Useless effort! After several days the workmen were told that they were going to be shipped to Germany, and that they would be compelled to work there without pay. At the same time the families of the men were notified of the situation in the hope that they would intervene. Nothing happened, and the next day, when the train began to pull out, the imprisoned workmen together with the population which had come en masse to the railway station, cried out at the top of their lungs: "Vive la Belgique!" The train did not go beyond Namur, and the workmen were liberated.

Some days later another attempt was made. The Germans, by force, brought about a hundred workmen into the lunchroom of the workshop, and a German officer asked them (at first politely) to go back to work. Being met by a general silence, he threatened to send them to Germany, and added: "You need have no fear for the future; the Kommandatur will give you a document showing that you have returned to work only under compulsion and restraint; let those who accept take two steps to the front." Every workman took one step to the rear crying: "*Vive la Belgique! Vivent nos soldats!*" [Hurrah for Belgium! Hurrah for our soldiers!]

Following these events, Mr. Kesseler, manager of the central workshop of Luttre, was arrested at Brussels on the 10th of May. Having been sent to the Charleroi jail where he was made to sleep on straw, he was, on Wednesday May 12th, conducted under guard to the workshop of Luttre whither a large number of workmen had already been conducted in the same manner. In the meantime there had been distributed to each of the workmen a written declaration threatening them with detention in Germany if they should still refuse to work. Mr. Kesseler, upon being invited to send the men back to work, replied that he had taken the oath of fidelity to the King and that he would not break his oath. He added that the foremen were bound by a similar oath. He was then invited to try to persuade the men to go to work with the promise that they would only be required to work on locomotives intended for commercial transportation. Mr. Kesseler limited himself to repeating the communication that had been made to him, and added that he would leave it to each man to do whatever his conscience should dictate. Not one consented to return to work. Moreover, no one trusted in the German promise, the bad faith of which was evident from the class of locomotive then undergoing repair in the shop.

Following these incidents, Mr. Kesseler was detained in the Charleroi jail. An accountant, Mr. Ghislain, and a clerk, Mr. Menin, were also detained there. One hundred and ninety workmen were sent to Germany, and about sixty others were arrested on the 5th of June.

[The account of the proceedings at Malines and Sweveghem omitted. — *Ed.*]

As may be seen by the proclamation of Governor-General von Bissing, these three incidents are not attributable to local errors on the part of the German authorities. They are attributable to a system which is participated in by the Governor-General and by the highest German military officers, by those who are perfectly familiar with the Regulations of the Hague Convention and who do not hesitate to infringe them openly. This cynicism is evident in the Proclamation which was posted at Ghent on June 10th, 1915, and of which we have a specimen before us:

"*Notice*

"By order of His Excellency, the Inspector of the Post, I bring the following to the knowledge of the communities:

"The attitude of certain factories which, under pretext of patriotism and relying upon the Hague Convention, have refused to work for the German Army, proves that among the population there is a tendency to create difficulties for the Administration of the German Army.

"In this connection I give notice that I shall, by all means at my disposal, repress such intrigues, which can only disturb the good relations heretofore existing between the Administration of the German Army and the population.

"I hold the municipal authorities primarily responsible for the extension of such tendencies, and I call attention to the fact that the people themselves will be the cause why the liberties, hitherto so abundantly accorded them, should be taken away and replaced by restrictive measures rendered necessary by their own fault.

"Lieutenant-General

"(Signed) GRAF VON WESTCARP.

"*The Commandant of the Post.*

"GHENT, *June 10th, 1915.*"

The Government of the King has the honor of denouncing to the American Government this new violation by Germany of the Customs of War, of the universally recognized principles of the Law of Nations, and of the articles of the Hague Convention.

(As communicated by the Belgian Minister.)

THE LILLE REMOVALS (1916)

[The following documents and extracts are from the New York *Times* of August 20, 1916, in which was published a translation of the recent French *White Book* relative to Germany's treatment of civilians in occupied French territory:]

[*Exhibit No. 1*]

Proclamation of the German Military Commander of Lille

[*Posted during Holy Week*]

"The attitude of England renders it increasingly difficult to feed the population.

"To lessen misery, the German authority has recently asked volunteers to work in the country. This offer has not had the success which was expected. Consequently the inhabitants will be removed by compulsion and transported to the country. Those removed will be sent in the interior of French occupied territory far behind the front, where they will be employed in agriculture and in no way in military work.

"By this measure the opportunity will be given them to better provide for their support.

"In case of necessity, the revictualing may be effected by the German depots.

"Each person removed may carry 30 kilograms of baggage, (house utensils, clothes, &c.,) which it will be well to prepare immediately. Hence I order:

"No one may until further notice change residence. Nor may any one be absent from his declared local domicile from 9 o'clock at night until 6 o'clock in the morning (German time) unless he holds a regular permit.

"As this concerns an irrevocable measure, it is in the interest of the population itself to remain calm and obedient.

"(Signed) The Commander.

"Lille, *April, 1916.*"

A supplemental notice by the local commander gave details in regard to the carrying out of the order (see Exhibit No. 2). These

proclamations called forth vigorous protests from the Mayor and from the Bishop of Lille, on the ground that the proposed action was a violation of international law and at the same time was both cruel and dangerous to the moral welfare of the persons affected.

The French *White Book*, relating the manner in which this measure was carried out, states:

"Upon the order of General von Graevenitz and with the assistance of Infantry Regiment 64, sent by the German General Headquarters, about twenty-five thousand French, young girls from sixteen to twenty years old, young women and men up to the age of fifty-five years, without distinction of social condition, were torn from their homes at Roubaix, Tourcoing, and Lille, pitilessly separated from their families, and forced to do agricultural work in the Departments of the Aisne and Ardennes." (Extract.)

The *White Book* prints the German note of March 22, 1916, "to show the opinion of the Imperial [German] Government that no work should be imposed upon civilian prisoners." The sentences most directly bearing upon this point are as follows:

"The German Government views with satisfaction that the French Government now again gives formal assurance that German civilian prisoners are not obliged to work in France. . . .

"The German Government does not doubt that the French Government will renew strict orders to all camp commanders and it hopes that further complaints regarding violations of these instructions will not be brought to its attention, either concerning Medjoung or other places. If the German Government should be deceived in this, the only course remaining open to it is to adopt energetic methods of reprisal."

In addition to the documents relative to the removals of civilians, the *White Book* contains over two hundred depositions, etc., bearing upon the treatment of the French population in the territory occupied by Germany. The articles of the Fourth Hague Convention, relative to the "Laws and Customs of War on Land," are cited and the depositions classified to show that the German military authorities violated the provisions of the Convention by the action taken relative to the excessive amount and the illegal nature of the services exacted. Others relate to the inadequacy

of the food and compensation, and to the forcible participation in the military operations to which the civilian inhabitants were subjected.

"ILLEGAL REQUISITION OF STUD HORSES, MARES, AND COLTS" (1914)

"The Belgian stock of draught horses has long been famous. In the last twenty years the breeders, encouraged and supported by the Government, have succeeded in bringing the stock of these horses to such a degree of perfection that this branch of national activity had become an important source of wealth. Most of the continental countries came to Belgium for their supplies of draught horses. Germany was one of the best customers for draught horses reared in Belgium. She imported every year from Belgium horses to the value of more than 24 million francs."

. . . . . .

"Documents Appendix I"

(Notice posted in the villages of the breeding districts during October and November, 1914.)

"*General Dépôt for Horses*

"The Commission for the purchase of horses will sit on Monday, 3rd November, at 3 o'clock (4 o'clock German time) at the Grand Place, Thuillies.

"All carriage and saddle horses as well as yearling foals must be brought before this Commission.

"Carriage horses must be, if possible, provided with their working harness. Purchases will be paid in ready money and without any rebate.

"For the German General Government.
"The Officer in Charge of the Central Dépôt for Horses.

"Any persons neglecting to bring their horses to the Commission will be liable to have their stock requisitioned without indemnity."

(Extract from the *13th Report of the Belgian Committee of Inquiry*, Havre, April 10, 1915.)

(c) Taxation

PROTEST AGAINST REQUISITIONS OF GOODS BY THE GERMAN AUTHORITIES IN BELGIUM

Communicated by the Belgian Legation to State Department, June 30, 1915

ENORMOUS quantities of raw material and manufactured goods, including property of American consignors have been requisitioned in Antwerp by the German Government and have not been paid for, according to a statement made by the President of the Antwerp Chamber of Commerce.

The statement declares that Germany, instead of trying to restore normal business conditions in Belgium, as promised, has absolutely paralysed the trade of Antwerp.

Millions of dollars worth of merchandise have been seized, in many cases prices have been fixed by the German authorities, at their own arbitrary valuation; in other instances the goods have been carried away and the valuation deferred for future adjustment. Only a small proportion of the merchandise has been paid for up to the present time. During a careful investigation covering the requisitioning of raw materials valued at about $17,000,000 it was found that only $4,000,000 had been paid for. Although the merchandise was carried away months ago, the remaining $13,000,000 has never been paid for.

It is estimated that several times this amount of goods has been seized by the German authorities, but it has been difficult for the Antwerp Chamber of Commerce to obtain full information, partly on account of the absence of many of the Antwerp merchants whose merchandise has been requisitioned and partly on account of the restrictions placed on telephone and wire communication. It is impossible to reach Belgian merchants who have gone to other countries, and is even difficult to communicate by phone with those who have remained in Antwerp, and the merchants are prohibited from selling it without permission from the German authorities, a permission which, the President of the Chamber of Commerce says, is rarely given.

Among the merchandise taken by the Germans are mentioned

wheat, barley, flax seed, oilcake, nitrate, animal and vegetable oil, petroleum, wool, cotton, rubber, hides, ivory, wax, lumber, cocoa, coffee, rice, and manufactured articles of almost every sort from children's toys up to automobiles.

A large amount of the requisitioned goods is said to be the property of United States and South American merchants.

Factories, wharves and warehouses have also been requisitioned by the German authorities and, in some cases, machinery has been taken out of the factories and sent to Germany.

The Antwerp Chamber of Commerce protests against this wholesale seizure of property at arbitrary valuations and furthermore against the German Government's failure to pay even the amount promised. It points out however, that, last December, the German Government imposed upon the provinces of Belgium a heavy tax $7,000,000 per month, and, at that time, the Belgian Provincial Delegates expressed their willingness to pay this amount provided the German Government would put an end to its former system of wholesale requisitions; the German authorities finally agreed to put an end to the system on condition that the tax be raised to $8,000,000 per month and to this the Belgian delegates assented. The Belgians have punctually paid the $8,000,000 per month but Germany has failed to carry out her part of the contract.

The wholesale requisitions continue; goods carried away many months ago have not been paid for; but Germany continues to collect punctually every penny of the enormous tax of $8,000,000 a month or $96,000,000 a year.

(As communicated by the Belgian Minister.)

(*d*) Fines

THE IMPOSITION OF A FINE ON LUNEVILLE (1914)

"NOTICE TO THE POPULATION

"On the 25th August, 1914, the inhabitants of Lunéville made an attack by ambuscade against the German columns and trans-

ports. On the same day the inhabitants fired on hospital buildings marked with the Red Cross. Further, shots were fired on the German wounded and the military hospital containing a German ambulance. On account of these acts of hostility a contribution of 650,000 francs is imposed on the Commune of Lunéville. The Mayor is ordered to pay this sum — 50,000 francs in silver and the remainder in gold — on the 6th September at 9 o'clock in the morning to the representative of the German Military Authority. No protest will be considered. No extension of time will be granted. If the commune does not punctually obey the order to pay 650,000 francs all the goods which are available will be seized. In case payment is not made domiciliary searches will take place and all the inhabitants will be searched. Any one who shall have deliberately hidden money or shall have attempted to hide his goods from the seizure of the military authorities, or who seeks to leave the town, will be shot. The Mayor and hostages taken by the military authorities will be made responsible for the exact execution of the above order. The Mayor is ordered to publish these directions to the commune at once.

"*Commander-in-Chief*,

"VON FOSBENDER.

"HENAMENIL, *3d September, 1914*."

(*German Atrocities in France.* Translation of the Official Report of the French Commission, p. 18 [*Journal Officiel de la République Française*, 8th January, 1915].)

"LETTER SENT BY LIEUTENANT-GENERAL VON NIEBER TO THE BURGOMASTER OF WAVRE ON THE 27TH AUGUST, 1914"

ON 22d August, 1914, the General Commanding the 2d Army, General von Bülow, imposed on the town of Wavre a war-levy of frs. 3,000,000, payable up till 1st September, to expiate the heinous conduct, contrary to the Laws of the Rights of Nations and the Customs of War, which they showed in making a surprise attack on the German troops.

The General Commanding the 2nd Army has just ordered the General of the Division of the 2nd Army to collect without delay the said levy, which the town must pay on account of the conduct of its inhabitants.

I order and summon you to hand over to the bearer of the present the two first installments, namely frs. 2,000,000 in gold.

I also ask that a letter, duly sealed with the town seal, should be given to the bearer, declaring that the balance, frs. 1,000,000, will be paid without default on the 1st September.

I draw the town's attention to the fact that in no case can it count on the delay being prolonged, for the civil population of the town has put itself beyond the pale of the Rights of Nations by firing on the German troops.

The Town of Wavre will be set on fire and destroyed, if the payment is not made when due; without distinction of persons, the innocent will suffer with the guilty.

(From the English translation of the *Sixth Report* [November 10, 1914] *of the Belgian Commission of Inquiry.*)

(e) War rebels

GERMAN PROCLAMATIONS (1914)

Proclamation posted in Brussels on 25th September, 1914

General Government in Belgium

It has happened in districts at present occupied by more or less strong bodies of German troops that convoys of wagons and of patrols have been attacked by surprise by the inhabitants.

I draw the attention of the public to the fact that a "register" is kept of the localities, in the neighborhood of which such attacks have taken place, and that they may expect their punishment as soon as the German troops pass near them.

The Governor-General of Belgium,

Baron von der Goltz,

Field-Marshal.

Brussels, *25th September, 1914.*

Notice posted in Brussels on 5th October, 1914, and probably in most of the Communes of the Kingdom

During the evening of 25th September the railway line and the telegraph wires were destroyed on the line Lovenjoul-Vertryck. In consequence of this, these two localities have had to render an account of this, and had to give hostages in the morning of the 30th September.

In future, the localities nearest to the place where similar acts take place will be punished without pity; *it matters little if they are accomplices or not.* For this purpose hostages have been taken from all localities near the railway line, thus menaced, and at the first attempt to destroy the railway line, or the telephone or telegraph wires, they will be immediately shot.

Further, all the troops charged with the duty of guarding the railway have been ordered to shoot any person who, in a suspicious manner, approaches the line, or the telegraph or telephone wires.

The Governor-General of Belgium,
BARON VON DER GOLTZ,
Field-Marshal.

Notice posted in Brussels on 1st November, 1914

A legally constituted court-martial pronounced the following sentences on 28th October: —

(1) The police constable de Ryckere was condemned, for having attacked, in the legal exercise of his duties, an authorized agent of the German authorities, for having voluntarily inflicted bodily hurt in two cases, with the aid of other persons, for having procured the escape of a prisoner in one case, and for having attacked a German soldier, to 5 years' imprisonment.

(2) Police constable Seghers was condemned, for having attacked, in the legal exercise of his duties, an authorized agent of the German authorities, for voluntarily inflicting bodily injury on this German agent, and for having procured the escape of a prisoner (all these offences constituting one charge), to 3 years' imprisonment.

The sentences were confirmed on 31st October by the Governor-General, Baron von der Goltz.

The town of Brussels, not including its suburbs, has been punished for the injury done by its police constable de Ryckere to a German soldier, by an additional fine of 5 million francs.

The Governor of Brussels,
BARON VON LUETWITZ,
General.

BRUSSELS, *1st November, 1914.*

(From the English translation of the *Sixth Report* [November 10, 1914] *of the Belgian Commission of Inquiry.*)

ENLISTMENTS (1914)

THE following extract is taken from a statement by Cardinal Mercier, Archbishop of Malines, in regard to Germany's observance of the obligations resulting from the Hague Convention concerning the laws and customs of war on land:

"A notice signed by Baron von der Goltz posted October 7, 1914, subjects families to collective punishment. It says: 'The Belgian Government has given orders to members of the militia [*miliciens*] of several classes to join the army. . . . All those who receive these orders are strictly prohibited from complying. In case of disobedience the family of the militiamen will also be held responsible.'"

(Published in the *Third Belgian Gray Book* [Paris, May 1, 1916], p. 503.)

(*f*) Criminal warfare

THE EXPLOSION AT LAON (1870)

ON the 9th of September the town of Laon surrendered to the 6th Cavalry Division. After the conclusion of the capitulation, the fourth company of the Fourth Rifle Battalion occupied the citadel; and, as the last men of the Mobile Guards were leaving, a terrible explosion ensued, by which great damage was caused to

the city. . . . General d'Hame, who was in command of the citadel, was placed under arrest by the Prussians, but ultimately declared innocent. The firing of the mine seems to have been the work of a private soldier, who, without any concert with others, and obeying a blind and perverted instinct of patriotism, resolved to revenge the fall of Laon by one terrible blow. He himself is said to have perished in the explosion; and it should be observed that the French lost many more than the Prussians.

(Extract from the account in Cassell's *History of the War between France and Germany* [London, 1870–71], pp. 172, 173.)

(*g*) Sniping

SHOOTING OF A SNIPER

LONDON, *September 2*. One of the most vivid accounts of an episode of war comes from the *Lokalanzeiger* of August 24. It is a letter from Paul Oskar Hoecker, a Berlin playwright now serving as a captain of the reserve. He describes a mission on which he was dispatched to search for arms in Belgian villages in which shots had been fired by civilians on German troops. His instructions were to summon the villagers to deliver up their arms, and that those in whose possession arms were found after they declared that they had none, were to be instantly shot.

Describing a visit to Jungbusch, he says that at one house were found an old man, a woman, and a girl of thirteen.

"Then a terrible thing happened. A sergeant and a private dragged a young fellow out of the house. They had found him hiding among the straw in the loft. He had in his hand a Belgian rifle, loaded with five cartridges. From the opening of the roof he may have aimed at many an honest German. The youth had to put his hands up. Stammering and deadly pale he stands there.

"'Who is this youth?' I asked the old man. As if struck by lightning they all three fell on their knees wailing. The woman groaned, 'He is my son! For God's sake you are not going to kill him?' And the little girl sobbed as if her heart would break. The prisoner tried to escape, but was put up against the wall by the men.

"I had to picture to myself by force the German patrols riding through the night with the bullets of treacherous francs-tireurs whistling round their helmets, and think of the tall figures and bright eyes of our good German fellows, in order to master my nerves in face of this sorrow and fulfill my orders.

"'He has to be shot. Three men! Ready!'

"The three men commanded, who were fathers of families, did not turn a hair. This is a just business. We had got a ruffian who merited no compassion. The volley rang out. The trembling body collapsed to the ground and did not move again. Three tiny holes were visible in the blue blouse. The boy's eyes are closed. His face has not changed its expression. Death by our rifle is painless.

"'We ought to burn the old man's house over his head,' said one of my men. 'Quick march,' I ordered. The three peasants are still kneeling on the ground; the corpse lies up against the wall."

(As printed in the New York *Evening Post*, September 11, 1914.)

(*h*) Guerilla warfare

THE ATTITUDE OF THE BELGIAN POPULATION (1914)

THE Belgian Commission issued the following statement:

"The Commission makes it a rule to limit its publications to a mere statement of facts, thinking that no commentary could add anything to their tragic eloquence. It thinks, however, that the evidence given above leads to certain conclusions.

"It has been said that when Belgium makes up the account of her losses, it may appear that war has levied more victims from the civil population than from the men who were called out to serve their country on the battlefield. This prophecy, which seemed contrary to reason, is now confirmed as regards the Province of Namur. In certain parts of it half the male adult population has disappeared: the horrors of the conflagrations at Louvain and Termonde, of the massacres at Aerschot and in Luxembourg and Brabant, are all surpassed by those of the slaughter at Dinant, at Andenne, at Tamines, and at Namur.

"In this twentieth century the people of Namur have had to live through all the frightful details of a mediæval war, with its traditional episodes of massacres *en masse*, drunken orgies, sack of whole towns, and general conflagration. The 'exploits' of the mercenary bands of the seventeenth century have been surpassed by those of the national army of a State which claims the first place among civilized nations!

"The German Government cannot deny the truth of these facts — they are attested by the ruins and the graves which cover our native soil. But already it has set to work to excuse its troops, affirming that they only repressed, in consonance with the Laws of War, the hostile acts of the Belgian civil population.

"From the day of its First Session our Commission has been trying to discover what foundation there might be for this charge — a charge which seemed very unconvincing to anyone who knew the character of the Belgian people. After having examined hundreds of witnesses — foreigners and natives — and after having exhausted every possible means of investigation, we affirm once more that the Belgian people took no part in the hostilities. The supposed 'franc-tireur' war, which is said to have been waged against the German army, is a mere invention. It was invented in order to lessen in the eyes of the civilized world the impression caused by the barbarous treatment inflicted by the German army on our people, and also to appease the scruples of the German nation, which will shudder with fear on the day when it learns what a tribute of innocent blood was levied by its troops on our children, our wives, and our defenseless fellow-citizens.

"Moreover, the chiefs of the German army have made a singular error when they try to influence the verdict of the civilized world by this particular argument. They seem unaware of the fact that the repression by general measures of individual faults — a system condemned by the International Conventions at which they scoff — has long been condemned by the conscience of the nations of to-day. Among those nations Germany appears for the future as a monstrous and disconcerting moral phenomenon."

(Extract from translation of the *Eleventh Report* [January 16, 1915] *of the Belgian Commission of Inquiry.*)

(i) Concentration camps

CONDITION OF CONCENTRADOS IN CUBA (1897)

Mr. Sherman, Secretary of State, to Mr. Dupuy de Lôme, Spanish Minister at Washington, D.C.

Sir: Referring to the conversation which the Assistant Secretary, Mr. Day, had the honor to have with you on the 8th instant, it now becomes my duty, obeying the direction of the President, to invite through your representation the urgent attention of the Government of Spain to the manner of conducting operations in the neighboring Island of Cuba.

By successive orders and proclamations of the captain-general of the Island of Cuba, some of which have been promulgated while others are known only by their effects, a policy of devastation and interference with the most elementary rights of human existence has been established in that territory tending to inflict suffering on innocent non-combatants, to destroy the value of legitimate investments, and to extinguish the natural resources of the country in the apparent hope of crippling the insurgents and restoring Spanish rule in the island.

No incident has so deeply affected the sensibilities of the American people or so painfully impressed their Government as the proclamations of General Weyler, ordering the burning or unroofing of dwellings, the destruction of growing crops, the suspension of tillage, the devastation of fields, and the removal of the rural population from their homes to suffer privation and disease in the overcrowded and ill-supplied garrison towns. The latter aspect of this campaign of devastation has especially attracted the attention of this Government, inasmuch as several hundreds of American citizens among the thousands of concentrados of the central and eastern provinces of Cuba were ascertained to be destitute of the necessaries of life to a degree demanding immediate relief through the agencies of the United States, to save them from death by sheer starvation and from the ravages of pestilence.

From all parts of the productive zones of the island, where the enterprise and capital of Americans have established mills and

farms, worked in large part by citizens of the United States, comes the same story of interference with the operations of tillage and manufacture, due to the systematic enforcement of a policy aptly described in General Weyler's bando of May 27 last as "the concentration of the inhabitants of the rural country and the destruction of resources in all places where the instructions given are not carried into effect." Meanwhile the burden of contribution remains, arrears of taxation necessarily keep pace with the deprivation of the means of paying taxes, to say nothing of the destruction of the ordinary means of livelihood, and the relief held out by another bando of the same date is illusory, for the resumption of industrial pursuits in limited areas is made conditional upon the payment of all arrears of taxation and the maintenance of a protecting garrison. Such relief can not obviously reach the numerous class of concentrados, the women and children deported from their ruined homes and desolated farms to the garrison towns. For the larger industrial ventures, capital may find its remedy, sooner or later, at the bar of international justice, but for the labor dependent upon the slow rehabilitation of capital there appears to be intended only the doom of privation and distress.

Against these phases of the conflict, against this deliberate infliction of suffering on innocent noncombatants, against such resort to instrumentalities condemned by the voice of humane civilization, against the cruel employment of fire and famine to accomplish by uncertain indirection what the military arm seems powerless to directly accomplish, the President is constrained to protest, in the name of the American people and in the name of common humanity. The inclusion of a thousand or more of our own citizens among the victims of this policy, the wanton destruction of the legitimate investments of Americans to the amount of millions of dollars, and the stoppage of avenues of normal trade — all these give the President the right of specific remonstrance; but in the just fulfillment of his duty he can not limit himself to these formal grounds of complaint. He is bound by the higher obligations of his representative office to protest against the uncivilized and inhumane conduct of the campaign in the island of Cuba. He conceives that he has a right to demand that a war, conducted almost within sight of our shores and grievously affect-

ing American citizens and their interests throughout the length and breadth of the land, shall at least be conducted according to the military codes of civilization.

It is the President's hope that this earnest representation will be received in the same kindly spirit in which it is intended. The history of the recent thirteen years of warfare in Cuba, divided between two protracted periods of strife, has shown the desire of the United States that the contest be conducted and ended in ways alike honorable to both parties and promising a stable settlement. If the friendly attitude of this Government is to bear fruit it can only be when supplemented by Spain's own conduct of the war in a manner responsive to the precepts of ordinary humanity and calculated to invite as well the expectant forbearance of this Government as the confidence of the Cuban people in the beneficence of Spanish control.

Accept, etc.,

JOHN SHERMAN.

(*Foreign Relations of the United States, 1897*, pp. 509–10; cf. Moore: *Digest of International Law*, vol. VII, pp. 212–15.)

(*j*) Terrorization

SHIFTING THE BURDEN OF WAR ON THE INHABITANTS OF MEXICO (1847)

MR. MARCY, Secretary of War, acting in accordance with a communication received from President Polk, March 31, 1847, addressed to General Scott, April 3, 1847, the following instructions:

"As the Mexicans persist in protracting the war, it is expected that, in the further prosecution of it, you will exercise all the acknowledged rights of a belligerent, for the purpose of shifting the burden of it from ourselves upon them. The views of the Government, in this respect, were presented to General Taylor in a dispatch from this Department of the 22d September, 1846, a copy of which, so far as relates to this subject, is herewith sent to

you, with the direction that these views may be carried out under a discretion similar to that given to him. The enemy should be made to realize that there are other inducements to make them desire peace besides the loss of battles, and the burden of their own military establishments. The right of an army, operating in an enemy's country, to seize supplies, to forage, and to occupy such buildings, private as well as public, as may be required for quarters, hospitals, storehouses, and other military purposes, without compensation therefor, can not be questioned; and it is expected that you will not forego the exercise of this right to any extent compatible with the interest of the service in which you are engaged."

Referring to these instructions, General Scott, in a letter of April 28, 1847, dated at Jalapa, said that he had endeavored to reach that place, where he might obtain as many essential supplies as possible, such as clothing, ammunition, medicines, breadstuffs, beef, mutton, sugar, coffee, rice, beans, and forage. For these they must pay or they would be withheld, concealed, or destroyed by the owners, whose national antipathy to the Americans remained unabated. Again, on May 20, 1847, he wrote that, if it was expected at Washington that the army was to support itself by forced contributions levied upon the country, it might ruin and exasperate the inhabitants and starve itself. Not a ration for a man or horse would be brought in except by the bayonet, and this would oblige the troops to spread themselves out many leagues to the right and left in search of subsistence, and to stop all military operations.

(Extract from Moore: *Digest of International Law*, vol. VII, p. 284, where references and further discussion will be found.)

GENERAL SHERMAN'S TELEGRAM (1864)

In his *Memoirs* written by himself General Sherman gives a telegram of October 9, 1864, to General Grant, from which the following extract is taken:

"Until we can repopulate Georgia, it is useless for us to occupy

it; but the utter destruction of its roads, houses, and people, will cripple their military resources. By attempting to hold the roads, we will lose a thousand men each month, and will gain no result. I can make this march, and make Georgia howl!"

(*Memoirs of General W. T. Sherman* [New York, 1875], vol. II, p. 152.)

"A SYSTEM OF GENERAL TERRORIZATION" (1914)

THE Bryce Committee, in its summary (p. 60) of the results of its investigations, came to a definite conclusion to the effect that it had been proved that "*looting, house-burning, and the wanton destruction of property were ordered and countenanced by the officers of the German army, that elaborate provision had been made for systematic incendiarism at the very outbreak of the war, and that the burnings and destruction were frequent where no military necessity could be alleged, being indeed part of a system of general terrorization.*"

The *Report* also contains the following statements:

"Enraged by the losses which they had sustained, suspicious of the temper of the civilian population, and probably thinking that by exceptional severities at the outset they could cow the spirit of the Belgian nation, the German officers and men speedily accustomed themselves to the slaughter of civilians" (p. 11).

. . . . . .

"We may now sum up and endeavor to explain the character and significance of the wrongful acts done by the German army in Belgium.

"If a line is drawn on a map from the Belgian frontier to Liège and continued to Charleroi, and a second line drawn from Liège to Malines, a sort of figure resembling an irregular Y will be formed. It is along this Y that most of the systematic (as opposed to isolated) outrages were committed. If the period from August 4th to August 30th is taken it will be found to cover most of these organised outrages. Termonde and Alost extend, it is true, beyond the Y lines, and they belong to the month of September. Murder, rape, arson, and pillage began from the moment when the

German army crossed the frontier. For the first fortnight of the war the towns and villages near Liège were the chief sufferers. From the 19th of August to the end of the month, outrages spread in the directions of Charleroi and Malines and reach their period of greatest intensity. There is a certain significance in the fact that the outrages round Liège coincide with the unexpected resistance of the Belgian army in that district, and that the slaughter which reigned from the 19th August to the end of the month is contemporaneous with the period when the German army's need for a quick passage through Belgium at all costs was deemed imperative.

"Here let a distinction be drawn between two classes of outrages.

"Individual acts of brutality — ill-treatment of civilians, rape, plunder, and the like — were very widely committed. These are more numerous and more shocking than would be expected in warfare between civilized Powers, but they differ rather in extent than in kind from what has happened in previous though not recent wars.

"In all wars many shocking and outrageous acts must be expected, for in every large army there must be a proportion of men of criminal instincts whose worst passions are unloosed by the immunity which the conditions of warfare afford. Drunkenness, moreover, may turn even a soldier who has no criminal habits into a brute, who may commit outrages at which he would himself be shocked in his sober moments, and there is evidence that intoxication was extremely prevalent among the German army, both in Belgium and in France, for plenty of wine was to be found in the villages and country houses which were pillaged. Many of the worst outrages appear to have been perpetrated by men under the influence of drink. Unfortunately little seems to have been done to repress this source of danger.

"In the present war, however — and this is the gravest charge against the German army — the evidence shows that the killing of non-combatants was carried out to an extent for which no previous war between nations claiming to be civilized (for such cases as the atrocities perpetrated by the Turks on the Bulgarian Christians in 1876, and on the Armenian Christians in 1895 and 1896,

do not belong to that category) furnishes any precedent. That this killing was done as part of a deliberate plan is clear from the facts hereinbefore set forth regarding Louvain, Aerschot, Dinant, and other towns. The killing was done under orders in each place. It began at a certain fixed date, and stopped (with some few exceptions) at another fixed date. Some of the officers who carried out the work did it reluctantly, and said they were obeying directions from their chiefs. The same remarks apply to the destruction of property. House burning was part of the programme; and villages, even large parts of a city, were given to the flames as part of the terrorizing policy.

"Citizens of neutral states who visited Belgium in December and January report that the German authorities do not deny that non-combatants were systematically killed in large numbers during the first weeks of the invasion, and this, so far as we know, has never been officially denied. If it were denied, the flight and continued voluntary exile of thousands of Belgian refugees would go far to contradict a denial, for there is no historical parallel in modern times for the flight of a large part of a nation before an invader.

"The German Government have, however, sought to justify their severities on the grounds of military necessity, and have excused them as retaliation for cases in which civilians fired on German troops. There may have been cases in which such firing occurred, but no proof has ever been given, or, to our knowledge, attempted to be given, of such cases, nor of the stories of shocking outrages perpetrated by Belgian men and women on German soldiers.

"The inherent improbability of the German contention is shown by the fact that after the first few days of the invasion every possible precaution had been taken by the Belgian authorities, by way of placards and hand-bills, to warn the civilian population not to intervene in hostilities. Throughout Belgium steps had been taken to secure the handing over of all firearms in the possession of civilians before the German army arrived. These steps were sometimes taken by the police and sometimes by the military authorities" (pp. 39, 40).

. . . . . .

"That these acts should have been perpetrated on the peaceful population of an unoffending country which was not at war with its invaders but merely defending its own neutrality, guaranteed by the invading Power, may excite amazement and even incredulity. It was with amazement and almost with incredulity that the Committee first read the depositions relating to such acts. But when the evidence regarding Liège was followed by that regarding Aerschot, Louvain, Andenne, Dinant, and the other towns and villages, the cumulative effect of such a mass of concurrent testimony became irresistible, and we were driven to the conclusion that the things described had really happened. The question then arose how they could have happened. Not from mere military licence, for the discipline of the German army is proverbially stringent, and its obedience implicit. Not from any special ferocity of the troops, for whoever has travelled among the German peasantry knows that they are as kindly and good-natured as any people in Europe, and those who can recall the war of 1870 will remember that no charges resembling those proved by these depositions were then established. The excesses recently committed in Belgium were, moreover, too widespread and too uniform in their character to be mere sporadic outbursts of passion or rapacity.

"The explanation seems to be that these excesses were committed — in some cases ordered, in others allowed — on a system and in pursuance of a set purpose. That purpose was to strike terror into the civil population and dishearten the Belgian troops, so as to crush down resistance and extinguish the very spirit of self-defense. The pretext that civilians had fired upon the invading troops was used to justify not merely the shooting of individual francs-tireurs, but the murder of large numbers of innocent civilians, an act absolutely forbidden by the rules of civilized warfare" (pp. 43–44).

§ 11. RESTRICTIONS FOR THE GENERAL INTEREST OF HUMANITY

(*a*) Restrictions against unchivalric warfare based upon the idea of a man-to-man fight

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RED-HOT SHOT (1801)

THE following is an extract from a letter sent by Admiral Lord de Saumarez to Don Joseph de Mazzaredo, Commander-in-Chief of the Spanish ships at Cadiz:

H.M.S. Cæsar, off Cadiz, 17th August, 1801.

"Having been informed that reports were circulated in Spain, ascribing the destruction of the two first-rates, *Real Carlos* and *San Hermenegildo*, in the engagement of the 12th July last, to red-hot balls from His Majesty's ships under my command, I take this present opportunity to contradict, in the most positive and formal manner, a report so injurious to the characteristic humanity of the British nation, and to assure Your Excellency that nothing was more void of truth. This I request you will be pleased to signify in the most public way possible. To assuage, as far as lay in my power, the miseries that must necessarily result from a state of warfare, has ever been my strenuous endeavour, and such will be the rule of my conduct in carrying on the blockade of Cadiz, or any other service committed to my charge."

The Spanish Commander-in-Chief replied in quaint English that such reports "existed only among the ignorant public, and have not received credit from any persons of condition, who well know the manner of combating of the British navy." The biographer remarks: "We need only add that Sir James's request was complied with, and that several communications were subsequently made by flags of truce for the exchange of prisoners, by which the sufferings on both sides were much alleviated."

(*Memoirs of Admiral Lord de Saumarez*, by Sir John Ross [London, 1838], vol. II, pp. 10–14.)

GENERAL JOHNSTON DEFILES ALL POTABLE WATERS (1863)

General Sherman, in his narrative of his pursuit of Johnston, immediately after the surrender of Vicksburg [July 4, 1863], says: "On the 8th all our troops reached the neighborhood of Clinton, the weather fearfully hot, and water scarce. Johnston had marched rapidly, and in retreating had caused cattle, hogs, and sheep, to be driven into ponds of water, and there shot down; so that we had to haul their dead and stinking carcasses out to use the water."

(*W. T. Sherman's Memoirs* [New York, 1875], vol. I, p. 331.)

GERMANS POISON WELLS IN AFRICA (1915)

The Secretary of State for the Colonies issues the following communication:

"On the occupation of Swakopmund on January 14, 1915, by the Union troops, it was discovered that six wells from which water was to be drawn for human consumption had been poisoned by means of arsenical cattle dip. In some instances bags full of this poison were found in the wells.

"On February 13 General Botha addressed a letter to Lieutenant-Colonel Franke, the Commander of the German forces, drawing his attention to the fact that such an act was contrary to Article No. 23 (a) of the Hague Convention, and informing him that, if the practice was persisted in, he would hold the officers concerned responsible and he would be reluctantly compelled to employ such measures of reprisal as might seem advisable.

"To this letter Lieutenant-Colonel Franke replied on February 21 that the troops under his command had been given orders:

> "'If they can possibly prevent it not to allow any water supplies to fall into the hands of the enemy in a form which allows such supplies to be used either by man or beasts. Accordingly, the officer in charge when Swakopmund was evacuated had several sacks of cooking salt thrown into the

> wells. But we found that the salting of the water could in a short time be rendered ineffective. Thereafter we tried Kopper Dip, and we found that, by using this material, any enemy occupying the town would for some time have to rely on water brought from elsewhere.'

"Lieutenant-Colonel Franke also claimed that, in order to prevent 'inflicting injury to the health of the enemy,' instructions had been given that the wells so treated should be marked by warning notices and stated that he had sent one of the oldest of his staff officers to Swakopmund to inspect what had been done in the matter.

"General Botha replied on February 28 expressing regret that this use of poison apparently received the support of the German military authorities. He again drew attention to the breach of Article 23 (*a*) of the Hague Convention, and pointed out that the offence against customs of civilized warfare was in no degree lessened by the exhibition of warning notices, even if displayed, and added that, as a matter of fact, no such notices had been found when Swakopmund was occupied. Finally, General Botha repeated his intention to hold the officer commanding responsible, and reiterated the hope that the German military authorities would refrain from similar practices in future.

"However, on March 22 a message, dated March 10, from a Captain Kruger, of the German Protectorate troops, to an outpost at Pforte was intercepted. It reads as follows:

> "'The patrol at Gabib has been instructed thoroughly to infect with disease the Ida Mine. Approach Swakop and Ida Mine with extreme caution, and do not water there any more.'

"Since their evacuation of Aus, Warmbad, and other places, the German troops have consistently poisoned all the wells along the railway line in their retirement."

(London *Times*, May 6, 1915.)

(*b*) The protection of science, education, and art

THE *MARQUIS DE SOMERUELES*

Vice-Admiralty Court at Halifax, February 26, 1813

FEBRUARY 26, 1813, Dr. Croke, Judge of the Court of Vice-Admiralty sitting at Halifax in Nova Scotia, condemned the *Marquis de Somerueles*, captured on her way to Salem from Civita Vecchia, "and her cargo to the captors as having been taken under the Order in Council of the 26th of April."

On April 21, 1813, the case was heard again upon petition for the restitution of the property. The petition was supported by the Solicitor General, and opposed, though not strenuously, by the King's advocate, the captors not consenting.

Dr. Croke: "This petition is of a different kind from what usually engages the attention of the court. It prays that certain paintings and prints, which were captured on board the American vessel called the *Marquis de Somerueles*, may be restored to the petitioner on behalf of a scientific establishment at Philadelphia. The ground of the petition is contained in a letter annexed to it, which states: 'That in the *Somerueles*, from Italy, was taken a case belonging to the Academy of Arts in that city, containing twenty-one paintings and fifty-two prints; that they were presented to the academy by Mr. Joseph Allen Smith, who has already given most objects of the statuary, paintings, and prints which they possess; indeed this is the remnant of what he collected for the purpose of assisting in its formation. The value we know not, but in this country, and in an infant establishment, every accession is important. The Academy is now preparing an application for them, which will be handed with an accompanying letter from Anthony St. John Baker, late secretary of Mr. Foster, who has examined into the circumstances — knowing that even war does not leave science and art unprotected, and that Britons have often considered themselves at peace with these, we are not without hopes of seeing them.'

"Heaven forbid that such an application to the generosity of Great Britain should ever be ineffectual. The same law of nations,

which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species. Not to mention innumerable cases of the mutual exercise of this courtesy between nations in former wars, even the present governor of France, under whose control that country has fallen back whole centuries in barbarism, whilst he has trampled upon justice and humanity, has attended to the claims of science. Besides other instances, there was one which came within my knowledge. A gentleman, a fellow of the royal society, was unfortunately one of the persons so unjustly detained at Paris at the commencement of the war. Considerable interest was exerted, through the medium of the British Government to procure his release, but without effect. Yet to an application from Sir Joseph Banks, as the president of the Royal Society, in favor of a member of that useful institution, Bonaparte paid immediate attention, and in the handsomest manner permitted him to return to England. If such cases were unheard of, every Briton would be anxious that his country should set the honorable example; but I trust that every British bosom would blush with shame, if his country should be found inferior to the lawless government of France in obeying the dictates of liberality. We are at war in the just defence of our national rights, not to violate the charities of human nature.

"In thus favoring an institution of this kind, besides contributing to the maintenance of such a reciprocal exchange of civilities with our enemy as is consistent with the state of hostilities, we shall perhaps at the same time promote most effectually our own best interests. There is a natural connection between all the arts and sciences, as well material as intellectual. It is impossible for a nation to improve in the polite arts without a corresponding amelioration in the practical science of human nature. It is a school-boy quotation, but not the less true for being trite, that

Ingenuas didicisse fideliter artes emollit mores: nec sinit esse feros.

"This observation is founded in nature, for what is usually called taste is only good sense applied to the polished ornaments of life; and correct ideas in morality are the same good sense directed to human actions. All absurdities, and deviations from rectitude, are nothing more than a bad taste influencing human conduct. The public standard of morals will therefore always rise with the advancement of the polite arts. Minds, accustomed to the contemplation of picturesque excellence, cannot fail of being disgusted with any departure from the sublimer form of moral beauty.

"In the United States, such improvements are not improbable, or perhaps very remote, and cannot fail of being advantageous to both countries. They have shown themselves not incapable of producing genius in these departments. The very eminent artist [Benjamin West] who now presides, with so much credit to the country, and so much benefit to the students, in the Royal Academy of Great Britain, owes his birth and earlier education to that country. The time may shortly come when in an advanced state of the arts, to which this very institution, which is now before the court as a petitioner, may contribute its share, new Wests may arise to revive the school of Raphael in the wilds of America; and when likewise, by a corresponding improvement in moral feeling, the public taste may be too highly cultivated to bear with such hideous deformities as the picture of a country priding itself upon its liberty and independence, yet submitting to be the tool of a foreign despot; so cowed by faction that no man is bold enough to stand up and avow himself the friend of the land of his forefathers; so destitute of all sense of honor and generosity, as to spurn, with indignity, the hand of fraternal benevolence repeatedly held out to it, and to throw itself into the embraces of the common enemy, who despises and insults it: — when such an improved state of society shall take place, there can be no doubt but that the two nations of brethren on the opposite shores of the Atlantic, will be united in the indissoluble bonds of friendship, as well by inclination as by a common interest; they will cultivate in unison the advantages of an enlightened commerce; they will labor together in the furtherance of the useful arts; and will experience no other enmity than a liberal rivalship in every elegant and manly accomplishment.

"Not to disappoint the expectations which have been entertained of the liberality of this country, and to give every encouragement to an infant society, whose views and objects are so laudable and beneficial, with real sensations of pleasure, and the sincerest wishes for its success and prosperity, in conformity to the law of nations, as practised by all civilized countries, I decree the restitution of the property which has been thus claimed."

(Stewart: *Reports of Cases argued and determined in the Court of Vice-Admiralty, at Halifax, in Nova Scotia, etc.* [London, 1814], pp. 482–86. The statement of the facts is condensed.)

THE *AMELIA*

United States District Court, November 26, 1861

AND now, 26th November, 1861, this case was heard upon the claim of Mitchell King, of Charleston, South Carolina, for two cases of books marked "The University of North Carolina, Chapel Hill, North Carolina, care of Mitchell King, Esq., Charleston, South Carolina, Nos. 1 and 2," received and filed on the 14th instant, with the written consent of the District Attorney of the United States. And the affidavit of John Pennington, taken on the 16th instant, and this day filed, being read by consent, and the letter of the said claimant therein mentioned being put in evidence, and it appearing to the Court that other parts of the said letter than are extracted in the said affidavit should be considered in forming an opinion as to the sufficiency of the authority conferred upon Mr. Pennington to receive the said two cases of books, the said letter is filed of record. And the said claim having been considered upon the above-mentioned papers, and upon the documents on board of the captured vessel, the Court said:

Cadwalader, Judge: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question, gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise

increase the wealth of that district. But the United States are not at war with literature in that part of their territory. The case of the pictures of the Philadelphia Academy of Fine Arts, liberated by a British Colonial Prize Court in the war of 1812, the prior proceedings in France mentioned in the report of that case, and the French and other decisions upon cases of fishing vessels, are precedents for the decree which I am about to pronounce. Without any such precedents, I would have had no difficulty in liberating these books.

"Whereupon it is ordered, adjudged and decreed, that the said two cases of books be liberated from the custody of the marshal, and delivered to the said John Pennington."

(*Philadelphia Reports Containing the Decisions published in the Legal Intelligencer* [Philadelphia, 1863], vol. IV, pp. 417–18.)

FRANCE PROTESTS TO NEUTRALS THE DESTRUCTION OF RHEIMS CATHEDRAL (1914)

THE French Foreign Office has forwarded to neutral Governments a protest against the German bombardment of the Cathedral of Rheims, couched in the following terms:

"Without being able to invoke even the appearance of military necessity, and for the mere pleasure of destruction, German troops have subjected the Cathedral of Rheims to a systematic and furious bombardment. At this hour the famous basilica is but a heap of ruins.

"It is the duty of the Government of the republic to denounce to [sic] universal indignation this revolting act of vandalism, which, in giving over to the flames this sanctuary of history, deprives humanity of an incomparable portion of its historic patrimony."

(Textual extract from New York *Times*, September 22, 1914.)

THE BURNING OF LOUVAIN LIBRARY (1914)

"At nightfall on the 26th August the German troops, repulsed by our soldiers, entered Louvain panic-struck. Several witnesses affirm that the German garrison which occupied Louvain was erroneously informed that the enemy were entering the town. Men of the garrison immediately marched to the station, shooting haphazard the while, and there met the German troops who had been repulsed by the Belgians, the latter having just ceased the pursuit. Everything tends to prove that the German regiments fired on one another. At once the Germans began bombarding the town, pretending[1] that civilians had fired on the troops, a suggestion which is contradicted by all the witnesses, and could scarcely have been possible, because the inhabitants of Louvain had had to give up their arms to the Municipal Authorities several days before. The bombardment lasted till about 10 o'clock at night. The Germans then set fire to the town. Wherever the fire had not spread the German soldiers entered the houses and threw fire-grenades, with which some of them seem to be provided. The greater part of the town of Louvain was thus a prey to the flames, particularly the quarters of the upper town, comprising the modern buildings, the ancient Cathedral of St. Pierre, the University Buildings, together with the University Library, its manuscripts and collections, and the Municipal Theatre.

"The Commission considers it its duty to insist, in the midst of all these horrors, on the crime committed against civilization by the deliberate destruction of an academic library which was one of the treasures of Europe."

(Extract from the English translation of the *Second Report* [August 31, 1914] *of the Belgian Commission of Inquiry.*)

[1] Erroneous translation of the original "prétendant," which really means "claiming."

(c) Restrictions upon barbaric and unscientific warfare

RUSSIANS ACCUSED OF SUBORNING ASSASSINATION (1914)

Baron von Giesl to Count Berchtold

[Telegram]

AUSTRO-HUNGARIAN ARMY HEADQUARTERS,
Oct. 24th, 1914.

ARMY headquarters makes the following announcement:

Methods of Russian warfare are once more illustrated. The Russians have promised a reward of 80,000 roubles for capture or assassination of one of our army leaders. This explains the murderous attempt upon the life of one particular general, which fortunately failed.

(From the *Collection of Evidence* [concluded January 31, 1915] published by the Austro-Hungarian Ministry of Foreign Affairs [English edition], p. 59.)

RUSSIAN TROOPS DON CHINESE COSTUMES (1904)

IN an official statement of October 19, 1904, the Japanese Government made the following complaint of the use of Chinese costumes by Russian troops and asked the Unites States to transmit their protest:

"In a report from the Commander-in-Chief of the Manchurian Armies the fact is mentioned that on the 4th of October, 1904, a body of infantry belonging to the 3d Russian Regiment of Sharpshooters, all wearing Chinese costumes, attacked our forces on the road to Mukden. It is also reported that of late Russian soldiers clad in Chinese costumes have often approached our forces, and even attempted surprises. Moreover, according to different reports recently received, the Russian Army is said to be purchasing, even now, an enormous number of Chinese costumes.[1]

[1] Lieutenant-Colonel Walter S. Schuyler, American Military Attaché with the Russian Army, makes the following remark in his report:

". . . Pending the arrival of clothing from Russia, it was necessary to issue to the men cotton coats and quilts of Chinese manufacture. In many cases also soldiers found it necessary to wear Chinese shoes while awaiting the arrival of boots.

"It is generally admitted that combatants who are not attired in proper uniform can be punished as offenders of the rules of war, and should they take part in the actual fighting without wearing their proper uniform, not only is their action a violation of international usages, as well as an unlawful act contrary to the meaning of Art. XXIII of the Convention concerning the Laws and Customs of War on Land, but it will prove a source of great calamity to the innocent Chinese, who will thus be exposed to danger, owing to the impossibility of distinguishing from a distance between Russian soldiers and the real Chinese.

"Consequently the Imperial Government has deemed it necessary to call the attention of the Russian Government to such unlawful action on the part of the Russian Army, and has instructed H. I. J. M. Minister at Washington to take, through the United States Ambassador at St. Petersburg, the necessary steps to that effect."

In a note of October 18, 1904, Mr. Hay, Secretary of State, informed the Japanese representative that a copy of his note had been transmitted to the American Chargé d'Affaires at St. Petersburg with appropriate instructions.

(See Takahashi: *International Law applied to the Russo-Japanese War* [New York, 1908], pp. 174–75.)

GERMAN MEMORIAL REGARDING THE EMPLOYMENT OF COLORED TROOPS (1915)

"BERLIN, *July 30th, 1915.*

"IN the present war England and France have not relied solely upon the strength of their own people, but are employing large numbers of colored troops from Africa and Asia in the European

This was the clothing complained of by the Japanese in dispatches published from time to time in the press, but there never was, as far as I could observe, any attempt at disguising Russian soldiers nor any possibility of mistaking them for Chinese. The coats issued were of gray color, and not of the blue ordinarily worn by the Chinese. It would be a dull eye that would mistake a Russian soldier for a Chinese at any distance, even in these garments. The supplies of winter clothing arrived during the months of October and November in large quantities from Russia, and their issue was speedily made."

(Extract from *Reports of Military Observers attached to the Armies in Manchuria during the Russo-Japanese War* [Washington, 1906], part 1, p. 144.)

arena of war against Germany's popular army. Gurkhas, Sikhs and Panthans, Sepoys, Turcos, Goums, Moroccans, and Senegalese fill the English and French lines from the North Sea to the Swiss frontier. These people, who grew up in countries where war is still conducted in its most savage forms, have brought to Europe the customs of their countries; and under the eyes of the highest commanders of England and France they have committed atrocities which set at defiance not only the recognized usages of warfare, but of all civilization and humanity.

"The documents contained in the appendix are only a selection from the comprehensive material at hand illustrating the barbarous behavior of the mercenary colored troops of England and France. They contain exclusively the sworn testimony of approved witnesses, and also extracts from diaries and letters of citizens of hostile countries.

"From the documents it is evident that the colored Allies employed by England and France upon the European arena of war have the barbarous practice of carrying with them as war-trophies the severed heads and fingers of German soldiers, and wearing as ornaments about their necks ears which they have cut off (Appendix 1 to 7). On the battlefields they creep up stealthily and treacherously upon the German wounded, gouge their eyes out, mutilate their faces with knives, and cut their throats. Indian troops commit these atrocities with a sharp dagger which is fastened in the sheath of their side-arms. Turcos, even when wounded themselves, creep around on the battlefield and like wild beasts murder the defenceless wounded (Appendix 7 to 14).

"It is incomprehensible that commanders of French troops, who are aware of this savagery and cruelty of the colored Senegalese, should allow German wounded prisoners to be escorted by these people and in this way give the Senegalese an opportunity to murder German soldiers (Appendix 7, 15). But every civilized man must feel the deepest indignation that the French military authorities have not scrupled to set these savages to guard innocent women who had the misfortune to be staying in France at the outbreak of the war, and to expose them to their animal passions (Appendix 16).

"The laws of nations do not, indeed, expressly prohibit the

employment of colored tribes in wars between civilized nations. The presupposition for such employment, however, is that the colored troops thus employed in war, be kept under a discipline which excludes the possibility of the violation of the customs of warfare among civilized peoples. The documents in the Appendix prove that the colored troops employed by England and France in this war against Germany are very far from meeting this requirement.

"Just as Lord Chatham once protested in the English House of Lords, during the American War of Independence (Appendix 17), and Prince Bismarck in the Franco-Prussian war of 1870–71 (Appendix 18), against the employment, contrary to International Law, of uncivilized peoples in wars against white troops, so the German Government sees itself compelled in the present war to enter a most solemn protest against England and France bringing into the field against Germany troops whose savagery and cruelty are a disgrace to the methods of warfare of the twentieth century. The Government bases its protest upon the spirit of the international agreements of the past few decades, which expressly make it a duty of civilized peoples 'to lessen the inherent evils of warfare,' and 'to serve the interests of humanity and the ever-progressing demands of civilization.'

"In the interest of humanity and civilization therefore the German Government demands most emphatically that colored troops be no longer used upon the European arena of war."

(*Memorial of the German Foreign Office* [July 30, 1915] *relative to the Employment, contrary to International Law, of Colored Troops upon the European Arena of War by England and France* [English translation]. The Appendix of testimony to which the Memorial refers in support of its statements are too long to include here.)

SCOUTING IN THE CIVIL WAR (1861)

William Howard Russell, the famous war correspondent of the London *Times*, makes the following comment upon scouting and the treatment of sentries in the early months of the Civil War:

". . . From the want of cavalry, I suppose it is, the unmilitary practice of 'scouting,' as it is called here, has arisen. It is all

very well in the days of Indian wars for footmen to creep about in the bushes, and shoot or be shot by sentries and pickets; but no civilized war recognizes such means of annoyance as firing upon sentinels, unless in case of an actual advance or feigned attack on the line. No camp can be safe without cavalry videttes and pickets; for the enemy can pour in impetuously after the alarm has been given, as fast as the outlying footmen can run in. In feeling the way for a column, cavalry are invaluable, and there can be little chance of ambuscades or surprises where they are judiciously employed; but 'scouting' on foot, or adventurous private expeditions on horseback, to have a look at the enemy, can do, and will do, nothing but harm. Every day the papers contain accounts of 'scouts' being killed, and sentries being picked off. The latter is a very barbarous and savage practice; and the Russian, in his most angry moments, abstained from it. If any officer wishes to obtain information as to his enemy, he has two ways of doing it. He can employ spies, who carry their lives in their hands, or he can beat up their quarters by a proper *reconnoissance* on his own responsibility, in which, however, it would be advisable not to trust his force to a railway train." . . . June 22, 1861.

(Extract from William Howard Russell: *My Diary North and South* [Boston, 1863], p. 343.)

(*d*) Restrictions upon inhumane methods

HUMANE CONSIDERATION FOR TROOPS STRUGGLING IN THE WATER (1863)

FLAG-SHIP CHICORA,
CHARLESTON HARBOR, *August 10, 1863.*

Rear-Admiral John A. Dahlgren,
Commanding U. S. Naval Forces off Charleston:

Sir: Your communication of the 6th instant, to General Beauregard, Confederate States of America, complaining that after the capture of the launch belonging to your squadron the men were fired at in the water, has been referred to me.

I am happy to be able to state, from information received from the Confederate States naval officer in command at that time, that the men were not fired at in the water.

I highly appreciate your desire to conduct the war upon civilized principles, and it affords me great pleasure to join in so laudable a desire.

Very respectfully, your obedient servant,

J. R. TUCKER,

Flag Officer, Comdg. C. S. Naval Forces, Charleston Harbor.

(*Official Records of the Union and Confederate Armies*, Series I [Serial no. 47], p. 41.)

THE RELEASE OF DR. W. T. ROBINSON (1864)

HEADQUARTERS DEPARTMENT OF THE SOUTH,
HILTON HEAD, S.C., *July 7, 1864.*

Maj. Gen. Samuel Jones,
Comdg. Confederate Forces, S.C., Ga., and Fla.:

General: During a recent movement on John's Island Dr. W. T. Robinson, of the One hundred and fourth Regiment Pennsylvania Volunteers, was taken prisoner by your forces. I would respectfully request that he be released, in accordance with the well-established custom of releasing medical officers of both armies.

Very respectfully, your obedient servant,

J. G. FOSTER,
Major-General, Commanding.

HEADQRS. DEPT. OF S. CAROLINA, GEORGIA, AND FLORIDA,
CHARLESTON, S.C., *July 13, 1864.*

Maj. Gen. J. G. Foster,
Commanding U. S. Forces, Hilton Head, S.C.:

General: Permit me to say, in reply to your letter of the 7th instant, that I am not aware of any "well-established custom of releasing medical officers of both armies." I shall, however, make the necessary inquiries on this point, and if the custom referred to, which I believe has of late fallen into disuse, from what causes I need not say, is still regarded I shall be governed thereby. It is, however, proper to say that Dr. W. T. Robinson, of the One hun-

dred and fourth Pennsylvania Volunteers, was not when captured attending to the sick and wounded of your army, but was separated from his command, apparently engaged in reconnoitering the country. While I hope that no obstacle to his release may arise, I regret to be compelled to detain him until the facts in his case can be more particularly learned.

The blank pay accounts have been disposed of as requested.

Very respectfully, &c.,

SAM. JONES,
Major-General, Commanding.

HEADQUARTERS DEPARTMENT OF THE SOUTH,
HILTON HEAD, S.C., *July 16, 1864.*

Maj. Gen. Samuel Jones,
Comdg. Confederate Forces, Dept. of S.C., Ga., and Fla.:

General: Regarding the case of Dr. W. T. Robinson, of the One hundred and fourth Pennsylvania Volunteers, captured by your pickets on John's Island, I deem it proper to say that at the time of his capture he was not, as you state in your letter of the 13th instant appeared to be the case, "reconnoitering the country." Having been detained as the regiment moved in the morning on professional duty, he missed his way in following, and thus met your pickets. With respect to the custom of liberating surgeons when captured, I have to say that it has been my custom while in command both in North Carolina and East Tennessee. Your action in the present case will determine whether the custom will be continued in this department.

Very respectfully, your obedient servant,

J. G. FOSTER,
Major-General, Commanding.

HEADQUARTERS DEPARTMENT OF THE SOUTH,
HILTON HEAD, S.C., *July 30, 1864.*

Maj. Gen. Samuel Jones,
Comdg. Confederate Forces, S.C., Ga., and Fla., Charleston, S.C.:

General: I have the honor to transmit herewith an official copy of General Orders, No. 190, from Adjutant-General's Office, dated Washington, D.C., May 3, 1864, and would respectfully invite your particular attention to section 127, page 4, which relates to

the principle recognized in regard to holding medical officers and chaplains as prisoners of war.[1] I respectfully ask to be informed as soon as practicable of your decision regarding the return of Dr. W. T. Robinson, One hundred and fourth Pennsylvania Volunteers, as requested by me in communication to you bearing date of July 7, 1864.

Very respectfully, your obedient servant,

J. G. FOSTER,
Major-General, Commanding.

HEADQRS. DEPT. OF S. CAROLINA, GEORGIA, AND FLORIDA,
CHARLESTON, S.C., *August 2, 1864.*

Maj. Gen. J. G. Foster,
Comdg. U. S. Forces, Dept. of the South, Hilton Head:

General: . . . On your assurance conveyed in your letter of the 16th ultimo, that Assistant Surgeon Robinson, of the One hundred and fourth Pennsylvania Regiment, was not, when captured, reconnoitering, I will release and send him within your lines as soon as it can be done. He had been sent from here before I received your letter in regard to him.

I am, very respectfully, your obedient servant,

SAM. JONES,
Major-General, Commanding.

(*Official Records of the Union and Confederate Armies*, Series I, vol. XXXV, pt. II [Serial no. 66], pp. 170, 175, 176, 200, 210.)

(e) Respect for religion

THE DESTRUCTION OF THE MAHDI'S TOMB (1898)

WINSTON SPENCER CHURCHILL, who was an eye-witness, gives the following account:

"The village being captured, and the enemy on the East bank

[1] Full order will appear in Series II [original note. — *Ed.*]. The section referred to is as follows: "The principle being recognized that medical officers and chaplains should not be held as prisoners of war, all medical officers and chaplains so held by the United States will be immediately and unconditionally discharged."

killed or dispersed, the gunboats proceeded to engage the batteries higher up the river. The howitzer battery was now landed, and at 1:30 began to bombard the Mahdi's Tomb.

"This part of the proceedings was plainly visible to us, waiting and watching on the ridge, and its interest even distracted my attention from the Dervish army. The dome of the tomb rose tall and prominent above the mud houses of the city. A lyddite shell burst over it — a great flash, a white ball of smoke, and, after a pause, the dull thud of the distant explosion. Another followed. At the third shot, instead of the white smoke, there was a prodigious cloud of red dust, in which the whole tomb disappeared. When this cleared away we saw that, instead of being pointed, it was now flat-topped. Other shells continued to strike it with like effect, some breaking holes in the dome, others smashing off the cupolas, all enveloping it in dust, until I marveled alike at the admirable precision and the wasteful folly of the practice."

After the rout of the Dervishes at Omdurman (September 2, 1898) and the surrender of the city, Mr. Churchill repaired to the Mahdi's Tomb which lay outside the great wall. He says: "The reader's mind is possibly familiar with its shape and architecture. It was much damaged by the shell-fire. The apex of the conical dome had been cut off. One of the small cupolas was completely destroyed. The dome itself had one enormous and several smaller holes smashed in it; the bright sunlight streamed through these and displayed the interior. Everything was wrecked. Still, it was possible to distinguish the painted brass railings round the actual sarcophagus, and the stone beneath which the body presumably lay. This place had been for more than ten years the most sacred and holy thing that the people of the Soudan knew. Their miserable lives had perhaps been brightened, perhaps in some way ennobled by the contemplation of something which they did not quite understand, but which they believed exerted a protecting influence. It had gratified that instinctive desire for the mystic which all human creatures possess, and which is perhaps the strongest reason for believing in a progressive destiny and a future state. By Sir H. Kitchener's [the late Lord Kitchener, who commanded the expedition] orders the Tomb has been profaned and razed to the ground. The corpse of the Mahdi was dug up. The

head was separated from the body, and, to quote the official explanation, 'preserved for future disposal' — a phrase which must in this case be understood to mean, that it was passed from hand to hand until it reached Cairo. Here it remained, an interesting trophy, until the affair came to the ears of Lord Cromer, who ordered it to be immediately reinterred at Wady Halfa. The limbs and trunk were flung into the Nile."

(Winston S. Churchill: *The River War* [London, 1899], vol. II, pp. 93–94, 211–12.)

"THE GLORIFICATION OF JAPAN'S ARMY" (1905)

"With regard to churches, the Sakhalin Army similarly gave them ample protection in conformity with the principle of International Law. Luikoff had a street fight at the time of its occupation; but the big church of the town was so completely protected that it did not suffer the slightest damage, but remained standing, in the center of the town, as if it glorified the civilized army of Japan." (Takahashi: *International Law* [New York, 1908], p. 247.)

(*f*) Due process of law

WILLIS'S CASE

Mexican Claims Commission, Convention of July 4, 1868

CLAIMANT kept a hotel in Mexico, at which the wife of a French general boarded. In September 1866 this officer was killed, and his widow got in arrears for board to the amount of $120. These arrears certain French officers then present paid by the delivery to Willis of four saddles and five reams of paper. Not long afterward the French were driven out of the city, and the Mexican forces demanded the delivery of the saddles and paper as enemy's property. Claimant declined to deliver them up, and they were taken from him; and on the 10th of April 1867, apparently without any judicial trial, he was fined $500 for secreting enemy's property. He declined to pay this fine and a levy was made on his

property to satisfy it. The commissioners having differed in opinion, the umpire, Sir Edward Thornton, decided that the claimant was justified in receiving the saddles and paper for the payment of a debt legally due to him, and that there was no evil intention on his part and no attempt to conceal the possession of the property. The fine was unjust in itself, and was rendered more so by the manner in which it was levied, claimant not having been condemned to pay by a court of justice, and not having had an opportunity to defend himself against the charges on account of which he was fined. The umpire awarded the amount of the original debt, and of the proceeds of the property, with interest.

(Taken textually from Moore: *International Arbitrations*, vol. IV, pp. 3725–26.)

A SECRET BRITISH EXECUTION (1915)

London, Dec. 2. A spy whose name was not made public was executed by shooting to-day, according to an official announcement given out by the British Official Press Bureau.

(New York *Times*, December 3, 1915.)

THE EXECUTION OF MISS CAVELL (1915)

On August 26, 1915, Sir Edward Grey requested the American Ambassador to make inquiry by telegraph of the American Minister at Brussels relative to the reported arrest of Miss Edith Cavell. The ensuing correspondence [1] and the course of events is recorded in the following report which M. de Leval, legal adviser to the Legation, made to Minister Whitlock:

M. de Leval to Mr. Whitlock, Minister in Brussels of the United States

October 12, 1915.

Sir: As soon as the Legation received an intimation that Miss Cavell was arrested, your letter of the 31st August [2] was sent to

[1] The documents are given in the *White Paper, Miscellaneous No. 17, 1915* [Cd. 8013], to which the references relate.

[2] See Enclosure 2 in No. 6.

Baron von der Lancken. The German authorities were by that letter requested, *inter alia* [among other things], to allow me to see Miss Cavell, so as to have all necessary steps taken for her defense. No reply being received, the Legation, on the 10th September,[1] reminded the German authorities of your letter.

The German reply, sent on the 12th September,[2] was that I would not be allowed to see Miss Cavell, but that Mr. Braun, lawyer at the Brussels Court, was defending her and was already seeing the German authorities about the case.

I immediately asked Mr. Braun to come to see me at the Legation, which he did a few days later. He informed me that personal friends of Miss Cavell had asked him to defend her before the German Court, that he agreed to do so, but that owing to some unforeseen circumstances he was prevented from pleading before that Court, adding that he had asked Mr. Kirschen, a member of the Brussels Bar and his friend, to take up the case and plead for Miss Cavell, and that Mr. Kirschen had agreed to do so.

I, therefore, at once put myself in communication with Mr. Kirschen, who told me that Miss Cavell was prosecuted for having helped soldiers to cross the frontier. I asked him whether he had seen Miss Cavell and whether she had made any statement to him, and to my surprise found that the lawyers defending prisoners before the German Military Court were not allowed to see their clients before the trial, and were not shown any document of the prosecution. This, Mr. Kirschen said, was in accordance with the German military rules. He added that the hearing of the trial of such cases was carried out very carefully, and that in his opinion, although it was not possible to see the client before the trial, in fact the trial itself developed so carefully and so slowly, that it was generally possible to have a fair knowledge of all the facts and to present a good defense for the prisoner. This would specially be the case for Miss Cavell, because the trial would be rather long as she was prosecuted with thirty-four other prisoners.

I informed Mr. Kirschen of my intention to be present at the trial so as to watch the case. He immediately dissuaded me from taking such attitude, which he said would cause a great prejudice

[1] See Enclosure 3 in No. 6.
[2] See Enclosure 2 in No. 3.

to the prisoner, because the German judges would resent it and feel it almost as an affront if I was appearing to exercise a kind of supervision on the trial. He thought that if the Germans would admit my presence, which was very doubtful, it would in any case cause prejudice to Miss Cavell.

Mr. Kirschen assured me over and over again that the Military Court of Brussels was always perfectly fair and that there was not the slightest danger of any miscarriage of justice. He promised that he would keep me posted on all the developments which the case would take and would report to me the exact charges that were brought against Miss Cavell and the facts concerning her that would be disclosed at the trial, so as to allow me to judge by myself about the merits of the case. He insisted that, of course, he would do all that was humanly possible to defend Miss Cavell to the best of his ability.

Three days before the trial took place, Mr. Kirschen wrote me a few lines saying that the trial would be on the next Thursday, the 7th October. The Legation at once sent him, on the 5th October, a letter [1] confirming in writing in the name of the Legation the arrangement that had been made between him and me. This letter was delivered to Mr. Kirschen by a messenger of the Legation.

The trial took two days, ending Friday the 8th.

On Saturday I was informed by an outsider that the trial had taken place, but that no judgment would be reached till a few days later.

Receiving no report from Mr. Kirschen, I tried to find him, but failed. I then sent him a note on Sunday, asking him to send his report to the Legation or call there on Monday morning at 8:30. At the same time I obtained from some other person present at the trial some information about what had occurred, and the following facts were disclosed to me:

Miss Cavell was prosecuted for having helped English and French soldiers, as well as Belgian young men, to cross the frontier and to go over to England. She had admitted by signing a statement before the day of the trial, and by public acknowledgment in Court, in the presence of all the other prisoners and the

[1] See Enclosure 10 in No. 6.

lawyers, that she was guilty of the charges brought against her, and she had acknowledged not only that she had helped these soldiers to cross the frontier, but also that some of them had thanked her in writing when arriving in England. This last admission made her case so much the more serious, because if it only had been proved against her that she had helped the soldiers to traverse the Dutch frontier, and no proof was produced that these soldiers had reached a country at war with Germany, she could only have been sentenced for an attempt to commit the "crime" and not for the "crime" being duly accomplished. As the case stood, the sentence fixed by the German military law was a sentence of death.

Paragraph 58 of the German Military Code says:

> "Will be sentenced to death for treason any person who, with the intention of helping the hostile Power, or of causing harm to the German or allied troops, is guilty of one of the crimes of paragraph 90 of the German Penal Code."

The case referred to in above said paragraph 90 consists in:

> ". . . conducting soldiers to the enemy . . ." (viz.: "dem Feinde Mannschaften zuführt").

The penalties above set forth apply, according to paragraph 160 of the German Code, in case of war, to foreigners as well as to Germans.

In her oral statement before the Court Miss Cavell disclosed almost all the facts of the whole prosecution. She was questioned in German, an interpreter translating all the questions in French, with which language Miss Cavell was well acquainted. She spoke without trembling and showed a clear mind. Often she added some greater precision to her previous depositions.

When she was asked why she helped these soldiers to go to England, she replied that she thought that if she had not done so they would have been shot by the Germans, and that therefore she thought she only did her duty to her country in saving their lives.

The Military Public Prosecutor said that argument might be good for English soldiers, but did not apply to Belgian young men

whom she induced to cross the frontier and who would have been perfectly free to remain in the country without danger to their lives.

Mr. Kirschen made a very good plea for Miss Cavell, using all arguments that could be brought in her favor before the Court.

The Military Public Prosecutor, however, asked the Court to pass a death sentence on Miss Cavell and eight other prisoners amongst the thirty-five. The Court did not seem to agree, and the judgment was postponed. The person informing me said he thought that the Court would not go to the extreme limit.

Anyhow, after I had found out these facts (viz., Sunday evening), I called at the Political Division of the German Government in Belgium and asked whether, now that the trial had taken place, permission would be granted to me to see Miss Cavell in jail, as surely there was no longer any object in refusing that permission. The German official, Mr. Conrad, said he would make the necessary enquiry at the Court and let me know later on.

I also asked him that permission be granted to Mr. Gahan, the English clergyman, to see Miss Cavell.

At the same time we prepared at the Legation, to be ready for every eventuality, a petition for pardon, addressed to the Governor-General in Belgium and a transmitting note addressed to Baron von der Lancken.

Monday morning at 11 I called up Mr. Conrad on the telephone from the Legation (as I already had done previously on several occasions when making enquiries about the case), asking what the Military Court had decided about Mr. Gahan and myself seeing Miss Cavell. He replied that Mr. Gahan could not see her, but that she could see any of the three Protestant clergymen attached to the prison; and that I could not see her till the judgment was pronounced and signed, but that this would probably only take place in a day or two. I asked the German official to inform the Legation immediately after the passing of said judgment, so that I might see Miss Cavell at once, thinking, of course, that the Legation might, according to your intentions, take immediate steps for Miss Cavell's pardon if the judgment really was a sentence of death.

Very surprised to still receive no news from Mr. Kirschen, I then

called at his house at 12:30 and was informed that he would not be there till about the end of the afternoon. I then called, at 12:40, at the house of another lawyer interested in the case of a fellow-prisoner, and found that he also was out. In the afternoon, however, the latter lawyer called at my house, saying that in the morning he had heard from the German Kommandantur that judgment would be passed only the next morning, viz., Tuesday morning. He said that he feared that the Court would be very severe for all the prisoners.

Shortly after, this lawyer left me, and while I was preparing a note about the case, at 8 P.M. I was privately and reliably informed that the judgment had been delivered at 5 o'clock in the afternoon, that Miss Cavell had been sentenced to death, and that she would be shot at 2 o'clock the next morning. I told my informer that I was extremely surprised at this, because the Legation had received no information yet, neither from the German authorities nor from Mr. Kirschen, but that the matter was too serious to run the smallest chance, and that therefore I would proceed immediately to the Legation to confer with your Excellency and take all possible steps to save Miss Cavell's life.

According to your Excellency's decision, Mr. Gibson and myself went, with the Spanish Minister, to see Baron von der Lancken, and the report of our interview and of our efforts to save Miss Cavell is given to you by Mr. Gibson.[1]

[1] *Report of Mr. Gibson, Secretary of the Legation to Minister Whitlock.*

BRUSSELS, *October 12, 1915.*

Sir, — Upon learning early yesterday morning through unofficial sources that the trial of Miss Edith Cavell had been finished on Saturday afternoon and that the prosecuting Attorney (*Kriegsgerichtsrat*) had asked for a sentence of death against her, telephonic inquiry was immediately made at the *Politische Abteilung* as to the facts.

It was stated that no sentence had as yet been pronounced, and that there would probably be delay of a day or two before a decision was reached. Mr. Conrad gave positive assurances that the Legation would be fully informed as to developments in this case. Despite these assurances, we made repeated inquiries in the course of the day, the last one being at 6:20 P.M. Belgian time. Mr. Conrad then stated that sentence had not yet been pronounced, and specifically renewed his previous assurances that he would not fail to inform us as soon as there was any news.

At 8:30 it was learned from an outside source that sentence had been passed in the course of the afternoon (before the last conversation with Mr. Conrad), and that the execution would take place during the night. In conformity with your instructions I went (accompanied by Mr. de Leval) to look for the Spanish Minister, and

This morning, Mr. Gahan, the English clergyman, called to see me and told me that he had seen Miss Cavell in her cell yesterday

found him dining at the home of Baron Lambert. I explained the circumstances to His Excellency, and asked that (as you were ill and unable to go yourself) he go with us to see Baron von der Lancken and support as strongly as possible the plea which I was to make in your name that execution of the death penalty should be deferred until the Governor could consider your appeal for clemency.

We took with us a note addressed to Baron von der Lancken and a plea for clemency (*requête en grâce*) addressed to the Governor-General (enclosures 5, 6, and 7 attached to this report). The Spanish Minister willingly agreed to accompany us, and we went together to the *Politische Abteilung*.

Baron von der Lancken and all the members of his staff were absent for the evening. We sent a messenger to ask that he return at once to see us in regard to a matter of utmost urgency. A little after 10 o'clock he arrived, followed shortly after by Count Harrach and Herr von Falkenhausen, members of his staff. The circumstances of the case were explained to him and your note presented, and he read it aloud in our presence. He expressed disbelief in the report that sentence had actually been passed, and manifested some surprise that we should give credence to any report not emanating from official sources. He was quite insistent on knowing the exact source of our information, but this I did not feel at liberty to communicate to him.

Baron von der Lancken stated that it was quite improbable that sentence had been pronounced, that, even if so, it would not be executed within so short a time, and that in any event it would be quite impossible to take any action before morning. It was, of course, pointed out to him that if the facts were as we believed them to be, action would be useless unless taken at once.

We urged him to ascertain the facts immediately, and this, after some hesitancy, he agreed to do. He telephoned to the presiding Judge of the Court-martial, and returned in a short time to say that the facts were as we had represented them, and that it was intended to carry out the sentence before morning. We then presented as earnestly as possible your plea for delay. So far as I am able to judge we neglected to present no phase of the matter which might have had any effect, emphasizing the horror of executing a woman, no matter what her offense, pointing out that the death sentence had heretofore been imposed only for actual cases of espionage, and that Miss Cavell was not even accused by the German authorities of anything so serious. I further called attention to the failure to comply with Mr. Conrad's promise to inform the Legation of the sentence.

I urged that inasmuch as the offenses charged against Miss Cavell were long since accomplished, and that as she had been for some weeks in prison, a delay in carrying out the sentence could entail no danger to the German cause. I even went so far as to point out the fearful effect of a summary execution of this sort upon public opinion both here and abroad, and, although I had no authority for doing so, called attention to the possibility that it might bring about reprisals. The Spanish Minister forcibly supported all our representations and made an earnest plea for clemency.

Baron von der Lancken stated that the Military Governor was the supreme authority (*Gerichtsherr*) in matters of this sort; that appeal from his decision could be carried only to the Emperor, the Governor-General having no authority to intervene in such cases. He added that under the provisions of German Martial Law the Military Governor had discretionary powers to accept, or to refuse acceptance of, an appeal for clemency.

After some discussion he agreed to call the Military Governor on the telephone

night at 10 o'clock, that he had given her the Holy Communion and had found her admirably strong and calm. I asked Mr. Gahan whether she had made any remarks about anything concerning the legal side of her case, and whether the confession which she made before the trial and in Court was, in his opinion, perfectly free and sincere. Mr. Gahan says that she told him she perfectly well knew what she had done; that according to the law, of course, she was guilty and had admitted her guilt, but that she was happy to die for her country.[1]

G. DE LEVAL.

On October 20, Sir Edward Grey sent the following note to the American Ambassador:

and learn whether he had already ratified the sentence and whether there was any chance for clemency. He returned in about half an hour and stated that he had been to confer personally with the Military Governor, who said that he had acted in the case of Miss Cavell only after mature deliberation; that the circumstances in her case were of such a character that he considered the infliction of the death penalty imperative, and that in view of the circumstances of this case he must decline to accept your plea for clemency or any representation in regard to the matter.

Baron von der Lancken then asked me to take back the note which I had presented to him. To this I demurred, pointing out that it was not a *requête en grâce*, but merely a note to him transmitting a communication to the Governor, which was itself to be considered as the *requête en grâce*. I pointed out that this was expressly stated in your note to him, and tried to prevail upon him to keep it; he was very insistent, however, and I finally reached the conclusion that inasmuch as he had read it aloud to us and we knew that he was aware of its contents there was nothing to be gained by refusing to accept the note, and accordingly took it back.

Even after Baron von der Lancken's very positive and definite statement that there was no hope, and that under the circumstances "even the Emperor himself could not intervene," we continued to appeal to every sentiment to secure delay and the Spanish Minister even led Baron von der Lancken aside in order to say very forcibly a number of things which he would have felt hesitancy in saying in the presence of the younger officers and of Mr. de Leval, a Belgian subject.

His Excellency talked very earnestly with Baron von der Lancken for about a quarter of an hour. During this time Mr. de Leval and I presented to the younger officers every argument we could think of. I reminded them of our untiring efforts on behalf of German subjects at the outbreak of the war and during the siege of Antwerp. I pointed out that while our services had been rendered gladly and without any thought of future favors, they should certainly entitle you to some consideration for the only request of this sort you had made since the beginning of the war. Unfortunately our efforts were unavailing. We persevered until it was only too clear that there was no hope of securing any consideration for the case.

We left the *Politische Abteilung* shortly after midnight, and I immediately returned to the Legation to report to you.

HUGH GIBSON.

[1] October 18, Minister Whitlock transmitted to London the report of this interview which he requested Mr. Graham to prepare. (Enclosure 2 in No. 9.)

FOREIGN OFFICE, *October 20, 1915.*

The Secretary of State for Foreign Affairs presents his compliments to the United States Ambassador, and has the honor to acknowledge the receipt of His Excellency's Note of the 18th inst. enclosing a copy of a dispatch from the United States Minister at Brussels respecting the execution of Miss Edith Cavell at that place.

Sir E. Grey is confident that the news of the execution of this noble Englishwoman will be received with horror and disgust, not only in the Allied States, but throughout the civilized world. Miss Cavell was not even charged with espionage, and the fact that she had nursed numbers of wounded German soldiers might have been regarded as a complete reason in itself for treating her with leniency.

The attitude of the German authorities is, if possible, rendered worse by the discreditable efforts successfully made by the officials of the German Civil Administration at Brussels to conceal the fact that sentence had been passed and would be carried out immediately. These efforts were no doubt prompted by the determination to carry out the sentence before an appeal from the finding of the Court-martial could be made to a higher authority, and show in the clearest manner that the German authorities concerned were well aware that the carrying out of the sentence was not warranted by any consideration. Further comment on their proceedings would be superfluous.

In conclusion Sir E. Grey would request Mr. Page to express to Mr. Whitlock and the staff of the United States Legation at Brussels the grateful thanks of His Majesty's Government for their untiring efforts on Miss Cavell's behalf. He is fully satisfied that no stone was left unturned to secure for Miss Cavell a fair trial, and, when sentence had been pronounced, a mitigation thereof.

Sir E. Grey realizes that Mr. Whitlock was placed in a very embarrassing position by the failure of the German authorities to inform him that the sentence had been passed and would be carried out at once. In order, therefore, to forestall any unjust criticism which might be made in this country he is publishing Mr. Whitlock's dispatch to Mr. Page without delay.

§ 12. PRISONERS OF WAR

A CAVALRY CHARGE AT ELANDSLAAGTE
OCTOBER 21, 1899

MAJOR GORE gave the order for which the men had been straining — "Gallop!" — and with leveled lances and bared sabres the two squadrons dashed forward and rode over and through the panic-stricken burghers. As soon as the latter heard the thud of the galloping horses and the exulting cries of the troopers, they opened out and tried to save themselves by flight. But with so small a start their little ponies were no match for the big-striding Walers, and the cavalry were upon them almost before they realized that they were pursued. Some tried to snap their Mausers from the saddle, some threw themselves on the ground, others knelt down vainly imploring for mercy in the agony of their terror.[1] For a mile and a half the Dragoons and Lancers overrode the flying enemy. Then they rallied and galloped back to complete the havoc and to meet such of the fugitives as had escaped the initial burst. In the second gallop but little sabering or spearing was done, and many prisoners were taken. Then the scattered troopers were again rallied. The men fell in and cheered madly. There was something awful in the dramatic setting of the scene. The wild troopers forming in the thickening darkness, with their reeking weapons bare; the little knot of prisoners, with faces blanched in fear, herded together at the lance point; the

[1] This charge created the greatest terror and resentment among the Boers, who vowed at the time that they would destroy all Lancers they captured. But it must be clearly understood that charging cavalry are fully justified in not giving quarter to individuals (though it was done in a good many cases in this charge at Elandslaagte), unless the whole object of the charge is to be frustrated. Similarly the wounding of men several times over — one young Boer at Elandslaagte received sixteen lance wounds and survived — is a natural and almost inevitable feature of a cavalry charge. The Boers have been the first to introduce into war the theory that every individual has the right to ask quarter for himself at any moment in an action, a theory which our soldiers seem to have almost invariably accepted. Thus Sir G. White, in his dispatch on Elandslaagte, notes that in the final stage of the flank attack the Boers remained lying down and firing at our men till they came within twenty yards and then quietly asked quarter, which was invariably granted. [Original note.]

dim patches on the veldt, which denoted the destruction which had been dealt, and the spasmodic popping of rifles from remote portions of the field as the fighting died out with last light of day, or as the wounded tried to attract attention. It should be said to the credit of the British troopers that, although they had mercilessly carried out the duties attendant upon a cavalry pursuit, yet, once their duty was accomplished, they showed every solicitude for those who had suffered.

(Extract from the *Times History of the War in South Africa* [London, 1902], vol. II, pp. 190–91.)

THE BOERS RELEASE THEIR PRISONERS (1900)

De Wet makes the following statement:

" . . . Again, we captured more prisoners than formerly. It is much to be regretted that we were unable to keep them, for had we been in a position to do so, the world would have been astonished at their number. But unfortunately we were now unable to retain any of our prisoners. We had no St. Helena, Ceylon or Bermuda, whither we could send them. Thus, whilst every prisoner which the English captured meant one less man for us, the thousands of prisoners we took from the English were no loss to them at all, for in most cases it was only a few hours before they could fight again. All that was required was that a rifle should be ready in the camp on a prisoner's return, and he was prepared for service once more."

(De Wet: *Three Years' War* [New York, 1902], p. 227.)

THE WORK OF GERMAN PRISONERS (1916)

Answering Mr. Gilbert (Newington, W., L.), Mr. Tennant (Parliamentary Secretary of War) said: "Prisoners of war, both combatant and civilian, are employed at various places in work of public utility; but, whereas combatants can be compelled to work, civilians can be forced only to keep their camps in order. A considerable number are employed in making mail bags, some in agri-

culture, and other work in the neighbourhood of their camps. The actual number employed cannot be stated with accuracy. It is hoped to arrange shortly for the employment of prisoners of war on an extended scale."

(Debates in the House of Commons reported in the London *Times*, April 6, 1916.)

THE TRIAL OF LIEUTENANT ANDLER FOR ATTEMPT TO ESCAPE (1915)

[The following account of the trial of Lieutenant Andler of the German Navy for attempt to escape from the interned camp is taken from the report of the correspondent of the London *Times* at Chester, April 23, 1915:]

"After wandering a week in the Welsh hills, the lieutenant and his companion, Lieutenant Leben, were recognized and captured.

"Five officers constituted the Court, and Colonel Irwin, of the *dépôt* of the Royal Welsh Fusiliers, presided. Captain Evans was present to prosecute, and Lieutenant Graine acted as interpreter. The trial took place in the Grand Jury room at the Castle, overlooking the River Dee, and throughout the proceedings, which occupied about four hours, the two prisoners could hear the shouts of command from non-commissioned officers who in the Castle yard were drilling new recruits for the British Army.

"The cases were taken separately. Lieutenant Andler, who gave his age as twenty-six, pleaded 'Guilty' to the charge. His injured hand was bandaged, and with the jacket of his naval uniform he wore civilian trousers of dark brown cloth. His knowledge of English enabled him to follow the proceedings without the help of the interpreter, but to ensure the strictest fairness all material matters were translated to him by Lieutenant Graine.

"When the evidence of his escape and return under escort to Dyffryn Aled had been read he was asked whether he wished to make any statement, to give evidence, or to call witnesses as to character. To each question he gave a negative answer. The President then asked if the accused would like to make any statement in mitigation of punishment.

"*Lieutenant Graine.* He wants to know if he can afterwards appeal to a higher Court.

"*The President.* No.

"*Lieutenant Graine.* The accused says that according to the Hague Convention he is only subject to disciplinary punishment.

"*The President.* He must state this in mitigation. Whatever punishment we give him is not final. It has to be confirmed by the General, and whatever he says now will be taken into consideration.

"Lieutenant Graine, after talking with the accused, said that Lieutenant Andler urged that the Hague Convention made a difference between disciplinary punishment and other punishment. He wished to bring before the notice of the Court that in Article 8 of Chapter II in the annex to the Hague Convention it was provided that escaped prisoners of war who were retaken were subject to disciplinary punishment, and that in Article 12 of the same chapter it was stated that prisoners of war, liberated on parole and recaptured bearing arms against the Government to which they had pledged their honour, forfeited their right to be treated as prisoners of war, and might be put on trial before the Courts.

"*The President.* His point is that, not being on parole, he is not liable to the same punishment? The punishment of an officer who broke his parole would be more severe than that of an officer who had not given his parole.

"*Lieutenant Graine.* He says that an officer not on parole who attempted to escape cannot be brought before a Court, and that he can only be given disciplinary punishment by being brought before his Commandant.

"*The President.* His point is that he should not have been brought before this Court at all?

"*Lieutenant Graine.* That is his point.

"*The President.* I asked him at the beginning if he had any objection to being tried by us and he said 'No.'

"*Lieutenant Graine.* He meant that he had no objection to you personally.

"The President said he did not think the accused quite understood the constitution of the Court. Whatever punishment they

gave him had to be confirmed by General Mackinnon, commanding the district. The statement made by the accused would be taken into consideration not only by them, but by General Mackinnon. The punishment given by the Court might be wiped out altogether or reduced by the General. He asked whether the accused still wished to imply that the Court had no right to try him.

"*Lieutenant Graine.* Notwithstanding what you have said he still protests against it. His contention is that disciplinary punishment can only be inflicted by one individual.

"*The President.* Does he wish to imply that we have no powers to give him more than disciplinary punishment?

"*Lieutenant Graine.* He says that in Germany the Courts can only inflict prison or penal servitude.

"After further argument the accused formally made his protest against being tried by this Court, his offense having made him liable to disciplinary punishment. He said that he could be tried only by his Commandant or the immediate superior of the Commandant.

"The Court was cleared, and when, after an interval, the proceedings were resumed, the President said that the objection had been overruled.

"Captain Evans produced evidence as to the rank, age, and character of the accused. His character during the period of his internment was stated to have been good.

"The Court then considered its sentence in private. . . ."

(London *Times*, April 24, 1915.)

THE AMERICAN EMBASSY REPORTS ON THE TREATMENT OF BRITISH PRISONERS OF WAR IN GERMANY (1915)

AMERICAN EMBASSY, BERLIN,
April 3, 1915.

My dear Colleague:

WITH reference to my telegram of the 11th March, 1915, to the Department of State, based on a Note from the Imperial Foreign Office, embodying the result of an arrangement agreeable to the

German Government, whereby American diplomatic chiefs of mission and members of their staffs or consular officials whom they appoint may at all times visit camps where enemy prisoners of war under their protection are interned, I am writing to inform you that on the 29th March passes were issued to myself, Mr. Jackson, and other members of the Embassy staff, as well as to the Consul at Hanover, to visit any and all prisoners' camps or hospitals in Germany. These passes permit visits at any time, and the fact that a member of my staff has visited a camp once does not prevent his going to the same place as often as he may desire to do so.

On the 30th March, I visited, with Mr. Jackson and Mr. Osborne, the camp at Döberitz, where non-commissioned officers and men are interned, and on Wednesday and Thursday, Mr. Jackson and Mr. Russell made a thorough inspection of the officers' camps at Burg, Magdeburg, and Halle. I am anxious to have every place in Germany, where British subjects are interned, visited by a member of my staff and I will then draw up a general report for transmission to His Majesty's Government.

At the present time I am glad to say that there appears to be a general improvement in the conditions prevailing in prisoners' camps throughout Germany. Parcels, money and letters appear to be arriving with great regularity. The health of the officers and men appears on the whole to be very good. I shall not go into matters in detail at this time, but wait until a greater number of places have been visited.

For your information I beg to enclose herewith a copy of a letter from Mr. Jackson to Sir Edward Grey, regarding his visits to Döberitz and Burg.

Yours sincerely,

JAMES W. GERARD.

(*British White Paper, Miscellaneous No. 11, 1915* [Cd. 7861].)

TRANSFER TO SWITZERLAND OF BRITISH AND GERMAN WOUNDED PRISONERS OF WAR (1916)

Mr. Page to Sir Edward Grey (received May 2)

AMERICAN EMBASSY, LONDON,
May 1, 1916.

THE American Ambassador presents his compliments to His Majesty's Secretary of State for Foreign Affairs, and, with reference to Sir E. Grey's note of the 22nd April, relative to the proposed transfer of British and German prisoners of war to Switzerland, has the honor to acquaint Sir E. Grey with the text of a telegram received from the Embassy at Berlin, dated the 27th April, as follows:

"In note received today Foreign Office states German Government agrees to transfer of German and British wounded to Switzerland on same principle as between Germans and French, and suggests employment of Swiss doctors to make preliminary examination.

"Final decision to be made by respective Exchange Commissions on principles agreed to by Germany and France.

"Foreign Office proposes transfer to begin about the 17th May, if British Government declares willingness to begin on same date.

"Foreign Office presumes German prisoners will be sent through France to Lyons, and safety guaranteed by both British and French Governments.

"Written communications will be forwarded next pouch.

"Assume British Government possesses French schedule of disabilities."

(*British White Paper, Miscellaneous No. 17, 1916.*)

§ 13. RELATIVE MILITARY ADVANTAGE AS COMPARED WITH THE INJURY AND MISERY INFLICTED

BELGIAN RELIEF (1914)

The Secretary of State to Ambassador Gerard

[Telegram]

DEPARTMENT OF STATE,
WASHINGTON, *October 7, 1914.*

DEPARTMENT has received following from London, which you may communicate to Imperial Foreign Office:

"Belgian committee has been formed at Brussels under the patronage of the American and Spanish ministers for the purpose of importing foodstuffs for the poor of Belgium. The German authorities in occupation have consented and the Belgian Minister here informs me that under instructions from his Government he has obtained permission of the British authorities for the export of supplies on condition that they be despatched by this Embassy and consigned to our Legation at Brussels. I believe it would be well to obtain a definite assurance from the German Government of their approval of this humanitarian project the execution of which is in charge of an American citizen, Mr. Shaler, who is now in London purchasing supplies."

Please take up informally with Foreign Office and cable reply.

BRYAN.

The Acting Secretary of State to Minister Whitlock

[Telegram]

DEPARTMENT OF STATE,
WASHINGTON, *October 19, 1914.*

Your 548, 18th. The plan of the Belgian committee in Brussels to import foodstuffs for poor of Brussels has been approved by the German Government and the Embassy in London has been so advised.

LANSING.

The German Ambassador to the Secretary of State

NEW YORK, *January 28, 1915.*

With reference to my note of 21st instant, I now beg to state that the German Government gives formal assurance that foodstuffs imported from the United States will not be used by the Government for the military or naval authorities and will not reach any contractors of the Government. The German Government guarantees that it will not interfere with the distribution of such foodstuffs by the American importers to the civilian population exclusively.

J. BERNSTORFF.

(From *European War No. 2* [printed and distributed by the Department of State October 21, 1915], pp. 97, 98, 106; *American Journal of International Law, Supplement*, July, 1915, pp. 314, 316, 331.)

THE ZEPPELIN ATTACK ON LONDON OCTOBER 13, 1915

[THE London *Times* (October 18, 1915) prints an article by "the writer appointed by the Home Office to observe and describe the effect of the recent Zeppelin raid." Of the full account the following summary is also given:]

"On the evening of Wednesday, October 13, another aerial attack was directed against London, which differed in no material respect from those made on previous occasions. The enemy's vessel or vessels flew high at an altitude chosen, no doubt, in order to prevent as far as possible the danger of damage or destruction from anti-aircraft guns. The darkening of the Metropolitan area, together with the height at which the aircraft traveled, certainly prevented the enemy from discovering the exact position of places of importance.

"As on the last occasion, the official report issued in Berlin proves the raiders to have been grossly in error in most cases as to where they were dropping their bombs, and if we can suppose that they had really some definite objective other than the mere haphazard destruction of the lives and property of non-combatants then, owing to the height at which they flew, they entirely failed to

attain that objective. Except for one chance shot, the damage was exclusively on property unconnected with the conduct of the war. Of the 127 persons killed or injured none, save one or two soldiers who were in the street at the time, were combatants. As for the moral effect, for which presumably the enemy is seeking, that was all to his disadvantage."

(London *Times*, October 18, 1915.)

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§ 14. THE RESTRICTIVE NATURE OF THE LAWS OF WAR

THE RESTRICTIVE NATURE OF THE LAWS OF WAR (*Westlake*)

"So far as the in this sense natural procedure [fighting out their quarrels] of the human species is mitigated in the behavior of the parties, that is due to the scope which they may allow to the better qualities of our mixed humanity, and to the influence of certain rules which the consent of nations has made a part of international law. These rules are always restrictive, never permissive in any other sense than that of the absence of prohibition, for law can give no positive sanction to any act of force of which it cannot secure the employment on the side of justice alone, even if the particular act be not one which the law would prohibit both to the just and to the unjust if it could. Whenever therefore in speaking of the laws of war it is said that a belligerent may do this or that, it is always only the absence of prohibition that must be understood."

(John Westlake: *International Law* [2d ed., Cambridge, 1913], vol. II, p. 56.)

THE NORTH SEA MINE FIELD (1914)

THE Secretary of the Admiralty communicates the following:

"The German policy of mine-laying,[1] combined with their submarine activities, makes it necessary on military grounds for the

[1] The following extracts relating to the laying of mines are from articles by the Naval Correspondent of the London *Times:*

[Extract from London *Times*, August 6, 1914:] "The sinking of the *Königin Luise*, by which the British Navy scores first blood, is precisely one of the incidents

Admiralty to adopt counter-measures. His Majesty's Government have therefore authorized a mine-laying policy in certain areas, and a system of mine fields has been established and is being developed upon a considerable scale.

"In order to reduce risks to non-combatants, the Admiralty announce that it is dangerous henceforward for ships to cross the area between Latitude 51° 15′ N. and 51° 40′ N. and Longitude 1° 35′ E. and 3° E.

"In this connection it must be remembered that the southern limit of the German mine field is Latitude 52° N. Although these

which are fairly certain to precede decisive action. The *Königin Luise* was a Hamburg-Amerika liner of about two thousand tons and had been converted into a mine layer. Probably she carried four hundred or five hundred mines, each filled with explosive and so fitted that after a certain time had elapsed it would become 'live' or ready to explode if touched. Rows of such mines can be fastened round the bulwarks or, on a deck sloping towards the stern, suspended from an overhead tramway. Sometimes they are fastened together with chains or wire hawsers, and matters are so arranged that when put into the water they remain at a depth fixed by the layer. A ship, either an old cruiser, still of good speed, or a fast liner, is fitted in this way, and her business is to steam at high speed across the estuary of a river, or the entrance to a port, and as successive runs are made to strew the mines in parallel or converging rows until the layer has disposed of her cargo. The *Königin Luise* was perhaps on her way to the Thames to get rid of her cargo in this way when the Harwich patrol flotilla and the *Amphion* picked her up and stopped her game with a torpedo. That other attempts will be made is certain, and our destroyers may not always be so fortunate as to score. There is, however, another way of dealing with the mines, and the mine sweeper is a vessel which also performs its duty very efficiently and with extraordinary quickness."

[Extract from London *Times*, August 14, 1914:] "As the official announcement also stated, however, that Germany had scattered mines indiscriminately in this area, this rather points to such a battle being fought later on instead of immediately. Very much depends, however, upon what is meant by the term 'indiscriminately.' It must be fairly certain that the mines can only have been laid in areas within which the Germans have been able to operate. Unless, therefore, very broad paths have been left through the fields, the mines will act as much as a deterrent to the egress of the German ships as to the movements of our own vessels against the enemy. It is well to remember that mines once laid in open waters are beyond the control of either side. That is to say, nothing can prevent them from exploding if the protrusions which contain the igniting apparatus are struck, by friend or foe alike. Admiral von Ingenohl, therefore, can have no more desire than Admiral Jellicoe to manœuvre his fleet in such a dangerous area. Still assuming, therefore, that the mines have been strewn indiscriminately, should an order be given for the German Admiral to give battle at any cost — such an order, for example, as Napoleon gave to Villeneuve — either the mines must first be picked up again or the movements of the German vessels are limited to such channels as have been left open. Not until they were clear of the dangerous area could the Germans challenge an action. Moreover, to fight with the knowledge that behind them these mines were scattered indiscriminately would be for the Germans to take a risk which is almost inconceivable."

limits are assigned to the danger area, it must not be supposed that navigation is safe in any part of the southern waters of the North Sea.

"Instructions have been issued to His Majesty's ships to warn east-going vessels of the presence of this new mine field."

(London *Times*, October 3, 1914.)

SECRETARY BRYAN'S PROPOSAL RELATIVE TO FLOATING MINES ON THE HIGH SEAS (1915)

In regard to floating mines, Secretary Bryan on February 20, 1915, proposed[1] to the German and British Governments to agree:

"1. That neither will sow any floating mines, whether upon the high seas or in territorial waters; that neither will plant on the high seas anchored mines except within cannon range of harbors for defensive purposes only; and that all mines shall bear the stamp of the Government planting them and be so constructed as to become harmless if separated from their moorings."

The German note of February 28 in answer to this proposal contained the following paragraph relative to the use of floating mines:

"1. With regard to the sowing of mines, the German Government would be willing to agree as suggested not to use floating mines and to have anchored mines constructed as indicated. Moreover, they agree to put the stamp of the Government on all mines to be planted. On the other hand, it does not appear to them to be feasible for the belligerents wholly to forego the use of anchored mines for offensive purposes."

A few days later (March 15th) Sir Edward Grey handed the American Ambassador a memorandum discussing Germany's method of conducting the war as compared with that of Great Britain, dated March 13th. It contained the following statement in regard to the employment of mines by Great Britain:

[1] This proposal in regard to mines was associated with a similar proposal in regard to submarine attacks on merchant vessels and the use of neutral flags with the purpose of disguise or *ruse de guerre*.

"3. At the very outset of the war a German mine layer was discovered laying a mine field on the high seas. Further mine fields have been laid from time to time without warning and so far as we know are still being laid on the high seas, and many neutral as well as British vessels have been sunk by them."

After discussing the violations of the law of war alleged to have been committed by the German Government, Sir Edward Grey continues: "On the other hand, I am aware of but two criticisms that have been made on British action in all these respects: (1) It is said that the British naval authorities also have laid some anchored mines on the high seas. They have done so, but the mines were anchored and so constructed that they would be harmless if they went adrift and no mines whatever were laid by the British naval authorities till many weeks after the Germans had made a regular practice of laying mines on the high seas. (2) . . ."

(Extracts from the *Correspondence* published by the State Department; *American Journal of International Law, Supplement*, July, 1915, pp. 97–99.)

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§ 15. SANCTIONS: MEANS TO ENFORCE RESPECT FOR THE LAWS OF WAR

(*a*) Investigation by the Government responsible

THE TREATMENT OF BRITISH PRISONERS (1780)

General Washington to General Clinton

July 26, 1780.

I AM exceedingly obliged by the favorable sentiments you are pleased to entertain of my disposition towards prisoners; and I beg leave to assure you, Sir, that I am sensible of the treatment which those under your direction have generally experienced. There is nothing more contrary to my wishes, than that men in captivity should suffer the least unnecessary severity or want; and I shall take immediate occasion to transmit a copy of the report

you enclose . . . to the commandant at Charlottesville, with orders to inquire into the facts, and to redress grievances wherever they may exist.

(George Washington: *Writings*, collected and edited by W. C. Ford [11 vols., New York, 1889–91], vol. VIII, pp. 360–61.)

THE *BARALONG* INCIDENT (1915)

[THE following condensed outline of the *Baralong* case is made up of extracts taken almost textually from the British and German notes:]

On December 6, 1915, Ambassador Page, acting under telegraphic instructions received from the American Government, transmitted to Sir Edward Grey a "memorandum from the German Government (dated November 28, 1915) concerning the murder of the crew of a German submarine by the commander of the British auxiliary cruiser *Baralong*," which stated that:

"According to the unanimous statements" of these witnesses [whose affidavits were annexed], the occurrence took place as follows: "In August, 1915, the British steamer *Nicosian* was on her way from New Orleans to Avonmouth. She carried about 350 mules for war purposes, thus being laden with contraband. The witnesses were shipped as muleteers and superintendents. On the 19th August, about 70 nautical miles south of Queenstown (Ireland), the steamer was stopped by a German submarine and fired on, after the whole crew, including the witnesses, had first left the ship in the life-boats.

"When the witnesses were in the life-boats outside the line of fire from the submarine, a steamer which had been already noticed by the witnesses, Garrett, Hightower, Clark, and Curran, when still on board the *Nicosian*, approached the spot. This, as afterwards transpired, was the British auxiliary cruiser *Baralong*. As this steamer approached all the witnesses noticed clearly that she was flying the American flag at the stern and that she carried on her sides large shields with the American flag painted on them. As the steamer carried the distinguishing marks of a neutral ship and had shown signals, which according to the seafaring members of

the crew of the *Nicosian* meant that she was willing to assist if desired, and as there was nothing in her outward appearance to indicate her warlike character, the crew in the life-boats presumed that she was merely concerned with their rescue.

"While the submarine was firing at close range on the port side of the *Nicosian*, the unknown steamer came up behind the latter and steamed past on her starboard side. When she was a short distance ahead of the *Nicosian's* bow, she opened fire on the submarine at first, as all the witnesses, with the exception of Garrett, affirm, with small arms, and immediately afterwards with cannon, which had been hidden up to that time by screens, and were only visible when the latter were removed. The witness Curran also deposed that the American flag flying at the stern of the unknown ship was only lowered after the rifle fire. He repeated this statement in the enclosed affidavit made before the public notary, Robert Schwarz, at New York, on the 21st October, 1915. (Annex No. 4.)

"As the submarine after being struck several times began to sink, the commander and a number of seamen sprang overboard, the seamen having first removed their clothes. Some of them (the number is given by the witnesses Garrett and Curran as five) succeeded in getting on board the *Nicosian*, while the remainder seized the ropes left hanging in the water when the *Nicosian's* life-boats were lowered. The men clinging to the ropes were killed partly by gun-fire from the *Baralong* and partly by rifle fire from the crew, while the witnesses were boarding the *Baralong* from the life-boats or were already on her deck. With regard to this, the witness Curran also further testifies that the commander of the unknown ship ordered his men to line up against the rail and to shoot at the helpless German seamen in the water.

"Next the commander of the *Baralong* steamed alongside the *Nicosian*, made fast to the latter, and then ordered some of his men to board the *Nicosian* and search for the German sailors who had taken refuge there. The witnesses Palen and Curran testify regarding this incident that the commander gave the definite order 'to take no prisoners.' Four German sailors were found on the *Nicosian*, in the engine-room and screw tunnel, and were killed.

"The commander of the submarine, as the witnesses unani-

mously testify, succeeded in escaping to the bows of the *Nicosian*. He sprang into the water and swam round to the bow of the ship towards the *Baralong*. The English seamen on board the *Nicosian* immediately fired on him, although, in a manner visible to all, he raised his hands as a sign that he wished to surrender, and continued to fire after a shot had apparently struck him in the mouth. Eventually he was killed by a shot in the neck.

"All the witnesses were then temporarily ordered back on board the *Nicosian*. There the witnesses Palen and Cosby each saw one body of a German sailor, while the witness Curran — who remained on board the steamer with members of the crew absolutely necessary to man her — saw all four bodies, which were thrown overboard in the afternoon.

"The commander of the *Baralong* had the *Nicosian* towed for a few miles in the direction of Avonmouth, and then sent back to the *Nicosian* the remainder of the crew who were still on the *Baralong;* at the same time he sent a letter to the captain of the *Nicosian*, in which he requested the latter to impress on his crew, especially the American members of it, to say nothing about the matter, whether on their arrival at Liverpool or on their return to America. The letter, which the witness Curran himself has read, was signed 'Captain William McBride, H.M.S. *Baralong*.' That the unknown vessel was named the *Baralong* was discovered also by the witness Hightower from a steward of the steamer, when he (the witness) was on board this ship; while the witness Palen deposes that he, when he was leaving the ship, saw this name indistinctly painted on the bows."

The memorandum closes as follows: "The German Government inform the British Government of this terrible deed, and take it for granted that the latter, when they have examined the facts of the case and the annexed affidavits, will immediately take proceedings for murder against the commander of the auxiliary cruiser *Baralong* and the crew concerned in the murder, and will punish them according to the laws of war. They await in a very short time a statement from the British Government that they have instituted proceedings for the expiation of this shocking incident; afterwards they await information as to the result of the proceedings, which should be hastened as much as possible, in order that they may

convince themselves that the deed has been punished by a sentence of corresponding severity. Should they be disappointed in this expectation, they would consider themselves obliged to take serious decisions as to retribution for the unpunished crime."

In a sarcastic note of answer, dated December 14, 1915, Sir Edward Grey accused the German Government and forces of violating the laws of war, and stated that though the British Government did not accept the German allegations, "the charge against the commander and crew of the *Baralong* is negligible compared with the crimes which seem to have been deliberately committed by German officers, both on land and sea, against combatants and non-combatants."

In reference to the German suggestion, the British Minister called attention "to three naval incidents which occurred during the same forty-eight hours in the course of which the *Baralong* sank the submarine and rescued the *Nicosian*." The incidents referred to were the sinking of the *Arabic* and the *Ruel* and the firing on the crew of a stranded British submarine. Sir Edward Grey concluded his account of these cases with the following counter-proposal: "It seems to His Majesty's Government that these three incidents, almost simultaneous in point of time, and not differing greatly in point of character, might, with the case of the *Baralong*, be brought before some impartial court of investigation, say, for example, a tribunal composed of officers belonging to the United States navy. If this were agreed to, His Majesty's Government would do all in their power to further the inquiry, and to do their part in taking such further steps as justice and the findings of the court might seem to require."

The German Government responded in a note dated January 10, 1916, in which they entered "the strongest protest against these unheard of and unproved charges leveled by the British Government against the German army and navy, as well as against the imputation that the German authorities failed to prosecute crimes of this sort when they come to their knowledge. . . ." The German Government declared that the "three cases quoted by the British Government were at the time made the object of a thorough investigation by the competent German authorities." The note briefly described the results of these in-

vestigations. As to the British proposal, the German Government declared that they held to the point of view "that charges raised against members of the German fighting forces must be investigated by their own competent authorities, and that this provides every guarantee for an impartial judgment of the case, and, if need be, for adequate punishment. This was all that they required from the British Government in the *Baralong* case, not doubting for a moment but that a court martial consisting of British naval officers would inflict suitable punishment for the cowardly and treacherous murder. Their demand was, moreover, all the more justified in view of the fact that the sworn declarations of American witnesses (*videlicet* neutral) which were presented to the British Government leave practically no doubt at all about the guilt of the commander and crew of the *Baralong*." The note concluded by a declaration to the effect that the German Government found themselves "obliged to take in hand the punishment of the unexpiated crime, and to apply the retaliatory measures which the circumstances of the case demand." In another note of January 10 Sir Edward Grey controverted the results of the German findings in regard to the incidents referred to.

(See the official correspondence published in the London *Times*, January 5 and 20, 1916, and March 8, 1916; *American Journal of International Law, Supplement*, April, 1916.

(*b*) Punishment

ARABI PASHA PUNISHED (1882)

. . . On the morning of July 12, 1882, while the British fleet was lying off Alexandria, in support of the authority of the Khedive of Egypt, and the rebels under Arabi Pasha were being driven to great straits, a rebel boat, carrying a white flag of truce, was observed approaching H.M.S. *Invincible* from the harbor, whereupon H.M. ships *Téméraire* and *Inflexible*, which had just commenced firing, were ordered to suspend fire. So soon as the firing ceased the boat, instead of going to the *Invincible*, returned to the harbor. A flag of truce was simultaneously hoisted by the rebels on the

Ras-el-Tin fort. These deceits gave the rebels time to leave the works and to retire through the town, abandoning the forts, and withdrawing the whole of their garrison, under the flag of truce. Furthermore they left the Bedouin convicts to pillage and fire the town and murder the Europeans. For these offenses Arabi was brought to trial by the Egyptian Government and condemned, with the full approval of the Government of Great Britain.[1]

(Extract from Halleck: *International Law* [4th ed., revised and rewritten by Sir G. Sherston Baker, London, 1908], vol. II, p. 350.)

(c) Reprisals

(See under § *16, Military reprisals*)

(d) Protests

(See previous cases)

(e) Interposition and intervention

PRESIDENT WILSON'S REPLY TO THE BELGIAN COMMISSION (1914)

WASHINGTON, Sept. 10. The Royal Belgian Commission of King Albert to the United States, sent here on a special mission to lay before President Wilson evidence of atrocities alleged to have been committed by German soldiers against Belgium and its people, was received in the Blue Room at the White House this afternoon by the President.

[1] Extract from the text of the charges against Arabi Pasha, drafted by Borelli Bey on behalf of the prosecution: "Ahmed Arabi is accused: 1. Of having, against the laws of war and in violation of the right of nations, hoisted the white flag at Alexandria on the morning of July 12, and of having at the same moment withdrawn his troops, and ordered the pillage and firing of the town of Alexandria ('fait procéder au pillage et à l'incendie')." Extract from dispatch of Earl Granville to Sir E. Malet (October 23, 1882): "On September 8 you were informed that . . . H.M.'s Government would not take steps to prevent execution in cases such as the following: having been guilty of taking part in the burning of Alexandria, of abusing the flag of truce on July 12, or of being implicated in the murder of Europeans." (Baker's Note.)

Accompanied by E. Havenith, the Belgian Minister to the United States, the members of the Commission called first at the State Department, were presented to Secretary Bryan, and were accompanied by him to the White House.

As spokesman for the Commission, Henry Carton de Wiart, who came to this country vested with special diplomatic powers and clothed with the rank of Envoy Extraordinary and Minister Plenipotentiary, read an oral statement to the President, explaining the mission upon which King Albert had sent the Commissioners:

"His Majesty the King of the Belgians has appointed a special envoy for the purpose of acquainting the President of the United States of America with the deplorable state of affairs prevailing in Belgium, whose neutrality has been unjustly violated, and who since the beginning of hostilities has been the theatre of the worst outrages on the part of the invading German army, in defiance of rule solemnized by international treaty and customs consecrated by public right and law of nations.

"Mr. Henry Carton de Wiart, Minister of Justice, has been chosen for this mission. He is accompanied by Messrs. de Sadeleer, Hymans, and Vandervelde, Ministers of State. Count Louis Lichtervelde is attached to the mission as Secretary."

M. de Wiart then delivered the following address:

"*Excellency:* His Majesty, the King of the Belgians, has charged us with a special mission to the President of the United States.

"Let me say to you how much we feel ourselves honored to have been called upon to express the sentiments of our King and of our whole nation to the illustrious statesman whom the American people have called to the highest dignity of the commonwealth.

"As far as I am concerned, I have already been able, during a previous trip, to fully appreciate the noble virtues of the American nation, and I am happy to take this opportunity to express all the admiration with which they inspire me.

"Ever since her independence was first established, Belgium has been declared neutral in perpetuity. This neutrality, guaranteed by the powers, has recently been violated by one of them. Had we consented to abandon our neutrality for the benefit of one of the belligerents, we would have betrayed our obligations toward the

others. And it was the sense of our international obligations as well as that of our dignity and honor that has driven us to resistance.

"The consequences suffered by the Belgian nation were not confined purely to the harm occasioned by the forced march of an invading army. This army not only seized a great portion of our territory, but it committed incredible acts of violence, the nature of which is contrary to the law of nations.

"Peaceful inhabitants were massacred, defenseless women and children were outraged, open and undefended towns were destroyed, historical and religious monuments were reduced to dust, and the famous library of the University of Louvain was given to the flames.

"Our Government has appointed a Judicial Commission to make an official investigation, so as to thoroughly and impartially examine the facts and to determine the responsibility thereof, and I will have the honor, Excellency, to hand over to you the proceedings of the inquiry.

"In this frightful holocaust which is sweeping all over Europe, the United States has adopted a neutral attitude.

"And it is for this reason that your country, standing apart from either one of the belligerents, is in the best position to judge, without bias or partiality, the conditions under which the war is being waged.

"It is at the request, even at the initiative of the United States, that all civilized nations have formulated and adopted at The Hague a law regulating the laws and usage of war.

"We refuse to believe that war has abolished the family of civilized powers, or the regulations to which they have freely consented.

"The American people has always displayed its respect for justice, its search for progress and an instinctive attachment for the laws of humanity. Therefore, it has won a moral influence which is recognized by the entire world. It is for this reason that Belgium, bound as she is to you by ties of commerce and increasing friendship, turns to the American people at this time to let it know the real truth of the present situation. Resolved to continue unflinching defense of its sovereignty and independence, it deems it a duty to bring to the attention of the civilized world the innumer-

able grave breaches of rights of mankind of which she has been a victim.

"At the very moment we were leaving Belgium, the King recalled to us his trip to the United States and the vivid and strong impression your powerful and virile civilization left upon his mind.

"Our faith in your fairness, our confidence in your justice, in your spirit of generosity and sympathy, all these have dictated our present mission."

President Wilson in reply said to the Commission:

"Permit me to say with what sincere pleasure I receive you as representatives of the King of the Belgians, a people for whom the people of the United States feel so strong a friendship and admiration, a King for whom they entertain so sincere a respect, and express my hope that we may have many opportunities of earning and deserving their regard.

"You are not mistaken in believing that the people of this country love justice, seek the true paths of progress, and have a passionate regard for the rights of humanity.

"It is a matter of profound pride to me that I am permitted for a time to represent such a people and to be their spokesman, and I am proud that your King should have turned to me in time of distress as to one who would wish on behalf of the people he represents to consider the claims to the impartial sympathy of mankind of a nation which deems itself wronged.

"I thank you for the document you have put in my hands containing the result of an investigation made by a judicial committee appointed by the Belgian Government to look into the matter of which you have come to speak. It shall have my utmost attentive perusal and my most thoughtful consideration.

"You will, I am sure, not expect me to say more. Presently, I pray God very soon, this war will be over. The day of accounting will then come, when, I take it for granted, the nations of Europe will assemble to determine a settlement. Where wrongs have been committed their consequences and the relative responsibility involved will be assessed.

"The nations of the world have, fortunately, by agreement made a plan for such a reckoning and settlement. What such a plan cannot compass, the opinion of mankind, the final arbiter in such

matters, will supply. It would be unwise, it would be premature for a single government, however fortunately separated from the present struggle, it would be inconsistent with the neutral position of any nation, which, like this, has no part in the contest, to form or express a final judgment.

"I need not assure you that this conclusion, in which I instinctively feel that you will yourselves concur, is spoken frankly because in warm friendship, and as the best means of perfect understanding between us, an understanding based upon mutual respect, admiration, and cordiality.

"You are most welcome and we are greatly honored that you should have chosen us as the friends before whom you could lay any matter of vital consequence to yourselves, in the confidence that your cause would be understood and met in the same spirit in which it was conceived and intended."

The Commission made public a statement containing a summary of the evidence laid before the President.

(From the report in the New York *Times*, September 17, 1914, abridged and transposed.)

(f) Publicity

EMPEROR WILLIAM'S PROTEST TO PRESIDENT WILSON (1914)

LONDON, September 10. The correspondent of the *Daily Mail* at Rotterdam has telegraphed the text of the message sent by Emperor William to President Wilson under date of September 4. It is as follows:

"I consider it my duty, Sir, to inform you, as the most notable representative of the principles of humanity, that after the capture of the French fort of Longwy my troops found in that place thousands of dum-dum bullets, which had been manufactured in special works by the French Government. Such bullets were found not only on French killed and wounded soldiers and on French prisoners, but also on English troops. You know what terrible wounds

and awful suffering are caused by these bullets, and that their use is strictly forbidden by the generally recognized rules of international warfare.

"I solemnly protest to you against the way in which this war is being waged by our opponents, whose methods are making it one of the most barbarous in history. Besides the use of these awful weapons, the Belgian Government openly incited the civil population to participate in the fighting, and has for a long time carefully organized their resistance. The cruelties practiced in this guerrilla warfare, even by women and priests, toward wounded soldiers, and doctors and hospital nurses — physicians were killed and lazarets fired on — were such that eventually my Generals were compelled to adopt the strongest measures to punish the guilty and frighten the bloodthirsty population from continuing their shameful deeds.

"Some villages and even the old town of Louvain, with the exception of its beautiful Town Hall (Hotel de Ville), had to be destroyed for the protection of my troops.

"My heart bleeds when I see such measures inevitable, and when I think of the many innocent people who have lost their houses and property as a result of the misdeeds of the guilty.

"WILHELM I. R."

(Extract from New York *Times*, September 11, 1914.)

THE BELGIAN COMMITTEE OF INQUIRY (1914)

Mr. D. M. Mason (Coventry, Min.) asked whether the statement of German atrocities, issued through the British Press Bureau, and drawn up by a Belgian Committee of Inquiry, was true, and if so what action His Majesty's Government proposed to take to protest against so flagrant a violation of the rules of civilized warfare.

Mr. Asquith: "The statements referred to are the result of an inquiry by a committee constituted and presided over by the Belgian Minister of Justice, and composed of the highest judicial and university authorities of Belgium. They have been officially communicated to His Majesty's Government by the Belgian Minister

at this Court. His Majesty's Government understand that the Belgian Government are taking all the necessary steps to bring the facts established by their official court to the knowledge of the civilized world." (Cheers.)

(Extract from the Report of the Debates in the House of Commons, August 26, 1914, London *Times*, August 27, 1914.)

THE CONCLUSIONS OF THE BRYCE COMMITTEE (1915)

FROM the foregoing pages it will be seen that the Committee have come to a definite conclusion upon each of the heads under which the evidence has been classified.

It is proved:

(i) That there were in many parts of Belgium deliberate and systematically organized massacres of the civil population, accompanied by many isolated murders and other outrages.

(ii) That in the conduct of the war generally innocent civilians, both men and women, were murdered in large numbers, women violated, and children murdered.

(iii) That looting, house burning, and the wanton destruction of property were ordered and countenanced by the officers of the German Army, that elaborate provision had been made for systematic incendiarism at the very outbreak of the war, and that the burnings and destruction were frequent where no military necessity could be alleged, being indeed part of a system of general terrorization.

(iv) That the rules and usages of war were frequently broken, particularly by the using of civilians, including women and children, as a shield for advancing forces exposed to fire, to a less degree by killing the wounded and prisoners, and in the frequent abuse of the Red Cross and the White Flag.

Sensible as they are of the gravity of these conclusions, the Committee conceive that they would be doing less than their

duty if they failed to record them as fully established by the evidence. Murder, lust, and pillage prevailed over many parts of Belgium on a scale unparalleled in any war between civilized nations during the last three centuries.

Our function is ended when we have stated what the evidence establishes, but we may be permitted to express our belief that these disclosures will not have been made in vain if they touch and rouse the conscience of mankind, and we venture to hope that as soon as the present war is over, the nations of the world in council will consider what means can be provided and sanctions devised to prevent the recurrence of such horrors as our generation is now witnessing.[1] We are, etc.,

BRYCE.
F. POLLOCK.
EDWARD CLARKE.
KENELM E. DIGBY.
ALFRED HOPKINSON.
H. A. L. FISHER.
HAROLD COX.

(*Bryce Committee Report*, p. 61.)

(g) Neutral observers and investigations

THE FUNCTION OF THE CARNEGIE BALKAN COMMISSION OF INQUIRY (1914)

APROPOS of a statement by the *Trgovinski Glasnik* the Report of the Commission makes the following suggestion:

". . . The function of the Commission was in no sense 'juridical,' and its conclusions [to some extent foreseen by the paper

[1] *Mr. D. Mason* asked the Prime Minister whether, in view of the terrible facts in the report of Lord Bryce's Committee, he would consider the advisability of bringing it before the notice of neutral countries.

Mr. Asquith: "I am sure that Lord Bryce's report will be read all over the world." (Hear, hear.)

Mr. Pike Pease (Darlington, Opp.): "Would it not be desirable that every householder in the country should be furnished with a copy of this report?" (Hear, hear.)

Mr. Asquith was understood to indicate assent.

(From the Debates in the House of Commons, May 13, 1915, as reported in the London *Times*, May 14, 1915.)

referred to], are in no way analogous to intervention by international diplomacy. The Commission only represented pacificist public opinion, although in the course of its work it frequently received assistance from the States concerned. This was the case in Bulgaria, where it had the opportunity of interrogating official personages on the facts which interested it; where it received information not only from private persons but from the Government itself; and where it was permitted to search the archives (the Greek letters) and to communicate with State institutions (the government departments, the Holy Synod). This was also the case in Greece to some extent.

"Nevertheless the question raised by the *Trgovinski Glasnik* is not superfluous, and the Commission deals with it here. Were it possible for there to be a commission of inquiry with the belligerent armies, during war, not in the shape of an enterprise organized by private initiative, but as an international institution, dependent on the great international organization of Governments, which is already in existence, and acts intermittently through Hague Conferences, and permanently through the Hague Tribunal, — the work of such a body would possess an importance and an utility such as can not attach to a mere private commission. Nevertheless, the Commission has succeeded in collecting a substantial body of documents, now presented to the reader. It has, however, met with obstacles, in the course of its work, which have cast suspicion on its members. A commission which was a permanent institution, enjoying the sanction of the Governments which signed the Convention, could exercise some control in the application of these conventions. It could foresee offenses, instead of condemning them after they had taken place. If it is stated, correctly enough, that conventions can not be carried out so long as they do not form an integral part of the system of military instruction, it may be stated with even more force, that they can not be carried out without a severe and constant control in the theater of war. Diplomatic agents and military attachés are given a special place with the army in action. Military writers have already mooted the idea of establishing a special institution for the correspondents who follow the army. Attention ought, therefore, to be given to the control which could be exercised by an international commis-

sion, not there to divulge military secrets, but as the guardian of the army's good name, while pursuing a humanitarian object.

"If the work we have done in the Balkans could lead to the creation of such an institution as this, the Commission would feel its efforts and its trouble richly rewarded, and would find there a recompense for the ungrateful task undertaken at the risk of re-awakening animosity and drawing down upon itself reproaches and attacks. May their task then be the prelude to a work destined to grow!"

(*Report of the Balkan Commission* [published by the Carnegie Endowment for International Peace, Washington, D.C., 1914], pp. 233–34.)

NEWSPAPER CORRESPONDENTS AND MILITARY ATTACHÉS

MILITARY operations in the wars of the nineteenth century were closely followed and carefully reported by newspaper correspondents, like the famous William H. Russell, of the London *Times*, — who were as remarkable for their literary descriptive powers as for their practical acquaintance with all military details. In more recent wars, however, the Governments, by their strict censorship and refusal to permit newspaper correspondents within the areas of hostilities, have impaired their utility, and the warring powers, following this policy of jealous secrecy, do not hesitate to restrict as far as possible the facilities for observation of military attachés of neutral states.[1]

The military authorities may be justified in applying these measures, but the unrestrained opportunities for the abusive power which such a secrecy and strangling of publicity permits, must be condemned by every lover of justice. From the point of view of humanity as a whole, it is of the utmost importance to have some means of learning how far the combatants observe the laws of war.

[1] The attitude of Great Britain is shown by the following extract from a cable of October 13, 1914, from London (New York *Times*, October 14, 1914):

"Under the present rulings of the War Office and the Admiralty an American attaché is permitted to see nothing. Naval attachés have not only failed to get permission to be aboard ships, but are even prohibited from visiting dock-yards, aerial establishments, and other naval plants."

Secrecy and censorship permit the dissemination of unfounded rumors and accusations, the effect of which may be more disastrous to ultimate success than any evils resulting from a very wide publicity could be. The consequences of the lack of reliable, impartial information during the early months of the war now in progress may perhaps in future influence the military authorities themselves to ask for the establishment of some system of publicity, of such a nature as to protect them against unfounded rumors, without interfering too seriously with that secrecy which is an absolute essential for the success of military operations.

THE AMERICAN EMBASSY INVESTIGATES THE ISLE OF MAN DETENTION CAMP (1914)

Statement issued by the Press Bureau, London, December 29, 1914

THE United States Ambassador has communicated to the Foreign Office the following report by Mr. Chandler Hale, of the United States Embassy, on the Isle of Man detention camp and the recent riot there. Mr. Hale left for Douglas on the night of the 23d November, the date on which the riot in the Isle of Man detention camp was reported in the press, and made a careful inquiry into the cause of the riot and an inspection of the camp. He reports as follows:

"3300 non-belligerent enemy aliens are interned at Douglas, consisting of 2000 Germans and 1300 Austrians and Hungarians. The camp is now somewhat crowded, but the authorities will transfer 1000 men to another camp at Peel, on the other side of the island, as soon as accommodations there are ready for them — probably in a few weeks. At present 500 are housed in two large comfortable buildings, where each man has a bunk with mattress and three blankets. Other and similar huts are being erected for the rest of the prisoners who are now living in tents, each of which has a raised wooden flooring. The dietary is excellent. Breakfast, 1 pint porridge, 1¼ oz. syrup, 1 pint tea with sugar and milk, 8 oz. bread and ½ oz. margarine. Supper, 1 pint tea with sugar and milk, ½ oz. margarine and 8 oz. bread. Dinner, 20 oz. potatoes, 4 oz. bread, a green vegetable every other day and meat in following rotation: Sunday, ¼ lb. roast beef; Monday, stew;

Tuesday, 6 to 8 oz. sausages; Wednesday, scouce made of meat, potatoes, and vegetables; Thursday, stew; Friday, sausages; Saturday, scouce. The men have their meals in a large glass-roofed, steam-heated, and electric lighted building where 1600 can eat at a time. The latrines and washing facilities are ample and very good, and are kept clean, [and] there is hot and cold running water. As compared with Ruhleben or any other camp that I have visited in either country, conditions are very good. The riot started, it is alleged, as the result of bad potatoes. The authorities admit that one shipment proved worm-eaten, and they were rejected after a few days. On the 18th November the men declared a hunger strike at dinner. The following day they ate their dinner without any complaint, and immediately after the withdrawal of the guards from the rooms, the prisoners suddenly, and evidently by pre-arrangement, started in to break up the tables, chairs, crockery, and everything they could lay their hands on. Upon the appearance of the guards, the rioters charged them armed with table legs and chairs. The guards fired one volley in the air, but it had no effect. Finally, and in self-protection, they fired a second round which resulted in the death of four Germans and one Austrian, and the wounding of nineteen others. I talked freely with the wounded and also with many others, and gathered that the prisoners were in the wrong and had only themselves to blame. One of the most intelligent men I talked with, a German, said that a considerable percentage of the men were a bad lot gathered in from the East of London, with several agitators amongst them who preached discontent and insubordination which was really the direct cause for the trouble. I am satisfied this was so, as I saw the whole camp and every detail connected with it, and have nothing but commendation for its entire organization and the kindly treatment accorded the prisoners by the Commandant and his subordinates."

(*British White Paper, Miscellaneous, No. 7, 1915*, Cd. 7817, No. 47.)

(*h*) Indemnity

INDEMNITY (*Acland*)

"THERE are also certain particular reasons which make a strict observance of these rules for the future a matter of great importance. Great Britain undertook at The Hague, in 1907, to issue instructions to her troops on the subject of war law, and to pay an indemnity for any breaches of war law committed by them. Thus, if in the future our troops do not know and observe the laws of war (and on some occasions, as Mr. Spaight shows, we did not know and observe them during the war in South Africa), their fault will appear in War Office Estimates, and will be felt in the taxpayers' pockets."

(Extract from the Preface by Francis D. Acland, Parliamentary Under-Secretary for Foreign Affairs, in Spaight's *War Rights on Land* [London, 1911], pp. vii, viii.)

(*i*) Respect for international law on the part of individuals

COLONEL PETERS DISOBEYS ORDER TO BURN CHAMBERSBURG (1865)

. . . THIS act of his subordinate was a great shock to General Lee's sensibilities. Although the destruction of Chambersburg was wholly in the nature of reprisal for the wholesale destruction of the Virginia valleys and the burning of Southern cities, yet it was so directly in contravention of General Lee's orders, and so abhorrent to the ideas and maxims with which he imbued his army, that a high-spirited Virginia soldier flatly refused to obey the order when directed by his superior officer to apply the torch to the city. That soldier, whose disobedience was prompted by the highest dictates of humanity, deserves a place of honor in history. He was not only a man of iron resolution and imperturbable courage, who fought from April, 1861, to April, 1865, and was repeatedly wounded in battle, but he was a fit representative of that noblest type of soldier who will inflict every legitimate damage on

the enemy in arms against his people, but who scorns, even as a retaliatory measure, to wage war upon defenseless citizens and upon women and children. This knightly Southern soldier was Colonel William E. Peters, of the Twenty-first Virginia Cavalry, who has for forty-six years been a professor in the University of Virginia and at Emory and Henry College. He obeyed the order to move into Chambersburg with his troops and occupy the town, as he was not apprised of the purpose of its occupancy; but when the next order reached him to move his men to the court-house, arm them with torches, and fire the town, his spirit rose in righteous revolt. He calmly but resolutely refused obedience, preferring to risk any consequences that disobedience might involve, rather than be instrumental in devoting defenseless inhabitants to so dire a fate. If all the officers who commanded troops in that war, in which Americans fought one another so fiercely and yet so grandly, had possessed the chivalry of Colonel Peters, the history of the conflict would not have been blurred and blackened by such ugly records of widespread and pitiless desolation. Colonel Peters was promptly placed under arrest for disobedience to orders; but, prudently and wisely, he was never brought to trial.

(Extract from Gordon: *Reminiscences of the Civil War* [New York, 1903], pp. 305-06.)

§ 16. MILITARY REPRISALS

(*a*) Repressive reprisals

GENERAL EISLER'S EXPERIENCE (1914)

The Staff of the Forty-third Division of Infantry to the Headquarters of the Fifth Army

PETKOVCI, *August 27, 1914.*

IN the night of August 16 the scouting detachments of the Infantry Battalion II/100 were shot at from several houses in the village of Ljubovija. As the guilty persons could not be detected and arrested, the houses specified, and only those, were set on fire under orders.

On August 17th, during our advance on Petzka through Lju-

bovija, we were enabled to refrain from violence as the population remained passive.

After our column had been attacked by Komitadjis near Bacevits, however, I personally ordered houses set on fire as a measure of reprisal; the priest of Pacevitsa, who was court-martialled and convicted of having incited the people of his parish to resist, was shot.

From that time on persons and property were absolutely spared, because the population behaved correctly.

In my opinion, every effort should be made to treat population and property with consideration in order to avoid irritating without cause a people whom we can dispose favorably by fair measures; but the severest means of retaliation must be taken whenever the population attempts to attack our troops. The population must be made to understand fully the difference in treatment; it must be made to realize that kind or harsh treatment depends wholly upon its own behavior.

EISLER, *Lieutenant-General.*

(From the *Collection of Evidence* [concluded January 31, 1915] published by the Austro-Hungarian Ministry of Foreign Affairs, No. XII, p. 81, of the English edition.)

EXTRACT OF A PROCLAMATION TO THE COMMUNAL AUTHORITIES OF THE TOWN OF LIÈGE (1914)

22d August, 1914.

THE inhabitants of the town of Andenne, after having protested their peaceful intentions, made a treacherous surprise attack on our troops.

It was with my consent that the General had the whole place burnt down, and about one hundred people shot.

I bring this fact to the knowledge of the town of Liège, so that its inhabitants may know the fate with which they are threatened, if they take up a similar attitude.

The General Commanding-in-Chief,

VON BÜLOW.

(From the English translation of the *Sixth Report* [November 10, 1914] of the *Belgian Committee of Inquiry.*)

THE SEGREGATION OF SUBMARINE PRISONERS (1915)

Official documents, statements, and comments as published in the Press

[EXTRACT from the London *Times* April 3, 1915:]

The Foreign Office communicates the following Notes:

"AMERICAN EMBASSY,
LONDON, *March 20, 1915.*

"The American Ambassador presents his compliments to His Majesty's Secretary of State for Foreign Affairs and has the honor under instructions from the Secretary of State at Washington, to transmit, hereto annexed, the text of a telegram, dated March 17, which Mr. Bryan has received from the German Foreign Office through the Embassy at Berlin:

"'According to notices appearing in the British Press, the British Admiralty is said to have made known its intention not to accord to officers and crews of German submarines who have become prisoners, the treatment due to them as prisoners of war, especially not to concede to the officers the advantage of their rank.

"'The German Government is of the opinion that these reports are not correct, as the crews of the submarines acted in the execution of orders given to them, and in doing this have solely fulfilled their military duties. At any rate, the reports in question have become so numerous in the neutral Press that an immediate explanation of the true facts appears to be of most urgent importance, if for no other reasons than consideration of public opinion in Germany.

"'The Imperial Foreign Office therefore requests the American Embassy to have inquiry of the British Government made by telegraph through the medium of the American Embassy at London as to whether and in what way they intend to treat officers and crews of German submarine boats who have been made prisoners in any respect worse than other prisoners of war. Should this prove to be the case, the request is added that in the name of the German Government sharpest protest be lodged with the British Government

against such proceedings, and that no doubt be left that for each member of the crew of a submarine made prisoner a British Army officer held prisoner of war in Germany will receive corresponding harsher treatment. The Imperial Foreign Office would be grateful for information at the earliest convenience regarding the result of the steps taken.'

"FOREIGN OFFICE, *April 1, 1915.*

"The Secretary of State for Foreign Affairs presents his compliments to the United States Ambassador, and with reference to His Excellency's note of the 20th ultimo respecting reports in the Press upon the treatment of prisoners from German submarines, has the honor to state that he learns from the Lords Commissioners of the Admiralty that the officers and men who were rescued from the German submarines U–8 and U–12 have been placed in the Naval Detention Barracks in view of the necessity of their segregation from other prisoners of war. In these quarters they are treated with humanity, given opportunities for exercise, provided with German books, subjected to no forced labor, and are better fed and clothed than British prisoners of equal rank now in Germany. As, however, the crews of the two German submarines in question, before they were rescued from the sea, were engaged in sinking innocent British and neutral merchant ships and wantonly killing non-combatants, they cannot be regarded as honorable opponents, but rather as persons who at the orders of their Government have committed acts which are offenses against the law of nations and contrary to common humanity.

"His Majesty's Government would also bring to the notice of the United States Government that during the present war more than 1000 officers and men of the German Navy have been rescued from the sea, sometimes in spite of danger to the rescuers, and sometimes to the prejudice of British naval operations. No case has, however, occurred of any officer or man of the Royal Navy being rescued by the Germans."

[Extract from the London *Times* of April 23, 1915, giving a report of the proceedings in the House of Commons, April 22:]

In reply to Lord C. Beresford, Mr. Primrose (Wisbech, Min.)

said: "On the 12th inst. I requested the United States Ambassador in London to be good enough to ask the United States Ambassador at Berlin by telegram to ascertain from the German Government whether there was any truth in the statement which had appeared in the Press that morning that 39 British officers had been placed in imprisonment in military detention barracks in retaliation for the alleged harsh treatment of the crews of German submarines. On the 17th inst. the United States Ambassador informed me that a number of British officers had been placed under officers' arrest as a reprisal for the treatment of the German submarine crews in England, and that the further procedure against those officers would be made to conform to the treatment of the German prisoners. I thereupon asked his Excellency to be good enough to ascertain by telegraph the names of the British officers who had been arrested. We have informed the United States Embassy that an inspection can be made of the treatment of German submarine officers and crews here if the same facilities are given by the German Government for inspection of the treatment of these British officers. This is practically the only way in which further information can be obtained."

[Extract from the London *Times* of April 26, 1915:]

The Secretary of State for Foreign Affairs has received the following communication:

"The American Ambassador presents his compliments to His Majesty's Secretary of State for Foreign Affairs, and, with reference to the telephonic message referred to in the last paragraph of the note Sir Edward Grey was good enough to address to him on the 19th inst. asking for the names of the thirty-nine English officers in Germany who have been placed under arrest as a reprisal for the treatment of German submarine crews in England, has the honor to quote the following telegram he has just received from the Ambassador at Berlin:

"List of officers is as follows:"

[Omitted.]

"The list is particularly interesting as showing that the Germans have chosen as the victims of their measures of reprisal officers belonging to the families and the regiments they consider

to be the most distinguished in this country. The proportion of Scottish names and regiments is remarkable. It will be seen that among the officers named are . . ."

[Extract from the New York *Times*, June 12, 1915:]

The German press expresses great satisfaction at the announcement of A. J. Balfour, First Lord of the British Admiralty, that hereafter prisoners taken from the German submarines will receive the same treatment as other prisoners of war.

The *Kölnische Zeitung* says that Great Britain abandoned her policy of separate treatment for the submarine prisoners only because it recoiled on that country.

The *Lokal Anzeiger*, the *Kreuz Zeitung* and other Berlin newspapers take a similar view, asserting that German reprisals have achieved their intended effect.

[Extract from the London *Times*, June 14, 1915:]

The following Note, dated June 12, has been addressed to the American Ambassador by the Secretary of State for Foreign Affairs:

"The Secretary of State for Foreign Affairs presents his compliments to the United States Ambassador, and has the honor to state that His Majesty's Government, having decided to release from naval custody those naval prisoners of war who were saved from the submarines U–8, U–12, and U–14, and to transfer them to the custody of the military authorities to be confined under precisely the same conditions as other prisoners of war, instructions have been given for the officers to be moved to Dyffryn Aled, Donington Hall, and Holyport, and for the men to be interned in Shrewsbury, Frith Hill, and Dorchester detention camps.

"His Majesty's Government expect that, in accordance with the undertaking of the German Government, they will at once send the thirty-nine British officers now under barrack arrest back to the ordinary detention camps; and they will be glad to learn as soon as possible to which camps the officers in question have been sent and which officers have been sent to which camps.

"The Secretary of State will be much obliged if Mr. Page will

communicate the foregoing to the United States Ambassador at Berlin by telegram, and request Mr. Gerard to obtain a reply from the German Government in regard to the matter at his early convenience."

(*b*) Preventive reprisals: threats, hostages, automatic reprisals

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PROCLAMATION POSTED IN BRUSSELS ON 25TH SEPTEMBER, 1914

General Government in Belgium

It has happened in districts at present occupied by more or less strong bodies of German troops that convoys of wagons and of patrols have been attacked by surprise by the inhabitants.

I draw the attention of the public to the fact that a "register" is kept of the localities, in the neighborhood of which such attacks have taken place, and that they may expect their punishment as soon as the German troops pass near them.

The Governor-General of Belgium,

BARON VON DER GOLTZ,

Field Marshal.

BRUSSELS, 25th *September, 1914.*

(Extract from the English translation of *Sixth Report* [November 10, 1914] *of the Belgian Commission of Inquiry.*)

NOTICE POSTED IN BRUSSELS ON 5TH OCTOBER, 1914, AND PROBABLY IN MOST OF THE COMMUNES OF THE KINGDOM

DURING the evening of 25th September the railway line and the telegraph wires were destroyed on the line Lovenjoul-Vertryck. In consequence of this, these two localities have had to render an account of this, and had to give hostages in the morning of the 30th September.

In future, the localities nearest to the place where similar acts take place will be punished without pity; *it matters little if they are accomplices or not.* For this purpose hostages have been taken from all localities near the railway line, thus menaced, and at the first attempt to destroy the railway line, or the telephone or telegraph wires, they will be immediately shot.

Further, all the troops charged with the duty of guarding the railway have been ordered to shoot any person who, in a suspicious manner, approaches the line, or the telegraph or telephone wires.

The Governor-General of Belgium,
(S) Baron von der Goltz,
Field Marshal.

(From the English translation of the *Sixth Report* [November 10, 1914] *of the Belgian Commission of Inquiry.*)

PROCLAMATION POSTED UP IN NAMUR ON 25TH AUGUST, 1914

1. The Belgian and French soldiers must be delivered as prisoners of war before 4 o'clock in front of the prison. *Citizens who do not obey will be condemned to hard labor for life in Germany.*

A rigorous inspection of houses will commence at 4 o'clock. Every soldier found will be immediately shot.

2. Arms, powder and dynamite must be given up at 4 o'clock. Penalty: being shot.

Citizens who know of a store of the above must inform the burgomaster, *under pain of hard labor for life.*

3. Every street will be occupied by a German guard, who will take ten hostages from each street, whom they will keep under surveillance. If there is any rising in the street, *the ten hostages will be shot.*

4. Doors may not be locked, and at night after eight o'clock there must be lights in three windows in every house.

5. It is forbidden to be in the street after eight o'clock. The in-

habitants of Namur must understand that there is no greater and more horrible crime than to compromise the existence of the town and the life of its citizens by criminal acts against the German army.

The Commander of the Town,

VON BÜLOW.

NAMUR, *25th August, 1914.*

(From the English translation of the *Sixth Report* [November 10, 1914] *of the Belgian Commission of Inquiry.*)

PRISONERS MADE TO REMOVE TORPEDOES (1864)

GENERAL SHERIDAN describes the following incident of his march toward Richmond, May 12, 1864:

"The enemy, anticipating that I would march by this route, had planted torpedoes along it, and many of these exploded as the column passed over them, killing several horses and wounding a few men, but beyond this we met with no molestation. The torpedoes were loaded shells planted on each side of the road, and so connected by wires attached to friction-tubes in the shells, that when a horse's hoof struck a wire the shell was exploded by the jerk on the improvised lanyard. After the loss of several horses and the wounding of some of the men by these torpedoes, I gave directions to have them removed, if practicable, so about twenty-five of the prisoners were brought up and made to get down on their knees, feel for the wires in the darkness, follow them up and unearth the shells. The prisoners reported the owner of one of the neighboring houses to be the principal person who had engaged in planting these shells, and I therefore directed that some of them be carried and placed in the cellar of his house, arranged to explode if the enemy's column came that way, while he and his family were brought off as prisoners and held till after daylight."

(*Personal Memoirs of P. H. Sheridan* [New York, 1888], vol. 1, pp. 380–81.)

THE BURNING OF FONTENOY (1871)

SHORTLY before the bridge at Fontenoy had been blown up, a train from Toul, with upwards of 1000 French prisoners, was approaching to pass over it, but the German double sentry, which had been placed on the bridge and had retired towards Toul, was in time to cause it to return. The village of Fontenoy, whose inhabitants were suspected of having taken part in the surprise, was burnt down at once on the 22d, and the population of all Lorraine was fined 10 million francs. As had been ordered on other lines, so it was in future arranged here, for every train to be accompanied by two French citizens, who were accommodated on the locomotive and kept as hostages. The blowing up of the bridges caused a very troublesome disturbance of the traffic. In spite of the most strenuous efforts of numerous laborers the traffic on a single line could only be restored after a fortnight, and on both lines after three weeks.

(Major-General J. Maurice: *The Franco-German War* [London, 1900], p. 563), giving a translation of article by Colonel George C. von Widdern, in active service during the war.)

(c) Reciprocity

PRISONERS' USE OF TOBACCO (1915)

Sir Edward Grey to the American Ambassador in London

FOREIGN OFFICE,
January 28, 1915.

Your Excellency,

I LEARN on good authority that British prisoners of war in Germany in certain camps are not allowed to smoke, and that the ground on which the prohibition is based is that German prisoners of war in this country are not permitted either to receive or buy tobacco.

I have the honor to request that your Excellency will inform the United States Ambassador at Berlin that this is not the case, and that German prisoners are allowed the use of tobacco. I should be grateful if Mr. Gerard, in bringing this matter to the

notice of the German Government, would add that His Majesty's Government will be glad to receive an assurance that the above-mentioned prohibition has been withdrawn; as otherwise (though they would take this course most unwillingly) they may be forced to reconsider the question of allowing the use of tobacco to German prisoners in England.

I have, &c.

E. GREY.

(*British White Paper, Miscellaneous No. 7, 1915* [Cd. 7817], p. 50.)

RECIPROCITY WAITS UPON RECIPROCITY (1914)

MR. ERIC FISHER WOOD, attaché at the Paris Embassy, gives the following account of his difficulties in caring for the Germans and other nationalities whose interests had been placed under the protection of the American Government:

"For two weeks now, I have been entirely ready to start on my first tour of the detention camps. The need has seemed so pressing that I have been prepared to start immediately on the receipt of permission from the Minister of Foreign Affairs. Mr. Herrick rightly refuses to allow me to start without this permission. The reason for the delay seems to be that France insists that she will accord us only those privileges with regard to her German prisoners that the German Government gives to the Spanish Embassy in Berlin with regard to the French prisoners in Germany. The hitch is that each takes exactly the same ground, so neither side does anything definite."

(E. F. Wood: *The Note-Book of An Attaché* [New York, 1915], pp. 53–54.)

(*d*) Super-reprisals

BOMBS OF PAPER (1916)

PARIS, July 24. — An official communication given out to-day said:

"On June 20, at 9:30 o'clock in the evening, Sub-Lieut. Marchal ascended at Nancy on board a Nieuport monoplane of a special

type, taking with him a supply of fuel sufficient to last fourteen hours. His mission was to cross Germany at a low altitude in order to drop proclamations on the capital, Berlin, and then to descend in Russia.

"This audacious flight was accomplished point by point, and after flying all night Lieutenant Marchal was compelled to descend at 8:30 o'clock in the morning of June 21 near Chelm, Russian Poland, at least 100 kilometers (62 miles) from the Russian lines. He was made a prisoner.

"The proclamation which Lieutenant Marchal dropped on Berlin began with the words:

"'We could bombard the open town of Berlin and thus kill the women and innocent children, but we are content to throw only the following proclamation.'

"Lieutenant Marchal was interned at Salzerbach, whence he forwarded to France a postal . . ."

(Extract from the New York *Times*, July 25, 1916.)

(e) Recognition of the enemy as a regular belligerent

THE UNION HESITATES TO RECOGNIZE THE CONFEDERACY AS A REGULAR BELLIGERENT (1861)

HEADLEY, in his *Great Rebellion*, gives the following account:

". . . Our Government endeavored to carry out the theory that the Southern Confederacy, being nothing more than an organized rebellion, it could not be recognized so far as to treat with it for exchange of prisoners. To do so would be a concession that far outweighed in importance the fate of our brave officers and soldiers in the rebel hands. This question now became still more embarrassed, as the South had resolved to treat our men precisely as we treated the crew of the privateer *Savannah*, whom we had incarcerated as pirates, and threatened to hang as such. Davis imprisoned man for man, and declared he would hang man for man. Our indignation had been aroused because England had recognized the rebels as belligerents, and the Government en-

deavored to avoid doing anything which might be construed into a similar recognition. While it professed to act on this hypothesis, it treated rebel officers taken in battle with more courtesy than is usually extended to prisoners of war. It conformed to every other rule of war except that of exchange of prisoners. This course was looked upon by a portion of the people as unreasonable, while all lamented the sufferings and dreary imprisonment it entailed on our soldiers captured by the enemy."

(J. T. Headley: *The Great Rebellion* [Hartford, 1863], vol. 1, p. 138.)

CHAPTER IV

THE TERMINATION OF HOSTILITIES

§ 17. THE PRINCIPLE OF *UTI POSSIDETIS*

THE SCHOONER *SOPHIE*

High Court of Admiralty, September 18, 1805

THIS was a question, as to the ship, reserved at the former hearing, on a claim given by the British proprietor, who stated her to have belonged to him, and to have been captured by the French, and carried into a port in Norway, and condemned by the French Consular Court in that country 1799. It now appeared that other proceedings had been afterwards had, on the former evidence, in the regular Court of Prize in Paris, where a sentence of condemnation had been pronounced, professing to affirm the sentence of the Consular Court.

[The British owner contended that there had been no valid sentence by a Prize Court to divest him of his property. The neutral claimant controverted this view, and further argued "that the capture and condemnation in question were acts of the late war. A treaty of peace had intervened; which must be taken to have effectually established the title of captor, and all other titles derived from him, on the ground of the *uti possidetis*, which may be considered as the natural basis of every treaty of peace, when no other conditions are expressed."

The advocate for the captors argued that "the neutral purchaser was no party to that contract [treaty of peace] and could not derive any protection from it."]

Sir William Scott [*Lord Stowell*], delivering the opinion of the Court: "I am of opinion that the title of the former owner is completely barred by the intervention of peace, which has the effect

of quieting all titles of possession arising from the war; and if the vessel has been transferred to the subject of another country, he also will be entitled to the same benefit from the treaty, as the captor himself would have been, if he had continued in possession. It is admitted that as to the enemy it would have this effect, and that it would not be lawful to look back beyond the general amnesty, to examine the title of his possession. If his property is transferred, the purchaser must also be entitled to the benefit of the same considerations, for otherwise it could not be said, that the intervention of peace would have the effect of quieting the possession of the enemy; because if the neutral purchaser was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him. I am of opinion, therefore, that the intervention of peace has put a total end to the claim of the British proprietor, and that it is no longer competent to him to look back to the enemy's title, either in his own possession, or in the hands of neutral purchasers. As to any effect of the new war, though that may change the relation of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before. Those purchasers, though no parties to the treaty, are entitled to the full benefit of it; because they derive their title from those who are."

Further proof of the property ordered — Finally restored September 27, 1806.

(See Robinson: *Admiralty Reports*, vol. VI, pp. 138–42. The opinion and statement of facts are given in full with condensed statement of arguments. — *Ed.*)

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§ 18. THE LIQUIDATION OF WAR

THE RELEASE OF THE FRENCH PRISONERS RETAINED IN GERMANY (1872)

From his own account we learn that when the Vicomte de Gontaut-Biron [1] accepted the post of first Ambassador from France to

[1] Vicomte de Gontaut-Biron: *Mon Ambassade en Allemagne* (1872–1873) [Plon-Nourrit et C^ie^, Paris, 1906]. Chapter II, of vol. I, from which this summary is taken,

the newly constituted German Empire he found his attention engaged by two important questions: that of the liberation of the French territory from the German army of occupation before the payment of the full amount of the war indemnity, and that of the release of certain French prisoners still retained by Germany. Soon after his arrival in Berlin early in January, 1872, the Ambassador of the Republic lost no time in presenting the views of his Government relative to this latter object. This he did with all the force and insistence the peculiarly delicate nature of his position would allow. The subject had already been much discussed in the press and a philanthropic French lady had visited the prisoners and succeeded in interesting the Empress and others in securing their release. The Empress promised to intervene at an appropriate opportunity. M. de Gontaut-Biron has given us his own appreciation of the merits of the controversy:

"In France, it must be admitted, the question of the sharpshooters [*francs-tireurs*] was not looked at with all the requisite justice; the French were blinded by a patriotic and quite natural feeling, that of their right to defend, at any cost, national territory invaded by enemies — a feeling which is in a certain sense sacred, and which looks upon everything as permissible in its efforts towards its fulfillment. This feeling has unquestionably given rise to prodigies of heroism, as in Spain and Russia in the first years of the century, and as in France during the war. But the fact was not considered that these prodigious feats in their turn gave rise to terrible reprisals, to horrible cruelties, so that war assumed a character of atrocity and savagery. This is what the modern law of nations has made an attempt to avoid by imposing certain rules favorable to humanity upon the conduct of war.

"To a certain extent, the vehemence of our claims was not justified. But did that make Germany blameless? The law may have been on her side; but who does not know the axiom, *summum jus summa injuria* [the full measure of the law may mean the full measure of injustice]? It is possible to be at once strictly within the law and quite outside of humanity. A pitiless rigor in the exercise of her rights as a belligerent, a severity amounting even to

the author devotes to an account of his diplomatic action to secure the release of his compatriots.

cruelty toward the guerillas [*corps francs*] and sometimes toward the hostages taken by her, the harshness and the incredibly large number of her requisitions of every sort, in kind and in money, not to speak here of the leonine conditions of peace, these were what made the rights of Germany, whose leaders were continually invoking Providence, a real attack upon Christian civilization; these were what contributed to engender hatreds hard indeed to calm.

"It came to our ears that the German Government was dividing the prisoners into categories, and that it would liberate certain among them without delay. The government was occupied with settling this question, so M. von Thile, Secretary of State for Foreign Affairs, had told M. de Gabriac. He repeated it to me at my first interview with him, on the 14th of January. Faithful to the restraint I had imposed upon myself, I made a mental note to take advantage of the occasion to speak to him of our poor prisoners, if an opportunity were offered me; otherwise, not to approach the question of my own accord that day. M. von Thile quickly relieved my anxiety. Upon my expressing to him my hope of seeing good relations, founded on both sides on the wish to maintain peace, consolidated between France and Germany, he answered that his hopes were of the same nature as mine, and that the German Government was furnishing proofs of her good disposition by seeking very diligently to arrange for a settlement of the matter of our prisoners according to our desire. I thanked him. 'I will not conceal from you,' I added, 'that in France there are but few questions that touch public opinion so deeply as this does; everyone expected, peace once concluded, to see all the prisoners without exception come home, including those even who had been condemned to penalties during their captivity for infractions of discipline, for the cessation of the state of war, which was the original cause of such punishments, ought logically to entail the disappearance of all its effects. Remember, since you want peace, that nothing is more potent to consolidate it than an amnesty. There is hardly a department, there is not a class of society, not represented among these prisoners. By giving them *all* back to France together' (and I intentionally emphasized the word *all*) 'by sending them back into every corner of our country,

you would occasion, in families among all our citizens, a joy and satisfaction more efficacious than anything else as a means toward pacification and as a guarantee of peace. It would be, in my opinion, an act of the best policy for you yourselves.'

"Against this M. von Thile urged the severity of Germany's discipline and her military laws, which, according to him, had not been applied to our soldiers in all their rigors; far from it; nevertheless he renewed his earnest assurances of the good will of his Government and of its desire to settle the question quickly and satisfactorily."

After some further conversation, in which Von Thile complained of the hostile attacks of the French press, the Ambassador assured Von Thile of the sincerity of his country's desire to establish good relations with Germany. To the latter's assurance in regard to the amicable desires and intentions of his own Government Gontaut-Biron replied, "Well, then, for the sake of such precious interests give us the amnesty."

"The Secretary of State had given me too many assurances of the German Government's good-will on this point to answer me in the negative; but he affected a certain astonishment at my insistence, on the ground that most of our prisoners did not deserve so warm an interest, since the grounds for their condemnation, according to him, were recognized crimes."

A few days later the Emperor assured the Ambassador that he hoped soon to liberate certain categories of the prisoners and that he had been on the point of signing the decree when had come the news that the French juries at Paris and Melun had acquitted those accused of attacking the German soldiers and that this had alarmed his soldiers and their families. To assure them he had had to delay affixing his signature as he had intended. Gontaut-Biron expressed his gratitude to the Emperor but to Von Thile he made some observations regarding the conditions of the promised release:

"I told him of the mixture of satisfaction and apprehension that I felt; apprehension, in regard to the inconsiderable effect that would be produced in France by a partial amnesty, which, in consequence, would not accomplish the effect intended by both his Majesty and Prince Bismarck; on the other hand to pass the

sponge over the whole past would, I suggested, have an excellent result. I begged him, further, to tell me how this classification into categories was to be understood. 'In a manner broad enough to allay your apprehensions,' answered M. von Thile. 'We are establishing two categories, one, much the larger, composed of soldiers, the other of civilians. The first will be restored to liberty at once; but the second will still be retained. And the proportion of soldiers is about ninety per-cent of the whole number of prisoners.'

"I have already told with what severity the German government treated the men who did not belong to the regular troops but were taken, weapons in hand, and consequently in the very act of insurrection [*complot*] against the army of occupation. Without denying that the amnesty thus proposed was rather broader in character than I had dared to hope, I yet ventured again to plead the cause of the second category of prisoners, composed of some fifteen or twenty peasants and sharpshooters [*francs-tireurs*], whom I had charged one of the secretaries of the embassy to go and visit in the fortress of Werden, where they had been gathered together. I assured him that among this number were several very worthy of consideration, among others, M. Tharel, in whom many influential people were interested, M. and Mme. Thiers heading the list. If my information was correct, and I thought it was, we could bring forward a very extenuating circumstance in their favor: they were the victims of a lie — or of an error — on the part of M. Gambetta, who had sent them to Nevers with the assurance that the government was forming a corps of one hundred and fifty thousand men in that place. While on their way there a considerable number of them were taken by the Prussians, who began by shooting three or four of them, and sent the rest to Germany.

"M. von Thile promised me to make a new and careful examination of the documents relating to this category, especially those relating to M. Tharel; he even urged me to send him what information I possessed in regard to this matter. I did not fail to do so, with no great hope, however, of obtaining the satisfaction to which we had such just claims."

In spite of the Emperor's promise there was some delay and it

was not until a month later, February 29, that the decree was signed pardoning all officers and men detained because of insubordination. That is to the number of sixty-two, the most numerous of the categories. Two days later, Gontaut-Biron and the other members of the French Embassy were invited to dine with the Chancellor. His colleagues, the Ambassadors of England, Austria, and Russia, as well as several of the most important German officials, were among the guests. It was the anniversary of the exchange of the ratification of the preliminaries of the peace signed at Versailles the 26th of February, 1871. In reply to Bismarck's expression of his desire to see that peace continue, Gontaut-Biron thanked him for M. Thiers, President of the Republic, for the release of the French prisoners, and then added that the best cement for that peace would be a broad and complete amnesty, and that Germany would be the first to benefit from it. Bismarck replied that it was his duty to make it clear that certain methods of making war were not to be allowed, and that it was indispensable to punish them in order to make a lasting impression. This was the reason why they still kept some prisoners confined. "Such things," said he, "are incidents of war."

Early in July others of the prisoners were liberated, but there still remained eight or nine civilians and four or five regulars who had not been released. When the Ambassador saw the Emperor, July 27, he thanked him again for his clemency and recommended to his benevolent consideration the small number still imprisoned. The Emperor seemed surprised that his decree had excluded any except one individual accused of poisoning, and promised to investigate and take in consideration what the Ambassador had said. Shortly thereafter the last of the prisoners were set at liberty.

PART II

NEUTRALITY

CHAPTER V

THE DECLARATION OF NEUTRALITY

§ 19. PROCLAMATION OF NEUTRALITY

THE DUTY OF MAINTAINING A CONDITION OF NEUTRALITY (*Westlake*)

"THERE is no general duty of maintaining the condition of neutrality. On the contrary, the general duty of every member of a society is to promote justice within it, and peace only on the footing of justice, such being the peace which alone is of much value or likely to be durable. Thus in a state the man would be a bad citizen who allowed a crime to be committed before his eyes without doing his best to prevent it, or who refused to assist the magistrates in punishing crime; and in the society of states the action of all the members in upholding its laws is the more required since an organized government is wanting. . . . We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral."

(Westlake: *International Law*, Part II, *War* [2d ed., Cambridge, 1913], pp. 190–91.)

PRESIDENT WILSON'S APPEAL TO THE CITIZENS OF THE REPUBLIC (1914)

PRESIDENT WILSON, in an appeal to the citizens of the United States requesting their assistance in maintaining a state of neutrality during the European war, defined ' the true spirit of neutrality," and alluded to the variety of sympathy and desire among the people of the United States in regard to the issues and circumstances of the conflict. He warned them against being "divided

into camps of hostile opinion, hot against each other," thus becoming "involved in the war itself in impulse and opinion if not in action." The consequences of such a course would, he said, be fatal to the national peace of mind, and seriously stand in the way of the proper performance of their duty as the one great nation at peace, holding itself "ready to play a part of impartial mediation and [to] speak counsels of peace and accommodation, not as a partisan, but as a friend."

"We must," the President declared, "be impartial in thought as well as in action, must put a curb upon our sentiments as well as upon every transaction that might be construed as a preference of one party to the struggle before another."

(Presented in the Senate by Mr. Chilton, August 19, 1914; *American Journal of International Law, Supplement*, July, 1915, pp. 199–200; extracts pieced together from the original. — *Ed.*)

§ 20. RECOGNITION OF BELLIGERENCY

THE RECOGNITION OF CONFEDERATE BELLIGERENCY (1861)

In recognizing the belligerency of parties to a civil war within a state, the difficulty for other states is to ascertain the fact of war itself, especially the date of its commencement. How necessary this is appears from the discussion which arose over the recognition of the belligerency of the Confederate States by Great Britain through its proclamation of neutrality issued on May 13, 1861. Was Great Britain justified, in fact and in law, in so prompt a recognition? The opinion of the Government of the United States at the time and later was that she was not.[1] In the *Prize*

[1] "The principal danger in the present insurrection which the President has apprehended is that of foreign intervention, aid, or sympathy; and especially of such intervention, aid, or sympathy on the part of the Government of Great Britain.

"The justice of this apprehension has been indicated by the following facts, namely:

. . . . . .

"4. The issue of the Queen's proclamation, remarkable, first, for the circumstances under which it was made, namely, on the very day of your arrival in London, which had been anticipated so far as to provide for your reception by the British secretary, but without affording you the interview promised, before any decisive ac-

Cases, however, the Supreme Court of the United States expressed itself as follows: "A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign the world acknowledges them as belligerents, and the contest a *war*." (Black: *Reports*, vol. II, pp. 666–67.)

How far did the situation on May 13, 1861, conform to these conditions? As early as February several States had seceded and organized into the Confederacy. Fort Sumter had been attacked on April 11. On April 15, Lincoln, by proclamation, had called upon the state militia. Two days later, Jefferson Davis invited applications for letters of marque and reprisal. On April 19, a blockade of the ports of seven of the Confederate States had been proclaimed by the President and extended on April 27 to the ports of Virginia and North Carolina. On May 2, the news of the blockade reached London, but the official copy of the proclamation was not received by Lord Russell until May 14. (*Correspondence Concerning Claims against Great Britain*, vol. I, p. 23.)[1] On May 13 the British proclamation of neutrality was issued, the French, on June 10, followed by those of other states in the course of the summer. On August 6, Congress ratified the President's acts, as a measure of legal precaution, though later the courts decided that the President, by virtue of his office as commander-in-chief of the forces, had the right to institute the blockade — clearly an act of war by the law of nations. The Supreme Court, in the cases cited, held that the legal commencement of the Civil War dated from the two proclamations of blockade,[2] the minority opinion holding that

tion should be adopted; secondly, the tenor of the proclamation itself, which seems to recognize, in a vague manner, indeed, but still does seem to recognize, the insurgents as a *belligerent* national *power*." — Seward to Adams, June 3, 1861 (*Diplomatic Correspondence, 1861*, p. 91).

[1] Bernard says the proclamation was specially communicated to Lord Russell by Mr. Dallas on May 11. So does the British Case before the Geneva Tribunal.

[2] "It would seem, then, that if the British Government erred in thinking that the war began as early as Mr. Lincoln's proclamation in question, they erred in company with our Supreme Court." (Woolsey: *International Law* [6th ed.], p. 294.)

it began July 13, 1861, on which date an Act of Congress "recognized a state of civil war . . . and made it territorial."

At first the Government of the United States, though disapproving of the action of Great Britain, was not inclined to criticize it unduly. The proclamation of neutrality, *ipso facto*, closed British ports to Confederate warships and accepted without question the legitimacy of the blockade with its accompanying right to interfere with British commerce, both facts of great benefit to the North. But later, when British opinion in many quarters revealed a sympathy with the South and British neutrality was compromised by the exploits of Southern cruisers, emphatic protest was made against the British proclamation as having been premature and to a large extent responsible for the prolongation of the struggle. The most thorough-going exponent of this view was Charles Sumner (Senator from Massachusetts and Chairman of the Committee on Foreign Relations), who, in his formulation of the so-called "indirect claims," charged Great Britain "with the widespread consequences which ensued" from the war. In 1865, after the suppression of the rebellion, Mr. Charles Francis Adams (American Minister at London) and Lord Russell (Secretary for Foreign Affairs) traversed the question in a series of diplomatic exchanges. Mr. Adams recognized that occasion may demand recognition, but contended that the action of Great Britain had been "precipitate and unprecedented." (*Diplomatic Correspondence, 1865*, Part I, pp. 375–83, 554–60.) Lord Russell maintained that the situation was unusual in that the rebellion was fully matured and had exhibited belligerent proportions from its inception, necessitating that the position of neutrals be defined at once. It was the Government of the United States, he argued, that first recognized the belligerency by instituting the blockade; "had they not been belligerents the armed ships of the United States would have had no right to stop a single British ship upon the high seas." These respective positions were maintained before the Geneva tribunal, but no damages were awarded on the ground of "indirect claims." (See *The Alabama Claims Arbitration*, p. 341.)

(*Correspondence Concerning Claims against Great Britain* [*Sen. Ex. Doc.*, 41st Cong., 1st Sess., No. 11], vols. I, IV, *passim; Diplo-*

matic Correspondence, 1865, Part I, *passim; Letters* by *Historicus*, pp. 1–37; Bernard: *Neutrality of Great Britain during the Civil War*, pp. 106–70; Moore: *Digest of International Law*, vol. I, pp. 184–93; Moore: *International Arbitrations*, vol. I, pp. 560–63, 594–95.)

§ 21. RECOGNITION OF A CONDITION OF INSURGENCY

THE *THREE FRIENDS*

The Supreme Court of the United States, March 1, 1897

THE steamer *Three Friends* was seized November 7, 1896, by the collector of customs for the district of St. John's, Florida, as forfeited to the United States under section 5283 of the Revised Statutes, and, thereupon, November 12, was libeled on behalf of the United States in the District Court for the Southern District of Florida.

The decision of the case turned upon whether the statute would apply in a case where the acts enumerated for the purposes specified had been undertaken with the intent that the vessel in question should be employed in the service of a people whose belligerency has not been recognized. In other words whether section 5283 of the Revised Statutes relating to the enforcement of neutrality would apply in the case of an insurrection when there had been no recognition of belligerency to bring into existence a state of neutrality.

Chief Justice Fuller, delivering the opinion of the Court, reviewed the history of the Neutrality Act and of the English and American cases. After discussing the meaning of certain words ["people," etc.] in the act he concluded in relation to the recognition of belligerency and the application of the act:

"If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

"Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs

the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

"No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

"Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interest of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. (*The Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.)

"But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

"The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

"On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was 'the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity'; declaring that 'the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances

adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government'; and admonishing all such citizens and other persons to abstain from any violation of these laws.

"In his annual message of December 2, 1895, the President said: 'Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage-ground from which to aid those in arms against Spanish sovereignty.

"'Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their Government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from

the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfill every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits.'

"July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that 'the insurrection in Cuba still continues with all its perplexities,' and gave an extended review of the situation.

"We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place, and it cannot be doubted that, this being so, the act in question is applicable.

"We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed."

(*United States Reports*, vol. 166, p. 1 *ff*. Condensed statement of facts with extracts from the opinion.)

CHAPTER VI

THE DUTY OF NEUTRAL STATES TO REFRAIN FROM PARTICIPATION

§ 22. THE OBLIGATION OF THE NEUTRAL GOVERNMENT NOT TO LEND ITS ASSISTANCE TO EITHER OR TO BOTH OF THE BELLIGERENTS

(*a*) By performing governmental functions

COINAGE OF MONEY FOR A BELLIGERENT (1898)

EARLY in June, 1898, the American Ambassador at Paris reported that Spain had applied to France for the use of her mint for coining silver pieces, and that the French Minister of Foreign Affairs, before acceding to the request, desired to learn whether the United States would take exception to such a transaction. It appears that the French mint is a Government institution, but that it is used by various small states for their coinage, and it was surmised, in case the desired permission should be refused to Spain, the work would be done in Belgium, where the mint is a private institution. The Secretary of State communicated with the Secretary of the Treasury on the subject, and, in so doing, suggested that the inquiry of France might have been prompted by the circumstance that money may, under certain conditions, be treated as contraband; but before any conclusion was reached the American Ambassador reported that other arrangements had been made by Spain, and that the coinage would not be done by the French mint.

(Extract from Moore: *Digest of International Law*, vol. VII, p. 868.)

(*b*) By permitting the use of its territory

THE PASSAGE OF TROOPS ACROSS AMERICAN TERRITORY (1915)

SECRETARY OF STATE BRYAN, in a letter of January 20, 1915, in answer to Senator Stone, Chairman of the Committee on Foreign Relations, made the following statement relative to the complaint of the action of the Government on the ground of its

Failure to prevent transshipment of British troops and war material across the territory of the United States:

"The Department has had no specific case of the passage of convoys of troops across American territory brought to its notice. There have been rumors to this effect, but no actual facts have been presented. The transshipment of reservists of all belligerents who have requested the privilege has been permitted on condition that they travel as individuals and not as organized, uniformed, or armed bodies. The German Embassy has advised the Department that it would not be likely to avail itself of the privilege, but Germany's ally, Austria-Hungary, did so.

"Only one case raising the question of the transit of war material owned by a belligerent across United States territory has come to the Department's notice. This was a request on the part of the Canadian Government for permission to ship equipment across Alaska to the sea. The request was refused."

(*Senate Executive Documents*, 63d Cong., 3d Sess., No. 716.)

(*c*) By furnishing supplies: troops, money, and government property

THE UNITED STATES REFUSES A LOAN TO FRANCE (1798)

TIMOTHY PICKERING, Secretary of State, on March 23, 1798, addressed a letter of instructions to Charles Cotesworth Pinckney, John Marshall, and Elbridge Gerry, American Commissioners to

the French Republic, enclosing the directions of the President, from which the following extract is taken:

"In no event is a treaty to be purchased with money, by loan or otherwise. There can be no safety in a treaty so obtained. A loan to the republic would violate our neutrality; and a *douceur* to the men now in power might by their successors be urged as a reason for annulling the treaty, or as a precedent for further and repeated demands."

(*American State Papers, Foreign Relations*, vol. II, p. 201. Cf. Moore: *Digest of International Law*, vol. VII, p. 978.)

THE SALE OF UNITED STATES ORDNANCE (1870)

In 1872 a question was raised in the United States Senate as to certain "sales of ordnance stores" which had been made by the Government of the United States during the fiscal year ending June 30, 1870, to persons who were said to be agents of the French Government. A committee was appointed to investigate the subject. The report of the committee was made by its chairman, Mr. Carpenter, on May 11, 1872. The report referred to the act of Congress of 1868 (15 Stat. 259), which authorized the sale by the Government of such arms and military stores as were "unsuitable" for use. Under this provision, so the report stated, large sales were made without preference to purchasers as to opportunities or conditions of purchase, except that persons were excluded from the opportunity to purchase who were suspected of being agents of France, which was then at war with Germany. The report took the ground, however, that as Congress had, by the act of 1868, directed the Secretary of War to dispose of the arms and stores in question, and as the Government was engaged in such sales prior to the war between France and Germany, it "had a right to continue the same during the war." The report stated that *after* certain sales to Remington & Sons had been agreed on, but before delivery, the Secretary of War received a telegram which led him to suspect that Remington & Sons might be purchasing as agents of the French Government, and that he then gave orders that no

further sales should be made to them, although the sale already made was not repudiated and the articles were afterwards delivered. The committee, in conclusion, held: "(1) The Remingtons were not, in fact, agents of France during the time when sales were made to them; (2) if they were such agents, such fact was neither known nor suspected by our Government at the time the sales were made; and, (3) if they had been such agents, and if that fact had been known to our Government, or if, instead of sending agents, Louis Napoleon or Frederick William had personally appeared at the War Department, to purchase arms, it would have been lawful for us to sell to either of them, in pursuance of a national policy adopted by us prior to the commencement of hostilities."

(Taken textually from Moore: *Digest of International Law*, vol. VII, pp. 973–74, where will be found references and also extracts from authorities condemning this transaction.)

(*d*) By according to insurgents a premature recognition of their independence

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THE RECOGNITION OF THE INDEPENDENCE OF THE UNITED STATES (1778)

JOHN BASSETT MOORE gives the following extract from a manuscript letter in the Department of State addressed by Mr. Adams, Secretary of State, to Mr. Thompson, Secretary of the Navy, May 20, 1819:

So long as the question of sovereignty and independence "remains at stake upon the issue of flagrant war, no third party can recognize the one contending for independence as independent, without assuming as decided the question the decision of which depends upon the issue of the war, and without thereby making itself a party to the question. No longer neutral to the question, the recognizing power can no longer claim the right of being neutral to the war. These positions are clear in principle, and they are confirmed by the experience of our own revolutionary history. The acknowledgment of our independence by France was the im-

mediate and instantaneous cause of war between France and Great Britain. It was not acknowledged by the Netherlands until after war between them and Great Britain had broken out. It was acknowledged by no other European power till it had been recognized by Great Britain herself at the peace. Had it been the interest and policy of the United States to make a common cause with Buenos Ayres, the acknowledgment of her independence would have followed of course."

(Moore: *Digest of International Law*, vol. VII, pp. 863–64.)

(e) By failing to make reasonable efforts to secure respect for its neutral rights

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GERMAN ANIMADVERSIONS ON AMERICAN NEUTRALITY (1915)

On April 4, 1914, Count von Bernstorff handed Secretary Bryan a memorandum on German-American trade and the question of the delivery of arms. It contained the following remarks upon the attitude of the American Government relative to British interference with neutral commerce:

"Under the circumstances the seizure of the American ship was inadmissible according to recognized principles of international law. Nevertheless the United States Government has not to date secured the release of the ship and cargo, and has not, after a duration of the war of eight months, succeeded in protecting its lawful trade with Germany.

"Such a long delay, especially in matters of food supply, is equivalent to an entire denial.

"The Imperial Embassy must therefore assume that the United States Government acquiesces in the violations of international law by Great Britain.

"Then there is also the attitude of the United States in the question of the exportation of arms. The Imperial Government feels sure that the United States Government will agree that in questions of neutrality it is necessary to take into consideration not

only the formal aspect of the case, but also the spirit in which the neutrality is carried out." [1]

In the course of his answer (April 21, 1915) to this memorandum Secretary Bryan did not fail to notice these criticisms as the following extracts indicate:

". . . I regret to say, the language which Your Excellency employs in your memorandum is susceptible of being construed as impugning the good faith of the United States in the performance of its duties as a neutral. I take it for granted that no such implication was intended, but it is so evident that Your Excellency is laboring under certain false impressions that I cannot be too explicit in setting forth the facts as they are, when fully reviewed and comprehended.

". . . It will be a matter of gratification to me if I have removed from Your Excellency's mind any misapprehension you may have been under regarding either the policy or the spirit and purposes of the Government of the United States. Its neutrality is founded upon the firm basis of conscience and good-will." [2]

(*White Paper, No. 1*, distributed by the Department of State May 27, 1915; also printed in the *American Journal of International Law, Supplement*, July, 1915, pp. 91, 126, 128, 129.)

The German note of May 4, 1916, contained the following paragraph:

"The German people knows that the Government of the United States has the power to confine this war to the armed forces of the belligerent countries in the interest of humanity and the main-

[1] A previous note relative to the trade in contraband, dated February 16, 1915, handed to the American Ambassador at Berlin, contained the following references to the action of "neutrals": "The neutrals have not been able to prevent this interception of different kinds of trade with Germany contrary to international law. It is true that the American Government have protested against England's procedure, and Germany is glad to acknowledge this, but in spite of this protest and the protests of the other neutral Governments England has not allowed herself to be dissuaded from the course originally adopted. . . .

"In this way the following [situation] has been created: Germany is to all intents and purposes cut off from oversea supplies with the toleration, tacit or protesting, of the neutrals regardless of whether it is a question of goods which are absolute contraband or only conditional contraband or not contraband at all, following the law generally recognized before the outbreak of the war."

[2] In the American note of February 10 the efforts of the American Government loyally to maintain its neutral rights had been asserted.

tenance of international law. The Government of the United States would have been certain of attaining this end had it been determined to insist against Great Britain on its incontestable rights to the freedom of the seas. But, as matters stand, the German people is under the impression that the Government of the United States, while demanding that Germany, struggling for her existence, shall restrain the use of an effective weapon, and while making the compliance with these demands a condition for the maintenance of relations with Germany, confines itself to protests against the illegal methods adopted by Germany's enemies. Moreover, the German people knows to what a considerable extent its enemies are supplied with all kinds of war material from the United States." (*White Book, No. 3*, p. 304.)

(*f*) By modifying unnecessarily the existing neutrality regulations

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THE ALTERATION OF NEUTRALITY REGULATIONS IN THE COURSE OF A WAR

"SEEING that it is, for neutral powers, an admitted duty to apply these rules impartially to the several belligerents;

"Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral power, except in a case where experience has shown the necessity for such change for the protection of the rights of that power."

(Extract from the preamble of Convention [XIII] Concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague, October 18, 1907.)

CHAPTER VII

DUTIES RELATIVE TO THE POLICE OF NEUTRAL TERRITORY AND JURISDICTION

§ 23. THE VIOLATION OF NEUTRAL TERRITORY

THE *DRESDEN* (1915)

The Chilean Minister to Sir Edward Grey. (*Received March 26*)

[Translation]

CHILEAN LEGATION,
LONDON, *March 26, 1915.*

Sir, — In compliance with instructions from my Government, I have the honor to inform Your Excellency of the facts which led to the sinking of the German cruiser *Dresden* in Chilean territorial waters, as they appear to be established by the information in the possession of the Chilean Government.

The cruiser cast anchor on the 9th March in Cumberland Bay, in the island of Mas-a-Tierra, belonging to the Juan Fernandez group, five hundred metres from the shore, and her commander asked the Maritime Governor of the port for permission to remain there for eight days for the purpose of repairing her engines, which were, he said, out of order. The Maritime Governor refused to grant the request, as he considered it unfounded, and ordered the captain to leave the bay within twenty-four hours, threatening to intern the cruiser if her stay were prolonged beyond that period. Upon the expiry of the time stated the Maritime Governor proceeded to notify the captain of the *Dresden* that he had incurred the penalty imposed, and he immediately reported the situation which had arisen to the Government of the Republic. Meanwhile, on the 14th March, a British naval squadron, composed of the cruisers *Kent* and *Glasgow* and the armed transport *Orama*, arrived at Cumberland Bay and immediately opened fire upon the *Dresden*

while she lay at anchor. The Maritime Governor, who was making his way towards the *Glasgow* in order to carry out the usual obligations of courtesy, was compelled to return to land.

The *Dresden* hoisted a flag of truce, and dispatched one of her officers to inform the *Glasgow* that she was in neutral waters, a circumstance disregarded by the British naval squadron, which summoned the *Dresden* to surrender, warning her that if she refused she would be destroyed. The captain of the *Dresden* then gave orders to blow up the powder magazine and sink the ship.

The act of hostility committed in Chilean territorial waters by the British naval squadron has painfully surprised my Government.

The internment of the *Dresden* had been notified to her captain by the Maritime Governor of Juan Fernandez, and the Government of the Republic, having been informed of what had occurred, would have proceeded to the subsequent steps had it not been for the intervention of the British naval squadron.[1] Having regard to the geographical position of the islands of Juan Fernandez and to the difficulty of communication with the mainland, the only authority able to act in the matter did everything possible from the outset, and the internment of the *Dresden* was as effective and complete as the circumstances would permit when she was attacked by the British naval squadron. Even supposing that the British force feared that the *Dresden* intended to escape and to ignore the measures taken by the Maritime Governor of Juan Fernandez, and that this apprehension was adduced as the reason which determined its action, it should still be observed that the close watch which the British naval squadron could itself exercise precluded the possibility of the attempt. Moreover, no such eventuality was contemplated by the British squadron which, as I have said, did not give the Maritime Governor of Mas-a-Tierra the opportunity of explaining to the naval officer in command of the

[1] The Chilean Government, through its Minister at Berlin, transmitted a vigorous protest to the German Government also against the violation committed by the *Dresden* in remaining in Chilean waters more than twenty-four hours. Furthermore, the Chilean Government, considering that the destroyed cruiser was in the position of an interned vessel, decided to intern her crew. Germany, in her answer, denied that she had been guilty of a violation of Chilean neutrality, and argued against the justice of interning the crew. (See A. Alvarez: *La Grande Guerre Européenne et la Neutralité du Chili* [Paris, 1915], pp. 227–37.)

island the state of the *Dresden* in Cumberland Bay. The officer in command of the squadron acted *à priori* without pausing to consider that his action constituted a serious offense against the sovereignty of the country in whose territorial waters he was at the time. The traditions of the British navy are such that I feel convinced that if the officer who commanded the British squadron had received the Maritime Governor, who was going on board his ship in the fulfillment of his duty, and had been informed of the state of the interned vessel, he would not have opened fire upon her and would not have brought about the situation which now constrains my Government, in defense of their sovereign rights, to formulate the most energetic protest to His Britannic Majesty's Government.

Your Excellency will not be surprised that the attitude of the naval squadron should have aroused such deep feeling in Chile if you bear in mind the fact that the British warships composing it had received, shortly before and upon repeated occasions, convincing proofs of the cordial friendship which unites us to Great Britain, and which finds its clearest and strongest expression in our respective navies. They had been supplied in the ports of the republic with everything which it was permissible for us to furnish consistent with our neutrality in the present European conflict. Nothing, therefore, could be a more painful surprise to us than to see our exceedingly cordial and friendly attitude repaid by an act which bears unfortunately all the evidences of contempt for our sovereign rights, although it is probable that nothing was further from the minds of those by whom it was unthinkingly committed.

Nor will Your Excellency be astonished that my Government should show themselves to be very jealous of the rights and prerogatives inherent in the exercise of sovereignty. Nations which lack powerful material means of making their rights respected have no other guarantee and protection for their life and prosperity than the clear and perfect understanding, and the exact and scrupulous fulfillment of the obligations incumbent upon them towards other nations, and the right to demand that other nations shall equally observe their duties towards them. Few nations have given more convincing proofs than Great Britain of their desire to comply with international obligations and to require com-

pliance from others, and few have shown more eloquently their respect for the rights and prerogatives both of great and small nations. These facts convince my Government that His Britannic Majesty's Government will give them satisfaction for the act committed by the British naval forces of a character to correspond with the frankly cordial relations existing between them. Nothing could be more deeply deplored by the Chilean Government than that the traditional bonds of friendship uniting the two peoples, which my Government value so highly, and upon which they base so many hopes of new and mutual benefits, should fail to derive on this occasion additional strength from the test to which circumstances have subjected them.

I have, etc.

AUGUSTIN EDWARDS.

Sir Edward Grey to the Chilean Minister

FOREIGN OFFICE, *March 30, 1915.*

Sir, — His Majesty's Government, after receiving the communication from the Chilean Government of the 26th March, deeply regret that any misunderstanding should have arisen which should be a cause of complaint to the Chilean Government; and, on the facts as stated in the communication made to them, they are prepared to offer a full and ample apology to the Chilean Government.

His Majesty's Government, before receiving the communication from the Chilean Government, could only conjecture the actual facts at the time when the *Dresden* was discovered by the British squadron; and even now they are not in possession of a full account of his action by the captain of the *Glasgow*. Such information as they have points to the fact that the *Dresden* had not accepted internment, and still had her colors flying and her guns trained. If this was so, and if there were no means available on the spot and at the moment for enforcing the decision of the Chilean authorities to intern the *Dresden*, she might obviously, had not the British ships taken action, have escaped again to attack British commerce. It is believed that the island where the *Dresden* had taken refuge is not connected with the mainland by

cable. In these circumstances, if the *Dresden* still had her colors flying and her guns trained, the captain of the *Glasgow* probably assumed, especially in view of the past action of the *Dresden*, that she was defying the Chilean authorities and abusing Chilean neutrality, and was only awaiting a favorable opportunity to sally out and attack British commerce again.

If these really were the circumstances, His Majesty's Government cannot but feel that they explain the action taken by the captain of the British ship; but, in view of the length of time that it may take to clear up all the circumstances and of the communication that the Chilean Government have made of the view that they take from the information they have of the circumstances, His Majesty's Government do not wish to qualify the apology that they now present to the Chilean Government.

I have, etc.,

E. GREY.

(Notes exchanged between Sir Edward Grey, Secretary of State for Foreign Affairs, and the Chilean Minister respecting the sinking of the German cruiser *Dresden* in Chilean territorial waters: *Parliamentary Papers, Miscellaneous No. 9* [1915]; *American Journal of International Law, Supplement*, April, 1916, pp. 72–76.)

CRAMPTON'S CASE (1855)

ON the outbreak of the Crimean War in 1854, the Government of the United States announced its intention of observing strict neutrality towards all the belligerents. In a note of April 28 of that year, Mr. Marcy, Secretary of State, informed Mr. Crampton, British Minister at Washington, that "the laws of this country impose severe restrictions not only upon its own citizens, but upon all persons who may be residents within any of the territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking a part in any foreign war." No infringement of neutrality, he said, was feared, but "should the just expectation of the President be disappointed, he will not fail in his duty to use all the power with which he is invested to enforce obedience" to the neutrality laws.

On December 22, 1854, the British Parliament passed an act "to permit foreigners to be enlisted and to serve as officers and soldiers in Her Majesty's forces." This, in effect, authorized recruiting in neutral states, and objection to it was made in Parliament on that ground. In accordance with the act, the lieutenant-governor of Nova Scotia, Sir Gaspard le Marchant, was instructed "to embody a foreign legion and to raise British regiments for service in the provinces or abroad." A military depot was established at Halifax, and a notice, signed by the Provincial Secretary, was published in the United States, both in the newspapers and by means of handbills, inviting effective men between the ages of nineteen and forty to enlist at Halifax, offering as inducement a bounty of £6, together with arrangements for passage to Halifax. It further stated that "Nova Scotian and other shipmasters who may bring into this province poor men willing to serve Her Majesty, will be entitled to receive the cost of a passage for each man shipped from Philadelphia, New York or Boston." Mr. Howe, a member of the Provincial Government, and other agents came to the United States to promote recruitment, especially in the Eastern cities. Later, these activities were extended to the Western States by way of Buffalo and Niagara.

The recruiting scheme was carried on under the auspices of the British Minister and Consuls, and indeed with their active coöperation, but the British Government did not appear to consider it a violation of neutrality. "I entirely approve," wrote the Foreign Secretary, Lord Clarendon, to Mr. Crampton, "of your proceedings . . . with respect to the proposed enlistment in the Queen's service of foreigners and British subjects in the United States. . . . But the law of the United States with respect to enlistment, however conducted, is not only very just but very stringent, according to the report which is enclosed in your dispatch, and Her Majesty's Government would on no account run any risk of infringing this law of the United States."

The question involved in these operations was early referred to Attorney-General Cushing. In an opinion rendered March 23, 1855, he pronounced upon their illegality in terms as follows:

"It is perfectly clear that any such enlistment is contrary to law. The Act of Congress of April 20, 1818, not only forbids mili-

tary enlistments in the United States, for a purpose hostile to any country in amity with us, but also by foreign states for any purpose whatever.

"If the troops recruiting for Great Britain in New York are intended to serve against Russia, the undertaking is in violation of our neutrality; and, if not, still it is in violation of the sovereign authority of the United States.

"Not long since the Consul of the Mexican republic at San Francisco was duly tried and convicted there of this precise offense, in having enlisted persons in California for the domestic service of his Government.

"These views of the present question have been submitted to the President, and have his approbation; and he accordingly has directed me to advise you at once, in order to avoid delay, and to desire you to take the proper and lawful steps, in your discretion, to bring to punishment all persons engaged in such enlistments within your district.

"I am, very respectfully, "C. CUSHING.

"HON. JOHN MCKEON,
"*United States Attorney, New York.*"

(*Senate Executive Document*, 34th Cong., 1st Sess., No. 35.)

As a result, prosecutions under the Neutrality Act were begun in various cities, and, as the evidence showed that British officials were encouraging enlistments, the American Minister at London (Mr. Buchanan), on instructions from Marcy, made diplomatic representations to Lord Clarendon on July 6, 1855. "The reason," he said, "is manifest. The injury to the neutral principally consists in the violation of its territorial sovereignty by the belligerent for the purpose of raising armies; and this is the same, no matter what may be the national character of the persons who may agree to enter the service." Lord Clarendon was asked at the same time to state how far official persons had acted and if steps had been taken to restrain them. A few days later (July 15), Marcy further instructed Buchanan that more than a disavowal was looked for. "It is presumed," he said, "that Her Britannic Majesty's Government will regard it as due to the friendly relations between the two countries, which are alike cherished by

both, to explain the course it has pursued in this case; what countenance was given to it in the beginning; and what has been subsequently done to put a stop to it.

"Having at an early stage in the proceedings become aware of the illegal conduct of its officials in this matter, and the objectionable light in which that conduct was viewed by this Government, it is not to be supposed that proper measures were not taken by Her Britannic Majesty's Government to suppress all further attempts to carry out this scheme of enlistment, and to punish those who persevered in it. It would afford satisfaction to be informed what measures were adopted by Her Majesty's Government to arrest the mischief; but whatever they were it is evident they have proved ineffectual, for the ground of complaint still exists, and the practice is continued by the agency of persons beyond the limits of the United States as well as those within them, under circumstances which render a resort to criminal prosecution inadequate to suppress it. . . . The President . . . expects it [the British Government] will take prompt and effective measures to arrest their proceedings, and to discharge from service those persons now in it who were enlisted within the United States, or who left the United States under contracts made here to enter and serve as soldiers in the British Army."

These diplomatic protests, though couched in language admitting of no doubt as to the feelings of the Government of the United States, fail to convey the animus which was aroused against Great Britain by reason of the illegal enlistments. How delicate the situation was may be gathered from Lord Clarendon's dispatch of November 10, 1855, to Mr. Crampton. "Mr. Buchanan," he said, "called at this office some days ago, and in a very friendly manner asked me if I should object to inform him why such large reinforcements had been sent to the British squadron on the West Indies Station, as he was apprehensive that when the intelligence reached the United States, it would cause considerable excitement, and tend to increase the feelings of irritation which already existed in that country. I told Mr. Buchanan that I had no difficulty in answering his inquiry with perfect frankness, and that I would, in the first place, assure him that there was no intention on the part of Her Majesty's Government to attack or menace the

United States, but that, as . . . [among other reasons] we had received a note from Mr. Marcy to Mr. Crampton, couched in terms so unfriendly that it appeared to indicate a fixed purpose on the part of the United States Government to provoke a quarrel between the two countries, Her Majesty's Government had thought it their duty to take measures for the protection of British interests against any attack that might be made upon them."

Even personal feeling was displayed, Cushing complaining that Crampton's official communications contained "palpable errors of statement" touching him personally or his official action as Attorney-General. He commented also on "the *curiosa felicitas* [remarkable aptitude] of the British Minister in the perpetration of mistakes, and the very inexact representations which he habitually made, regarding the conversations, opinions and purposes of individuals in the Executive and in the Congress of the United States." (*Opinions of the Attorneys-General*, vol. VIII, p. 488.)

In reply to the representations of the American Minister on the subject of British enlistments, Lord Clarendon expressed regret if any violation of American neutrality had occurred, but maintained that what the British Government had authorized was perfectly legitimate. Many persons in the United States, of British and foreign nationality, had indicated their wish to enter Her Majesty's service, and the British Government, "desirous of availing themselves of the offers of these volunteers, adopted the measures necessary for making generally known that Her Majesty's Government were ready to do so, and for receiving such persons as should present themselves at an appointed place in one of the British possessions. The right of Her Majesty's Government to act in this way was incontestable." Lord Clarendon admitted that in some instances "self-constituted and unauthorized agents" had violated the law of the United States, "but such persons had no authority whatever for their proceedings from any British agents, by all of whom they were promptly and unequivocally disavowed." As for the proclamation of the lieutenant governor of Nova Scotia, it had been held by a court at Philadelphia that there was nothing therein conflicting with the laws of the United States: "A person," it said, "may go abroad, provided the enlistment be in a foreign place, not having accepted and exercised a commis-

sion." Mr. Crampton, however, had been instructed to issue orders to British consuls not to violate law, and "to have no concealment from the Government of the United States." Lord Clarendon concluded with the announcement that, to avoid further trouble, all proceedings for enlistment would be discontinued.

Marcy replied to the British contentions in a note to Crampton on September 5, 1855. The British Government, he pointed out, seemed to forget that the United States had sovereign rights quite apart from any municipal laws. Naturally, the recruiting agents would be cautioned against technical violations of the Neutrality Act, but something more than the mere avoidance of penalty was required. The correct policy to pursue implied respect for the principles underlying these laws as well as for the sovereign rights of the United States as an independent and friendly power. "It is exceedingly to be regretted," continued Marcy, "that this international aspect of the case was overlooked. As to the officers of the British Government, it is not barely a question whether they have or have not exposed themselves to the penalties of our laws, but whether they have in their proceedings violated international law and offered an affront to the sovereignty of the United States. As functionaries of a foreign government, their duties towards this country as a neutral and sovereign power are not prescribed by our legislative enactments, but by the law of nations. In this respect their relation to this government differs from that of private persons. Had there been no acts of Congress on the subject, foreign governments are forbidden by that law to do anything which would in any manner put to hazard our position of neutrality in respect to belligerents.

"The information which has been laid before the President has convinced him that the proceedings resorted to for the purpose of drawing recruits from this country for the British Army have been instituted and carried on by the active agency of British officers, and that their participation therein has involved them in the double offense of infringing our laws and violating our sovereign territorial rights. . . .

" . . . The question is not whether that government has authorized, or any of its officers have done acts for which the punishment denounced by our laws can be inflicted, but whether they

participated in any form or manner in proceedings contrary to international law, or derogatory to our national sovereignty. It is not now necessary, therefore, to consider what technical defense these officers might interpose if on trial for violating our municipal laws. . . .

"The President perceives with much regret that the disclosures implicate you in these proceedings. He has, therefore, preferred to communicate the views contained in this note to Her Majesty's Government through you, her representative here, rather than through our minister at London. The information in his possession does not allow him to doubt that yourself, as well as the lieutenant-governor of Nova Scotia, and several civil and military officers of the British Government of rank in the provinces, were instrumental in setting on foot this scheme of enlistment; have offered inducements to agents to embark in it, and approved of the arrangements for carrying it out. . . ." Should all this be found to have had the approval of the British Government, the President, said Marcy, would look to that Government "for a proper measure of satisfaction"; if found otherwise, "the course imposed upon him by a sense of duty will in that case be changed."

Throughout the controversy, which continued until the dismissal of Crampton on May 28, 1856, the British Government maintained the position first taken — that there had been no violation of the sovereign territorial rights of the United States "simply by enlisting as soldiers, *within British territory*, persons who might leave the United States territory in order so to enlist." Merely pointing out routes or explaining terms was not recruiting and even the payment of traveling expenses was not illegal. The offense lay in enlisting, organizing, and training recruits within the United States. The men who went to Halifax were free and enlisted at their own discretion. Further, there must be attestation within British territory before enlistment in the British service could be valid; "no binding contract could therefore be made with any man within the United States."

Marcy, in a review of the situation in his note of December 28, 1855, expressed his inability to adopt the views of the British Government. If they could be maintained, he said, "the territories of this country are open, almost without restriction, to the

recruiting operations of all nations, and for that purpose any foreign power may sustain a vigorous competition with this Government upon its own soil." Contrary to these views, the Government of the United States held that "no foreign power can by its agents or officers lawfully enter the territory of another to enlist soldiers for its services, or organize or train them therein, or even entice persons away in order to be enlisted, without express permission. . . . It is the sovereign right of every independent state, that all foreign powers shall abstain from authorizing or instigating their officers or agents to do that, even within their own dominions, which would, as a natural or very probable consequence, lead to the contravention of the municipal laws of such state. . . . In every instance where a person, whether a citizen or a foreigner, has been brought to the determination to leave this country for the purpose of entering into a foreign service as a soldier or sailor by any inducements offered by recruiting agents here, the law of the United States has been violated."

Failing to get other satisfaction, Marcy requested that Crampton be recalled, but this was not acceded to by the British Government, which was still of the opinion that the rights of the United States had in no way been disregarded. Clarendon, in his note of April 30, 1856, argued that, inasmuch as the United States had not prohibited its citizens from entering the service of a foreign state, "the just and inevitable conclusion is, that what it might have forbidden, but has not forbidden, it has designedly allowed — that is to say, in other words, that it is the policy of the United States to prevent foreign enlistments within the United States, but that it is not the policy of the United States to forbid citizens of the United States to enlist, when out of the United States, into the service of foreign states, if they choose to do so."

The views of the two governments, however, proved impossible to reconcile. Accordingly, on May 28, 1856, the President discontinued diplomatic intercourse with Crampton and at the same time annulled the exequaturs of the British consuls at New York, Philadelphia, and Cincinnati.

(*Senate Executive Documents*, 34th Cong., 1st Sess. [1855–56], Nos. 35, 74, 80; *House Executive Documents*, 34th Cong., 1st Sess. [1855–56], No. 107; *Opinions of Attorneys-General*, vol. VII, pp.

367–90, vol. VIII, pp. 468–69; Richardson: *Messages and Papers of the Presidents*, vol. V, pp. 332–33, 375; *British and Foreign State Papers*, vol. XLVII, pp. 358–474, vol. XLVIII, pp. 189–300; Hansard's *Parliamentary Debates*, 3d Series, vol. CXXXVI, *passim*.)

THE AMERICAN GOVERNMENT REQUESTS THE RECALL OF MR. DUMBA (1915)

The Secretary of State to Ambassador Penfield

DEPARTMENT OF STATE,
WASHINGTON, *September 8, 1915*.

YOU are instructed to present immediately the following in a note to the Foreign Office:

"Mr. Constantin Dumba, the Austro-Hungarian Ambassador at Washington, has admitted that he proposed to his Government plans to instigate strikes in American manufacturing plants engaged in the production of munitions of war. The information reached this Government through a copy of a letter of the Ambassador to his Government. The bearer was an American citizen named Archibald, who was traveling under an American passport. The Ambassador has admitted that he employed Archibald to bear official dispatches from him to his Government.

"By reason of the admitted purpose and intent of Mr. Dumba to conspire to cripple legitimate industries of the people of the United States and to interrupt their legitimate trade, and by reason of the flagrant violation of diplomatic propriety in employing an American citizen protected by an American passport as a secret bearer of official dispatches through the lines of the enemy of Austria-Hungary, the President directs me to inform Your Excellency that Mr. Dumba is no longer acceptable to the Government of the United States as the Ambassador of His Imperial Majesty at Washington.

"Believing that the Imperial and Royal Government will realize that the Government of the United States has no alternative but to request the recall of Mr. Dumba on account of his improper conduct, the Government of the United States expresses its deep

regret that this course has become necessary and assures the Imperial and Royal Government that it sincerely desires to continue the cordial and friendly relations which exist between the United States and Austria-Hungary."

LANSING.

Ambassador Penfield to the Secretary of State

[Telegram — Paraphrase]

AMERICAN EMBASSY,
VIENNA, *September 30, 1915.*

Ambassador Penfield reports receipt of a note from the Minister for Foreign Affairs of Austria-Hungary replying to the Department's note of September 8, 1915.

The Austro-Hungarian Minister for Foreign Affairs states that he has learned that Mr. Dumba is no longer acceptable to the United States Government as Austro-Hungarian Ambassador, and inasmuch as cognizance of this information has been taken by the Austro-Hungarian Minister for Foreign Affairs, he has no doubt as to the conclusions to be drawn therefrom regarding Mr. Dumba's retention as Austro-Hungarian Ambassador in Washington. However, the Austro-Hungarian Minister for Foreign Affairs cannot refrain from expressing the opinion that correspondence of a diplomatic character, especially between a Government and its Ambassador, regardless of the manner of transmission, should not, as has been the case in the Department's note referred to, be made the subject of an official criticism from a Government to whose attention this correspondence could come only by an accident, and for which it was not intended. The sincere desire expressed by the United States Government that the relations between the two Governments should, as heretofore, still retain their friendly and cordial character, is likewise entertained by the Austro-Hungarian Minister for Foreign Affairs, and he avails himself of this opportunity to renew, etc.

(*White Book, No. 3* [Aug. 12, 1916], pp. 321–22.)

§ 24. MAKING A BASE OF NEUTRAL TERRITORY

THE *TWEE GEBROEDERS* (Alberts, Master)

High Court of Admiralty, July 29, 1800

THIS was a case respecting four Dutch ships, taken in the Western Eems, in or near the Gronigen Wat, by boats, sent from the *Espeigle*, then lying in the Eastern Eems. The material point of the case turned on the question of territory. The Prussian Consul claiming restitution (by the direction of the Chargé des Affaires of Prussia) on a suggestion that it was a capture made within the protection of the Prussian territory.

Sir William Scott [*Lord Stowell*], delivering the judgment of the Court: ". . . I am of opinion, that the ship was lying within those limits, in which all direct hostile operations are by the law of nations forbidden to be exercised. That fact being assumed I have only to inquire, whether the ship being so stationed, the capture which took place, was made under such circumstances, as oblige us to consider it as an act of violence, committed within the protection of a neutral territory.

"It is said that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying; inasmuch as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far. I am of opinion, that no use of a neutral territory, for the purposes of war, is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. For, suppose that even a direct hostile use should be required, to bring

it within the prohibition of the law of nations, nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile — not complete indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received, on neutral ground; but no one would say, that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat, that is sent out on such an errand of force.

". . . Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious. If the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war. On these grounds, I am of opinion, that this capture cannot be maintained, and I direct these vessels to be restored."

(Statement of facts taken textually with extracts from the opinion as reported by C. Robinson: *Admiralty Reports*, vol. III, pp. 162–65.)

WIRELESS MESSAGES (1915)

In his letter to the Secretary of State of January 8, 1915, Senator Stone set forth the grounds of complaint in regard to the partiality of the Government to Great Britain, France, and Russia as against Germany and Austria. The first on the list was "*Freedom of communication by submarine cables, but censorship of wireless messages.*"

Mr. Bryan answered this as follows:

"The reason that wireless messages and cable messages require different treatment by a neutral Government is as follows:

"Communications by wireless cannot be interrupted by a belligerent. With a submarine cable it is otherwise. The possibility of cutting the cable exists, and if a belligerent possesses naval superiority the cable is cut, as was the German cable near the Azores by one of Germany's enemies and as was the British cable near Fanning Island by a German naval force. Since a cable is subject to hostile attack, the responsibility falls upon the belligerent and not upon the neutral to prevent cable communication.

"A more important reason, however, at least from the point of view of a neutral Government, is that messages sent out from a wireless station in neutral territory may be received by belligerent warships on the high seas. If these messages, whether plain or in cipher, direct the movements of warships or convey to them information as to the location of an enemy's public or private vessels, the neutral territory becomes a base of naval operations, to permit which would be essentially unneutral.

"As a wireless message can be received by all stations and vessels within a given radius, every message in cipher, whatever its intended destination, must be censored; otherwise military information may be sent to warships off the coast of a neutral. It is manifest that a submarine cable is incapable of becoming a means of direct communication with a warship on the high seas. Hence its use cannot, as a rule, make neutral territory a base for the direction of naval operations."

(*Senate Executive Documents*, 63d Cong., 3d Sess., No. 716.)

THE COALING OF GERMAN WARSHIPS FROM AMERICAN PORTS (1914)

In a memorandum communicated December 15, 1914, the German Government took exception to the action of various American port authorities who had "denied clearance from American ports to vessels of the merchant marine which would carry needed supplies or fuel to German warships either on the high seas or in

other neutral ports. . . . It stands to reason," so the memorandum states, "that one merchant vessel occasionally sailing with coal or supplies for German warships does not turn a neutral port into a German point of support contrary to neutrality."

Ambassador von Bernstorff in his accompanying note further declared: "The position taken by the Government of the United States as to the delivery of coal and other necessaries to warships of the belligerent states constituting a violation of neutrality is, in the opinion of the Imperial German Government, untenable in international law."

Count von Bernstorff expressed the hope entertained by his Government "that the Government of the United States, upon perusal of the memorandum, will concur in the view of the Imperial Government and, within the limits drawn in the memorandum, will grant free clearance to vessels that should supply German warships with coal."

Secretary of State Bryan answered this memorandum by a note of December 24, 1914, wherein he said: "the essential idea of neutral territory becoming the base for naval operations by a belligerent is in the opinion of this Government *repeated* departure from such territory of merchant vessels laden with fuel or other supplies for belligerent warships at sea."

(*American Journal of International Law, Supplement*, July, 1915, pp. 215–18.)

THE *RAINBOW* (1915)

The Secretary of State to the British Ambassador

DEPARTMENT OF STATE,
WASHINGTON, *March 27, 1915.*

My Dear Mr. Ambassador: I have received your informal note of the 24th instant concerning the observance of the American neutrality regulations by the British cruisers in the North Atlantic. In this relation I desire to call to your attention certain information which has come to my notice with reference to the operations of belligerent cruisers in the North Pacific. I have been reliably informed that several times during the past winter belligerent ships of war have taken on coal, and perhaps other supplies, within

the territorial waters of the United States in the vicinity of the islands off the Santa Barbara channel, southern California, and have had communication with the mainland in this locality. One circumstance in particular occurred, according to my information, on the 27th of February last, when the British steamship *Bellerophon*, of Liverpool, coaled the British cruiser *Rainbow* within a mile of the western shore of Anacapa Island. It appears that at the same time a launch left the vicinity of Hueneme, Cal., and communicated with the vessels above mentioned. I should appreciate the kindness if you will bring this matter informally to the attention of your Government, and, if the facts, upon examination, prove to be as represented, request your Government to issue such instructions to their fleet as will make a recurrence of such violations of the neutrality of the territorial waters of the United States impossible.

I am, etc., For the Secretary of State:
ROBERT LANSING.

(*American Journal of International Law, Supplement*, July, 1915, p. 220.)

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§ 25. ACCESS OF BELLIGERENT VESSELS TO NEUTRAL PORTS

(*a*) The rule of twenty-four hours' interval

LYING IN WAIT FOR THE *SUMTER* (1862)

THE sloop-of-war *Kearsarge* on her first cruise sailed from the Portsmouth Navy Yard, February 5, 1862, and proceeded to Cadiz, Spain, "where, on our arrival," says Second Assistant Engineer William H. Badlam, relating his experience on the cruise, "we learned that the Confederate steamer *Sumter* was anchored under the guns of Gibraltar, guarded by the United States steamer *Tuscarora*, which was lying at anchor in the port of Algeciras, a Spanish town across the bay from Gibraltar.

"We relieved the *Tuscarora* and kept a sharp lookout on the *Sumter* for some months, ready to go out in case she made a move. By lying in Spanish waters we were free to go out without waiting

twenty-four hours after the *Sumter* had departed, which we should have been obliged to do, if we had lain at Gibraltar, in English waters."

(*Civil War Papers* [Printed for the Commandery of the State of Massachusetts, Military Order of the Loyal Legion of the United States: Boston, 1900], vol. I, p. 11.)

THE *BRISTOL* (1914)

On December 13, at 10 P.M., the German cruiser *Dresden* left Punta Arenas. The next day, December 14, at 2 P.M., the British cruiser *Bristol* arrived and left the same day at 3:45 P.M. The naval officer of the port had notified the captain of the *Bristol* that he must wait until the expiration of the twenty-four hour interval prescribed by Article 16 of the Hague Convention, since the captain of the *Bristol* had not been aware of the departure of the *Dresden* until he had himself entered the port. The captain of the *Bristol* replied that Article 16 referred to only applied when the two ships were found simultaneously in the same port.

The controversy was referred to the Commander-in-Chief of the Magellan Naval Station, and was decided in conformity with the opinion of the captain of the *Bristol*.

(Translated and taken textually from the account as given by Dr. Alejandro Alvarez: *La Grande Guerre Européenne et la Neutralité du Chili* [Paris, 1915], p. 207.)

(*b*) The rule of twenty-four hours' stay: internment

THE *HARVARD* (1898)

An incident of the early stages of the war between the United States and Spain suggests the need of an amplification of the rule by which a belligerent man-of-war is required, except in case of stress of weather or of need of provisions or repairs, to leave a neutral port within twenty-four hours after her arrival. On May 11, 1898, Captain Cotton, of the auxiliary cruiser *Harvard*, cabled

from St. Pierre, Martinique, to the Secretary of the Navy that the Spanish torpedo-boat destroyer *Furor* had touched during the afternoon at Fort de France, Martinique, and had afterwards left, destination unknown, and that the Governor had ordered him not to sail within twenty-four hours from the time of the *Furor's* departure. At noon on the 12th of May, Captain Cotton was informed by the captain of the port at St. Pierre that the *Furor* had about 8 A.M. again called at Fort de France and would leave about noon and that he might go to sea at 8 P.M.; but that if he did not do so he would be required to give the Governor twenty-four hours' notice of his intention to leave the port. On the same day Captain Cotton received information which led him to telegraph to the Secretary of the Navy that he was closely observed and blockaded at St. Pierre by the Spanish fleet, and that the Spanish torpedo-boat destroyer *Terror* was at Fort de France. Later Captain Cotton cabled that the Spanish Consul protested against his stay at St. Pierre, and that he had requested permission to remain a week to make necessary repairs to machinery. Replying to these reports, the Secretary of the Navy telegraphed to Captain Cotton as follows: "Vigorously protest against being forced out of the port in the face of superior blockading force, especially as you were detained previously in the port by the French authorities because Spanish men-of-war had sailed from another port. Also state that the United States Government will bring the matter to the attention of the French Government. Urge the United States Consul to protest vigorously." It proved to be unnecessary to take further action. Captain Cotton's request for time was granted. The Governor showed no disposition to force him out of port, only requiring twenty-four hours' notice of an intention to sail; and the dangers to which the *Harvard* seemed to be exposed soon disappeared. It may be observed, however, that as the enforcement, under circumstances such as were described, of the twenty-four hours' limit would constitute a negation of the admitted privilege of asylum, it is not likely that it would be held to be applicable in such a situation.

(Taken textually from Moore: *Digest of International Law*, vol. VII, pp. 990–91, citing *Naval Operations of the War with Spain*, pp. 383–89, 407–10.)

THE SOJOURN OF THE RUSSIAN FLEET IN FRENCH WATERS (1904–05)

On October 16, 1904, the first division of the Baltic fleet sailed under the command of Admiral Rojestvensky from Libau for Vladivostock. On February 15, 1905, the second division, made up of less effective vessels, followed, under command of Admiral Nebogatoff. Admiral Rojestvensky's fleet coaled from colliers at Cherbourg in France, October 24, and arrived in Vigo in Spain October 26, where it was delayed four or five days, pending the settlement of preliminaries of the Dogger bank incident. After the Russian vessels had taken on a supply of coal at Tangier, the fleet was divided. One fleet was sent through the Suez Canal, the other proceeded southward along the West coast of Africa, no secret being made that the two divisions were to reunite at some point on or near the coast of Madagascar. The reunion did in fact take place off North Madagascar early in January 1905. The entire fleet remained at Nossi-Be, a small island off the northern coast of Madagascar from January 5 to March 16. The vessels appear to have engaged in drilling and gun practice, but to have been anchored outside the three mile limit, though they maintained close connection with the shore and thence obtained abundant supplies. They were furnished coal from colliers, which either accompanied them, or had been sent thither from European ports.

The sojourn of the Russian fleet in French waters aroused great indignation in Japan, where the opinion was widely entertained that Madagascar was being used as a base of operations against the Japanese. After departing from Nossi-Be the Russian fleet reached Kamranh Bay in French Indo-China April 12, remaining ten days, and took on coal from German and Russian transports. Excitement in Japan became intense, and the Government made representations at Paris on or about April 19. The French Government requested that the Russian vessels depart, and by April 26 Admiral Rojestvensky's fleet had left Kamranh Bay. On May 8 Admiral Rojestvensky's fleet was joined by Nebogatoff's squadron at some point off the Indo-China coast, and the entire fleet

continued on toward Tsushima in the Korean Straits, where, on May 27, 1905, it suffered defeat and destruction.

The use of French waters gave rise to further discussion between the two Governments. Although Japan recognized the existence of the French rules in regard to the stay of warships in her waters, the Mikado's Government considered that the surveillance had been lax, and that Admiral Rojestvensky had been greatly assisted in the accomplishment of his mission and cruise to the Chinese seas.

The French Government, for its part, contended that it had scrupulously observed the requirements of neutrality. It pointed to the extent of the coast and the absence of telegraph stations as an excuse for the transactions of the Russian fleet in Indo-Chinese waters. It considered that it had observed its own rules of neutrality, and taken care to preserve the spirit of an absolute impartiality, and that if the Russians had derived any advantage from their use of French ports, under similar circumstances the Japanese would have been assured of the equality of treatment.

(See Amos S. Hershey: *International Law and Democracy of Russo-Japanese War* [New York, 1906], pp. 190–98; Pitt Cobbett: *Leading Cases on International Law, War and Neutrality* [3d ed., London, 1913] pp. 315–18. This brief statement does not cover all the questions discussed in these two accounts.)

(c) The supply of coal and provisions

THE *LEIPZIG* (1914)

October 26, 1914, the German cruiser *Leipzig* took supplies [*vivres*] at the island of Juan Fernandez, Chile, and in the middle of the month at Valparaiso asked for more. The British Minister asked the Chilean Minister of Foreign Affairs to direct the naval authorities not to permit the *Leipzig* to re-victual, since she had taken on supplies less than three months before in another Chilean port. The Minister of Foreign Affairs took a different view, based upon Article 20 of the 13th Hague Convention, which prohibits

coaling (*combustible*) before the expiration of three months, but not other supplies. Consequently the naval authorities at Valparaiso permitted the *Leipzig* to take on supplies up to the normal peace standard, in conformity with Article 19 of the same Convention.

(Translated and taken textually from the account as given by Dr. Alejandro Alvarez: *La Grande Guerre Européenne et la Neutralité du Chili* [Paris, 1915], pp. 204–05.)

(*d*) Repairs

THE *KRONPRINZ WILHELM* (1915)

The Secretary of State to the German Ambassador

DEPARTMENT OF STATE,
WASHINGTON, *April 21, 1915.*

Excellency: In reply to your note of the 12th instant requesting the hospitality of the port of Norfolk for H.M.S. *Kronprinz Wilhelm*, I have the honor to inform you that the Department has received the report of the board of naval officers who have made an examination of the cruiser with a view to ascertaining the repairs which the vessel may undergo in American waters. From this report it appears that the time required for repairs will consume a period of six working days, but that the proposed repairs will not cover the damage to the port side of the cruiser incident to the service in which the vessel has been engaged.[1]

[1] [The following instructions of Mr. Clay, Secretary of State, to Mr. McCulloch, April 7, 1828, are quoted by Moore:]

The Buenos Ayrean privateer *Juncal* put in at Baltimore for the purpose of making repairs after an action at sea with a Brazilian cruiser. Under these circumstances, the collector of customs at Baltimore was instructed: "Whilst you will not fail to allow her the usual hospitality, and to procure the necessary refreshments, the President directs that you will be careful in preventing any augmentation of her force and her making any repairs not warranted by law. With respect to the latter article, the reparation of damages which she may have experienced from the sea is allowable, but the reparation of those which may have been inflicted in the action is inadmissible." (Taken textually from Moore: *Digest of International Law*, vol. VII, pp. 991–92.)

The Government has concluded, therefore, that H.M.S. *Kronprinz Wilhelm* will be allowed until midnight of the close of the 29th day of April next to complete the proposed repairs in the port of Norfolk, and that she will be allowed twenty-four hours in addition, or until midnight of 30th day of April, to leave the territorial waters of the United States, or, failing this, that she will be under the necessity of accepting internment within American jurisdiction during the continuance of the wars in which your country is now engaged.

It is expected that in accordance with the President's proclamations of neutrality H.M.S. *Kronprinz Wilhelm* will not depart from the port of Norfolk within twenty-four hours after a vessel of an opposing belligerent shall have departed therefrom.

This information has been confidentially conveyed to the collector of customs at Norfolk for transmittal to the commander of the *Kronprinz Wilhelm*.

Accept, etc., For the Secretary of State:
ROBERT LANSING.

(*American Journal of International Law, Supplement*, July, 1915, pp. 351–52.)

THE *GEIER* (1914)

The Counselor to the German Ambassador

DEPARTMENT OF STATE,
WASHINGTON, *October 30, 1914.*

My Dear Mr. Ambassador: The Department has been advised that the German gunboat *Geier* put into the port of Honolulu, and on October 15 the captain requested permission to make repairs to render the vessel seaworthy, and estimated the time for this work to be one week. The naval constructor of the United States at the port of Honolulu examined the vessel on October 20, and recommended that the time be extended eight days, from October 20, in order to place the boilers in a seaworthy condition. On October 27, the German consul at that port requested from eight to ten days additional time in which to make repairs to steam and feed piping and boilers that have been found to be in a leaking condi-

tion. Upon a further examination, the United States naval constructor reports that he is unable to state how long repairs should take, as conditions requiring remedy may be found as work progresses. It is also reported that, on account of the generally bad condition of the piping and boilers, further time may be required to complete all repairs.

The circumstances in this case point to the gunboat *Geier* as a ship that at the outbreak of war finds itself in a more or less broken-down condition and on the point of undergoing general repairs, but still able to keep the sea. In this situation the Government believes that it does not comport with a strict neutrality or a fair interpretation of the Hague Conventions, to allow such a vessel to complete unlimited repairs in a United States port. The Government therefore has instructed the authorities to notify the captain of the *Geier* that three weeks from October 15 will be allowed the *Geier* for repairs, and that if she is not able to leave American waters by November 6, the United States will feel obliged to insist that she be interned until the expiration of the war.

I am, etc., ROBERT LANSING.

(*American Journal of International Law, Supplement*, July, 1915, pp. 243–44.)

(e) Asylum from pursuit

THE REPAIR OF RUSSIAN SHIPS IN NEUTRAL PORTS (1904)

Mr. Dodge to Mr. Hay

AMERICAN EMBASSY,
BERLIN, *August 17, 1904.*

Sir: I have the honor to report to you that I was informed yesterday by Doctor von Mühlberg, Imperial Acting Secretary of State for Foreign Affairs, at the usual weekly diplomatic reception, that the Russian ships which had taken refuge at Tsingtau, including the battle ship *Cesarevitch* and three torpedo boats, had been disarmed by the German authorities and would not be al-

lowed to repair.[1] No reason had been given for this step, contrary to what had been reported in some of the newspapers. Doctor von Mühlberg then said that the position of neutrals in regard to allowing the ships of belligerents to repair in neutral ports was a very difficult one. The principles of international law in regard to this were very difficult of application. Of course it could not be laid down that Germany would under no circumstances allow belligerent ships to repair in her ports, but in the present case it had been decided not to allow this to be done. He had reason to believe that the British Government would act in a similar case as the German Government had done. In regard to the officers and men belonging to these ships and numbering about 1000, the Japanese Government had been asked whether it had any objection to their being sent to Russia under proper safeguards.

I am, etc., H. PERCIVAL DODGE.

(*Foreign Relations of the United States, 1904*, p. 323.)

(*f*) Reception of prizes

THE *APPAM* (1916)

EARLY in January, 1916, the German cruiser *Moewe* slipped through the blockade maintained in the North Sea and entered upon a brief career of commerce raiding. Nothing was known of

[1] Moore gives an account of the internment of the Russian transport or auxiliary cruiser *Lena* at San Francisco, September 15, 1904 (*Digest of International Law*, vol. VII, pp. 999–1000). The following spring, on June 3, three Russian men-of-war, the *Aurora*, the *Oleg*, and the *Jemtchug*, after an engagement with the Japanese sought asylum at Manila. Governor Wright allowed them coal and food supplies to last from day to day, awaiting instructions from Washington. The State Department, acting upon information communicated by the War and Navy Departments, prepared a memorandum. In accordance with the views therein expressed the Russian Admiral was informed on June 6 that the President could not consent to any repairs unless the ships were interned at Manila till the close of hostilities.

June 6 the War Department instructed Governor Wright that the twenty-four hour limit must be strictly enforced. Accordingly when the Russian ships had not left the harbor within the required twenty-four hours, Admiral Train notified the Russian Admiral that the force under his command must be considered as interned after June 8, at noon. (Moore: *Digest of International Law*, vol. VII, pp. 992–95.)

her activities until, on February 1, the steamship *Appam*, of the British and African line, arrived at Hampton Roads in charge of a German prize crew, having on board, in addition to valuable cargo, passengers and crew to the number of over three hundred. It soon transpired that the *Appam* had sailed from Dakar, West Africa, on January 11, for Liverpool, and on January 16 had been captured by the *Moewe* about three hundred miles from Teneriffe. After a large amount of bullion had been removed from the *Appam* to the *Moewe* and a number of prisoners from other captured British vessels placed on board, Lieutenant Hans Berg was placed in charge as prize master under commission "to bring the *Appam* to the nearest American port and there lay her up." He was assisted by a prize crew of twenty-two men together with some released German prisoners of war whom the *Appam* was taking from the Cameroons to Great Britain, but the *Appam's* own crew were compelled to work the ship to port.

The arrival of the *Appam* at a neutral port at once raised a number of questions as to the status of ship, crew, prize crew, and passengers. Was she a legally converted war vessel? If not, was she to be considered good German prize, entitled to asylum, or should she, under the circumstances, be restored to the British owners? If permitted asylum, what was to be done with the British prisoners, especially those of military character? Should the prize crew be interned? In case the vessel was restored to its former status, how were the original German prisoners to be considered? But, most pertinent of all, what was the relation to the case of the Prussian-American treaties of 1799 and 1828 as well as the Hague Convention of 1907 regarding the rights and duties of neutral powers in naval warfare?

The treaty provision invoked is as follows:

"The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers or admiralty of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the

commanding officer of such vessel shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel, that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests or any other danger, or accident of the sea, they shall be obliged to depart as soon as possible." (Article 19 of the Treaty of 1799 revived, except the last sentence, in Article 12 of the Treaty of 1828.)

The following are the rules laid down by the Hague Convention with respect to prizes in neutral ports:

"Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

"Art. 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

"Art. 23. A neutral power may allow prizes to enter its ports and roadsteads, whether or not under convoy, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty."

The State Department found no difficulty in determining the status of the *Appam*. From the first she was considered a prize of war, not a naval auxiliary. Orders promptly came from Washington to permit all persons on board to go ashore except the prize crew, and those who had coöperated with them. Some demur was made by the German officials at allowing the crew to go free, together with eleven British of military standing, but inasmuch as the *Appam*, a merchant vessel held as prize, had come voluntarily within neutral jurisdiction, no person on board could be held as prisoner, for such would do violence to neutral sovereignty. Accordingly, on February 3, all the passengers and crew went off the

ship, leaving her in temporary possession of the German prize crew.

The status of the *Appam* having been settled, there remained the question of treatment. In a memorandum of February 2 Count von Bernstorff, German Ambassador at Washington, informed the State Department that the *Appam* had been brought into an American port in accordance with the treaty provisions of 1799 and 1828. This implied, in his opinion, that no restriction could be placed upon the *Appam*, which was free to depart or to remain indefinitely. On February 4, the British Ambassador at Washington presented a request that the vessel be restored to her British owners in accordance with the terms of the Hague Convention of 1907. On February 11 the German prize court at Hamburg took jurisdiction of the case and condemned the *Appam* as prize of war.

Before the State Department gave its decision, however, libel proceedings were taken on February 16 in the District Court of the United States at Norfolk by the British and African Steamship Navigation Company against the *Appam* and by Captain Harrison, as master, against the cargo. The usual process was issued by the District Court on February 19, and deputy marshals were placed on board. The libel alleged that the *Appam* was "wrongfully withheld from the libellants by one Hans Berg and other persons unknown to the libellants."

Protest against these proceedings was made by Count von Bernstorff in a note to Secretary Lansing on February 22. The Ambassador declared himself to be at a loss to understand why such action had been taken "in view of the terms of Article 19 of the Treaty of 1799 and of the inoperation of the Hague Convention relating to neutral rights and duties in naval warfare." In his view, as possession by the captors was possession by their sovereign, "the neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its ports." In conclusion he requested that the Attorney-General take steps, through the proper officers, to secure the dismissal of the libel.

The Secretary of State, in his note of March 2, ruled adversely to the German contention. Referring to the treaty provision on

which the Ambassador had relied, he pointed out that its object was "to mollify the existing practice of nations as to asylum for prizes brought into neutral ports by men of war," and that hence it was "subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule." On such an interpretation it seemed clear, said Mr. Lansing, that Article 19 was applicable only to such prizes as were convoyed into ports of the United States by vessels of war. "The *Appam*, however, . . . was not accompanied by a ship of war, but came into the port of Norfolk alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privileges of carrying out their prizes again 'to the places expressed in their commissions.' The commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum." The commission of Lieut. Berg was that of a prize master and the intention was to proceed with the *Appam* to an American port and "there to lay her up." Hence the essential part of Mr. Lansing's decision:

"In the opinion of the Government of the United States . . . the case of the *Appam* does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of the spoils of war in an American port. In this interpretation of the treaty, which I believe is the only one warranted by the terms of the provision and by the British treaties referred to in Article 19, and by other contemporaneous treaties, the Government of the United States considers itself free from any obligation to accord the *Appam* the privileges stipulated in Article 19 of the Treaty of 1799.

"Under this construction of the treaty the *Appam* can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions, or necessity of repairs, but to leave as soon as the cause of their entry has been removed."

The legality of the libel proceedings was regarded by the State Department as a matter outside its province. "Whether in these circumstances," said Mr. Lansing, "the United States has properly or improperly assumed jurisdiction of the case and taken custody of the ship is a legal question which, according to American practice, must now be decided by the municipal courts of this country. With the purpose, however, of having your Excellency's views as to this matter brought to the attention of the court, I have transmitted your note of February 22 to the Attorney General, with a request that he instruct the United States District Attorney to appear in the case as *amicus curiae* and present to the court a copy of Your Excellency's note."

Accordingly, the libel suit had to proceed, but the State Department took no steps to give effect to its decision, pending determination by the courts as to whether jurisdiction of the case had been properly taken by the District Court. Arguments of counsel were heard in due time and concluded on May 16.

The contention of the libellants sought to establish both the jurisdiction of the court and the necessity for restitution consequent upon the violation of American neutrality. The law governing the case, they maintained, was laid down in Articles 21 and 22 of the Hague Convention (*supra*, p. 302), which, quite apart from any fact of ratification, are declaratory of existing international law. It followed from these provisions that "if a prize is brought into or detained in an American port under circumstances other than those expressly recognized as lawful, the neutrality of the United States is thereby violated." On the other hand, Article 23, permitting sequestration, was reserved and excluded by the United States when it adhered to the convention. Further, "even if Article 23 were law, it would not permit the *Appam* to remain in the ports of the United States unless our Government permitted this to be done by some positive action nor would permission in specific cases be sufficient." Article 23 was anomalous and was intended, as was shown in the Proceedings of the Hague Conference, to be a means of obviating destruction of neutral prize. The policy of modern states was against permitting prizes to remain in neutral ports for the purpose of sequestration. "It seems clear [quoting Wheaton] that to allow prizes to fly to a neu-

tral port, and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts in neutral ports." Such was the course pursued by Great Britain and France during the Civil War. Such, too, was the policy of the United States as shown in the origin and history of the neutrality laws. That jurisdiction in the case could be entertained and restitution awarded was clearly established in Anglo-American practice. Chief Justice Marshall's decision in *The Santissima Trinidad* was of great importance here. "Whatever," says Wheaton, reporting its affirmation by the Supreme Court, "may be the exemption of the public ship herself and of the armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality." (7 Wheaton, 354–355.) "In the case at bar," the libellants contended, "the violation of neutrality was subsequent to the act of capture and was a deliberate attempt to use an American port as a naval base for the safe-keeping of the prize during the war. The time of the violation of neutrality is immaterial; there has been a violation and the prize has been voluntarily brought within the jurisdiction of the American courts. The power and duty to make restitution follow as a matter of course." The Prussian-American treaties were not in conflict with the principles of international law applicable to the case, for they applied only to prizes convoyed to port by vessels of war, and in any case did not permit the prize to stay indefinitely in American waters. The captors' title to the *Appam* was one of merely temporary possession, and could become complete only when brought into a German port for adjudication. Until such time the prize might be lost to the captors in a number of ways, one of which was by abandonment. In effect, this was the situation with respect to the *Appam*, for sending a prize into a neutral port, insufficiently manned, with intent to lay her up, was equivalent to abandonment. This, coupled with overt violation of neutrality, operated to restore the vessel to her British owners, whose title had not been divested by the capture. Consequently, it was contended, the questions were justiciable

and the court had full jurisdiction "to award restitution of the *Appam* and her cargo to their respective owners under the law of nations as accepted and recognized by the United States."

The position taken by the respondents was "that no court in the United States, while it was at peace, has ever restored a belligerent's prize lying in a port of the United States, unless the prize was captured within the territorial limits of the United States or unless the captor vessel was illegally fitted out or unlawfully augmented its crew within the United States." The facts in the case made it impossible for either of these exceptions to arise. The "naked propositions before this court," according to the respondents, "are whether the courts of this country can transfer the prize jurisdiction of Germany to Norfolk, Virginia; whether a British vessel, legally captured by a German cruiser, must be restored to a British owner and Germany thus deprived of the lawful fruits of war through the actual intervention and participation of a neutral tribunal; whether a solemn treaty . . . is not now to govern the relations between Germany and the United States, although it has been relied upon again and again by the United States, not only in previous wars and times, but in this very war, for the prosecution of claims against Germany." International law, as applied on many occasions by the courts of the United States, did not permit one sovereign state to exercise jurisdiction over another, either in person or property, as was seen in the case of *The Exchange*. The commission of the captors established the legality of the capture and impressed it with the German national character. Restitutions of prizes for violation of neutrality was an exception to this general rule and the burden of proof of such violation was upon the libellants. Any violation, to be material, must have contributed to the capture; acts after the event did not entail the penalty of restitution. The cruise of the *Appam* having terminated at Hampton Roads, "this doctrine reduces libellant to the contention that the mere act of coming into Hampton Roads was a violation of neutrality. Such detention [*sic*] cannot be considered, because it occurred after the termination of the voyage, and consequently does not constitute any act of which the court can take cognizance." As for title derived from capture, it was complete in the captor from the moment of seizure,

and continued even while in a neutral port, for there [quoting Marshall] "she is in a place of safety, and the possession of the captor cannot be lawfully divested, because the neutral sovereign, by himself or by his courts, can take no cognizance of the question of prize or no prize." To legalize a capture as between enemies, it was not necessary to await the condemnation of the captor's prize courts, — a position which had been maintained by the Secretary of State as recently as March, 1915, in the case of the British ship *Farn.*[1] There was good precedent, it was maintained, for condemnation by the captor's courts of prize lying in a neutral port. Further, the presence of the *Appam* in a port of the United States had good justification both under the general principles of international law and the specific provisions of the Prussian-American treaties. The *Appam*, now "the property of a sovereign state reserved for public use," conformed to the status of a public vessel and as such was entitled to asylum for cause, as well as to extraterritorial privileges. "There were perils of the sea, remoteness from her own ports, imminence of re-capture, insufficient crew and other causes that justified her coming into the port of a friendly neutral nation which had never prohibited the admission of prizes." If it was lawful to seek temporary asylum, it was equally lawful to remain indefinitely, for to recruit a crew in the United States would be a breach of neutrality, while to order the *Appam* to sea would be only "to deprive Germany of property lawfully acquired." It was admitted that the United States might make what regulations it pleased upon the question of belligerent

[1] The *Farn*, a British vessel captured by a German cruiser and re-named the *K.D.3*, entered the port of San Juan, Porto Rico, on January 12, 1915. She was treated by the Government of the United States as "a tender to a belligerent fleet," and on January 25 was interned. Replying to the contention of the British Ambassador "that it would be necessary before the vessel could be treated as a German fleet auxiliary that she should have been condemned by a competent prize court," Mr. Lansing said: "With this conclusion the Government of the United States is under the necessity of disagreeing. In the opinion of this Government an enemy vessel which has been captured by a belligerent cruiser becomes as between the two governments the property of the captor without the intervention of a prize court. If no prize court is available this Government does not understand that it is the duty of the captor to release his prize or to refuse to impress her into its service. On the contrary, the captor would be remiss in his duty to his government and to the efficiency of its belligerent operations, if he released an enemy vessel because he could not take her in for adjudication." (*American Journal International Law, Supplement*, July, 1915, p. 364.)

asylum, but until due notice of change had been given, the right of asylum in favor of prizes was presumed.[1] The uniform policy of the United States had been to permit prizes to be taken into its ports, and no change should suddenly be made to the detriment of a prize already within its jurisdiction. But whatever might be the position of the *Appam* under international law, there was no doubt, in the opinion of the respondents, as to the effect of the treaties of 1799 and 1828. Under them the *Appam* was free to stay indefinitely and was protected from legal proceedings of any kind. These treaties, as well as similar treaties with other states, were to be considered in the light of their origin and purpose. Both Prussia and the United States intended that their ports should be free to the prizes of either, — the United States, because in need of European harbors of refuge, Prussia, "from a desire to liberalize the rules of maritime warfare against the restrictions of England." The limitation of the privilege to prizes escorted by vessels of war was narrow and inconsistent with the practice of the time when the treaties were made. "In those days captor vessels, on account of then existing conditions, frequently escorted their prizes in, but not always. The prize-master equally represented the sovereign and the captors. When sent from the captor ship, his act was its act. It is not the 'vessel of war, public or private,' that is the living thing. It is the crew. Without them no vessel ever brought another into port." Further, there was no reason to make such distinction: "The motives which prompted the provision applied with equal force to both cases, and we cannot suppose an intent to make a difference where no difference was necessary." As between a strict and a liberal interpretation, the latter was to be preferred, other things being equal. The Hague Convention was not in point, for it had not been ratified by all the belligerents; in any case, according to its preamble, it could not "modify provisions laid down in existing general treaties." Moreover, the State Department had already ruled, in the case of the *Farn*, that the convention under consideration was not binding between Great

[1] On this point the respondents quoted from the opinion of Attorney-General Cushing in the case of the Russian vessel *Sitka* brought into San Francisco as prize by the British ship of war *President* during the Crimean War. (*Opinions of the Attorneys-General*, vol. VII, p. 122.)

Britain and the United States. For all of these reasons the respondents prayed that the libel be dismissed.[1]

(*Brief for Libellants; Respondents' Trial Brief; White Papers re* the *Appam*, published by the Government of the United States.)

(g) Sale

THE *MINERVA*

High Court of Admiralty, August 12, 1807

Sir William Scott (*Lord Stowell*), delivering the opinion of the Court, said in part:

"This question arises on the purchase of a vessel which is asserted to have been made by a highly distinguished person, described to be the Prince of Kniphausen.

". . . It is clear also, from other parts of the evidence, that this vessel had been a Dutch ship of war that had maintained a conflict with a British frigate, and had been driven into Bergen where she had remained sealed up ever since, for nearly three years.

"The first question is, whether such a purchase can be legally made? I am not aware of any case in this Court, or in the Court of Appeal, in which the legality of such a purchase has been recog-

[1] It has been reported in the press that the German Prize Court has decided that the bullion on the *Appam* is good prize.

The United States District Court, *Waddill, District Judge*, has also given its decision, the conclusion of which is as follows:

"The court's conclusion is that the manner of bringing the *Appam* into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the Imperial Government of the German Empire; and it will be so ordered."

An appeal from this decision has been taken.

nized. There have been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion, and some hesitation of opinion, the validity of the purchase has been sustained. Such cases, I believe, did occur during the first war in which I attended this Court, or the Court of Appeal. But whether the purchase of a vessel of this description, built for war, and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerent, and driven into a neutral port for shelter — whether the purchase of such a ship, I say, can be allowed, which shall enable the enemy so far to rescue himself from the disadvantage into which he has fallen, as to have the value at least restored to him by a neutral purchaser, is a question on which I shall wait for the authority of the Superior Court, before I admit the validity of such a transfer. That a private merchant could lawfully do this, I shall not hold, until I am so instructed by the Superior Court."

(Extract from C. Robinson: *Admiralty Reports*, vol. VI [London, 1808], pp. 398–400.)

(*h*) The definition of a vessel of war

THE *LOCKSUN* (1914)

Counselor Lansing to Ambassador Bernstorff, November 7, 1914

"REFERRING to my previous communication to you of October 30 regarding the internment of the German cruiser *Geier* the Department is now in possession of information that the German steamship *Locksun*, belonging to the Norddeutscher Lloyd Company, cleared August 16, 1914, from Manila with 3215 tons of coal for Menado, in the Celebes; that she coaled the German warship *Geier* in the course of her voyage toward Honolulu, where she arrived soon after the *Geier;* that the *Locksun* received coal by transfer from another vessel somewhere between Manila and Honolulu, and that the captain stated that he had on board 245 or 250 tons of coal when he entered Honolulu, whereas investigation showed that he had on board approximately 1600 tons.

"From these facts the Department is of the opinion that the operations of the *Locksun* constitute her a tender to the *Geier*, and that she may be reasonably so considered at the present time. This Government is, therefore, under the necessity of according the *Locksun* the same treatment as the *Geier*, and has taken steps to have the vessel interned at Honolulu if she does not leave immediately."

Ambassador Bernstorff to Counselor Lansing, November 11, 1914

[Extract] "The *Locksun* cannot be considered as a man-of-war, not even an auxiliary ship, but is a simple merchant ship. As to the alleged coaling of H.M.S. *Geier* from the *Locksun*, the neutrality regulations of the United States only provide that a vessel can be prevented from taking coal to a warship for a period of three months after having left an American port. As the *Locksun* left the last American port (Manila) on August 16 she ought to be free on November 16."

Counselor Lansing to Ambassador Bernstorff, November 16, 1914

[Extract] ". . . The question involved does not relate to the amount of coal which either the *Locksun* or the *Geier* has taken on within three months, but rather relates to the association and coöperation of the two vessels in belligerent operations. The *Locksun*, having been shown to have taken the part of a supply ship for the *Geier*, is, in the opinion of this Government, stamped with the belligerent character of that vessel, and has really become a part of her equipment."

Ambassador Bernstorff to Secretary Bryan, November 21, 1914

[Extract] ". . . There is, so far as I know, no international law or stipulation in existence which imparts the character of a warcraft, *i.e.*, of a 'part of a warship' to a tender on account of her accompanying a warship. The situation in times of peace also proves this. Where there is a likelihood of the warship being unable safely to get along on her own resources, there is the necessity of sending tenders along. This is rather often done in times of peace without causing such tenders to be considered and treated on

that account as 'parts of the warship concerned,' or in the light of international law even as warships."

Secretary Bryan to Ambassador Bernstorff, December 11, 1914

[Extract] "In reply I have the honor to call your attention to the expression 'part of a warship' which occurs throughout your note. I do not understand from what source this expression is derived, as I do not find it in the correspondence of the Department to you on this subject. A tender is a part of the equipment of a vessel of war in the sense of acting as an auxiliary to such a vessel in the matter of carrying supplies and possibly giving other assistance. In a very real sense a vessel of war so attended may be considered as a belligerent expedition of which the tender is a part of the equipment, but to put a tender in the category of 'part of a warship' is to suggest that the treatment to be accorded the tender shall be governed by the rules of contraband."

Mr. Bryan then gave a quotation from the award of the Alabama Claims Commission, "which," he said, "seems to establish this principle regarding the treatment of tenders, although the application of this statement was not made to the exact circumstances of the *Locksun* case." The passage quoted was as follows:

"And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacomy*, and the *Archer* (tenders to the *Florida*), the tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals and be submitted to the same decision which applies to them respectively."

The Secretary of State continued:

"The entire practice of the internment of vessels appears to be of recent origin. The doctrine of internment was apparently first applied to any great extent during the Russo-Japanese War, and it is believed that the treatment of the *Locksun* is in keeping with the high standard of neutrality upon which the doctrine of internment is based. The Department is not aware that measures to preserve neutrality are entirely dictated by precedent and international law, and it believes that belligerents hardly have proper cause to question an attitude on neutrality justly in advance of

precedent and international law if it is applied by the neutral impartially to all belligerents.[1] As to the advisability of assuming such an attitude, the Department is impressed with the proposition that the neutral and not the belligerent is the proper judge in the circumstances."

(*American Journal of International Law, Supplement*, July, 1915, pp. 245–52.)

THE ADMISSION OF TRANSFORMED AUXILIARIES TO CHILEAN PORTS (1915)

In a note of February 4, 1915, the British Minister at Santiago asked the Chilean Government whether it would regard merchant vessels which had been employed as colliers for the British Admiralty as auxiliary vessels, even after they had ceased to be engaged in such service.

In a note of March 15, 1915, communicated to the representatives of the foreign governments at Santiago, the Chilean Minister of Foreign Affairs discussed the general question of transformation, and more specifically in answer to the British note declared:

". . . The Chilean Government finds no objection to admitting vessels which have been employed as auxiliaries to the fleets of either belligerent to the ports in territorial waters of Chile, and to treat them in every way as merchantmen, provided such vessels fulfill the following conditions:

"(1) That the auxiliary vessel has not violated the neutrality of Chile;

"(2) That the re-transformation of the vessel had been effected in the ports or territorial waters of the country to which the vessel belongs, or in the ports of its allies;

[1] *Counselor Lansing to the German Ambassador, December 23, 1914*

"*My Dear Mr. Ambassador:* In reply to your note of the 21st instant, with reference to the British S.S. *Mallina* and *Tremeadow*, which you state have served as tenders to British cruisers, and are demanding coal in the Panama Canal Zone, I would advise you that these vessels have been considered by the Canal authorities as coming under Rule 2 of the President's proclamation of November 13 last in relation to the neutrality of the Panama Canal Zone, which accords to transports or fleet auxiliaries the same treatment as that given to belligerent vessels of war."

"(3) That the re-transformation has really taken place. That is to say, that neither the crew nor the arrangements of the vessel indicate that she may be directly employed to serve the government of her country in the capacity of an auxiliary vessel;

"(4) That the government to which the vessel belongs communicate to the nations concerned, and particularly to neutrals, the names of the auxiliary vessels which have lost that quality and have become merchant vessels; and

"(5) That the notifying government agree that the vessels specified shall not in future be employed as auxiliaries in the service of the naval forces."

(Extract; Alejandro Alvarez: *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 255–56. Free translation from the original.)

THE TREATMENT OF ARMED MERCHANTMEN IN AMERICAN PORTS (1916)

On September 19, 1914, the United States issued a memorandum stating that merchant vessels defensively armed would receive the treatment of merchantmen in American ports. The presence of any armament was presumed to be for aggression until the proof of its defensive character had been supplied in each case to the satisfaction of the authorities.

Later on, the United States asked the belligerents not to arm their merchant vessels arriving in American ports, although it frankly admitted that the right to do so for defense existed. On January 18, 1916, Secretary Lansing addressed an "informal and confidential letter" to the British Ambassador, as well as to the representatives of other Entente Powers, in which he suggested that they should agree "that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever."

In the body of the note (letter) Secretary Lansing gave the

reasons which he considered to justify the adoption of such a "formula" and closed his remarks as follows:

"I should add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying armament of any sort, in view of the character of the submarine warfare and the defensive weakness of underseas craft, should be held to be an auxiliary cruiser and so treated by a neutral as well as by a belligerent government, and is seriously considering instructing its officials accordingly."

This note (letter) aroused a storm of protest and was the pivot about which the submarine negotiations turned.

The Allies claimed that the proposal to exclude their armed vessels was contrary to the recognized rules of international law and that, furthermore, it constituted an unneutral modification of the regulations already issued by the United States.

After some hesitation the Administration decided not to enforce the views expressed in Secretary Lansing's note (letter) of January 18.

Some time later the Entente Powers presented a memorandum [1] declining Secretary Lansing's proposal.

Relative to the intention announced in the final paragraph of Secretary Lansing's letter, the British memorandum set forth that Government's view as follows:

"At the end of his letter, the Honorable Secretary of State hypothetically considered the possibility of eventual decisions under which armed merchant vessels might be treated as auxiliary cruisers.

"It is His Britannic Majesty's Government's conviction that the realization of such a hypothesis which would materially modify, to Germany's advantage, the statement of views published in this respect by the American Government on September 19, 1914, cannot be given practical consideration by the American authorities.

"Such a modification indeed would be inconsistent with the general principles of neutrality as sanctioned in paragraphs 5 and 6 of the preamble to the 13th Convention of The Hague concerning maritime neutrality. Moreover the result would be contrary to

[1] The British answer was dated March 23, 1916.

the stipulations of the 7th Convention of The Hague concerning the transformation of merchant vessels into warships. Finally if armed merchant vessels were to be treated as auxiliary cruisers, they would possess the right of making prizes, and this would mean the revival of privateering."

In a note of April 7, 1916, Secretary Lansing, after expressions of regret, concluded: "The Entente Governments having, however, reached a decision to decline the proposed arrangement, it becomes my duty to accept their decision as final, and in the spirit in which they have made it."

The United States, in a memorandum dated March 25, set forth its understanding of the rules and frankly recognized the legality of arming merchant vessels for defense and that they might make resistance by firing upon an approaching enemy warship intent upon capture.

(The documents will be found in the *White Books*, *No. 2* and *No. 3*, issued by the Department of State. The earlier documents will also be found in the *American Journal of International Law*, *Supplement*, July, 1915.)

THE *DEUTSCHLAND* (1916)

On July 9, 1916, the German submarine *Deutschland* arrived at Baltimore with a cargo of dyestuffs from Bremen and thereby presented the Government of the United States with a new problem in neutrality. What was she to be considered — merchant vessel or warship? If the former, then she would be entitled to all the privileges accorded a merchant ship of a belligerent in a neutral port; if the latter, she could remain in port only twenty-four hours under normal conditions. Then there was the difficult question of armament. If a merchant ship, could a submarine be given the benefit of the ruling made by the State Department in the case of the Italian liner *Giuseppe Verdi* and others that a merchant vessel may carry a certain amount of armament for purposes of defense without forfeiting her rights under international law? These were questions for the neutral to solve and called for immediate answer. Beyond these were other questions of more concern to belligerents. Could such a vessel, for example, be sunk without

warning by an enemy cruiser? Must provision always be taken to save the lives of those on board? Could the principle of visit and search be applied and, if not, did that operate to put such a vessel outside the category of merchant vessel? Further, how was she to be considered with respect to the possibility of conversion on the high seas or elsewhere outside of neutral waters? And, on the European side of the Atlantic at any rate, could a belligerent warship reasonably be expected to discriminate between a freight-carrying submarine and one engaged in operations of war?

These points were early raised by the British and French Embassies at Washington. The *Deutschland*, they represented, was "potentially a warship." The very nature of a submarine made it impossible to comply with the requirements of international law, for example, visit and search; hence it was to be destroyed on sight.

The State Department, however, felt that it did not have to make decision on these latter questions until occasion arose. But on the status of the *Deutschland* herself while in a neutral port the ruling was entirely in her favor. The collector of customs at Baltimore reported on July 11 that the submarine was privately owned in Bremen, that her documents were regular, that she was unarmed, without gun decks or torpedo tubes, and that the crew, according to their own statements, were members of the German merchant marine but not attached to the regular naval establishment. The cargo, he reported, consisted of dyestuffs, scrap-iron ballast and three sealed packages for the German Ambassador. Later, after an examination of the submarine by three American naval experts, he further reported that there was no evidence that the ship was armed or could be armed "without extensive structural changes." These reports were forwarded by the Secretary of the Treasury to the State Department, by which they were referred to the Government Neutrality Board. On the strength of the opinion given by the Board, the Secretary of State ruled, on July 15, that the *Deutschland* was a merchant ship in the accepted sense of the term.[1]

[1] The New York *Times* of July 21 published the following dispatch from Washington: "A merchant ship, it is held by Allied diplomats here, is presumed in international law to be so constructed and navigated that she plainly discloses her char-

Later (October, 1916), the Department of State made public the interchange of memoranda which had taken place relative to this question. The memorandum of the Entente Powers was as follows:

"In view of the development of submarine navigation and by reason of acts which in the present circumstances may be unfortunately expected from enemy submarines, the allied governments consider it necessary, in order not only to safeguard their belligerent rights and liberty of commercial navigation, but to avoid risks of dispute, to urge neutral governments to take effective measures, if they have not already done so, with a view to preventing belligerent submarine vessels, whatever the purpose to which they are put, from making use of neutral waters, roadsteads, and ports.

"In the case of submarine vessels, the application of the principles of the law of nations is affected by special and novel conditions: First, by the fact that these vessels can navigate and remain at sea submerged, and can thus escape all control and observation; second, by the fact that it is impossible to identify them and establish their national character, whether neutral or belligerent, combatant or non-combatant, and to remove the capacity for harm inherent in the nature of such vessels.

"It may further be said that any place which provides a submarine warship far from its base with an opportunity for rest and replenishment of its supplies thereby furnishes such addition to its powers that the place becomes in fact, through the advantages which it gives, a base of naval operations.

"In view of the state of affairs thus existing, the allied governments are of the opinion that submarine vessels should be excluded from the benefit of the rules hitherto recognized by the law of nations regarding the admission of vessels of war or merchant vessels into neutral waters, roadsteads, or ports, and their sojourn in them. Any belligerent submarine entering a neutral port should be detained there.

acter, is capable of being stopped by warning shots across her bow, and can be boarded for examination of her papers. These strictures on the merchant status of the *Deutschland*, coupled with the declaration that submarine operation in itself constitutes an evidence of extra-legal character such as warships assume, are understood in fact to be crystallizing into a definite outline of a joint note of protest for presentation to the State Department."

"The allied governments take this opportunity to point out to the neutral powers the grave danger incurred by neutral submarines in the navigation of regions frequented by belligerent submarines."

To this the United States made answer in the memorandum of August 31, 1916, in part as follows:

"In reply the Government of the United States must express its surprise that there appears to be an endeavor of the allied powers to determine the rule of action governing what they regard as a "novel situation" in respect to the use of submarines in time of war, and to enforce a compliance of that rule, at least in part, by warning neutral powers of the great danger to their submarines in waters that may be visited by belligerent submarines. In the opinion of the Government of the United States, the allied powers have not set forth any circumstance, nor is the Government of the United States at present aware of any circumstances concerning the use of war or merchant submarines which would render the existing rules of international law inapplicable to them. In view of this fact, and of the notice and warning of the allied powers announced in their memoranda under acknowledgment, it is incumbent upon the Government of the United States to notify the Governments of France, Great Britain, Russia, and Japan that, so far as the treatment of either war or merchant submarines in American waters is concerned, the Government of the United States reserves its liberty of action in all respects and will treat such vessels as, in its opinion, becomes the action of a power which may be said to have taken the first steps toward establishing the principles of neutrality, and which for over a century has maintained those principles in the traditional spirit and with the high sense of impartiality in which they were conceived.

"In order, however, that there should be no misunderstanding as to the attitude of the United States, the Government of the United States announces to the allied powers that it holds it to be the duty of belligerent powers to distinguish between submarines of neutral and belligerent nationality, and that responsibility for any conflict that may arise between belligerent warships and neutral submarines on account of the neglect of a belligerent to so

distinguish between these classes of submarines must rest entirely upon the negligent power."

(New York *Times*, July, *passim*, October 10–11, 1916.)

§ 26. PREVENTION OF UNNEUTRAL ACTS BY INDIVIDUALS

FOREIGN LOANS (1915)

THE thirteenth ground of complaint against the manner of its observance of neutrality by the American Government covered by the Stone-Bryan correspondence was as follows:

"(13) *Change of policy in regard to loans to belligerents.*

"War loans in this country were disapproved because inconsistent with the spirit of neutrality. There is a clearly defined difference between a war loan and the purchase of arms and ammunition. *The policy of disapproving of war loans affects all governments alike, so that the disapproval is not an unneutral act.* The case is entirely different in the matter of arms and ammunition, because prohibition of export not only might not, but, in this case, would not, operate equally upon the nations at war. Then, too, the reason given for the disapproval of war loans is supported by other considerations which are absent in the case presented by the sale of arms and ammunition. The taking of money out of the United States during such a war as this might seriously embarrass the Government in case it needed to borrow money and it might also seriously impair this Nation's ability to assist the neutral nations which, though not participants in the war, are compelled to bear a heavy burden on account of the war, and, again, a war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan. The result would be that great numbers of the American people might become more earnest partisans, having material interest in the success of the belligerent, whose bonds they hold. These purchases would not be confined to a few, but would spread generally throughout the country, so that the people would be divided into groups of partisans, which would re-

sult in intense bitterness and might cause an undesirable, if not a serious, situation. On the other hand, contracts for and sales of contraband are mere matters of trade. The manufacturer, unless peculiarly sentimental, would sell to one belligerent as readily as he would to another. No general spirit of partisanship is aroused — no sympathies excited. The whole transaction is merely a matter of business.

"This Government has not been advised that any general loans have been made by foreign governments in this country since the President expressed his wish that loans of this character should not be made." (*Senate Executive Documents*, 63d Cong., 3d Sess., No. 716.)

Notwithstanding this official opinion, foreign loans were placed in the United States during the war by both belligerents, especially by the Entente Allies. In January, 1915, it was announced that the Russian Government had established with J. P. Morgan & Co. a credit of $12,000,000, against which drafts were to be made for the payment of obligations contracted in the United States, the understanding being, it was said, "that the Government does not regard this method of extending credits to foreign belligerents as a violation of the spirit of the President's neutrality proclamation." (New York *Times*, Jan. 19, 1915.) On April 1, 1915, it was stated that Morgan & Co. and other banking houses were prepared to receive applications for a large part of $50,000,000 one year five per cent bonds of the French Government at 99½ and interest, the proceeds of the sale to be used "only for purchases made by the French Government in the United States." On the same date subscriptions were invited by the Central Trust Co. and Chandler & Co. for the purchase of $10,000,000 nine months five per cent treasury notes of the German Government at 99⅝ and interest. (New York *Times*, April 1, 1915.) This step, it was later stated, was for the purpose of strengthening German credit in the United States.

On June 23, Morgan & Co., who had now become purchasing agents for the Allies, announced a new French loan on the following terms: "The Rothschilds of Paris have arranged to borrow in this market for a period of one year a considerable amount of money, the proceeds of which the Rothschilds will make available

to the French Government here for payment for its commercial obligations in this country. The loan will be secured by high-grade American railway bonds to be lodged with J. P. Morgan & Co. in New York. It is impossible at this time to state the amount of the loan." (New York *Times*, June 23, 1915.) This loan had in August, 1915, realized $43,000,000.

On July 9, 1915, a further French credit of $20,000,000 was announced by Morgan & Co. "to take the form of acceptances to be drawn by French banking houses upon the banking houses and institutions here which are parties to the arrangement." In addition, the loan was to be guaranteed by the Bank of France "and practically by the French Government as well," for the acceptances were to be secured by French treasury notes. (New York *Times*, July 9, 1915.)

By midsummer, 1915, however, the financial situation, as between America and Europe, was undergoing an unusual development. Sterling exchange was falling steadily, due to the shifting balance of trade. Gold shipments on a large scale were being made, but such measures, it was recognized, could be only temporary. Financiers generally were of opinion that, in order to restore international exchange to something like normal conditions, Great Britain and France, the chief customers of the United States, must be accommodated in some way, if they were to continue to purchase American products. Accordingly, the Anglo-French Financial Commission, headed by Lord Reading, Lord Chief Justice of Great Britain, came to New York in September, 1915, and held a number of conferences with representatives of the leading American financial institutions. Assurances were said to have been received that if a loan were arranged as a straight credit negotiation, "no opposition would be offered by the State Department on the score of a possible violation of neutrality." (New York *Times*, Sept. 14, 1915.)

As a result of these conferences, Lord Reading was able to announce, on September 28, that agreement had been reached as follows:

". . . The proceeds of the loan will be employed exclusively in America, for the purpose of making the rate of exchange more stable, thereby helping to maintain the volume of American exports.

"The plan contemplates the issue of $500,000,000 5 per cent five-year bonds constituting a direct joint and several obligation of the British and French Governments, as regards both capital and interest. No other external loan has been issued by either of these Governments apart from notes of the French Treasury to a limited amount, maturing in the next six months.

"The bonds will be repayable at the end of five years or convertible, at the option of the holder, into 4½ per cent bonds of the two Governments, repayable not earlier than fifteen years and not later than twenty-five years from the present time by the two Governments, jointly and severally.

"The bonds will be issued to the public at 98, yielding approximately 5½ to the investor. The work of offering this loan will be carried out by a syndicate which Messrs. J. P. Morgan & Co. and a large group of American bankers and financial houses will at once set about to form. Such group will include representatives throughout the country, and all members of the syndicate will be on precisely the same footing. This syndicate, whose business it will be to arrange that every investor shall have an opportunity to subscribe to the issue, will contract to purchase the loan from the two Governments at 96."[1] (New York *Times*, Sept. 29, 1915.)

The national, as distinguished from the international, significance of the Anglo-French loan was set forth in a statement issued

[1] The following raises an interesting question of neutrality with respect to the financial operations involved in the placing of the loan:

"The Federal Reserve Board has not passed directly on the propriety of rediscounting paper arising from the exportation of munitions of war, but in response to a request for an adverse ruling on the question from Labor's National Peace Council, the board did decline to rule so.

"The feeling here is that a banker's acceptance arising from a contraband shipment would be viewed simply as to its economic aspects without regard to the purpose of the shipment. In other words, an acceptance from the exportation of arms and warlike supplies would be approved if the security were considered sufficient and the transaction made in good faith. It is not believed that the Federal Reserve Board would go into the motives of the shipment or into the indirect effect of such trade upon the war." (Washington dispatch in New York *Times*, Sept. 14, 1915.)

"The Administration has scrupulously refrained from even suggesting what the Federal Reserve Board should do, but the Administration has let it be known that the Board need not be embarrassed by diplomatic considerations, in short, by the considerations popularly described as involving neutrality." (*Ibid.*, Sept. 15, 1915.)

by fourteen prominent Americans on October 18. To the United States, they said, the loan meant:

"1. That not one dollar of the money loaned will leave our shores.

"2. That every dollar will go, directly or indirectly, to some American farmer, workingman, merchant, or manufacturer, in cash payment for foodstuffs, clothing, raw material, labor and manufactured products that the English and French people need.

"3. That there will be established in this country a commercial credit just as important to us as to England and France, because it will be used to increase our trade and permit the outflow of our surplus products.

"4. That this country finally recognizes that, in order to further American trade, it must become a creditor nation, giving credit to any solvent and friendly nation that may be entitled to it." (New York *Times*, Oct. 18, 1915.)

HOSTILE EXPEDITIONS (1895)

"If . . . the persons supplying or carrying arms and munitions from a place in the United States are in any wise parties to a design that force shall be employed against the Spanish authorities, or that, either in the United States or elsewhere, before final delivery of such arms and munitions, men with hostile purposes toward the Spanish Government shall also be taken on board and transported in furtherance of such purposes, the enterprise is not commercial, but military, and is in violation of international law and of our own statutes."

(Opinion of Attorney-General Harmon, *Opinions of the Attorneys-General*, vol. XXI, pp. 267, 271, as cited in Moore: *Digest of International Law*, vol. VII, pp. 910–11.)

THE AUSTRIAN PROTEST AGAINST THE SALE OF MUNITIONS (1915)

ACCORDING to accepted principles of international law, commercial rights of neutrals remain unabridged by the fact of war. The sale of contraband, for example, though unneutral in its effects, comes under no restrictive regulation nor is it considered to compromise the neutrality of the state whose nationals or residents engage in it. As an offset, however, belligerents find an equitable remedy in the rights possessed by them of confiscating the contraband and condemning the vessels that carry it. This non-responsibility of neutral states for trade in contraband received expression at the Hague Conference of 1907 in Article 7 of the Convention Concerning the Rights and Duties of Neutral Powers in Naval War, as follows:

"A neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to an army or fleet." [1]

It was further stated in the preamble to the same convention that its rules "should not, in principle, be altered, in the course of the war, by a neutral power, except in a case where experience has shown the necessity for such change for the protection of the rights of that power."

In his proclamation of neutrality, issued on August 4, 1914, President Wilson set forth the customary rules relative to contraband thus:

"And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, . . . while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war,' yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established

[1] See also a similar provision (Art. 7) in the Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Land Warfare.

and maintained during the said war without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf."

From its beginning the war created an unprecedented demand for articles of contraband, especially arms and ammunition. The Entente Allies found themselves unprepared to produce the enormous quantities necessary and the manufacturers of the United States proceeded to supply the demand. On the other hand, the command of the seas having early passed to the Allies, the Teutonic belligerents were unable "to take advantage of neutral markets which, in theory, were open to both sides." Such a situation produced for a time some confusion of ideas as to the obligations of neutrality and charges were made that the United States was showing partiality to the Allies. The issue was presented to the Secretary of State on January 15, 1915, in a letter of inquiry from Senator Stone, Chairman of the Senate Committee on Foreign Relations, who, *inter alia*, requested information as to why there had been "no interference with the sale to Great Britain and her allies of arms, ammunition, horses, uniforms, and other munitions of war, although such sales prolong the war." Mr. Bryan replied on January 20, 1915, his statement on contraband trade being as follows:

"There is no power in the Executive to prevent the sale of ammunition to the belligerents.

"The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighboring American Republics, and then only when civil strife prevailed. Even to this extent the belligerents in the present conflict, when they were neutrals, have never, so far as the records disclose, limited the sale of munitions of war. It is only necessary to point to the enormous quantities of arms and ammunition furnished by manufacturers in Germany to the belligerents in the Russo-Japanese war and in the recent Balkan wars to establish the general recognition of the propriety of the trade by a neutral nation.

"It may be added that on the 15th of December last the German

Ambassador, by direction of his Government, presented a copy of a memorandum of the Imperial German Government which, among other things, set forth the attitude of that Government toward traffic in contraband of war by citizens of neutral countries. The Imperial Government stated that 'under the general principles of international law, no exception can be taken to neutral states letting war material go to Germany's enemies from or through neutral territory,' and that the adversaries of Germany in the present war are, in the opinion of the Imperial Government, authorized to 'draw on the United States contraband of war and especially arms worth billions of marks.' These principles, as the Ambassador stated, have been accepted by the United States Government in the statement issued by the Department of State on October 15 last, entitled 'Neutrality and trade in contraband.' Acting in conformity with the propositions there set forth, the United States has itself taken no part in contraband traffic, and has, so far as possible, lent its influence toward equal treatment for all belligerents in the matter of purchasing arms and ammunition of private persons in the United States."

The question was first taken up diplomatically in the memorandum delivered by the German Ambassador to the Secretary of State on April 4, 1915. It was necessary, he said, to take into consideration not only the formal aspect of the case, but also the spirit in which the neutrality is carried out. The situation was different from that in previous wars. The United States, alone of neutral countries, was in a position to furnish war material and was manufacturing and exporting it not in the ordinary course of business but through the creation of an "entirely new industry" the output of which inured to the benefit of the Entente Allies only, "the theatrical willingness to supply Germany also if shipments thither were possible," not altering the case. In an analogous situation in Mexico the Government of the United States had relaxed its embargo on the export of arms to that country in order to give Carranza equal opportunity with Huerta. Conversely, argued the Ambassador, "if this view were applied to the present case, it would lead to an embargo on the exportation of arms."

The Secretary of State, in his note of April 21, 1915, was unable to accept the German point of view. "This Government holds,"

he said, "as I believe Your Excellency is aware, and as it is constrained to hold in view of the present indisputable doctrines of accepted international law, that any change in its own laws of neutrality during the progress of a war which would affect unequally the relations of the United States with the nations at war would be an unjustifiable departure from the principle of strict neutrality by which it has consistently sought to direct its actions, and I respectfully submit that none of the circumstances urged in Your Excellency's memorandum alters the principle involved. The placing of an embargo on the trade in arms at the present time would constitute such a change and be a direct violation of the neutrality of the United States. It will, I feel assured, be clear to Your Excellency that, holding this view and considering itself in honor bound by it, it is out of the question for this Government to consider such a course."

It remained, however, for Austria-Hungary to make the most thorough-going protest. In a note to the American Ambassador at Vienna on June 29, 1915, Count Burian, the Austro-Hungarian Minister for Foreign Affairs, drew attention to the "far-reaching effects" of the traffic in munitions and expressed himself as impelled to discuss the question from the sense of his duty "to protect the interests intrusted to him from further serious damage which results from this situation as well to Austria-Hungary as to the German Empire." Though confident that the Government of the United States intended to be neutral, the Austro-Hungarian Government could not but conclude that conditions were such "as in effect thwart the intentions of the Washington Cabinet or even actually oppose them." In that case it became imperative that the Federal Government "maintain an attitude of strict parity with respect to both belligerent parties." The privileges of trade in contraband should be limited by the requirements of a genuine neutrality in conformity with the principles of international law. The authorities "who concern themselves more particularly with the question" lay it down that trade in contraband should not be permitted by a neutral government, "when this traffic assumes such a form or such dimensions that the neutrality of the nation becomes involved thereby." On any criterion, the export of munitions, "as is being carried on in the present war, is

not to be brought into accord with the demands of neutrality." It was not a question of protecting American industry from the loss incident to the existence of a world war but of setting limits to an industry that had "soared to unimagined heights." There was no question as to the right of the United States to put in force an embargo, nor would it, by so doing, come under the charge of having changed the rules in an unneutral manner. The preamble to the Hague Convention recognized a legal justification for change whenever the protection of the rights of the neutral state required it. Such a situation had arisen in the so-called blockade which was depriving the United States of its legitimate rights of commerce, and the Federal Government could, in the opinion of Count Burian, correct matters by confronting the opponents of Austria-Hungary and Germany "with the possibility of the prohibition of the exportation of foodstuffs and raw materials in case legitimate commerce in these articles between the Union and the two Central Powers should not be allowed." The note concluded with an appeal to the Federal Government "to subject its previously adopted standpoint in this so important question to a mature reconsideration."

Mr. Lansing, Secretary of State, replied in his note of August 12, 1915. After expressing surprise at the request of the Imperial and Royal Government, he proceeded to discuss the issues raised, in part, as follows:

" . . . To this assertion of an obligation to change or modify the rules of international usage on account of special conditions the Government of the United States cannot accede. The recognition of an obligation of this sort, unknown to the international practice of the past, would impose upon every neutral nation a duty to sit in judgment on the progress of a war and to restrict its commercial intercourse with a belligerent whose naval successes prevented the neutral from trade with the enemy.

"The contention of the Imperial and Royal Government appears to be that the advantages gained to a belligerent by its superiority on the sea should be equalized by the neutral powers by the establishment of a system of nonintercourse with the victor. The Imperial and Royal Government confines its comments to arms and ammunition, but if the principle for which it contends is sound it

should apply with equal force to all articles of contraband. A belligerent controlling the high seas might possess an ample supply of arms and ammunition, but be in want of food and clothing. On the novel principle that equalization is a neutral duty, neutral nations would be obligated to place an embargo on such articles because one of the belligerents could not obtain them through commercial intercourse.

"But if this principle, so strongly urged by the Imperial and Royal Government, should be admitted to obtain by reason of the superiority of a belligerent at sea, ought it not to operate equally as to a belligerent superior on land? Applying this theory of equalization, a belligerent who lacks the necessary munitions to contend successfully on land ought to be permitted to purchase them from neutrals, while a belligerent with an abundance of war stores or with the power to produce them should be debarred from such traffic.

"Manifestly the idea of strict neutrality now advanced by the Imperial and Royal Government would involve a neutral nation in a mass of perplexities which would obscure the whole field of international obligation, produce economic confusion and deprive all commerce and industry of legitimate fields of enterprise, already heavily burdened by the unavoidable restrictions of war."

Continuing, Mr. Lansing called attention to the practice of selling military supplies to belligerents, which had been uniformly pursued by both Austria-Hungary and Germany during recent wars and especially during the South African War, which, by reason of the isolation of the Boer republics, presented a situation identical with that in which the Central Empires were placed in the European War. "If at that time Austria-Hungary and her present ally had refused to sell arms and ammunition to Great Britain on the ground that to do so would violate the spirit of strict neutrality, the Imperial and Royal Government might with greater consistency and greater force urge its present contention."

Apart, however, from principles of international law, questions of policy were to be considered. The United States, which had never maintained a large military establishment, must be free to purchase arms and munition from neutrals, should it find itself involved in war, and what it claimed for itself, it could not deny to

others. This point of view was given a general application in terms as follows:

"A nation whose principle and policy it is to rely upon international obligations and international justice to preserve its political and territorial integrity might become the prey of an aggressive nation whose policy and practice it is to increase its military strength during times of peace with the design of conquest, unless the nation attacked can, after war had been declared, go into the markets of the world and purchase the means to defend itself against the aggressor.

"The general adoption by the nations of the world of the theory that neutral powers ought to prohibit the sale of arms and ammunition to belligerents would compel every nation to have in readiness at all times sufficient munitions of war to meet any emergency which might arise and to erect and maintain establishments for the manufacture of arms and ammunition sufficient to supply the needs of its military and naval forces throughout the progress of a war. Manifestly the application of this theory would result in every nation becoming an armed camp, ready to resist aggression, and tempted to employ force in asserting its rights rather than appeal to reason and justice for the settlement of international disputes.

"Perceiving, as it does, that the adoption of the principle that it is the duty of a neutral to prohibit the sale of arms and ammunition to a belligerent during the progress of a war would inevitably give the advantage to the belligerent which had encouraged the manufacture of munitions in time of peace and which had laid in vast stores of arms and ammunition in anticipation of war, the Government of the United States is convinced that the adoption of the theory would force militarism on the world and work against that universal peace which is the desire and purpose of all nations which exalt justice and righteousness in their relations with one another."

Other points raised in the Austro-Hungarian note were more summarily disposed of. The right and duty of determining when neutral rights need protection rested with the neutral state not with the belligerent. Such right and duty were "discretionary not mandatory." Otherwise, the belligerent would be dictating to the neutral on the subject of the latter power's own rights. As

for the prohibition of supplies to ships of war on the high seas (which Count Burian had cited as an instance of departure by the United States from the "true spirit and import" of the Hague Convention permitting export of contraband), the principle involved was the necessity of preventing neutral territory from being made a base for belligerent operations in contravention of the neutrality laws. Lastly, an examination by the Government of the United States of the principal authorities on international law had led to a different conclusion from that set forth in the Austro-Hungarian note. "Less than one fifth of the authorities consulted advocate unreservedly the prohibition of the export of contraband," while "several of those who constitute the minority admit that the practice of nations has been otherwise."

Summing up, Mr. Lansing found it "unnecessary to extend further at the present time a consideration of the statement of the Austro-Hungarian Government. The principles of international law, the practice of nations, the national safety of the United States and other nations without great military and naval establishments, the prevention of increased armies and navies, the adoption of peaceful methods for the adjustment of international differences, and, finally, neutrality itself are opposed to the prohibition by a neutral nation of the exportation of arms, ammunition or other munitions of war to belligerent powers, during the progress of the war." [1]

(*Diplomatic Correspondence between the United States and Belligerent Governments*, *passim*, published as a *Supplement* to the *American Journal of International Law*, vol. IX [1915].)

[1] The Austro-Hungarian Government replied to the American note on September 24, 1915, stating that after thoroughly examining "the points which were presented as pertinent by the Washington Cabinet, the most careful weighing and evaluation thereof cannot induce them to deviate from the standpoint set forth in their note of June 29." The provisions of the Hague Convention, it was repeated, did not contemplate the entirely new situation in which the economic life of the United States had been "militarized" for the benefit of one of the belligerent parties. No policy of "equalization" or "compensation" had been advocated, nor was there any intention to instruct the United States as to the exercise of its neutral rights and duties. What was claimed was merely the right of discussing the observance of neutrality "in case the question of the protection of the rights of a neutral state touches upon the sphere of rights of the belligerent."

THE ACTIVITIES OF ROBERT FAY (1916)

In his note of March 16, 1916, seeking to justify the British removals from the American steamship *China*, Sir Edward Grey said:

"The present war has shown that the belligerent activity of the enemies of this country is by no means confined to the actual theaters of military and naval operations and that there is no limit to the methods by which Germany in particular seeks to secure a victory for her arms. The hostile efforts of the enemy have shown, and continue to show, themselves on neutral soil in many parts of the world in political intrigues, revolutionary plots, schemes for attacking the sea-borne trade of this country and her allies, endeavors to facilitate the operations of ships engaged in this task, and in criminal enterprises of different kinds directed against the property of neutrals and belligerents alike. War has in effect been extended far beyond the bounds of the area in which opposing armies maneuver, and an unscrupulous belligerent may inflict the deadliest blows on his enemy in regions remote from actual fighting. It may be recalled that a certain Lieutenant Robert Fay, of the German army, was reported in the press last autumn to have been detected experimenting with bombs designed to destroy merchant ships leaving America and operating in the interests of the enemies of Germany. He was said to have admitted that he was sent by the German authorities to the United States expressly for this purpose. His Majesty's Government are not aware what degree of truth there may be in this story, but numerous incidents in America and elsewhere have shown that the facts may be as stated and may be typical."

(As made public by the Department of State.)

[Extract from the New York *Times* of August 30, 1916:]

"Robert Fay was sentenced to serve eight years in the Atlanta penitentiary by Judge Howe in the Federal District Court here on May 9 last. At the same time Walter Scholz, his brother-in-law, and his accomplice in the making of infernal machines, was sentenced to four years, and Paul Daeche, a German reservist, also an accomplice, to two years. All three were convicted on two indict-

ments charging them with conspiring to sink freight vessels used for carrying munitions to the Allies by attaching bombs to them. Their arrest and conviction followed a series of bomb plots which for a time threatened to interfere with the shipping from the port of New York and which included the dynamiting of the Canadian Pacific Railroad bridge over the St. Croix River.

"Fay, who had served at the front as a lieutenant of the Sixteenth Provisional Regiment of the Prussian Infantry, confessed that he had been sent to this country by the German Secret Police for the purpose of interfering with shipments of arms and ammunition to the Allies. His invention, a mine which was to be attached to the stern of a vessel and fired hours later at sea by clockwork, was to have been his means for carrying out this purpose.

"When the police arrested the conspirators in Weehawken, New Jersey, they found hundreds of pounds of high explosive and a number of these mines. They had perfected other arrangements, including the hiring of fast motor-boats and means of attaching the mines. When demonstrating the practicability of his scheme, Fay used dummy bombs and placed them in the same position in which the real bombs would be used.

"In passing sentence on Fay, Judge Howe severely censured his activities here.

"'As to Robert Fay,' he said, 'according to your testimony, you committed a grave crime against Germany by deserting your post and country, where you were engaged in lawful warfare, to come here, where you have committed still graver crimes against this nation for the purpose of helping Germany in the war. Altogether too many things have been happening in this country since the war commenced. Destruction of human life and property in violation of our law means little if anything to you. This Court is going to convince you and thoroughly warn others that this country is not a proper place in which to carry on the war, and that our laws are still binding, notwithstanding the war in Germany. Therefore, you are sentenced to serve a term of two years in the Federal Penitentiary at Atlanta and to pay a fine of one dollar on the first indictment, and a term of eight years in the same place and to pay a fine of one dollar on the second indictment. The terms of imprisonment to commence and run concurrently.'

"Fay's lawyers made efforts to have the sentence set aside and Fay sent a letter to President Wilson in which he begged to be deported so that he might reënter the German army and give his life for his country."

§ 27. DUE DILIGENCE IN ENFORCING NEUTRALITY

THE *ALABAMA* CLAIMS ARBITRATION

Special Arbitral Tribunal at Geneva, 1872

Among the subjects of international difference that had arisen between the United States and Great Britain during the Civil War, none presented greater difficulties in the way of amicable adjustment than did the so-called *Alabama* claims. These were claims of indemnity for losses sustained by American commerce through the depredations of the *Alabama* and other Confederate cruisers, which had been built, and in part equipped, within British jurisdiction, in direct violation (so the American Government contended) of the obligations of neutrality resting upon Great Britain in accordance with both international law and British domestic legislation. Various attempts were made to have all outstanding questions settled by a claims commission, but, in addition to technical difficulties of organization, the diplomatic situation was complicated by the advancement of other and far more extensive claims to "national" or "indirect" damages, which, so it was argued, resulted from the prompt recognition of belligerency accorded to the Confederacy by Great Britain. In 1871, however, the two governments agreed upon a Joint High Commission which was empowered primarily to settle various matters of contention between the United States and British North America, and to the consideration of this commission was submitted the *Alabama* claims controversy.

In their instructions the British Commissioners were authorized to express the regret of Her Majesty's Government for the escape of the *Alabama* "in such terms as would be agreeable to the Government of the United States and not inconsistent with the posi-

tion hitherto maintained by Her Majesty's Government as to the international obligations of neutral nations." The discussions on the subject of neutral duties disclosed fundamental differences in point of view, but inasmuch as the sense of the Commission favored a settlement of the claims by arbitration, it was seen to be necessary for the guidance of an arbitral tribunal, that some agreement be reached as to what constituted neutral rights and duties. Accordingly, preliminary to the Treaty of Washington, in which the results of their work were embodied and by which provision was made for an arbitration of the claims, the Commissioners formulated three rules, "to be taken as applicable to the case," as follows:

"A neutral government is bound —

"First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to hostile use.

"Secondly, not to permit, or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. . . ." (Malloy: *Treaties*, vol. I, p. 703.)

These rules, in the opinion of the British Government were not principles of international law at the time when the claims arose, but were assented to for the purpose of insuring the success of the arbitration.

The Treaty of Washington provided for the settlement of the *Alabama* claims by a tribunal of five arbitrators, one to be named by the President of the United States, one by Her Britannic Majesty, and the other three by the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil, respectively.

They were to meet at Geneva, and after presentation of cases and arguments by the agents, were to "first determine as to each vessel separately, whether Great Britain has, by any act or omission failed to fulfill any of the duties set forth in the foregoing rules, or recognized by the principles of international law not inconsistent with such rules." Should the Tribunal find that Great Britain had been remiss in its duty as a neutral, it might "proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it."

The Tribunal met for the first time in December, 1871. Charles Francis Adams was the American arbitrator, Sir Alexander Cockburn, the British. The other members were Count Sclopis, of Italy, who was elected to preside, M. Staempfli, of Switzerland, and Baron d'Itajuba, the Brazilian Minister at Paris. After organization, the respective cases were submitted and received, whereupon adjournment was made until June, 1872, to afford each party ample time to prepare its counter-case and argument.

In support of its claims, the United States maintained that Great Britain had violated neutrality, not only in despite of international law, but contrary to her own domestic statutes. The Foreign Enlistment Act of 1819 forbade in neutral territory such acts as recruitment of neutrals for belligerent forces, equipping, arming, or fitting out vessels with intent to be employed by a foreign belligerent government, or augmenting the warlike force of such vessels. This act, had it been applied in an atmosphere of impartiality, would have left no ground for complaint, but, as interpreted by the English courts, it had been rendered nugatory in its effect. That there was need of amendment was seen in the recommendations of the royal commission appointed in 1867 to report upon the act. The British proclamation of neutrality, of May 13, 1861, the instructions to naval officers and various other acts of the British Government all recognized that neutral duties do not depend upon the sufferance of municipal law. Good precedent for strict neutrality could be found in the relations of Great Britain and the United States in 1793–94, and again in 1838, during the Canadian rebellion. The essence of neutrality was that "due diligence" be exercised, and that implied a "diligence proportioned to the magnitude of the subject and to the dignity and

strength of the power which is to exercise it"; in other words, it must be "commensurate with the emergency or with the magnitude of the results of negligence."[1] The first rule was explicit in the matter of preventing the departure of vessels from neutral jurisdiction. The second rule did not in any way interfere with the legitimate commerce in arms or military supplies: it applied merely to the augmentation of armament for the furtherance of the naval plans of a belligerent. As to the contention repeatedly made that any liability of Great Britain for violation of neutral duties ceased when the *Alabama* and her sister cruisers were commissioned as ships of war, the United States considered it lacking in seriousness. In point of fact, most of the commissions had come from the office of the Confederate Agent in Liverpool, and in this respect resembled those issued by Genêt within the jurisdiction of the United States in 1793.

The claims, as finally presented before the Tribunal, were classified as follows:

"1. The claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.

"2. The national expenditures in pursuit of those cruisers.

"3. The loss in the transfer of the American commercial marine to the British flag.

"4. The enhanced payments of insurance.

"5. The prolongation of the war and the addition of a large sum to the cost of the war, and the suppression of the rebellion."

(*Geneva Tribunal*, vol. 1, p. 185.)

[1] "The expression 'due diligence' was contained in the draft submitted by the British delegation to the Second Hague Conference, upon which Article VIII [of the Convention respecting the Rights and Duties of Neutral Powers in Naval Warfare] was based. [Article omitted.]

"As the expression 'due diligence' was considered obscure, it was rejected, as the learned reporter of the convention, Mr. Louis Renault, says in the elaborate report which accompanies the convention, and which is, in accordance with the practice of international conferences, to be considered as the official and authoritative interpretation of the convention which it explains, justifies, and interprets. 'The expression of *due diligence*,' he says, 'which has become celebrated by its obscurity since its solemn interpretation, was rejected. The convention merely requires in the first instance (*On se content de dire d'abord*) that the neutral is *bound to employ the means at its disposal* . . . then, *to display the same vigilance.*'" (Mr. Bryan, Secretary of State, to the British Chargé d'Affaires, August 19, 1914.)

In denying liability for payment of these claims, Great Britain put forward certain propositions which, in her view, embodied fundamental principles of international law. In these she asserted that neutrality meant nothing but impartiality towards belligerents; in essence it was "to concede to one what it concedes to the other; to refuse to one what it refuses to the other." The *de facto* powers of a belligerent community must be recognized by a neutral, and, as warfare extends to the seas, the commissions of vessels of both belligerents must be equally considered. Early in the war Great Britain had forbidden the ships of either belligerent to carry prizes into British ports, and this had been warmly approved by the Secretary of State (Mr. Seward), whereas the Confederate Government had made protest against it. That the obligations of neutrality had been impartially enforced was seen in the continued complaints made by both parties that the enforcement was working hardship to the complainants. There was nothing in international law that bound a neutral government to prevent the sale of contraband or the manufacture and the delivery of such to the order of a belligerent. Often it was difficult to distinguish between a hostile expedition and vessels sailing merely as articles of contraband export. Neither was a neutral government bound to prevent vessels of war of a belligerent from remaining within its jurisdiction, provided the same privileges were extended to all parties to the war. The Foreign Enlistment Act had been modeled upon the Neutrality Act of the United States, and the latter had always been deemed sufficient in its scope, though "vessels had from time to time been fitted out and armed within the United States to cruise and commit hostilities against nations with which the United States was at peace." As for "due diligence," it could not be reduced to definite formula, but was conditioned by circumstances. In any event, in the matter of neutral duties a state was not bound to exercise more care than it would employ for its own safety, nor could it be expected to go beyond its own laws in enforcing neutrality: e.g., the rights of person and property involved in any proceeding must have all the benefit of jury-trial, procedure, rules of evidence, etc., accorded by the municipal law of each state. Wherever there had been a specific complaint, Great Britain had taken the proper action; in the particular cases

of the *Alabama* and the *Florida*, the arming had been done outside of British jurisdiction and their crews enlisted on the high seas. In a word, to establish lack of "due diligence," the United States had to show "a failure to use . . . such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation," and this the United States had not been able to do. Hence Great Britain maintained that there was no good claim for "pecuniary indemnity" especially for "indirect" damages. (See *Recognition of Confederate Belligerency*, p. 262.)

The arbitration almost came to failure over the question of "indirect" claims, but after skillful negotiation on the part of the two agents and the American arbitrator, the Tribunal decided that there was no foundation for such claims in international law, and that they "should be wholly excluded from the consideration of the Tribunal in making its award." The way was now clear for a decision upon the *Alabama* claims as such, and after full and careful discussion of each specific case, an award was concurred in by a majority of the arbitrators, Sir Alexander Cockburn alone dissenting.

In its decision, the Tribunal upheld the contentions of the United States and declared that, having regard to the "due diligence" of the first rule governing the arbitration, "the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel"; nor could the privilege of extra-territoriality be pleaded in extenuation of acts done in violation of neutrality. Coming to specific claims, the Tribunal found that in the case of the *Alabama*, Great Britain had failed to fulfill its neutral obligations on all counts: it had permitted the vessel to be constructed within British jurisdiction, had failed to detain it, and later had extended to it the hospitality of its colonial ports. So, too, in the case of the *Florida*. With respect to the *Shenandoah*, there had been no failure in "due diligence" in allowing it to depart from British jurisdiction, but there had been such failure later, in permitting it to augment its armament and enlist crews in Aus-

tralian ports. For the other vessels Great Britain was in no way responsible, nor were any claims for indemnity allowed on the ground of prospective earning or cost of pursuit of the Confederate cruisers. In accordance with authority conferred upon the Tribunal by the treaty, the sum of $15,500,000 in gold was awarded to the United States in satisfaction of all claims submitted, and such claims were declared by the Tribunal to be "fully, perfectly and finally settled." This sum was duly paid by Great Britain within the time specified by the Tribunal.

(*Papers relating to the Treaty of Washington*, vols. I–IV (*The Geneva Tribunal*); Moore: *International Arbitrations*, vol. I, pp. 495–682; Malloy: *Treaties*, vol. I, pp. 700–08; 717–22.)

THE *ODENWALD* (1915)

In a note of April 1, 1915, the German Ambassador protested against the action of the American authorities in the port of San Juan de Porto Rico relative to the detention of the *Odenwald*. Count Bernstorff described the occurrence and submitted affidavits. The note concluded as follows:

"Finally, I am unable to conceal from Your Excellency that the reckless action of the harbor authorities in opening fire on the steamer without warning does not seem to me to have been justified by the circumstances of the case. It could hardly be the intention of the American Government to endanger, without imperative cause, the lives of a ship's crew for the mere sake of insuring orderly traffic in the harbor."

Secretary of State Bryan in a note of May 3, 1915, answered the German Ambassador in part as follows:

"In reply I have the honor to state that upon the report to this Government by the authorities at San Juan of certain circumstances surrounding the preparation of the *Odenwald* for sea an investigation was immediately instituted. Until the investigation was concluded and acted upon at Washington, the authorities at San Juan were instructed to decline to issue clearance papers to the *Odenwald*. While this investigation was pending, and while the collector of customs at San Juan was acting

under these instructions, the captain of the *Odenwald* reached the determination that he would depart without authorized clearance and in open violation of the customs laws of the United States. Circumstances, which it does not seem necessary to relate here, have shown that the suspicions as to the *bona fides* of the application for clearance, which had been aroused by the preparations for sailing by the officers of the *Odenwald*, acting in conjunction with the officers of the German steamer *President*, lying in the same harbor, were well founded, and that this Government and its officers at San Juan were justified in the course which they took in deferring the clearance of the *Odenwald*. Irrespective of the substantial grounds for the suspicions of the port officials at San Juan, the fact remains that the *Odenwald* in her endeavor to leave port on March 21 last without papers committed a willful breach of the navigation laws of the United States, because of which judicial proceedings have been brought by the United States against the vessel and the persons concerned in her illegal conduct which made it necessary for the United States authorities to employ force to prevent her unauthorized departure on a mission which this Government felt at the time might constitute a breach of the neutrality of the United States and result in a possible claim for lack of due diligence on the part of this Government in performing its neutral duties.

"As to the assertion that the reckless action of the port authorities in their exercise of force endangered human lives on board the *Odenwald*, I have the honor to inform Your Excellency that this Government has had instituted a thorough and searching investigation into the circumstances of the attempted sailing and arrest of the *Odenwald* on March 21. The result of this investigation, which is supported by the statements and affidavits of the officers of the customs, as well as of the military officers in charge of the defenses of the port, establish the following facts:

"On March 19, at a conference between the collector of customs, Col. Burnham, United States Army, the German consul, the captain of the *Odenwald*, and others, the captain of the vessel was informed by Col. Burnham that the latter would use whatever force was necessary in order to prevent the *Odenwald* from leaving port without the necessary custom-house clearance and that he would

go to the length of using the guns of his command in the forts for this purpose.

"On March 20, at another conference between the same persons, a similar statement was made to the captain of the *Odenwald*, and it was arranged to place an armed party on board the vessel, unless the captain, the vessel's agents, and the German consul would give assurances that no attempt would be made to leave without proper papers. Promises were given not to leave during the night of March 20–21. Nevertheless, it was discovered in the early morning hours of the 21st that officers from the German steamer *President* had boarded the *Odenwald* and that the machinery of the *Odenwald* was being put in motion. The port authorities thereupon again notified the chief officer of the *Odenwald* not to depart without clearance papers, warning him that the vessel would be closely watched and would be stopped by force if necessary.

"On March 21, at about 3 P.M., the *Odenwald* raised anchor and started her engines. The customs officer on board the vessel at the time was told by the captain that if he desired to go ashore he could take the sail boat of the steamer *President*, which was at the gangway. The *Odenwald* had moved ahead about five lengths when the customs officers notified the captain that the vessel could not leave port without clearance papers. Notwithstanding this notice the vessel continued in motion, and the officer was under the necessity of leaving the ship while she was under weigh.

"As she passed San Augustin Bastion, five hundred feet from Morro Castle, Capt. Wood, United States Army, who was there stationed with a machine gun, hailed the vessel several times and ordered her to stop, in circumstances which made it impossible for the officers of the vessel not to have heard the order. The *Odenwald* nevertheless continued on her course, whereupon about seventy-five shots were fired from the machine gun mounted on the bastion. These shots were aimed and fell a considerable distance in front and short of the *Odenwald*. In order not to endanger craft which appeared ahead of the *Odenwald* as she proceeded, fifteen shots were fired from the machine gun, which fell off the stern of the vessel. Although these were small solid shots, they were used as a warning, because it is not possible to use blank cartridges in a machine gun. The machine gun was not aimed at the *Oden-*

wald, nor did any of the shots strike the vessel. Any marks on the *Odenwald's* hull, which is old and scarred through many months of sea service, were made by other causes than by machine-gun bullets striking the vessel, according to the proofs laid before this Government.

"The *Odenwald* did not heed this warning or slacken her speed. Thereupon a 4.7-inch gun on the Morro Castle was aimed and fired under the personal direction of Col. Burnham. The shot struck at least three hundred yards in front of the *Odenwald* and short of her projected course. The vessel then stopped and was taken back to her anchorage under the direction of a pilot. No machine-gun shots could have been fired from Morro Castle, as no machine guns are mounted at that fort.

"It will be observed that six distinct warnings were given to the captain of the *Odenwald* that force would be used in case he attempted to leave the harbor without the clearance papers required by law, namely, at the conferences on March 19 and March 20, twice by the customs officers on board the vessel on March 21, by the orders of Capt. Wood from the bastion, and by the shots from his machine gun. None of these warnings was heeded by the captain, who persisted in his determination to leave port in violation of the laws of the United States, until the warning shot from Morro Castle induced him to obey the regulations of the port.

"Your Excellency will perceive from the foregoing statement of facts that the United States authorities at San Juan in the performance of their duties avoided any act endangering the safety of the vessel and the lives of the persons on board and exercised no greater force than was necessary to prevent the illegal departure of the *Odenwald* from the port of San Juan."

(*American Journal of International Law, Supplement,* July, 1915, pp. 337–42.)

CHAPTER VIII

THE RESTRICTIONS PLACED UPON THE COMMERCIAL TRANSACTIONS OF NEUTRAL INDIVIDUALS

§ 28. ENEMY CHARACTER

THE *POSTILION*

High Court of Admiralty, January 8, 1779

Sir James Marriot rendered the decision in this case of which the following report is given:

A Lubeck ship was restored to the Lubeckers and the cargo to M. Lienau, the owner, who, though a Frenchman, was domiciled at Hamburg; and it appearing by evidence, and by a certificate of the magistrates on board the ship, that the cargo was his sole property, though consigned to his brothers in France, the cargo was also restored, and the privateer condemned in costs and damages. The ground of the decision was that a native of Hamburg, resident in France, would have his property condemned by the law of nations as an adopted Frenchman, *pro hac vice;* and so the King's declaration of reprisals [1] expresses it, that the ships and goods of persons inhabiting the territories of the French King shall be subject to reprisals; and therefore the same equity operates the other way, that a Frenchman resident at Hamburg should be considered as a Hamburger, and have the advantages of protection if he is the sole proprietor.

(Hay and Marriot: *Admiralty Reports*, p. 245; Roscoe: *Prize Cases*, vol. I, p. 20.)

[1] War had been declared against France previously to the declaration of reprisals above referred to. See Roscoe, *Prize Cases*, vol. I, p. vii.

THE *MARIANNA*

High Court of Admiralty, 1805

THIS was a question respecting the title of property in some goods, and also on the freight of a ship, sold at Buenos Ayres by an American to a Spanish merchant, for which the purchase money had not been paid, but was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale.

Sir William Scott (Lord Stowell): "This ship appears to have been originally an American vessel, sold to a Spanish merchant at Buenos Ayres, and seized on a voyage to this country, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. A claim is given on behalf of the former American proprietor, in virtue of a lien which he is said to have retained on the property, for the payment of the purchase money; but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a court of prize. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence, which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions, and to decide on the simple title of property, with scarcely any exceptions. Then what is the proprietor's character of the ship? She is described as the prop-

erty of the Spanish merchant, Mr. Romero. She is sailing under the Spanish flag, and is fully invested with the Spanish character, not ostensibly only, but actually, and in the real intention and understanding of the parties. She had been sold to Mr. Romero; but it is said that a part of the purchase money had not been paid. That objection can have little weight, since it is a matter solely for the consideration of the person who sells, to judge what mode of payment he will accept. He may consent to take a bill of exchange, or he may rely on the promissory note of the purchaser, which may not come in payment for a considerable time, or may never be paid. The court will not look to such contingencies. It will be sufficient that a legal transfer has been made, and that the mode of payment, whatever it is, has been accepted. Upon this view of the principle upon which the prize court has always acted, the ship must be considered to have been legally transferred, and must be pronounced subject to condemnation, as Spanish property, which will dispose of that part of the claim which prays for an indemnification to be allowed out of the freight."

The Court continued: "Then as to the title of property in the goods, which are said to have been going, as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt, will not alter the property — There must be something more."

The rest of this case deals with the enemy character of funds on the ship, claimed to be bound for London for the purpose of completing the payment on the ship. The Court held that the American vendor of the ship had not acquired ownership of this property and it was condemned.

After examining the conditions of the shipment, Sir William Scott concluded: ". . . I am of opinion that the title of property in the ship had been effectually transferred, and that no title of property in the parcel of tallow had been acquired." [1]

(Extract from C. Robinson: *Admiralty Reports*, vol. VI, pp. 24–28.)

[1] The discussion of a second question, concerning the rights of neutral goods shipped before the outbreak of war, is omitted. — *Ed.*

THE *HARDY*

Conseil des Prises, 13 fructidor, an IX (August 31, 1801)

The Council: We have heard the report of citizen Lacoste, member of the Council; from which it appears: There was no serious infraction in regard to the regularity of the papers relating to the vessel which was removed immediately after the decision of the Tribunal of Commerce. In regard to the cargo, Coste Lanfreda, who is the owner, fulfilling the duties of consul of Ragusa at Messina, proved before the Court of Appeal that he was a native of Ragusa, so that we cannot give heed to the vague assertion of the captain, that he thought he was a Neapolitan subject. A double destination was not shown, and even if it had been, the two ports indicated, being one neutral, the other that of an ally, afforded no reasonable ground of suspicion. As the law of 29 nivose, year VI, only related to the produce of English soil, it could not be applied to the Two Sicilies, which had not been occupied as conquered territory by the troops of Great Britain. Hence, to determine the character of the cargo of the *Hardy*, it is sufficient to examine whether the goods can be considered as enemy property on the ground that Costa Lanfreda, a native and consul of Ragusa, in the capacity of Ragusan consul resided and traded at Messina, which was then at war with the French Republic. This question of international law [*droit publique*] is easily answered in the negative, when we remember that residence abroad does not prevent an individual from belonging to the country where he was born. To break the tie with his native land, it is necessary that an individual voluntarily choose a new country [*patrie nouvelle*], and that he be regularly adopted by it. Without this renunciation on his part of the country to which he formerly belonged, and without this necessary adoption, he continues ever to remain what he was originally, — friend of the friends of his country, enemy to its enemies. When his country is neutral he himself remains neutral, and he should enjoy, both as regards his person and his property, all the advantages of neutrality, since possessions of themselves do not have a neutral or hostile character, but always take on that with which their owner is clothed. Furthermore, war is not a relation

between man and man, nor between societies and individuals, but of states among themselves; consequently it is not permissible to oblige an individual to participate when he has not manifested his express intention of associating himself with the belligerent power in whose territory he resides. The inconveniences and the abuses which might lead to the adoption of the other system, however serious they may be, are more than counterbalanced by the advantage which commerce obtains from the protection and the favor which belligerents accord to neutral commerce wherever it may be carried on. Natives of the enemy state, although established in a neutral country, and carrying on trade under protection of the neutral flag, do not lose their enemy character. It would, therefore, be both disloyal and illegal to assimilate, according to accident and the variable chances of war, individuals of neutral origin with enemies, solely because they reside and trade in the enemy's country. The authorities of the distant past, when might often stood in the place of right, may well have set forth precedents to the contrary, and defended a conflicting principle, but the continuing progress of civilization and the universal need to enlarge the liberty of commercial relations between peoples have introduced saner views, and given currency to the more liberal ideas which our Government at the present time is eager to proclaim, as typical of its policy, and as an earnest of its love of humanity. In applying these principles to the present case, we find an owner of neutral origin, who, by reason of his residence in a country momentarily become enemy, and through his commercial transactions, cannot be considered to have lost the advantages of his neutrality, and this the more since he exercises there the office of consul for his native land, and has not ceased to belong to it, both by law and in fact. Neither can he personally, nor his trade, which it is impossible to consider separately, be considered as enemy. Accordingly it is decided that the capture made by the French privateer *Voltigeant* of the Ragusan vessel, the *Hardy*, is void and illegal, and the vessel and cargo are ordered released to the owners.

(Translated from De Pistoye et Duverdy: *Traite des Prises Maritime* [Paris, 1859], vol. 1, pp. 326–27.)

THIRTY HOGSHEADS OF SUGAR (BENTZON *v.* BOYLE)

Supreme Court of the United States, March, 1815

Chief Justice Marshall delivered the opinion of the Court as follows:

"The island of Santa Cruz, belonging to the Kingdom of Denmark, was subdued, during the late war, by the arms of His Britannic Majesty. Adrian Benjamin Bentzon, an officer of the Danish Government, and a proprietor of land therein, withdrew from the island on its surrender, and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzon. On her passage, she was captured by the American privateer, the *Comet*, and brought into Baltimore, where the vessel and cargo were libelled as enemy property. A claim for these sugars was put in by Bentzon; but they were condemned with the rest of the cargo; and the sentence was affirmed in the Circuit Court. The claimant then appealed to this Court.

"Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

"Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?

"In arguing this question, the counsel for the claimants has made two points:

"1. That this case does not come within the rule applicable to

shipments from an enemy country, even as laid down in the British Courts of Admiralty.

"2. That the rule has not been rightly laid down in those Courts, and consequently will not be adopted in this.

"1. Does the rule laid down in the British Courts of Admiralty embrace this case?

"It appears to the Court that the case of the *Phœnix* is precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

"The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it, but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir William Scott lays down the general rule thus: 'Certainly nothing can be more decided and fixed, as the principle of this Court and of the Supreme Court, upon very solemn arguments, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made on the point of law, at this day.'

"Afterwards, in the case of the *Vrow Anna Catharina*, Sir William Scott lays down the rule, and states its reason. 'It cannot be doubted,' he says, 'that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation.'

"This rule laid down with so much precision, does not, it is con-

tended, embrace Mr. Bentzon's claim, because he has not 'incorporated himself with the permanent interests of the nation.' He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

"This distinction does not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

"The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he has incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy. He could ship his produce to Great Britain in perfect safety.

"The case is certainly within the rule as laid down in the British Courts. The next inquiry is: how far will that rule be adopted in this country?

"The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but

with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

"Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British Empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

"It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

"The rule laid down in the *Phœnix* is said to be a recent rule, because a case solemnly decided before the Lords Commissioners in 1783, is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

"The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extrava-

gant perversion of principle, nor is it a violent offense to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this Court is of opinion that there was no error, and the sentence is affirmed with costs."

(Facts and argument of counsel are omitted. Cranch: *Supreme Court Reports*, vol. IX, pp. 191–99.)

THE *FRIENDSCHAFT*

Supreme Court of the United States, February 25, 1819

THIS was an appeal from the Circuit Court of North Carolina.

Mr. Justice Story delivered the opinion of the Court:

"The shipment in this case was made by Moreira, Vieira and Machado, a house of trade established in London, on the account of the house, to Moreira, one of the partners in the house, who was a native of, and domiciled in, Lisbon, in the kingdom of Portugal; and the only question is, whether the share of Moreira in the shipment is exempted from condemnation by reason of his neutral domicil. It has been long since decided in the Courts of Admiralty, that the property of a house of trade established in the enemy's country, is condemnable, as prize, whatever may be the domicil of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicil of any of the company. The rule then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained, if the case were entirely new.

"*Decree affirmed with costs.*"

(Opinion taken textually from the reports. The statement of facts appears sufficiently in the opinion. Wheaton: *Supreme Court Reports*, vol. IV, pp. 105–07.)

CARGO FROM THE *EKATERINOSLAV*

Sasebo Prize Court, June 26, 1905

THE goods in question were consigned by the Vladivostock branch of Kunst and Albers, the claimants, a German firm, to the branch of the same firm at Odessa, and were captured with the Russian steamship *Ekaterinoslav* on the 6th of February, 1904, as appears from the evidence.

The claimants demanded the release of the goods on the ground that they were neutral property, and not contraband of war. They also claimed 64 rubles 37 kopeks, the amount of the freight paid on the goods, and 50 yen, traveling expenses incurred in attending the Court.

The Court, after hearing the Procurator's argument, dismissed the claim and condemned the goods consisting of musical instruments and other articles on the following grounds:

"International Law permits the capture in time of war of enemy goods carried in an enemy ship, whether they be contraband of war or not, and the question whether goods are enemy goods or not depends, not on the nationality of their owner, but on his domicile, or, in the case of a merchant, the place of his business. These goods are, therefore, clearly enemy goods, being despatched from the Vladivostock branch of Kunst and Albers to their Odessa branch, and are liable to condemnation. This Prize Court has no competence to decide on claims for freight or traveling expenses, and therefore the claim in regard to them must be rejected."

The claimants presented an appeal to the Higher Court, which was dismissed upon the same grounds on the 30th of May, 1905.

(A slightly modified extract giving the opinion in full from Hurst and Bray: *Russian and Japanese Prize Cases*, vol. II (*Japanese Cases*), pp. 10–11.)

§ 29. TRANSFER TO A NEUTRAL FLAG

THE *SECHS GESCHWISTERN*

High Court of Admiralty, November 19, 1801

THIS was a case respecting a ship asserted to have been purchased in France, by a neutral merchant, but not wholly transferred.

Sir William Scott (*Lord Stowell*) delivering the opinion: "This is the case of a ship, asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France, it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred, must be *bona-fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest, vitiates a contract of this description altogether. This is the rule which this country has always considered itself justified in enforcing; not forbidding the transfer as illegal, but prescribing such rules as reason and common sense suggest, to guard against collusion and cover, and to enable it to ascertain, as much as possible, that the enemy's title is absolutely and completely divested.

"In the present case there are covenants which preserve, and retain the interest of the enemy seller. The formal instruments of transfer rather import some such secret agreement; for in the account current, which bears date February, 1800, we find charges for neutral papers; and though the bill of exchange which is asserted to have been given in payment, is produced, and bears the semblance of an actual bill of exchange, no notice is taken of it in this account. With respect to the balance of the account also, as it is termed, there is an agreement by which 'the neutral purchaser mortgages the said brig, etc., to Citizen ———, deducting the sums received on account.' But there are no such sums charged or entered, as received; under these circumstances, the ship would stand bound for the whole amount, and it could not be said, that the interest of the former owner is divested. But there is another

condition of this contract which more directly points to the continuance of the enemy's interest. It recites, that 'whereas the seller is bound in a penalty not to sell, unless under condition of restitution, at the end of the war, we bind ourselves to all suits, to which the seller may become subject.' It seems, that it is the policy of the French Government, not to allow sales of French vessels, without this equity of redemption. From their inability to navigate their own ships during the war, they submit to a temporary transfer; but still keep their hand upon them, to enforce restitution on the return of peace. From this penalty, the neutral purchaser undertakes to exonerate the vendor. It is impossible for him to do this, without making himself answerable for the money, for which Citizen B. is bound; in which case, supposing that any adequate payment has been actually made, the neutral must be understood to undertake to pay a double price. Is there in this any sign of a *bona-fide* transfer? Is not the hand of the French vendor still on the vessel? Looking to the control which the French Government, and the vendor still retain over this property, it is impossible for me to hold, that all the interest of the enemy is completely divested.

"*Ship condemned.*"

(C. Robinson: *Admiralty Reports*, vol. IV, pp. 100–03.)

THE *JEMMY*

High Court of Admiralty, July 17, 1801

THIS was a case of a ship asserted to have been purchased at Dunkirk, by Mr. Schultz of Altona. This cause now came on to be heard on farther proof.

Sir William Scott (*Lord Stowell*): "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which, if the Court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of the former owner. Wherever that fact appears, the Court will hold it to be conclusive, because from the *evidentia rei* [the very evidence of the facts], the strongest presumption necessarily arises, that it is merely

a covered and pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the Court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the Court to protect itself against frauds.

"The positive objections which have been pointed out, on the fact of transfer, are also of considerable weight: The inadequacy of the price, and the chasms appearing in the correspondence, are circumstances inconsistent with the probability of ownership; there is also the course of trade, which has been entirely French, without interruption, excepting in one voyage to Barcelona; but even in that instance, the vessel returned again to a French port.

"It would be impossible for the Court to admit further proof in such a case as this, without exposing itself to continual imposition. I have no hesitation in condemning this vessel."

(C. Robinson: *Admiralty Reports*, vol. IV, pp. 31–32.)

THE *BRINDILLA* (1914)

SHORTLY after the outbreak of war in 1914 several vessels belonging to the Deutsche-Amerikanische Petroleum Gesellschaft and sailing under the German flag were transferred to the Standard Oil Company of New Jersey in accordance with recent legislation permitting foreign-built ships to take out American registry. Among the ships transferred was the *Brindilla*, formerly the *Washington*, which on October 13, 1914, cleared from Bayonne, New Jersey, for the neutral port of Alexandria with a cargo of illuminating oil. On the voyage she was seized by the British cruiser *Caronia* and taken to Halifax, where prize proceedings were begun against her on the ground that the transfer was not *bona-fide* and that her ownership was still German. The Standard Oil Company requested the Government of the United States to intervene in the case, and on October 22 the State Department filed a protest against the seizure and demanded release. It soon appeared that the British Government had not at first understood the relationship of the two companies, the German company being subsidiary

to the American and controlled by it. Under those circumstances the transfer involved merely a change of flag without a change of ownership, and on October 24 it was announced that the British Government "was not so much concerned about the transfer of registry of the ships as the detention of the cargoes of illuminating oil." [1] Accordingly, on October 26 orders were given to release the *Brindilla*, and she was permitted to resume her voyage to Alexandria.

In his note to Ambassador Page on February 10, 1915, Sir Edward Grey incidentally stated the position of the British Government with respect to such transfers as that of the *Brindilla*. Discussing belligerent restraints on commerce, he said:

"Another instance of the efforts which His Majesty's Government have made to deal as leniently as possible with neutral interests may be found in the policy which we have followed with regard to the transfer to a neutral flag of enemy ships belonging to companies which were incorporated in the enemy country, but all of whose shareholders were neutral. The rules applied by the British and by the American prize courts have always treated the flag as conclusive in favor of the captors in spite of neutral proprietary interests (see the case of the *Pedro*, 175 U. S. 354). In several cases, however, we have consented to waive our belligerent rights to treat as enemy vessels ships belonging to companies incorporated in Germany which were subsidiary to and owned by American corporations. The only condition we have imposed is that these vessels should take no further part in trade with the enemy country."

(*American Journal of International Law*, vol. IX, *Supplement*, July, 1915; London *Times*, October, 1914, *passim;* New York *Times*, October, 1914, *passim.*)

[1] Another Standard Oil ship, the *Platuria*, had been seized about the same time as the *Brindilla* and under the same circumstances, and taken into Stornoway. After protest by the Government of the United States, it was released on assurances from the Danish Government that its cargo of petroleum should not ultimately reach Germany.

THE *HOCKING* (1915)

THE *Hocking* was one of a fleet of eleven foreign-built steamships which in June, 1915, were acquired by the American Transatlantic Company, a Delaware corporation headed by one Richard G. Wagner, of New York. The purchase had been negotiated through a Danish agent, Jensen, with capital alleged to have been furnished by Hugo Stinnes, a German ship owner, and later through Theodore Lehr of Rotterdam, after Jensen had been imprisoned for breach of Danish neutrality. From the first the transaction had been under close observation by the British and French Governments, in the belief that the transfer of these ships, first to Danish registry and afterward to American, was fictitious, and the real ownership vested in German capitalists. Before her purchase by Jensen the *Hocking* had belonged to a Dutch company, so that in her case no question of change from enemy to neutral flag was involved.

The application for American registry was carefully scrutinized. The Commissioner of Navigation refused it and the Secretary of Commerce was inclined to sustain his ruling. Finally, however, it was referred to the Secretary of State, who decided in favor of registry. The law was clearly mandatory in the case where an American corporation declared that a vessel had been transferred in good faith; the Department of Commerce, under such circumstances, could not refuse registry. The investment of German capital in an American company did not stamp a transfer with illegality from the point of view of international law, so long as the corporation had an American personality.

The British Government had protested against the purchase of these ships from the first. Later, it announced that the transfer of foreign ships to American registry would not be recognized if enemy capital was represented, and similar announcement was made by France. To meet such cases the Allies abandoned Article 57 of the Declaration of London, according to which the enemy or neutral character of a vessel is determined by the flag which she is entitled to fly. An Order in Council of October 20, 1915, abrogating this provision, declared that "in lieu of said article British prize

courts shall apply the rules and principles formerly observed in such courts." This meant that the nationality of a merchant vessel was to be determined by her ownership rather than by her flag. "Where the Court is satisfied that there exists an enemy interest in the ship, it renders any such interest liable to condemnation. . . . It is not necessary in order to secure condemnation that the whole ownership of the ship should be vested in an enemy, and perhaps it is not often so vested. Where neutrals and enemies have interests in the same vessel, the neutral interests are exempt, but the enemy interests may be condemned, and on such condemnation either the vessel is sold and the price of the enemy interests appropriated to the Crown, or the enemy interests are sold to the neutral co-owners." (Editorial in London *Times*, October 26, 1915.)

The French Government effected a similar change by its decree of October 26, 1915, as follows:

"Article I. The provisions of Article 57, Paragraph 1, of the declaration signed at London Feb. 26, 1909, relating to naval warfare, shall be applied during the present war, with the following modification to it: Whenever it is established that a ship flying an enemy flag belongs in fact to the nationals of a neutral or an allied country, or conversely, that a ship flying a neutral or allied flag belongs in fact to nationals of an enemy country or to parties residing in an enemy country, the ship shall accordingly be considered neutral, allied, or enemy."

On October 31 it was announced that the *Hocking* had been brought into Halifax by a prize crew placed on board by a British cruiser which had captured her while on a voyage from New York to Norfolk, where she was to take on a cargo of coal for Argentina. A few days before the seizure a large number of ships had been placed by the British Government upon a "black list," including those recently acquired by the American Transatlantic Company, which action was intended as notice to shippers that the status of these ships was in question.

The owners of the *Hocking* at once protested that their company was American, that all the stock was owned in America and by Americans and that consequently there was no ground for seizure. A formal request that the Government of the United States de-

mand the release of the vessel was made by Wagner, the president of the company, on November 10, and the State Department promised to take action if proof of American ownership could be established. In the course of the month other vessels of the same line were seized — the *Genesee*, which was put into prize court at St. Lucia, and the *Kankakee*, which had been taken to Port Stanley in the Falkland Islands. Announcement was made also that a French prize court at Marseilles had condemned another of the company's ships, the *Solveig*, as prize of war.

Meanwhile, before any decision had been reached at Halifax or St. Lucia, the British Government took steps to requisition the *Hocking* and the *Genesee* for its own use. Against these proceedings the Government of the United States made prompt and vigorous protest, refusing to recognize the validity of the Orders in Council under which such action was taken. In consequence, the British Government announced on December 9 that the requisitions had been canceled but that the two ships would be held in prize court pending decision as to enemy ownership. Assurances were given that no other ships belonging to the company would be seized in the meantime, and instructions were given to release the *Kankakee*.

No further steps seem to have been taken in the case of these vessels until on April 22, 1916, the British Ambassador at Washington, on instructions from his Government, informed the Secretary of State that "the immunity from capture at present enjoyed by the American Transatlantic Company's vessels can only be continued provided that an assurance is given by the company that the vessels will not trade with Scandinavia or Holland." The Secretary of State, replying in a note of May 10, 1916, again emphasized the genuine American personality of the company, and pointed out that British governmental practice, as well as decisions in recent prize cases, appeared to establish "that the British judicial and administrative authorities have as a rule attached no importance to beneficial ownership in determining the nationality of the vessels owned by corporate organizations, but have uniformly proceeded on the theory that nationality in each case must be determined by the flag the vessels fly or by their corporate ownership.

"On the other hand, the British authorities in now seeking to condemn the ships of the American Transatlantic Company, which are owned by an American corporation and fly the American flag, on the ground, as they state, that they believe these vessels to be entirely, or to a large extent, enemy owned, apparently attach great importance to beneficial ownership and no importance to the flag or corporate ownership."

Apart, however, from theories of ownership, the facts did not, in Mr. Lansing's opinion, justify a change of treatment. "The owners of the vessels have informed the Department that they have complied strictly with the British Government's conditions, and the Department has no information to the contrary." [1]

(*White Papers*, published by the Government of the United States.)

THE *DACIA*

Conseil des Prises at Paris, August 5, 1915

An immediate effect of the War of 1914 was the enforced withdrawal of the German merchant marine from international commerce. This led to a scarcity of available shipping and the question was early raised under what circumstances it was permissible in international law to transfer belligerent vessels to a neutral flag. An attempt was made by the Ship Purchase Bill to acquire German ships for the United States for use in the Latin-American trade, but it failed of enactment, in part perhaps through fear of international complications. The difficulty lies in the adverse presumptions and the close scrutiny to which all such transfers are subjected. The Declaration of London lays down the following rule:

"The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

"There is, however, absolute presumption that a transfer is void:

[1] The cases of the *Hocking* and the *Genesee*, so far as ascertained, are still pending (October, 1916).

"(1) If the transfer has been made during a voyage or in a blockaded port.

"(2) If there is a right of redemption or of reversion.

"(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed." [1]

In a memorandum of August 7, 1914, the Hon. Cone Johnson, Solicitor for the State Department, gave the following official opinion relative to the transfer of merchant ships of a belligerent to a neutral after the outbreak of war, which memorandum he admitted was "hurriedly struck off" without opportunity to revise it.

"The declaration of the London convention on the question of the transfer of merchant vessels from a belligerent to a neutral flag but restates the position long maintained by the United States, Great Britain, and most of the other maritime nations, except as to the burden of proof of the *bona fides* [good faith] of such a transfer made during the existence of war. It is the *bona fides* of the sale which is the essence of a good transfer, and it is not perceived that the ulterior motive actuating the parties to the transfer is to govern, though such motive may have been the natural advantages in having the ship to fly the flag of a neutral rather than that of a country at war. If the transfer was *bona-fide*, without defeasance or reservation of title or interest, without any understanding that the vessel should be re-transferred at the end of hostilities, and without other indicia of a simulated or fictitious transfer, and not of a ship in a blockaded port or *in transitu*, the transfer is valid under international law, as it would be under the London convention, though the ulterior motive of the vendor and vendee may have been the natural advantages of flying the flag of a country at peace."

Among a number of citations in support of this opinion the memorandum gave one from the decision in the case of the *Benito*

[1] Though the framers of the Declaration considered its rules as corresponding "in substance with the generally recognized principles of international law," this statement cannot be taken too literally. The British Order in Council of October 20, 1915, which abrogated Article 57 of the Declaration directed its Prize Courts to return to "the rules and principles formerly observed." (The *Hocking*, pp. 361–62.)

Estenger (176 U. S. 568), in which the Supreme Court of the United States had stated the general principle, as follows: [1]

"Transfer of vessels *flagrante bello* [while war is raging] were originally held invalid, but the rule has been modified and is thus given by Mr. Hall, who, after stating that in France 'their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war,' says: 'In England and the United States the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the practice of fraud being great, the circumstances attending a sale are severely scrutinized and the transfer is not held to be good if it is subjected to any condition or tacit understanding by which the vendor keeps an interest in the vessel or its profits, control over it, and power of revocation, or a right to its restoration at the conclusion of the war.'" [2]

The question of the validity of transfers during war was raised in a direct manner by the announcement on January 4, 1915, that the *Dacia*, of the Hamburg-American line, had been purchased by one Edward N. Breitung, of Marquette, Michigan. American registry was granted in accordance with the provisions of the amendment to the Panama Canal Act of August 18, 1914, and the ship placed under charter to carry a cargo of cotton from Galveston to Bremen. The transfer at once became a subject of international discussion. The British Government announced that the *Dacia* would be seized as a test case, and rejected a request of the Government of the United States that the vessel be allowed to proceed with her cargo to Rotterdam under a safe-conduct, though

[1] The *Benito Estenger* was a Spanish vessel transferred to British registry during the Spanish-American War. The Court found that the transfer was colorable and had been effected for the purpose of protecting the vessel from the consequences of enemy ownership. There was no proof that any purchase money had passed. The Spanish captain and crew were retained and the former Spanish owner was on board, as supercargo, it being admitted by his counsel that he "still retained a beneficial interest after this sale and transfer of flag." Sentence of condemnation was affirmed.

[2] Compare the decision in the *Ariel* (Moore, *P. C.*, vol. XI, p. 119): "Their Lordships are of opinion that there is abundant proof that the sale was made *imminente bello* [when war was imminent] and in contemplation of it. Still, if the sale was absolute and *bona fide*, there is no rule of international law, as laid down by the courts of this country, which makes it illegal. Such a *bona-fide* sale, made even *flagrante bello*, would be legal, much more *imminente bello*."

it promised to guarantee the owners of the cargo against loss (cotton not having then been declared contraband). In the end, however, it was France, not Great Britain, which took action in the case, it having been recognized by the Allies, it would seem, that French practice regarding such transfers was more uniformly hostile to them than that of Great Britain.[1] Accordingly, on her voyage to Rotterdam, the *Dacia* was captured in the English Channel on February 27, 1915, by the French cruiser *Europe* and taken into Brest. After a commission appointed for the purpose had reported to the Minister of Marine that the seizure was valid, the Prize Court took jurisdiction and rendered a decree of condemnation on August 5, 1915.

As regards the facts, the court pointed out that the *Dacia* had been habitually engaged in the German trade with Gulf ports. The outbreak of war had found her at Port Arthur, Texas, where she had been compelled to remain to escape capture. On December 7, 1914, one Egon von Novelly, "a promoter, without solvency, and with whom no ship-owner could have serious business," signed and sent to Sickel, a director of the Hamburg-American Line, an offer of $165,000 for the *Dacia*, subject to obtaining American registry, the vessel to be engaged in carrying cotton or other non-contraband to Germany or Austria or neutral countries. Sickel, however, declared that he never received the letter containing this offer. On December 9, an agreement was made between Tom B. Owens of Fort Worth and E. von Novelly & Co., whereby the latter were to place the *Dacia* at the disposal of Owens for the purpose of carrying a cargo of 11,000 bales of cotton from Galveston to Bremen, freight to be payable on signature of the bills of lading, and Novelly & Co. to have the right to take additional bales on their own account "without prejudice to the cargo of Owens." It was also proven that the cotton had been sold by Owens & Co. to Harold von Linstow, of Bremen, acting for various German interests, the contract calling for delivery, direct or indirect, by the steamer *Dacia*. The sale had been made and the financial arrange-

[1] "The French practice dating as far back as the *Réglement* of 1694, and confirmed by that of 1778, ignores all sales of ships by enemies not made by authentic acts previous to the declaration of war or the commencement of hostilities." (Westlake: *International Law*, vol. II, p. 171.) For the texts of these ordinances see Lebeau: *Nouveau Code des Prises* [Paris, an VII], vol. I, p. 189; vol. II, p. 61.

ments guaranteed by the Deutsche Bank and the Diskonto-Gesellschaft of Germany. On December 16, the Hamburg American Line "confirmed its agreement" to sell the *Dacia* to Von Novelly for $165,000, the money to be returned in case of failure to obtain American registry. This agreement was followed by the cession by Von Novelly of all his rights to Breitung, the director of the company, however, declaring under oath that he was not aware of the cession until some time afterwards. The alleged bill of sale, as furnished to the authorities of the United States and later found on board the *Dacia*, represented Breitung as the co-contractant, though it was signed neither by himself nor by his representative. On December 16 and 21 Breitung sent to the Guarantee Trust Company, of New York, two checks in favor of the Hamburg American Line, amounting in all to $165,000. The same banking house advanced to Owens, on behalf of the two German banks aforementioned, seventy-five per cent of the purchase price of the cotton, Owens depositing with the Trust Company his insurance policies and other necessary papers. Thus, in the opinion of the court, the sale implied a property in the cotton on the part of the German purchasers from the time of shipment, subject to a lien of the Trust Company. The freight, payable in advance, amounted to $172,669, being $7,669 in excess of the price paid for the ship. In this way Breitung was reimbursed for his outlay from the first, as was Owens to the extent of seventy-five per cent of the value of his cotton.

Taking up the law involved in the transfer of the *Dacia*, the court held that it was to be governed by the decree of November 6, 1914, which had put the Declaration of London in force during the war, subject to certain reservations not in point in the present case. Both parties had recognized Article 56 as the only rule to apply, but, as the Declaration had not been ratified, it had merely national validity, and was subject to the interpretation of the court, whose reasoning, in part, was as follows:

"Whereas Breitung claims that the transfer of the *Dacia* to the American flag has not been made for the purpose of escaping the consequences which its enemy character brought upon it, alleging important and legitimate interests as the motive for acquiring it. . . .

"But whereas neither the nationality nor the commercial standing of Breitung nor his alleged enterprises, any more than the purpose he claims to have had of acquiring at a satisfactory price a thing of which he was in need, constitute in this case a sufficient proof that the transfer of the *Dacia* to the American flag was not made to avoid the risk of capture;

"Whereas none of Breitung's allegations have any bearing upon the circumstances under which the Hamburg-American Line, as far as it was concerned, sought to sell and did sell the *Dacia;*

"Whereas, in this regard, the mere affirmation of a director that the ship had been sold because it was old, is insufficient proof, when it is shown on the other hand that it was lying idle because of the risk of capture and that the transfer to the American flag was the condition upon which it was chartered and sold;

"Whereas, according to the claimant, the proof of the sincerity of the transfer and the existence of a real interest in the acquisition, are sufficient to make the transfer to the neutral flag valid as against a belligerent;

"Whereas the claimant has invoked on this point an opinion given by Mr. Cone Johnson, solicitor of the Department of State, on August 7, 1914 [*supra*, p. 365]. . . .

"Whereas, preliminary to the adoption of Article 56 of the Declaration of London, certain proposals had been made with a view to subordinating the validity of transfers of flag, as far as belligerents were concerned, to the sole consideration of good faith, whereupon a difference of opinion had been manifested with respect to the meaning of the expression 'good faith' proposed as the criterion of validity;

"Whereas the delegation of the United States apparently held that good faith was present if the agreement to transfer was genuine and complete and free from any fiction or irregularity, while the German and British proposals implied by 'good faith' the absence, among the motives for the transfer, of intention to withdraw the ship from the effect of the right of capture;

"Whereas, on this point, according to these propositions as well as according to the original text proposed for adoption by the Naval Conference at London under No. 35 of the bases of discussion, the transfer could be considered valid only when there was

reason to believe that it would also have taken place if war had not occurred (*Blue Book*, pp. 183 and 260);

"Whereas it is in this latter sense that the framers of the Declaration of London have expressed themselves when adopting the text of the aforesaid basis of discussion, while at the same time referring to the possibility of proof to the contrary, except in certain cases when there was an absence of interest in the actual transactions;

"Whereas the Report, presented to the Conference in support of the rules adopted, especially Article 56, expressly states that a transfer, to be valid as against a belligerent, must be one not due to the fact of war (*Blue Book*, pp. 326 and 212); for example, a transfer through inheritance;

"Whereas this view has been adopted by the German legislation (Prize Ordinance of September 30, 1909, chap. II, art. 12) according to which the transfer is valid only if the captor is convinced that 'the transfer would have equally taken place if war had not broken out — for instance, as a result of inheritance or a contract for construction'; by the Austrian legislation (Service Regulations for Naval Warfare, May 2, 1913, 3, art. III) which reproduces purely and simply the text of Article 56 of the Declaration of London; by the Russian legislation (Prize Regulations of March 27, 1895, art. 7), according to which it must be proved that the transfer did not have for its object the protection of enemy property; by the British legislation which has applied the Declaration of London to the conduct of the war in the same terms as the aforesaid French decree of November 6, 1914 (Order in Council of October 29, 1914); and by the Italian jurisprudence and legislation (Decree of June 3, 1915);

"Whereas, also, in the language of the Italian Prize Commission in 1912 (*Case of The Aghios Georghios, Proceedings of the Royal Prize Commission, Italo-Turkish War*, vol. I, p. 197), 'if capture is the penalty by means of which the belligerent forbids to enemy merchant vessels the use of the sea, it follows that any transaction whatever, even though proceeding from legitimate interest, can be considered by the belligerent only as in defraud of his rights and consequently void, if its immediate tendency is to withdraw the ship from this penalty.' . . .

"Whereas, in this case, apart from the singular character of the bill of sale which was found on board and which was alleged to have been executed on December 17 or 19, 1914, by the Hamburg American Line and Breitung, who had not signed it himself nor had any one on his behalf, with whom the director of the aforesaid company confesses never to have had dealing and whom he declares he never met — even admitting the regularity of the purchase of the *Dacia* by Breitung and even supposing the sincerity of the transfer of the ship by the company to Egon von Novelly and by the latter to Breitung — it is shown, as was brought out in other analogous cases (*The Jemmy*, 4 Rob. 31; 1 *English Prize Cases*, 331; *The Benito Estenger*, U. S. Rep. 176, p. 568; Story, *Notes on the Principles and Practice of Prize Courts*, p. 63) that not only had the ship, after transfer, 'continued its former trade with the enemy,' but at the moment of capture was engaged in the very voyage for which it had been chartered when it was under the German flag and for which it had been transferred to the neutral flag.

"Whereas an apparent transfer to a neutral flag for the purpose of permitting trade with the enemy and withdrawing the ship from capture cannot be valid as against belligerents;

"Whereas the court has jurisdiction over the validity of the capture of the ship only and consequently does not pass judgment upon the cargo; [1]

"It is decided:

"That the capture of the steamship *Dacia*, made by the auxiliary cruiser *Europe* on February 27, 1915, is adjudged good and valid prize, together with its tackle, furniture, equipment, and supplies of all kinds, to be distributed among those entitled to it in conformity with the laws and regulations in force;

"The articles and effects, being the personal property of the captain and the crew and not contraband, will be restored to those entitled to them." [2]

(*Revue Générale de Droit International Public*, vol. XXII [1915],

[1] The French Government purchased the cotton through a special appropriation.

[2] After her sale by the prize court, the *Dacia* was renamed the *Yser*, and in November, 1915, was torpedoed and sunk in the Mediterranean by a German submarine.

No. 6. *Jurisprudence en matière de prises maritimes*, pp. 34–35, 52–53, 83–90; *Senate Documents*, 63d Cong., 2d Sess., No. 563; 63d Cong., 3d Sess., No. 979.)

§ 30. CONTRABAND

THE *JONGE MARGARETHA*

High Court of Admiralty, February 5, 1799

THIS was a case of a Papenberg ship, taken on a voyage from Amsterdam to Brest with a cargo of cheese.

The Court (*Sir William Scott*): "I have many cases in which cheese has been restored; but are there any that apply to the circumstance of a destination to ports of naval equipment? I shall defer this case, that more precedents may be examined; and in the mean time I direct an inquiry to be made as to the particular nature and quality of these cheeses, by some officer of the king's stores.

"On the 20th of March the store-keeper's certificate was produced, stating them 'to be such cheeses as are used in English ships' stores, when foreign cheeses are served, and such as are used in French ships almost exclusively of others.'"

Sir William Scott (*Lord Stowell*) delivering the judgment:

"There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question of law: Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest or Morlaix, as it is said, but certainly to Brest? Or as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war — of provisions which are a capital ship's store — and to the great port of naval equipment of the enemy.

"If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description, if I noticed, what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time watched with great anxiety by a British fleet which lay off the harbor for the purpose of defeating its designs. Is the carriage of such a supply, to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?

"If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered: but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil, were liable to be deemed contraband. 'I do agree,' says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, 'that corn, wine, and oil, will be deemed contraband.'

"These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of his court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter, going to Rochelle, was condemned. How it happened that cheese at the same time was more favorably considered, according to the case cited by Dr. Swabey [representing the claimant], I don't exactly know. The distinction appears nice. In all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year. In 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of

human food have been so considered, at least where it was probable that they were intended for naval or military use.

"I am aware of the favorable positions laid down upon this matter by Wolff and Vattel, and other writers of the continent, although Vattel (book III, ch. 7, § 112) expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent.

"Among the circumstances which tend to preserve provisions from being treated as contraband, one is, that they are of the growth of the country which exports them. In the present case, they are the product of another country, and that a hostile country; the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

"Another circumstance to which some indulgence, by the practice of nations, is shown, is, when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavorable consideration, being a manufacture prepared for immediate use.

"But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war, may be constructed in that port. *Contra* [on the other hand], if the great predominant character of a port be that of a port of naval-military equipment, it shall be intended that the

articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption. For it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination. And the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

"In the case of the *Endraght*, cited for the claimant, the destination was to Bordeaux, and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation,[1] in the same manner as Brest is universally known to be.

"The Court, however, was unwilling, in the present case, to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

"Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied, I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor."

(C. Robinson: *Admiralty Reports*, vol. I, pp. 189–96; arguments omitted. — *Ed.*)

[1] Agreeably to this distinction Dutch cheeses going from Amsterdam to Bordeaux, on account of a merchant of Altona, were restored on farther proof. The *Welvaart*. August 27, 1799. (Reporter's note.)

THE *IMINA*

The High Court of Admiralty, August 1, 1800

THIS was a case of a cargo of ship timber which had sailed July, 1798, from Dantzic, originally for Amsterdam, but was going at the time of capture to Embden, in consequence of information of the blockade of Amsterdam.[1]

Sir William Scott (*Lord Stowell*), delivering the judgment: "This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Embden, a neutral port; a destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature, as to become contraband, if taken on a destination to a hostile port. On this point, some difference of opinion seems to have been entertained; and the papers which are brought in, may be said to leave this important fact in some doubt. Taking it, however, that they are of such a nature as to be liable to be considered as contraband on a hostile destination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto* [while committing the offense], in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offense is complete, and it is not necessary to wait, till the goods are actually endeavoring to enter the enemy's port. But beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

"Some argument has been drawn in this case, from the conduct of the owners. It is said, 'that they did not consider these articles as contraband; that they were sent openly, and without suppres-

[1] The blockade of Amsterdam and of the ports of Holland was suspended, by notification to the Foreign Minister, 27th November, 1799. (Reporter's note.)

sion or disguise.' Perhaps that alone would not avail them. It appears, however, that Amsterdam was declared by this country to be in a state of blockade, a circumstance that would make it peculiarly criminal to attempt to carry a cargo of this nature to that port. The master receives information of this fact at Elsineur, and on consultation with the consul of the nation, to which the cargo belonged, changed his purpose, and actually shaped his course for Embden, to which place he was sailing at the time of capture. I must ask then, was this property taken under such circumstances as make it subject to the penalty of contraband? Was it taken *in delicto*, in the prosecution of an intention of landing it at a hostile port? Clearly not. But, it is said, that in the understanding and intention of the owner it was going to a hostile port, and that the intention on his part was complete, from the moment when the ship sailed on that destination. Had it been taken at any period previous to the actual variation, there could be no question, but that this intention would have been sufficient to subject the property to confiscation. But when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* [act to constitute the offense] existing at the time of capture. In this point of view, I think, the case is very distinguishable from some other cases, in which, on the subject of deviation by the master, into a blockaded port, the Court did not hold the cargo, to be necessarily involved in the consequences of that act. It is argued, that as the criminal deviation of the master did not there immediately implicate the cargo, so here, the favorable alteration cannot protect it; and that the offense must in both instances, be judged by the act and designs of the owner. But in those cases there was the guilty act, really existing at the time of capture. Both the ship and cargo were taken *in delicto* and the only question was, to whom the *delictum* was to be imputed. If it was merely the offense of the master, it might bind the owner of the ship, whose agent he was. But the court held that it would be hard to bind the owners of the cargo, by acts of the master, who is not *de jure* [by law] their agent, unless so specially constituted by them. In the present instance, there is *no* existing *delictum*. In those cases the criminal appearance, which did exist, was purged away, by considering the owners of

the cargo not to be necessarily responsible for the act of the master: but here there is nothing requiring any explanation: The cargo is taken on a voyage to a neutral port. To say, that it is nevertheless exposed to condemnation, on account of the original destination, as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this, or the superior court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different. But however the variation has happened, I am disposed to hold, that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise. I shall decree restitution; but as it was absolutely incumbent on the captors to bring the cause to adjudication, from the circumstance of the apparent original destination, I think they are fairly entitled to their expenses."

"*Restitution. Captor's expenses decreed.*"

(C. Robinson: *Admiralty Reports*, vol. III, pp. 167–70), arguments omitted. — *Ed.*

THE *NEPTUNUS* (No. 3)

High Court of Admiralty, June 13, 1800

This was case of a miscellaneous cargo taken June 12, 1798, on a voyage from Cronstadt to Amsterdam. Further proof had been directed to be made on several claims for different parts of the cargo.

On a claim for a quantity of tallow, on the part of a merchant of Petersburg, the King's Advocate contended, that tallow was to be considered as a naval store, liable to confiscation as contraband.

Court (*Sir William Scott*): "I am not disposed to consider it in that light, on a destination to such a port as Amsterdam. Amsterdam is a great mercantile port, as well as a port of naval equipment. If it had been taken going to Brest, I should have had little doubt about it."

Restored.

On a claim for 275 bundles of sail-cloth, as the property of a merchant of Petersburg.

Court (*Sir William Scott*): "That is universally contraband,

even on a destination to ports of mere mercantile naval equipment; Amsterdam is a port both of great mercantile and military equipment."

Condemned.

On prayer for the freight and expenses of the ship, the King's Advocate contended that freight could not be given in a case of a contraband cargo.

Arnold and Robinson: "The Court will not think it necessary, to apply that rule, in its utmost rigor, in such a case as the present, where the contraband articles are but in a small quantity, amongst a variety of other articles."

The Court acceded.

Freight and expenses given.

(C. Robinson: *Admiralty Reports*, vol. III, pp. 108–09.)

HYDROAEROPLANES (1915)

The Secretary of State to the German Ambassador

DEPARTMENT OF STATE,
WASHINGTON, *January 29, 1915.*

Excellency: I have the honor to acknowledge the receipt of Your Excellency's note of the 19th instant, and in reply have to inform you that the statements contained in Your Excellency's note have received my careful consideration in view of the earnest purpose of this Government to perform every duty which is imposed upon it as a neutral by treaty stipulation and international law.

The essential statement in your note, which implies an obligation on the part of this Government to interfere in the sale and delivery of hydroaeroplanes to belligerent powers, is: "There is no doubt that hydroaeroplanes must be regarded as war vessels whose delivery to belligerent States by neutrals should be stopped under Article 8 of the 13th Convention of the Second Hague Conference of October 18, 1907."

As to this assertion of the character of hydroaeroplanes I submit the following comments: The fact that a hydroaeroplane is fitted with apparatus to rise from and alight upon the sea does not in my opinion give it the character of a vessel any more than the wheels

attached to an aeroplane fitting it to rise from and alight upon land give the latter the character of a land vehicle. Both the hydroaeroplane and the aeroplane are essentially air craft; as an aid in military operations they can only be used in the air; the fact that one starts its flight from the surface of the sea and the other from the land is a mere incident which in no way affects their aerial character.

In view of these facts I must dissent from Your Excellency's assertion that "there is no doubt that hydroaeroplanes must be regarded as war vessels," and consequently I do not regard the obligations imposed by treaty or by the accepted rules of international law applicable to air craft of any sort.

In this connection I further call to Your Excellency's attention that according to the latest advices received by this Department the German Imperial Government include "balloons and flying machines and their component parts" in the list of conditional contraband, and that in the Imperial Prize Ordinance, drafted September 30, 1909, and issued in the Reichsgesetzblatt on August 3, 1914, appear as conditional contraband "airships and flying machines" (Article 23, section 8). It thus appears that the Imperial Government have placed and still retain air craft of all descriptions in the class of conditional contraband, for which no special treatment involving neutral duty is, so far as I am advised, provided by any treaty to which the United States is a signatory or adhering power.

As in the views of this Department the provisions of Convention XIII of the Second Hague Conference do not apply to hydroaeroplanes I do not consider it necessary to discuss the question as to whether those provisions are in force during the present war.

Accept, etc., W. J. Bryan.

American Journal of International Law, Supplement, July, 1915, pp. 367–68.)

§ 31. CONTINUOUS VOYAGE

THE AMERICAN CIVIL WAR CASES

As originated by Lord Stowell, the doctrine of continuous voyage was applied during the French Revolutionary and Napoleonic wars to neutral vessels engaged in enemy trade ordinarily reserved in time of peace, especially colonial trade with the mother country, and was devised to meet the case of a neutral carrier breaking voyage at a neutral port and afterwards continuing on to the enemy destination with her original cargo.[1] All the condemnations

[1] In the *Polly* (C. Robinson's *Admiralty Reports*, vol. II, p. 361), Sir William Scott had held, February 5, 1800, that the landing of cargo and the payment of duty in the United States constituted a sufficient interruption of the continuity of a voyage to enable a neutral vessel, in spite of the Rule of 1756, to carry a cargo from the colony of a belligerent to the ports of the parent country, and *vice versa*. The court did not define the conditions of *bona-fide* importation but, according to Sir William Grant in the later case of the *William* (see below), the supposition was excluded "that one uniform effect was in all cases, to be ascribed to a given set of circumstances, with which, in different cases they might be found contrasted or combined." (*Ibid.*, vol. V, p. 400.)

In 1805, the American ship *Essex* took on a cargo of Spanish produce at Barcelona, with intention of putting in at Salem before proceeding to Havana, her destination. At Salem, certain transactions were gone through by which it appeared that customs duties were paid upon the cargo, but which in effect resulted in a nominal payment of $198 (payment having been made by means of a bond which permitted the drawback of most of the duties paid). She was captured on the voyage to Havana and condemned by a British prize court on the ground of continuity of voyage. The existence of an original intention to touch at the intervening port was sufficient.

In a similar case, the *Maria*, the court referred to this decision as follows: "In the case of the *Essex*, which was decided by the Court of Appeal, the principle of law, by which such cases are to be decided, was distinctly affirmed. It certainly is not a novel principle; and I [Sir William Scott] cannot but express my surprise, that it should be represented in any place, as I understand it has been, that the principle is new. On the contrary, it is an inherent and settled principle in all cases in which the same question can have come under discussion, that the mere *touching* at any port without importing the cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering her cargo at the ultimate port." (The *Maria*, *ibid.*, vol. V, p. 368.)

The *William* came before the Lords Commissioners of Appeal in Prize Causes on appeal from the Vice-Admiralty Court at Halifax, where both ship and cargo had been condemned, July 17, 1800. When captured, the *William* was destined to Bilboa with a cargo of cocoa which had been taken on at La Guaira, a Spanish American port, but the voyage had been broken at Marblehead, in Massachusetts, where the

under the rule were of captures made on the latter part of the voyage; the case of a vessel captured on the first part of such a voyage (that is, from the colonial port of shipment to the neutral

cargo had been unladen, and the ship cleaned and repaired, after which most of the cocoa had been reshipped, together with some sugar from Havana belonging to the owners of the ship, Messrs. Hooper of Marblehead. A certificate issued by the collector of customs stated that the vessel "had entered and landed a cargo of cocoa belonging to Messrs. W. & N. Hooper and that the duties had been secured agreeable to law, and that the said cargo had been reshipped on board this vessel bound for Bilboa; and that her cargo, consisting of cocoa, sugar, and fish, was the property of the said W. & N. Hooper." (*Ibid.*, vol. v, p. 386.) The Lords in 1804 allowed the appeal as to the ship and the cargo other than the cocoa, "but directed further proof to be made of the importation of the said cocoa into, and exportation from, the port of Marblehead in America and the payment of duties thereon, within nine months."

On these points judgment was given by Sir William Grant, March 11, 1806. The claimants had maintained that the voyage of the *William* had been from North America to Spain and not direct from a colony of Spain. Thus it became necessary to inquire what constituted a direct voyage. Nothing could depend on "the degree or the direction of the deviation" from the shortest course. Nor did the point of commencement change as often as the vessel stopped in the course of its voyage. Merely shifting the cargo did not necessarily amount to the termination of one voyage and the commencement of another.. It might have nothing to do with importation; for instance, it might be done for the purpose of drying the goods or repairing the ship. Hence the opinion of the court, in part:

"The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it, . . .

"The landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make." (*Ibid.*, vol. v, p. 396–97.)

In the case of the cargo of the *William* the court pointed out that a bond for $1239 had been given in payment of duties, but that the fact had been suppressed that a debenture had been granted "which in effect extinguished almost the whole of the duties that had been previously secured." The contention of the claimants that the cargo had been taken on "with the single view of bringing it to the United States and that they then had no intention of, or expectation of, exporting it in the *said schooner* to Spain," was considered to be ambiguous. Nothing had happened between the landing and the reshipment to change intention; such change had been

port of call), does not appear to have arisen, though, according to Westlake, "the same principle must have applied . . . supposing the intention to be proved." (*International Law* [2d ed., 1913], vol. II, p. 296.)[1]

During the Civil War the United States had an analogous problem with respect to the blockade of the Confederate ports, and her prize courts gave to the doctrine a new and wider application. In order to increase the chances of successfully running the blockade, it became the practice to ship cargoes from neutral countries to neutral ports in the vicinity of the South, such as Nassau, Matamoras, and ports in Cuba, and thence to introduce them into the Confederacy by transshipment on swift vessels specially designed for the purpose. The object of this new-found commerce became notorious when obscure ports like Nassau, scarcely visited by merchant vessels before the war, suddenly assumed, in volume of trade, the importance of Liverpool or New York. To meet this situation the naval officers of the United States were instructed to seize if a search yielded reasonable evidence that a vessel was engaged "in carrying contraband of war for or to the insurgents, and to their ports directly or indirectly by transshipment, or otherwise violating the blockade"; but if it appeared that she was "in good faith and without contraband actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents," she was not to be considered liable to seizure.

made earlier, on the expectation of securing better prices in Spain. But, said the court, "if the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the *Essex*, or as in this case, by the relinquishment of an original purpose to have brought it to a termination in America." An intention to import was not equivalent to importation. In the opinion of the court, there was no warrant in previous cases for the doctrine that a mere conformity to technical rules governing importations was sufficient, nor was the decision in the *Essex* exceptional. Looking into all the cases, Sir William Grant expressed the opinion: "I have shown that there was not one decision in which any such principle had been asserted or implied, and that there were at least two decisions which stood in direct contradiction to it, that in the *Freeport* in 1803, and that in the *William* in 1804." (*Ibid.*, vol. V, p. 404.)

Condemnation of that part of the cargo for which further proof had been ordered was accordingly confirmed. (*Ibid.*, vol. V, pp. 385–406.)

[1] For a succinct discussion of the doctrine of continuous voyage see Westlake's *Collected Papers* [Cambridge, 1914], pp. 461–74.

As most of the vessels subjected to search and seizure were British-owned, certain Liverpool merchants in July, 1862, addressed a memorial to the British Government requesting its protection against undue molestation of neutral rights to trade. This enabled Lord Russell, then Foreign Secretary, to state the position of the British Government with respect to such questions of contraband and blockade in his reply of July 5, 1862, as follows:

". . . It is alleged on the one hand by Mr. Seward and Mr. Adams that ships have been sent from this country to America with a fixed purpose to run the blockade; that high premiums of insurance have been paid with this view, and that arms and ammunition have been thus conveyed to the Southern States to enable them to carry on the war. Lord Russell was unable either to deny the truth of these allegations or to prosecute to conviction the parties engaged in those transactions. But he cannot be surprised that the cruisers of the United States should watch with vigilance a port (Nassau) which is said to be the great entrêpot of this commerce. . . .

"The true remedy would be that the merchants and shipowners of Liverpool should refrain from this species of trade. . . .

"It is true, indeed, that supplies of arms and ammunition have been sent to the Federals equally in contravention of that neutrality which Her Majesty has proclaimed. It is true, also, that the Federals obtain more freely and more easily that of which they stand in need. But if the Confederates had the command of the sea they would no doubt watch as vigilantly and capture as readily British vessels going to New York as the Federals now watch Charleston and capture vessels seeking to break the blockade.

"There can be no doubt that the watchfulness exercised by Federal cruisers to prevent supplies reaching the Confederates by sea will occasionally lead to vexatious visits of merchant ships not engaged in any pursuit to which the Federals can properly object. This, however, is an evil to which war on the ocean is liable to expose neutral commerce, and Her Majesty's Government have done all they can fairly do, that is to say, they have urged the Federal Government to enjoin upon their naval officers greater

caution in the exercise of their belligerent rights. . . ." (*Diplomatic Correspondence, 1862*, pp. 171–72.)

The first cases in which a prize court of the United States applied the doctrine of continuous voyage under the new conditions were those of the *Dolphin* and the *Pearl*.[1] The *Dolphin* was captured by a Federal cruiser on March 25, 1863, off Porto Rico, on an ostensible voyage from Liverpool to Nassau, and was condemned, together with her cargo, by the District Court of the United States for the Southern District of Florida. The cargo, consisting in part of arms, was held by the Court to be destined for Charleston or Wilmington and the destination to Nassau was considered colorable. Instead of unloading at the latter port, the *Dolphin* was to take on more cargo, according to the instructions sent in a letter found on board. Both ship and cargo were claimed by one, Grazebrook, of Liverpool, and, had there been an honest intention to go to Nassau, it was made clear that no condemnation would have followed. But the Court considered condemnation justifiable when the voyage "was not a voyage prosecuted by a neutral from one neutral port to another, but was a voyage to a port of the enemy, begun and carried on in violation of the belligerent rights of the United States to blockade the enemy's ports and prevent the introduction of munitions of war." In the opinion of the Court, "the act of sailing for a blockaded port, with the knowledge of the existence of the blockade, and with an intent to enter, is itself an attempt to break it, which subjects the vessel and cargo to capture in any part of the voyage." The significant part of the opinion, however, was the following: "The cutting up of a continuous voyage into several parts by the intervention or proposed intervention of several intermediate ports may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be, but it cannot make a voyage which in its nature is one to become two or more voyages, nor make any of the parts of one entire voyage become legal which would be illegal if not so divided. When the truth is discovered, it is according to the truth, and not according to the fiction, that the question is to be deter-

The *Dolphin*

[1] The Civil War cases are discussed substantially in the order of date of adjudication.

mined." (*Federal Cases*, vol. VII, p. 869.) No appeal was taken to the Supreme Court in the case of the *Dolphin*.

The *Pearl*

The *Pearl*, likewise British-owned, was seized January 20, 1863, about sixty miles east of Nassau, while bound to that port from Liverpool with a cargo of cloth and ready-made clothing consigned to Adderly and Company of Nassau. The District Court (Southern District of Florida), however, held that belligerent destination was not established and released vessel and cargo on payment of costs. This judgment was reversed on appeal to the Supreme Court in 1866, the vessel being condemned because destined "either immediately after touching at that port, or as soon as practicable after needed repairs, for one of the ports of the blockaded coast." The cargo was likewise condemned because considered the property of the owner of the ship.

The *Bermuda*

A more complicated case was that of the *Bermuda*, captured April 26, 1862, near the island of Abaco on a voyage from St. George's (in Bermuda) to Nassau. This vessel was apparently British-owned but, in spite of intricate business arrangements, there was strong evidence that real ownership vested in John Frazer and Company of Charleston. The *Bermuda* had sailed from West Hartlepool ostensibly for Bermuda and thence for Nassau. Its cargo consisted in large part of munitions of war, together with considerable merchandise of a non-contraband nature shipped by the British branch of Frazer and Company and consigned to Bermuda "unto order or assigns." After five weeks at St. George's without unloading she sailed for Nassau, from which place, in the opinion of the prize court, it was intended to transship her cargo to the *Herald*, a light steamer sent out from England for the purpose and expressly referred to in captured correspondence as a tender for the *Bermuda*. In consequence, the District Court (Eastern District of Pennsylvania) condemned the vessel and that part of her cargo consisting of articles suitable for use in war. Later, the rest of the cargo was condemned also. The Supreme Court affirmed this judgment on the following grounds:

(1) Spoliation of papers.

(2) Probable enemy ownership.

(3) The character of the cargo, which assuming neutral ownership, made "its ulterior, if not direct, destination to a rebel port quite certain."

(4) Evidence in letters of an intention on the part of the shippers to transship — that is, of contemplated breach of blockade.

(5) The consignment of the cargo to order or assigns — being tantamount to placing it at the disposal of John Frazer and Company. In other words, the real destination was the port in which the enemy consignee did business.

(6) Lack of good faith on the part of the owner of the vessel, as shown in the deceptive bills of lading.

(7) Probability that she was in the service of the Confederate Government with full knowledge of her owners.

As for the cargo "having been all consigned to enemies, and most of it contraband," it had to share the fate of the ship.

The legal effects of an ultimate enemy destination were set forth by the Court, as follows:

"There seems to be no reason why this reasonable and settled doctrine should not be applied to each ship where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship cannot be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole." (Wallace: *Supreme Court Reports,* vol. III, pp. 554–55.)

In the case of the *Stephen Hart* the doctrine of continuous voyage was again applied, this time in circumstances admitting of a

very clear statement of principles. The *Stephen Hart*, a British vessel, was captured on January 29, 1862, about twenty-five miles from Key West while on her way from London to Cardenas, Cuba, with a cargo of arms, ammunition and military clothing consigned by Isaac, Campbell and Company of London to Cardenas as ostensible destination, though on arrival there the master was to place both ship and cargo under the direction of the Confederate agent at that port. Several necessary papers were lacking, including invoices, bills of lading and manifest. The brokers in charge of the lading were Speyer and Haywood, the Confederate agents in London. Both vessel and cargo were condemned by the District Court (Southern District of New York) and the judgment was affirmed on appeal to the Supreme Court.

The *Stephen Hart*

After pointing out that the instructions under which these captures were being made were in accord with the early policy of the United States,[1] Judge Betts, who rendered the decision in the first instance, proceeded to emphasize the relation of original intention to ultimate destination:

"The question," he said, "whether or not the property laden on board of the *Stephen Hart* was being transported in the business of lawful commerce, is not to be decided by merely deciding the question as to whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary, and temporary voyage of the vessel, which may be but one of many carriers through which the property is to reach its true and original destination. . . . The proper test to be applied is, whether the contraband goods are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them. To justify the capture, it is enough that the immediate object of the voyage is to supply the enemy, and that the contraband property is certainly

[1] "In an ordinance of the Congress of the Confederation which went into effect on the 1st of January, 1782 (Wheaton, vol. v, Appendix, p. 120), it was declared to be lawful to capture and to obtain condemnation of all contraband goods, wares and merchandises, to whatever nations belonging although found in a neutral bottom, *if destined for the use of an enemy*." (Blatchford: *Prize Cases*, p. 402.)

destined to his immediate use. While it is true that goods destined for the use of a neutral country can never be deemed contraband, whatever be their character, and however well adapted they may be to the purposes of war, yet, if they are destined for direct use of the enemy's army or navy, they are not exempt from forfeiture on the mere ground that they are neutral property and that the port of delivery is also neutral. . . .

"If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy." (*Federal Cases*, vol. XXII, pp. 1262–63.)

The so-called Matamoras cases presented a somewhat different set of circumstances. Matamoras, on the Mexican side of the Rio Grande, was in close communication with Texas, but only by "in-

land navigation or transportation." Ocean-going vessels could not enter the river with a view to continuing their voyage from Matamoras to the Confederate ports. Hence, in the case of the *Peterhoff*, a British vessel captured on February 25, 1863, near St. Thomas on a voyage from London to Matamoras with an assorted cargo, a small part of which consisted of military articles, the question was raised whether a voyage to such a port, coupled with transportation later overland, constituted a situation to which the doctrine of continuous voyage could be applied. The District Court (Judge Betts) condemned both ship and cargo, but on appeal to the Supreme Court the ship was restored, together with that part of the cargo which was non-contraband. The military articles were considered as destined for Brownsville, being thus absolute contraband, and were condemned. The following were the chief points in the opinion, as rendered by Chief Justice Chase:

The *Peterhoff*

1. The blockade of Southern ports did not extend to the mouth of the Rio Grande or to its Mexican bank, hence neutrals were free to trade with Matamoras, except in contraband.

2. Inland navigation or transportation from Matamoras to Texas did not violate the blockade. "There was not and could not be any blockade of the Texan bank of the Rio Grande as against the trade of Matamoras. No blockading vessel was in the river, nor could any such vessel ascend the river, unless supported by a competent military force on land." The court admitted that such trade impaired the efficiency of the blockade, "but in such cases as that now in judgment," it said, "we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

3. The merchandise of a non-contraband character was not therefore subject to the rule of ulterior destination, it being liable to condemnation "only when a violation of blockade is intended."

4. The articles of the nature of conditional contraband were not condemned as they "were not proved to have been actually destined to belligerent use."

5. The articles of a contraband nature, "destined in fact to a

State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarliy destined to Matamoras."

6. But even in the case of the contraband the court would not have made condemnation if its real destination had been Matamoras. "It is true," it said, "that even these goods, if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But . . . all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville and other places in the vicinity." (Wallace: *Supreme Court Reports*, vol. v, p. 59.)

The court was careful to make a clear distinction between the case of the *Peterhoff* and that of the *Bermuda:* "In the case of the *Bermuda* the cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports; in the case before us the cargo, destined primarily for Matamoras, could reach an ulterior destination in Texas without violating any blockade at all." (Wallace: *Supreme Court Reports*, vol. v, pp. 56–57.)

The principles of the *Peterhoff* decision were further applied by the Supreme Court in other Matamoras cases — those of the *Dashing Wave*, the *Volant* and the *Science*. The cargoes of the latter two consisted in part of Confederate uniform cloth, but condemnation was not made, as there was nothing "to show destination to enemy territory or immediate enemy use."

The *Dashing Wave*, the *Volant*, the *Science*

Another vessel that met with capture and condemnation under the doctrine of continuous voyage was the *Gertrude*, a British steamer owned by one T. S. Begbie. She was captured on April 16, 1863, on an ostensible voyage from Nassau to St. John, N. B., having on board a cargo consisting partly of arms and ammunition shipped at Nassau by H. Adderly and Company. She had previously come from Greenock to Nassau and was suspected of having been sent out for the express purpose of blockade-running. It was held by the District Court (Judge Betts) that her voyage "was got up and prosecuted down to the seizure of the vessel, with the intent and endeavor to break

The *Gertrude*

the blockade; that her papers as to her destination were simulated and false; and that she was carrying cargo contraband of war, with the design to convey it to the aid and use of the enemy, with full knowledge of the criminality of the enterprise." (*Federal Cases*, vol. x, p. 265.) The condemnation was uncontested and no appeal was taken.

The Case of the Springbok

The most notable case during the Civil War, and the one giving rise to most controversy, was that of the British bark *Springbok*. This vessel was captured February 3, 1863, about one hundred and fifty miles east of Nassau while bound to that port from London with an assorted cargo, a small part of which consisted of arms and ammunition, a somewhat larger part of goods of the nature of conditional contraband, while the great bulk of it was merchandise non-contraband in character. The owners were May and Company, of British nationality, and the captain, James May, a son of one of the owners. She had been chartered for the voyage by T. S. Begbie, the owner of the *Gertrude*. The cargo was shipped by Isaac, Campbell and Company jointly with Begbie, and the brokers in charge of the lading had been Speyer and Haywood. The charter-party called for a "voyage to Nassau with a cargo of 'lawful merchandise goods,' the freight to be paid one-half in advance, on clearance, and the remainder in cash on delivery; thirty running days to be allowed the freighter for loading at the port of loading and discharging at Nassau." The bills of lading did not indicate who the owners were nor did they disclose the contents of more than a third of the packages. The manifest also failed to reveal the nature of the cargo, and both manifest and bills of lading consigned the cargo "to order." No invoices were found on board. A letter from Speyer and Haywood to Captain May instructed the latter to report himself on arrival at Nassau to B. W. Hart who would give him orders as to the delivery of the cargo and any further information required. In the examination *in preparatorio* [1] the captain stated that he did not know for what

[1] A preliminary examination of the witnesses in a prize case is held before prize commissioners appointed by the prize court. This evidence is taken privately and is termed *in preparatorio*.

reason the *Springbok* had been captured and that he was not aware that there were contraband goods on board, though some of the other officers expressed the opinion that the suspected presence of contraband was the cause of the seizure.

Both vessel and cargo were condemned by the District Court. Judge Betts, who rendered the decision, basing the condemnation mainly upon the following considerations:

Decision of the District Court— Judge Betts

1. The invocation of the proofs in the cases of the *Stephen Hart* and the *Gertrude* under a rule of the prize court providing that "when the same claimants intervene for different vessels or for goods, wares or merchandise captured on board different vessels, and proofs are taken in the respective causes, and the causes are on the docket for trial at the same time, the captors may, on the hearing in court, invoke, of course, in either of such causes, the proofs taken in any other of them, the claimants, after such invocation, having liberty to avail themselves also of the proofs in the cause invoked." (*Federal Cases*, vol. XXII, p. 998.) Of the claimants to the cargo of the *Springbok*, Isaac, Campbell and Company were claimants to the cargo of the *Stephen Hart* and Begbie was the owner of the *Gertrude*, while the same brokers were in charge of both the *Stephen Hart* and the *Springbok*. There was further a "singular correspondence between the marks and numbers on the packages in the *Springbok* and those on the packages in the *Gertrude*."

2. The status of the claimants — prize courts always being careful to inquire whether they come with clean hands, or whether "they have become engaged in a traffic similar to that with which they are charged in the particular case."

3. The doctrine of continuous transportation already fully set forth in the case of the *Stephen Hart* (*supra*, pp. 388–89).

4. The expected arrival of the *Gertrude* at Nassau a few days after the *Springbok*.

5. The unsatisfactory condition of the papers and the "studied ignorance" of the master as to the nature of the cargo. On the principle of agency the owners were to be held responsible for this lack of good faith. "If the owner of a vessel places it under the control of a master who permits it to carry, under false papers,

contraband goods, ostensibly destined for a neutral port, but in reality going to a port of the enemy, he must sustain the consequence of such misconduct on the part of his agent." (*Federal Cases*, vol. XXII, p. 1006.)

6. The contraband being condemned, the non-contraband belonging to the same owner shared in the condemnation. From the fact that Speyer and Haywood had endorsed the charter-party and had signed the manifest of the entire cargo, the court deduced a single ownership, "and it is fair to infer, from all the evidence, that there must have been a single destination for the whole of the cargo. If, therefore, any particular destination can with certainty be affixed to any portion of the cargo, the same destination must, on all the evidence, be ascribed to the whole of it." (*Federal Cases*, vol. XXII, pp. 1003–04.) "Upon the whole case," said Judge Betts, "my conclusion is that there are abundant grounds for condemning not only the contraband articles found on board of the vessel, as having been destined for the enemy's country, but also the entire cargo, as belonging to the owners of the contraband goods"; and he further laid it down as the settled rule of law (quoting Sir William Scott) "that the carriage of contraband with a false destination will work the condemnation of the ship as well as the cargo." "Where the owner of the vessel," said Judge Betts, "is himself privy to such carriage of contraband, or where the master of the vessel, as the agent of such owner, interposes so actively in the fraud as to consent to give additional color to it by sailing with false papers, the modern relaxation in favor of the vessel no longer exists." (*Federal Cases*, vol. XXII, p. 1006.)

On appeal, the Supreme Court in 1866 restored the ship but affirmed the sentence with respect to the cargo. Applying its ruling in the case of the *Bermuda*, it held that "where goods destined ultimately for a belligerent port are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, the ship, though liable to seizure in order to [effect] the confiscation of the goods, is not liable to condemnation as prize." (Wallace: *Supreme Court Reports*, vol. V, p. 21.) The *Springbok* was considered to

Decision of the Supreme Court

come fairly within this rule. "Her papers were regular and they all showed that the voyage on which she was captured was from London to Nassau . . . ; the papers, too, were all genuine, and there was no concealment of any of them, and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo, and there is no sufficient proof that they had any knowledge of its alleged unlawful destination." There was no evidence that the voyage was to be continued to a blockaded port. "On the contrary, the charter-party, which has the face at least of an honest paper, stipulated for the delivery of the cargo at Nassau, where, so far as is shown by that document, the connection of the *Springbok* with it was to end. The preparatory examinations do not contradict, but rather sustain, the papers." The ignorance of the master as to the real ownership of the cargo was not held to be material: "it must be remembered," said the court, "that the master of the *Springbok* had a clear right to convey neutral goods of all descriptions, including contraband, from London to Nassau, subject to the belligerent right of seizure, in order to [effect] confiscation of contraband if found on board, and proved to be in transit to the hostile belligerent." The misrepresentation of the master was more incriminating, and if the case for the ship had depended on his testimony, the court would have found it difficult to avoid condemnation. But, continued the court, "the fairness of the papers, the apparent good faith of the stipulations of the charter-party in favor of the owners, and the testimony of the witnesses restrain us from harsh inferences against the owners of the vessel, who seem to be in no way compromised with the cargo except through the misrepresentations of the master, and are not shown to have been connected with any former violation of neutral obligations." As penalty, however, for the misrepresentation of the master and for his signing incomplete bills of lading, no costs or damages were allowed the claimants. The Supreme Court further stated that there was irregularity in the invocation by the lower court of the documents from the cases of the *Stephen Hart* and the *Gertrude*, but none to justify a reversal of the decree or a refusal to examine the documents invoked.

The case of the cargo was considered to be different from that of the ship. The concealment practiced in the bills of lading and

the manifest were facts to awaken suspicion, "though these concealments do not of themselves warrant condemnation." The motive for such concealment, as supported by the documents invoked from the other cases, "must have been the apprehension of the claimants that the disclosure of their names as owners would lead to the seizure of the ship in order to [effect] the condemnation of the cargo." But the essential fact to determine was the real destination of the cargo, which the Supreme Court proceeded to establish, as follows:

"We do not now refer to the character of the cargo, for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for we repeat again, contraband or not, it could not be condemned if really destined for Nassau, and not beyond, and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade. . . . We cannot look at such a cargo as this and doubt that a considerable portion of it was going to the rebel states, where alone it could be used, nor can we doubt that the whole cargo had one destination.

"Now, if this cargo was not to be carried to its ultimate destination by the *Springbok* (and the proof does not warrant us in saying that it was) the plan must have been to send it forward by transshipment, and we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer and Haywood as indicating the intention; and the same inference must be drawn from the disclosures by the invocation that Isaac, Campbell and Company had before supplied military goods to the rebel authorities by indirect shipments, and that Begbie was owner of the *Gertrude* and engaged in the business of running the blockade.

"If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the *Gertrude* in the harbor of Nassau, with undenied intent to run the blockade, about the time when the *Springbok* was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the *Springbok* and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it only because the voyage was intercepted by the capture.

"All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading, and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but that no claim sworn to personally by either of the claimants has ever been filed.

"Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to the cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing.

"The decree of the District Court must, therefore, be reversed as to the ship, but without costs or damages to the claimants, and must be affirmed as to the cargo, and the cause must be remanded for further proceedings in conformity with this opinion." (Wallace: *Supreme Court Reports*, vol. v, pp. 26–28.)

The decision in the case of the *Springbok* at once gave rise to protest and controversy. In due time the claimants of the cargo, through their attorney, appealed to the British Government to demand on their behalf, "compensation from the United States Government for the unlawful seizure, sale, and condemnation of their property." In support of their claim they submitted a joint opinion given by two eminent Queen's Counsel, Mr. George Mellish and Mr. W. Vernon Harcourt,[1] who found the grounds for the condemnation "inaccurate in fact and erroneous in principle," for the following, among other, reasons:

Claimants' appeal to the British Government

1. The bills of lading were in the form "usually adopted in the course of trade" for "consignments to an agent for sale in such a port as Nassau."

2. It was admitted that no sale had been made to any one at Nassau; on the contrary, the cargo had been sent to find a market

[1] Author of *Letters by Historicus.*

there, and in such case the form of bills of lading "to order" was "perfectly regular and appropriate."

3. That a certain part of the cargo was contraband in character was held by the court to be good reason why it was not going to Nassau; on the contrary, such articles were going to Nassau just because they were of contraband character and "such a trade on the part of the person who sent them to Nassau for sale there would be a perfectly lawful trade."

4. The *Gertrude* was not at Nassau when the *Springbok* was captured — she was at Queenstown.

5. The declaration of B. W. Hart (which was also submitted to the British Government) strongly supported the contention that the usual course of trade had been followed with respect to the cargo of the *Springbok*. Had it arrived, he said, he would have sold it at Nassau and "had in fact sold a portion of the said cargo deliverable on arrival." [1]

In reply, the British Foreign Office found itself unable to comply with the request for intervention. It had already, in a note from Lord Russell to Lord Lyons, British Minister at Washington, in 1864, gone on record as approving the judgment of Judge Betts that "the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bona-fide* destined for Nassau . . . The complicity of the owners of the ship, with the design of the owners of the cargo is, to say the least, so probable on the evidence that there would be a great difficulty in contending that this ship and cargo had not been rightly condemned." [2] In explanation of its final refusal to take up the case diplomatically, it examined the reasons given in the joint opinion of counsel and offered opinions in rebuttal. As to the form of the bills of lading

British Government refuses its interposition

[1] For this opinion see *Parliamentary Papers* [1900], *Miscellaneous*, No. 1, pp. 51–53.

[2] In 1863, however, after the decree of condemnation had issued but before the judgment of the court had been delivered, the Law Officers of the Crown had given it as their opinion that the sentence was unjustifiable both as to ship and cargo. His Majesty's Government were therefore (in a dispatch to Lord Lyons) "disposed to think that the sentence was wrong, and ought to be reversed, but they would nevertheless be glad to see the reasons upon which it was founded, and they would hesitate to instruct your Lordship to interfere in the case until it had been heard before the Court of Appeal." (*Parliamentary Papers* [1900], *Miscellaneous*, No. 1, pp. 22–23.)

and the manifest, Lord Stanley argued that "no doubt the form is usual in time of peace, but the circumstance to which the Court was really referring is overlooked, viz., that a practice which may be perfectly regular in time of peace under the municipal regulation of a particular state, will not always satisfy the laws of nations in time of war, more particularly when the voyage may expose the ship to the visit of belligerent cruisers." The opinion that no *bona-fide* importation at Nassau had been intended, was considered by the Foreign Office as not "otherwise than tenable." With regard to sending contraband goods to Nassau for sale, the claimant, it was pointed out, had not explained what was to become of them after arrival there, and under all the circumstances of time and place, and in the absence of such evidence, it appeared to Her Majesty's Government "that the court was entitled to draw the inference that the consignors of the goods intended to be parties to the immediate transshipment and importation of these goods into a blockaded port, on their being taken out of the *Springbok*." The Supreme Court, in the opinion of the British Government, did not find that the *Gertrude* was necessarily the vessel intended to complete the transportation of the *Springbok* cargo; what the court did find was that "the owners of the cargo intended that it should be transshipped at Nassau in some vessel more likely to succeed in reaching a blockaded port than the *Springbok*," with a strong probability attaching to the *Gertrude*. The declaration of Mr. Hart, too, lost much of its value by his failure to support the claimants when their case was before the prize court and "even now none of the claimants make declarations for the purpose of explaining any of the suspicious circumstances, although in general terms they complain of being victims to unjust suspicions and imputations."

"For the above reasons, therefore," said the Foreign Office, "and upon a full consideration of the whole case, Her Majesty's Government do not feel that they would be justified, on the materials before them, in making any claim on the United States Government for compensation or damages on behalf of the owners of the cargo of the *Springbok*." (*Parliamentary Papers* [1900], *Miscellaneous*, No. 1, pp. 55–58.)

Under Article 12 of the Treaty of Washington (1871) provision

Civil War Claims Commission

was made for the reference of Civil War claims (other than the *Alabama* claims) to a mixed commission, and among those which came before it were claims respecting the *Springbok* and her cargo. Mr. Evarts, afterwards Secretary of State, was counsel for the claimants and made an incisive argument against the condemnation and the extension of the doctrine of continuous voyage implied in it. He pointed out that the amount of military supplies on board was negligible and that the proceeds of all the goods considered contraband were less than one per cent of the whole. "It is wrong [quoting Gessner] to seize contraband goods in a neutral vessel when they are in such small quantities that their inoffensive character is thereby established. The *bona fides* is a question to be determined by all the circumstances of the case, among which the quantity is a very material ingredient." The measure of the doctrine of continuous voyage, he maintained, was laid down in the case of the *Bermuda* — where the original destination was a blockaded port, "or if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage." Such an application was the extreme to which the doctrine could be pushed; with it, however, "as thus limited and defined, nothing in the case of the *Springbok* involves any necessary controversy; but . . . this doctrine ought not to be extended so as to make guilty a trade between neutral ports to which the intercepted voyage was actually and really confined, by surmise, conjecture, or moral evidence not of a further carriage and further carrier, but only of a probability that such supplementary further carriage and *some* supplementary further carrier may or must have been included in the original scheme of the commercial adventure. . . . Such a fiction of continuous voyage for the case of all trade between neutral ports, which has its stimulus from the state of war, made the belligerent prize court master of neutral commerce, and in fact established a paper blockade of the neutral port in question, and left their commerce at the mercy of the belligerent. . . . The whole history of prize jurisdiction on the doctrine of continuous voyage shows that the province of probable reasoning has been confined to the question of intent, while the *corpus delicti* — the

voyage to the enemy port — must be proved with the same definiteness of vehicle, port, and process of execution as is confessedly essential when the voyage is direct and simple." A condemnation for intended breach of blockade, under the circumstances in the case of the *Springbok*, being outside "the province of probable reasoning," there was nothing in the "presence of the trivial amount of contraband" that could be considered "evidence of its own destination or that of its accompanying innocent cargo to an ulterior market." (*Foreign Relations, 1873*, vol. III [*House Executive Document*, No. 1, 43d Cong., 1st Sess.], pp. 117–23.)

The commission awarded damages for the detention of the *Springbok* from the date of the decree of condemnation in the District Court until her release under the decree of the Supreme Court. The claim for the value of the cargo was disallowed, the British commissioner concurring. Similar claims in the cases of the *Peterhoff*, the *Dolphin* and the *Pearl* were also disallowed.

The *Springbok* case has given rise to interminable discussion among international jurists and the judgment of the Supreme Court has met with general disapproval on the Continent and even in Great Britain, though the British Government, as has been seen, has acquiesced in the condemnation. Many of the authorities of that day and since have commented on the decision adversely. At the meeting of the Institute of International Law at Wiesbaden in 1882, the maritime prize commission nominated by the Institute and composed of Messrs. Arntz, Asser, Bulmerincq, Gessner, Hall, De Martens, Pierantoni, Renault, Rolin, and Twiss, gave a unanimous opinion that the judgment was "subversive of an established rule of maritime warfare, according to which neutral property on board a vessel under a neutral flag, whilst on its way to another neutral port, is not liable to capture or confiscation by a belligerent as lawful prize of war"; and it characterized as a "novel theory" a ruling that condemned neutral property "not upon *proof* of an actual voyage of the vessel and cargo to an enemy port, but upon *suspicion* that the cargo, after having been unladen at the neutral port to which the vessel is bound, may be transshipped into some other vessel and carried to some effectively blockaded enemy port." In the opinion of these

Criticism of the Institute of International Law

jurists, "the result would be that, with respect to blockade, every neutral port to which a neutral might be carrying a neutral cargo would become *constructively* a blockaded port, if there was the slightest ground for *suspecting* that the cargo, after being unladen in such neutral port, was *intended* to be forwarded in some other vessel to some port actually blockaded." (Translation of opinion in Moore: *Digest of International Law*, vol. VII, pp. 731–32.)

The Doctrine of Continuous Voyage as applied during the Civil War

Based upon these decisions, the following general statements may be made upon the application of the doctrine of continuous voyage in the prize cases during the Civil War:

1. Contraband, absolute and conditional, was liable to condemnation if destined to the enemy either direct or by way of a neutral port.

2. It was immaterial whether the plan to introduce contraband called for continuous transport on the same carrier or involved transshipment or inland transportation.

3. Capture of contraband could be made at any stage in the "continuous" voyage between the original port of shipment and the enemy destination.

4. The question of breach of blockade was always more or less bound up with questions of the carriage of contraband, "contagion," or lack of good faith on the part of neutrals.

5. The courts, however, made it clear, especially in the case of the *Bermuda*, that the doctrine of continuous voyage applied equally to merchandise in the case of which a breach of blockade was contemplated, apart altogether from considerations of contraband. What was necessary to find to produce condemnation was a common intent and a common plan *ab initio* [from the start]. It mattered not how many ships or neutral ports were involved, provided each was a "part of the original and planned adventure," and, as in the case of contraband, capture could be made at any point in the chain of transportation.

6. The carriage of contraband did not *ipso facto* condemn the vessel. The latter was penalized only with loss of freight and expenses unless the vessel belonged to the owner of the contraband

or unless there were "circumstances of fraud as to the papers and the destination of the vessel or cargo."

7. A vessel might not necessarily share in the condemnation of her cargo for contemplated breach of blockade. Her owners might in all good faith be engaged in that part of the plan which called only for a voyage between neutral ports. The cargo in such case was differentiated from the ship. This has been pointedly criticized by Westlake. "The offense of blockade-running," he says, "consisting in the attempt to communicate with a prohibited port and not in the introduction of a prohibited class of goods, is essentially one of the ship, and not an offense of the goods except as derived from that of the ship." (*International Law*, vol. II, p. 297.)

8. Merchandise, of the nature of contraband or not, destined *bona-fide* to a neutral port, going to be incorporated into the general stock in trade, and merely taking the chance of the market, was not liable to capture, even though such merchandise might ultimately find its way into the enemy country. In other words, the principle of ultimate *destination* only was applied, not that of ultimate *consumption*.

9. The blockade was not construed as extending to such a port as Matamoras. Inland transportation, being beyond the operations of the blockading forces, was lawful and did not come within the scope of the doctrine of continuous voyage.

10. The case of the *Springbok*, in the view of many authorities, must be put in a category apart from the others, for in that case, they contend, blockade was applied by "judicial interpretation," neither intent nor a specific port of ultimate destination having been proven.

11. The *Springbok* decision is still to be considered as having the approval of the United States and Great Britain in the absence of official action to the contrary. As recently as the year 1900, Lord Salisbury informed the German Government that Great Britain had never expressed "any dissent from that decision on the grounds on which it was based." [1]

12. The decisions, looked at as a whole, illustrate the development of international law to meet new conditions. To quote

[1] See the case of the *Bundesrath*, p. 411.

Professor Moore (*International Law Situations*, Naval War College, 1901, pp. 78–79):

"When we consider on the one hand the not infrequent censure of the American decisions as introducing novel and unwarranted doctrines, and on the other hand the contrary opinion expressed by the British Government and implied by the action of the international commission, it seems not inappropriate to recall the words of Lord Stowell:

"'All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being an *innovation* on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances.'" [1]

(The *Dolphin*, *Federal Cases*, vol. VII, pp. 868–71; the *Pearl*, *Federal Cases*, vol. XIX, pp. 54–55; Wallace: *Supreme Court Reports*, vol. V, pp. 574–78; the *Bermuda*, *Federal Cases*, vol. III, pp. 270–72; Wallace: *Supreme Court Reports*, vol. III, pp. 514–59; the *Stephen Hart*, *Federal Cases*, vol. XXII, pp. 1253–75; Wallace: *Supreme Court Reports*, vol. III, pp. 559–60; the *Peterhoff*, *Federal Cases*, vol. XIX, pp. 316–56; Wallace: *Supreme Court Reports*, vol. V, pp. 28–62; the *Dashing Wave*, Wallace: *Supreme Court Reports*, vol. V, pp. 170–78; the *Science*, Wallace: *Supreme Court Reports*, vol. V, pp. 178–79; the *Volant*, Wallace: *Supreme Court Reports*, vol. V, pp. 179–80; the *Gertrude*, *Federal Cases*, vol. X, p. 265; the *Springbok*, *Federal Cases*, vol. XXII, pp. 994–1007; Wallace: *Supreme Court Reports*, vol. V, pp. 1–28; Moore: *Digest of International Law*, vol. VII, pp. 698–739; Moore: *International Arbitrations*, vol. I, pp. 683–99; vol. IV, pp. 3928–35; *Parliamentary Papers* [1900], *Miscellaneous*, No. 1; *Official Records of the Union and Confederate Navies*, Series I, vol. I, pp. 417–18; vol. II, p. 159; *Diplomatic Correspondence*, *1862*, pp. 171–72; *Hale's Report* in *Foreign Relations of the United States*, *1873*, vol. III [*House Executive Document*, No. 1, 43d Congress, 1st Session], pp. 117–23; *Parliamentary Papers* [1874] (41) *North America*, No. 2; Twiss:

[1] The *Atalanta* (C. Robinson: *Admiralty Reports*, vol. VI, p. 458; *post*, p. 449).

Belligerent Rights on the High Seas, pp. 18–32; *Revue de Droit International*, vol. VII [1875], pp. 236–58; vol. XIV [1882], pp. 329–31; vol. XVI [1884], pp. 124–35; Fauchille: *Du Blocus Maritime*, pp. 329–46; Calvo: *Droit International*, vol. V, pp. 43–50; *Revue Générale de Droit International Public*, vol. IV [1897], pp. 297–323.)

THE *DOELWYK*

Italian Prize Commission, December 8, 1896

DURING the war between Italy and Abyssinia in 1895–96 the latter found its access to the sea chiefly through French Somaliland. The war began without formal declaration, but on March 15, 1896, an Italian royal decree announced that the troops operating in Erythrea and adjoining territory were to be considered as having been upon a war footing from December, 1895 (in the case of certain of them from October). On June 18, 1896, another decree gave notification that Erythrea and its military establishment were no longer in a state of war. But the war was still kept up by Abyssinia, and on August 16, 1896, an Italian prize commission was created to adjudicate upon captures made during the period of hostilities. On October 26, 1896, a treaty was signed restoring peace.

The *Doelwyk*, a steamer flying the Dutch flag, had taken on a cargo of arms and ammunition at Reval and Riga, which was augmented at Rotterdam by similar shipments from Liège. On July 12, she left Rotterdam with a crew shipped for Karachi [Kurrachee] in British India but with bills of lading indicating that she was to call at Port Said for orders. At the latter port instructions to the captain from the owner, Mr. Ruys (acting for the charterers and consignors, Lacarrière and Son) directed him to proceed to Djibouti (in French Somaliland) there to await orders from an agent of the consignors, who had left Marseilles for that port. He was further instructed to take on one, M. Carrette, en route for Djibouti.

In the Red Sea on the night of August 8 the *Doelwyk* was observed by the Italian cruisers to deviate from the course to Karachi and to turn to the right towards Djibouti. She was there-

upon captured by the *Etna* on the ground of carriage of contraband destined for the enemy forces in Abyssinia. The captain stated that the deviation had been for the purpose of landing M. Carrette at Djibouti, but that the ship and cargo were destined for Karachi. M. Carrette was set at liberty by order of the Italian Government, but the vessel was taken to Massowah, a port in Erythrea. Prize proceedings were taken before the commission instituted under the decree of August 16 and the decision rendered at Rome on December 8, 1896, after the signing of the treaty of peace but before notice had been received of its ratification.

Two preliminary exceptions were taken by the claimants: (1) that jurisdiction had lapsed with the conclusion of hostilities, and (2) that the commission, being a local tribunal, had no competence to adjudicate upon an international question. The latter exception was easily disposed of. Up to the present, said the commission, according to constant usage and the positive law of civilized countries, all questions of prize are decided by tribunals created by the government of the belligerent state making the capture.[1] With respect to the other exception, the commission held that the conclusion of war did not *ipso facto* end all consideration of cases arising during the war. It was precisely for the settlement of those cases that the commission had been instituted. For that reason it proceeded to examine the merits of the case. But it made a difference between the judicial facts of capture and of condemnation. In accordance with Article 226 of the Italian Code for the Merchant Marine the one decision might be separate from the other. Capture and condemnation were distinct acts, both in nature and according to the time and circumstances of their occurrence. The commission, however, considered that, even though recognizing the legality of the capture, it would not be justified in proceeding to confiscation. The right of prize, in its opinion, was based on the right of defense; this right ceased when war was at an end — hence the custom of stipulating in treaties of peace for the restitution of prizes taken after cessation of hostilities;[2] and confiscation, apart from being contradictory to the establish-

[1] For the French translation of the decree instituting the prize commission, see *Journal de Droit International Privé*, vol. XXIV, pp. 270–71; also *Revue de Droit International*, vol. XXIX, pp. 57–59.

[2] There was, however, no such clause in the treaty of peace with Abyssinia.

ment of peace, put upon the property of another a restriction which could not be any longer justified by the necessity of legitimate defense. But in the case of capture, it was necessary, even after conclusion of hostilities, to proceed to adjudication upon its legality, because of the question of compensation and costs.[1]

The merits of the case, as considered by the commission, involved two main questions:

1. Was there a legal state of war at the time of capture?
2. What was the destination of the ship and cargo?

On the first question it was admitted that there had been no declaration of war. But the latter was not the only means of knowing that a state of war existed. There had been no declaration in the present case because the facts made it evident. Even granted that the date of commencement was uncertain, it was well established when the *Doelwyk's* cargo was put on board, and its existence could not be ignored. The decree of June 18 had not said that the state of war had ceased but merely that Erythrea had ceased to be considered as upon a war footing. The decree was purely administrative and was not notified because not of international concern. War had not in fact ceased after June 18 nor could it through the will of one of the parties only. The decree of August 16 (instituting the prize commission) was proof that the earlier decree had not put an end to the war; furthermore, Italy had notified various governments (including that of the Netherlands) that war still continued. Hence the commission decided that there was a state of war at the time of the capture producing its juridical effects upon neutral rights and duties.

On the question of destination, the commission had no difficulty in finding that Djibouti was the destination of the ship. It remained to establish the destination of the cargo and, in the light of that destination, the relation between ship and cargo, and the legal consequences. Arms ultimately destined for one of the belligerents did not at any time fail to have such destination legally, because they were at a later stage to be transported on another

[1] This part of the decision is criticised by Brusa in the *Revue Générale de Droit International Public*, vol. IV, pp. 157–75. He argues that the right of prize is less a right of defense than of repression. *See also* Oppenheim: *International Law*, vol. II, p. 556.

neutral vessel or "because one part of the route to the belligerent could not be made by sea, but had necessarily to be made over land and by means of land transportation." The commission pointed out that the Italian Code spoke of neutral ships going "towards an enemy *country*" not "an enemy port," clearly showing that it recognized the contraband character in "the intended and final destination of the goods and not in the actual and immediate destination of the ship transporting them to the place where it must necessarily stop in order that the goods reach the belligerent." As for the ship carrying the contraband, it was considered sufficient reason for capture if it was going in the direction of the enemy country, "especially when, in certain cases, it cannot from the nature of things arrive at the country of the enemy." If this were not so, it would be impossible to capture contraband sent to such a belligerent. In the present case France was not at war and had no need of such an exceptional cargo. Further, under the Brussels Act of 1890 for the suppression of the slave trade such traffic in arms in that region of Africa was illegal. The conclusion was that "the cargo of arms and munitions on board the *Doelwyk* is proved to have been destined to Abyssinia, by sea to Djibouti and from there of necessity by land." [1]

After further considering that the *Doelwyk* had been legally captured both as to place and form, that the owners of the ship had shared in the guilty intention and hence had rendered her liable to confiscation, and that, finally, no damages were due for the seizure of either ship or cargo, the commission, for these reasons, in accordance with Articles 215, 225, and 226 of the Merchant Marine Code and Article 1151 of the Civil Code, formulated its decision as follows:

"It rejects the preliminary exceptions based upon the lapse of its jurisdiction and its own incompetence as well as the demand for adjournment made by the Government commissioner;

"It pronounces legal the capture of the steamship *Doelwyk* and its cargo;

"It further pronounces that the condemnation of the ship and

[1] For a comparison of the cases of the *Doelwyk* and the *Springbok* with respect to the doctrine of continuous voyage, see the article by Fauchille in the *Revue Générale de Droit International Public*, vol. IV, pp. 297–323.

cargo is not well-founded legally, in consequence of the termination of the state of war with Abyssinia, and that both should be restored to their respective owners;

"It declares that M. Ruys and the firm of Lacarrière have no right to claim damages and costs and it consequently rejects their demands in this regard."

(*Archives Diplomatiques*, vol. CXXIII [1897], pp. 81–103; *Revue Générale de Droit International Public*, vol. IV [1897], pp. 39–42, 157–75, 297–323, 399–400; *Journal du Droit International Privé*, vol. XXIV [1897], pp. 268–96; *Revue de Droit International*, vol. XXIX [1897], pp. 55–80.)

THE *BUNDESRATH* (1900)

In the Boer War Great Britain was fighting an enemy that had no seaboard, an unusual situation in modern warfare. The South African Republics could get supplies only through neutral ports, the chief of which was Lourenço Marques in Portuguese East Africa. A blockade was out of the question; hence the problem before Great Britain was whether or not the doctrine of continuous voyage could be applied, consistent with practice in previous wars. In the course of her efforts to prevent contraband reaching the enemy, several German merchant vessels were detained and searched, which proceedings gave rise to spirited protests on the part of Germany, especially in the case of the *Bundesrath*.

The latter vessel was under suspicion when at Aden early in December, 1899. She was reported to the British Admiralty as having sailed for Delagoa Bay with ammunition "suspected but not ascertained" and with "twenty Dutch and Germans and two supposed Boers, three Germans and Austrians believed to be officers, all believed to be intending combatants, although shown as civilians." On December 29 she was brought into Durban by a British cruiser as a prize. The German Consul at Durban at once protested against the seizure and detention and on the 31st the German Embassy at London requested her release "on the ground that she carries no contraband according to assurances of owners, and because her detention, owing to her being a mail-

ship, interferes with public and common interests, in addition to the loss suffered by the Company." This was followed on January 4, 1900, by a formal note setting forth the opinion of the German Government that there was no justification for Prize Court proceedings. "This view," it said, "is grounded on the consideration that proceedings before a prize court are only justified in cases where the presence of contraband of war is proved, and that, whatever may have been on board the *Bundesrath*, there could have been no contraband of war, since, according to recognized principles of international law, there cannot be contraband of war in trade between neutral ports.

"This is the view taken by the British Government in 1863 in the case of the seizure of the *Springbok* as against the judgment of the American Prize Court, and this view is also taken by the British Admiralty in their 'Manual of Naval Prize Law' of 1866.

"The Imperial Government are of opinion that, in view of the passages in that Manual: 'A vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral,' and, 'the destination of the vessel is conclusive as to the destination of the goods on board,' they are fully justified in claiming the release of the *Bundesrath* without investigation by a prize court, and that all the more because, since the ship is a mail-steamer with a fixed itinerary, she could not discharge her cargo at any other port than the neutral port of destination."

Later, after it was reported that nothing in the nature of contraband had been found, it was maintained by the German Government that "even if contraband had been discovered, it would not have justified the British authorities in interfering with a neutral ship plying between two neutral ports. . . . It would be for the authorities of the neutral port to prevent the contraband reaching one of the belligerents, and surely Her Majesty's Government had the means of exerting sufficient pressure on the Portuguese authorities to prevent them from allowing contraband of war to reach the Transvaal, without capturing apparently innocent German ships, and detaining them for so long a time."

In his reply of January 10, Lord Salisbury, the British Foreign

Secretary, took issue on both the facts and the law as set forth in the German note of January 4. It was not the case, he said, that the British Government had gone on record as protesting against the judgment in the case of the *Springbok*. Though the owners of that vessel had asked the British Government to intervene on their behalf, on the ground that the cargo as well as the ship was *bona-fide* consigned to a neutral at Nassau (a contention, said Lord Salisbury, that could not "be adduced in support of the doctrine now advanced by the German Government"), "Her Majesty's Government, after consulting the Law Officers of the Crown, distinctly refused to make any diplomatic protest or enter any objection against the decision of the United States Prize Court, nor did they ever express any dissent from that decision on the grounds on which it was based."

As for the "Manual of Naval Prize Law of the British Admiralty" from which the German note had quoted, Lord Salisbury stated that it embodied only general principles expressed in convenient form for the use of officers; "but it has never been asserted and cannot be admitted to be an exhaustive or authoritative statement of the views of the Lords Commissioners. The preface to the book states that it does not treat of questions which will ultimately have to be disposed of by the Prize Courts, but which do not concern the officer's duty of the place and hour. The directions in this Manual, which for practical purposes were sufficient in the case of wars such as have been waged by Great Britain in the past, are quite inapplicable to the case which has now arisen of war with an inland State, whose only communication with the sea is over a few miles of railway to a neutral port. In a portion of the Introduction the author discusses the question of destination of the cargo as distinguished from destination of the vessel, in a manner by no means favorable to the contention advanced in Count Hatzfeldt's note. . . .

"In the opinion of Her Majesty's Government, the passage cited from the Manual, 'that the destination of the vessel is conclusive as to the destination of the goods on board,' has no application to such circumstances as have now arisen.

"It cannot apply to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or

intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country."

The correct view of the case, Lord Salisbury said, was to be found in the statement of Bluntschli that "if ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war and confiscation will be justified." (*Droit International Codifié*, French translation [2d ed.], § 813.)

In conclusion, the British Government was unable to order the release of the *Bundesrath* "without examination by the Prize Court as to whether she was carrying contraband of war belonging to, or destined for, the South African Republics," but it stated that arrangements had been made to forward the mails as speedily as possible.

In reply to the British contention, the German Government maintained that, quite apart from the question of neutral trade, there was no justification for bringing the *Bundesrath* before a prize court, as the preliminary search had not revealed the presence of contraband. On January 14 it was announced that temporary orders had been issued not to detain German mail-steamers merely on suspicion until after the examination of the *Bundesrath* had been completed, and on the 18th both ship and cargo were released.

Meanwhile other German vessels had been detained. On January 4 the Admiralty stated that the German East-African steamship *General* was being searched at Aden on suspicion and on the 6th the *Herzog* of the same line was brought into Durban as a prize. The *General* was found to have on board ammunition and rifles consigned to Mombasa and a food cargo for Delagoa Bay, but everything was apparently consigned *bona-fide* and nothing contraband was found. Among the passengers were sixty or more Dutch and Germans "in plain clothes, but of military appearance," suspected of being trained artillerists, but proof of this could have been adduced only by searching their baggage, which was not regarded as warranted on the evidence at hand. Accordingly the *General* was released, and she sailed as soon as the cargo could be re-stowed. The *Herzog* was found to be carrying a large ambulance party as well as "large quanti-

ties of provisions consigned to enemy's agents." In reply to a request of the naval authorities at Durban for instructions, the Admiralty directed immediate release, "unless guns or ammunition have been revealed by the summary search," or "unless provisions on board are destined for the enemy's Government or agents, and are also for the supply of troops or are specially adapted for use as rations for troops." In compliance with these instructions the *Herzog* was released on January 9.

The day after the release of the *Bundesrath*, Count von Bülow, the German Chancellor, made a full statement in the Reichstag on the subject of belligerent rights and neutral commerce, in which he set forth the German position as one "which finds expression in the principle that, for ships consigned from neutral states to a neutral port, the notion of contraband of war simply does not exist." And he proceeded to announce the settlement arrived at in the case of the three vessels, as follows:

"In compliance with our demand, the steamers *General* and *Herzog* were released forthwith. The *Bundesrath* was released yesterday.

"In the second place, we demanded the payment of compensation for the unjustified detention of our ships and for the losses thereby incurred by the German subjects whose interests were involved. The obligation to payment of compensation has been recognized in principle by England, and the British Government have declared their readiness to give every legitimate satisfaction.

"Thirdly, we drew attention to the necessity for issuing instructions to the British naval commanders to molest no German merchantmen in places not in the vicinity of the seat of war, or, at any rate, in places north of Aden. The English Government thereupon issued an instruction, according to which the stopping and searching of vessels shall in future take place neither at Aden nor at any point at an equal or greater distance from the seat of war.

"Fourthly, we stated it to be highly desirable that the English Government should instruct their commanders not to arrest steamers flying the German mail-flag. The English Government hereupon issued an order that in future German mail-steamers are not to be stopped and searched upon suspicion only.

This order will remain in force until another arrangement has been arrived at between the two Governments.

"Fifthly, we proposed that all the points in dispute should be submitted to arbitration. The English Government have expressed their concurrence in the institution of a tribunal, if necessary, to arbitrate upon the claims for compensation.

"Lastly, the English Government have given expression to their regret for what has occurred. We cherish the confident hope that such regrettable incidents will not be repeated. We trust that the English naval authorities will not again proceed, without sufficient cause, in an unfriendly and precipitate manner against our ships."

(*Parliamentary Papers* [1900], *Africa*, No. 1; Moore: *Digest of International Law*, vol. VII, pp. 739–43; *International Law Topics and Discussions*, United States Naval War College, vol. V [1905], pp. 94–100.)

THE *CARTHAGE*

The Permanent Court of Arbitration at The Hague, 1913

ON January 16, 1912, during the war between Italy and Turkey, the French mail-steamer *Carthage*, on her regular voyage from Marseilles to Tunis, was stopped by the Italian destroyer *Agordat* about seventeen miles south of Sardinia and subjected to the exercise of visit and search. The object of the search was an aeroplane on board the *Carthage* addressed to M. Duval, the aviator, at Tunis and claimed by the Italian authorities to be contraband destined for the Turkish forces in Tripoli. On the refusal of the captain to deliver it up, the *Carthage* was taken to the port of Cagliari. A second demand for the aeroplane met with a similar refusal, as did an offer of the Italian authorities to forward the mails to their destination. Accordingly, the *Carthage* was sequestrated and everything on board placed under seal.

As soon as he was informed of the seizure, M. Poincaré, the French Minister of Foreign Affairs, instructed the French representative at Rome to secure the release of the *Carthage*, "making all reservations on the subject of the possible consequences of sequestration." The Italian Government replied that it had re-

liable information that the aviator Duval was under agreement with the Turkish Government and that his machine was destined for military service in Tripoli. It was willing, however, to allow the *Carthage* to proceed on her voyage, if the aeroplane was left behind at Cagliari. This proposal was rejected by the French Government as "appearing unjustifiable in international law." The Italian Government then offered immediate release on condition that the French Government give an undertaking that the aeroplane would not pass the frontier into Tripoli or be used in any way by the Turks. The French Government considered that they could not give such a promise. An aeroplane destined to a neutral port was not, in its opinion, contraband of war. Besides, a neutral government was not bound to prevent the export or transport of contraband to belligerents. (Hague Convention of 1907, on rights and duties of neutral powers and persons in war on land, art. 7.) However, on the declaration of the father of Duval, made voluntarily to the French Government, that his son was not in the Turkish service but was intending merely to make flights in Tunis and Egypt, the Italian Government accepted this statement as a sufficient guarantee and released the *Carthage*, which resumed her voyage on January 20, arriving at Tunis the same evening.

The discussion which at once arose over the case was concerned with two points: (1) the immunity of mail-boats from visit and search and (2) the law of contraband as applied to aeroplanes consigned to a neutral destination. Those who condemned the action of the Italian authorities invoked (1) the Hague Convention of 1907 relative to certain restrictions on the right of naval capture (though this convention had not been ratified by Italy); (2) the Franco-Italian Convention of 1869 and the later agreement in 1875, which give to the national mail-boats the status of ships of war for certain purposes, though strictly applicable only in time of peace and to the European, not the colonial, service; (3) the Declaration of London (though unratified), which places aeroplanes among articles of the nature of conditional contraband to which the doctrine of continuous voyage does not apply; and (4) the Proclamation of the Italian Government of October 6, 1911. From all of these it was maintained that, while

mail-boats were not exempt from visit and search, such should take place only in extreme cases where guilt was clear. Aeroplanes, if the lists of the Declaration of London were followed, were at most only of the nature of conditional contraband, and under Article 35 of the Declaration were not liable to seizure when on the way to a neutral destination. Italy could not well ignore the Declaration on this point, for she had invoked it in the case of the *Manouba* (p. 454). The Proclamation of October 6 had but one class of contraband — absolute, and made no mention of aeroplanes.

Steps were promptly taken to settle the questions at issue in a friendly manner. In a joint note of January 26 the Marquis di San Giuliano, the Italian Minister for Foreign Affairs, and M. Barrère, the French Ambassador at Rome, agreed "that the questions arising from the capture and temporary arrest of the steamer *Carthage* shall be referred for examination to the Court of Arbitration at The Hague under the Franco-Italian arbitration convention of December 23, 1903, renewed December 24, 1908." Accordingly, on March 6, 1912, a *compromis* was agreed upon instituting an arbitral tribunal to decide the following questions:

"1. Were the Italian naval authorities within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail-steamer *Carthage?*

"2. What pecuniary or other consequences ought to follow from the decision given upon the preceding question?"

The tribunal, chosen by the two Governments from the members of the Permanent Court, was composed of M. Fusinato of Italy, M. Kriege of Germany, M. Renault of France, Baron Michel de Taube of Russia, and M. de Hammarskjöld of Sweden. The latter was designated by the two Governments as president. The tribunal met at The Hague on March 31, 1913, and concluded its sessions on April 26. The awards in both the *Carthage* and the *Manouba* cases were rendered May 6, 1913.

On motion before the tribunal, the French Agent requested that the Italian authorities be considered as not within their rights in the seizure of the *Carthage* and that the Italian Government be held to pay to France the following compensation:

"1. The sum of *one franc* for the offense offered the French flag;

"2. The sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe the international common law and conventions reciprocally binding upon Italy and upon France;

"3. The sum of five hundred and seventy-six thousand, seven hundred and thirty-eight francs, twenty-three centimes, the total amount of the losses and damages claimed by private parties interested in the steamer and its voyage."

The Italian Agent, on the other hand, requested that Italy be recognized as within her rights and entirely free from the necessity of paying compensation. Instead, he asked that France be held to pay some two thousand francs for expenses caused by the seizure.

In its award the tribunal, while recognizing the right of a belligerent to visit and search neutral vessels, pointed out that "the legality of every act going beyond the limits of visit and search depends upon the existence either of contraband trade or of sufficient reasons to believe that there is such." In the case of the *Carthage,* the only justification for seizure would have been the hostile destination of the aeroplane, but in the opinion of the tribunal, "the information possessed by the Italian authorities was of too general a nature and had too little connection with the aeroplane in question to constitute sufficient juridical reasons to believe in any hostile destination whatever and, consequently, to justify the capture of the vessel which was transporting the aeroplane."

Having reached this conclusion, the tribunal considered that it was not incumbent upon it to inquire whether the aeroplane was contraband, absolute or conditional, or whether the doctrine of continuous voyage applied to the case. The demand for the surrender of the mails was found to be within the provisions of the Convention of 1907 on the point. On the question of compensation, the tribunal considered that the mere statement in an award that a power has failed to fulfil its obligations, coupled with the payment of compensation for material losses, is sufficient penalty, without further reparation for "moral and political

injury," as "the imposition of other pecuniary penalty appears to be superfluous and to go beyond the purposes of international jurisdiction."

For these reasons the tribunal awarded as follows:

"The Italian naval authorities were not within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer *Carthage*.

"The Royal Italian Government shall be obliged, within three months from the present award, to pay to the Government of the French Republic the sum of one hundred and sixty thousand francs, the amount of the losses and damages sustained by the private parties interested in the vessel and its voyage, by reason of the capture and seizure of the *Carthage*.

"There is no reason to comply with the other claims contained in the motions of the two parties."

(G. G. Wilson: *The Hague Arbitration Cases*, pp. 351–71; *Journal du Droit International Privé*, vol. XXXIX [1912], pp. 449–86; *Revue de Droit International*, vol. XLV [1913], pp. 128–38; *Jahrbuch des Völkerrechts*, vol. I [1913], pp. 544–67; *American Journal of International Law*, vol. VII [1913], pp. 623–29.)

THE DOCTRINE OF ULTIMATE CONSUMPTION (1915–16)

THE examination of the cases relative to continuous voyage makes clear that the successive modifications and enlargement of the principle were along the line of what might be called its growth. While it is true that legal principles do not change with new inventions and consequent modification of circumstances, it is inevitable that compromise regulations, such as those of contraband, must either be subjected to some system of interpretation, to make them conform to the new conditions, or else cast aside as utterly unworkable. In the latter event neutral commerce would be at the mercy of belligerent exactions. Under the circumstances, therefore, the general interests of nations and the commercial rights of neutral individuals are best conserved by acquiescence in a reasonable interpretation of the old regulations

to make them conform to new conditions. It is a question of degree, and the neutral may justly insist that the belligerent make no sudden break with what impartial examination would show to be the evolutionary process of the compromise system of neutral regulations. The authority of Lord Stowell's decisions is due to the happy manner in which he discovered how to unearth the living principle within the incrusted mass of legal precedent, and set it forth as a rule to govern the actual cases submitted to his determination. In this way he enunciated the doctrine of continuous voyage. (See p. 381.) He looked behind the alleged destination of the cargo, and when the accompanying circumstances showed that it was colorable and merely a stage in the transit, did not hesitate to declare that the whole voyage had been from its inception one and continuous toward the enemy's territory. Nevertheless this doctrine was only applied in those instances when the cargo was taken on the last leg of its voyage, that is when it was actually on the way to the belligerent port. In the Civil War the same principle was applied when goods destined to the Confederacy were given a colorable destination to a chosen neutral port. The American courts in their decisions of the prize cases submitted to them did not hesitate to condemn cargoes seized upon the first leg of the voyage, when satisfactory proof was furnished that the goods in question were really destined to the enemy. In some cases, even, the decisions of the court made application of the doctrine upon the ground of the violation of blockade, as well as for the carriage of contraband. In all these cases it is therefore difficult to get at the rule, since the court, groping in its ignorance of the fundamental principles, set forth whatever ground might serve to tie the condemnation with many cables of arguments — perhaps in the hope that one at least would hold. In no case, however, was the cargo condemned in the absence of actual proof satisfactory to the court that it was really destined to the enemy's territory.[1] In the case of the *Dashing Wave* (see p. 391), bound for Matamoras on the Confederate border, cloth of material patently intended for the fabrication of Confederate uniforms was liberated because proof was not forth-

[1] With the possible exception of the case of the *Springbok* which is discussed elsewhere. (See p. 392.)

coming of its destination to the Confederacy. The court might have a moral certainty that it was contraband, destined to their enemies, but in the absence of definite proof they did not feel at liberty to substitute their convictions in the place of the proof required in prize cases.

From the outbreak of the War of 1914 it was evident that its wide area and intense bitterness, as well as the Allies' absolute control of the sea and the usual weakness of neutral powers, would have a serious effect in modifying the application of the rules governing neutrality. It is a bootless quest to attempt to discover through the maze of British Orders in Council, diplomatic explanations, and prize decisions the familiar principles governing neutrality. An explanation of the British measures belongs more properly to the field of political investigation. In the first instance, as was natural, the Allies deformed the recognized principles in such a manner as to secure the desired result with the least injury to neutral susceptibilities and danger of establishing an inconvenient precedent for some future war, when they might be neutral or similarly circumstanced to beleaguered Germany. What could not be accomplished by such means was frankly placed upon the ground of reprisal.[1] Whatever the explanation may be, the allied powers have not thought it best to tamper with the recognized rules governing blockade, and have bent their principal efforts toward the seizure of alleged enemy's goods, or the repression of alleged instances of contraband trade.

The paramount necessity of belligerents to cut off *bona-fide* trade in absolute contraband is too well recognized to give rise to much discussion, so that we may confine our examination to

[1] No principle of international law is better recognized than the rule of the Declaration of Paris, which protects enemy goods under the neutral flag. Consequently, to effect the seizure of exports through neutral countries, the Allies must needs have recourse to reprisal.

In the course of his speech in the House of Commons on March 1, 1915, Mr. Asquith said: "Now the Committee will have observed that in the statement which I have just read out of the retaliatory measures we propose to adopt, the words 'blockade' and 'contraband' and other technical terms of international law do not occur. And advisedly so. In dealing with an opponent who has openly repudiated all the principles both of law and of humanity we are not going to allow our efforts to be strangled in a network of juridical niceties. . . . " (Extract from the London *Times*, March 2, 1915.)

the more interesting cases of articles conditionally contraband. To understand the Allies' course in this latter instance, it is necessary first to discuss the recognized law governing carriage of articles conditionally contraband — food supplies, fuel, and almost all important articles of commerce serving at one and the same time to supply the needs of war as well as those of the ordinary peaceful civilian population. A due consideration of neutral interests has not permitted in the case of such articles a wide latitude of interference. The cruisers of a strong belligerent power scouring the seas cannot be expected to permit its enemy freely to supply food and clothing to his troops from abroad, but yet the confiscation of all such articles bound for enemy territory can not be tolerated by neutrals, and would be the negation of the system of neutrality. In the course of time and of many wars, a compromise has been effected. Its essence lies in the requirements placed upon the shipper to prove the innocence of his traffic. In the first place, as is reasonable in conformity with the practical requirements of the situation, the neutral shipper is bound to furnish proof that the articles in question are on their way to civilian consignees.[1] But as postal and cable communications make it simple enough to interpose a civilian consignee even when the articles are really destined to the armed forces of the enemy, the belligerent is permitted to apply certain presumptions which have been evolved to furnish a reasonable and practical rule by which a belligerent may intercept the greater proportion of that trade which would probably reach the armed forces of his enemy. These presumptions are also intended to avoid too expensive an interruption of the ordinary peaceful commerce of neutrals.

As discovered from the cases heretofore set forth, one of the principal presumptions is that derived from the prevailing character of the port of destination to which the cargo is bound. Food supplies, when on the way to a port of military equipment or naval base, are declared contraband, even though it

[1] Neutral property found on board a belligerent vessel consigned to an enemy would be confiscated, since capture is presumed to be delivery, and the property when delivered would become enemy in character. In the case of neutral vessels, however, this presumption cannot be applied, and condemnation can be justified only in the case of contraband.

might be shown in any particular instance that they were actually and *bona-fide* bound to civilians.[1] The development of land transportation has destroyed the meaning of this rule, and it was natural that both belligerents should be inclined to condemn all food supplies on the way to ports of their enemy.[2]

Germany based her action on the presumptions recognized by the unratified London Declaration, while Great Britain explained hers as a retaliation, justified by the decree of the German Government taking over control of all food supplies. This course, the British Government professed to consider, had abolished the distinction between supplies bound to civilians and those bound to military forces, and rendered all foodstuffs subject to condemnation as on the way to the German Government.[3]

In the absence of any blockade of German ports, the increase of prices might still have been sufficient to make neutral commerce with German ports lucrative, had not the Allies made their preparations. Seizing upon another German error of policy and action of questionable legality — that of sowing mines on the high seas — the British Admiralty justified themselves in staking out a wide mine area, and notified vessels, with a kindly solicitude for their safety, that they must enter British ports, where they would find the pilots conversant with the only safe channels through the imperiled region. Once within British jurisdiction, not only the

[1] Formerly, when land transportation was too expensive to be largely employed, the cutting off of supplies bound to the ports which served as military bases furnished the belligerent with the means of preventing the forces of his enemy from receiving supplies. Under modern conditions, however, with the development of cheap land transportation, the only effect of such a presumption would be that all articles conditionally contraband would be destined to ports of a conspicuously non-military character, and the application of the right to seize articles conditionally contraband would elude belligerents. To meet these conditions the London Declaration enunciated a further set of presumptions. (See Articles 33–36 of the Declaration.)

[2] The German cruiser *Karlsruhe* destroyed the *Maria* laden with grain consigned to Dublin and Belfast. This was made one of the ostensible grounds for presumptions adopted by the British Government to justify the interruption of food supplies bound to Germany. A regard for future political situations may have made the German authorities anxious to have a precedent, but their action furnished a dangerous argument to their adversaries. (See Note of February 19, 1915, *American Journal of International Law, Supplement*, July, 1915, pp. 176–77; cf. the cases of the *Wilhelmina*, p. 559, and the *Frye*, p. 517.)

[3] The German Government perceived too late its tactical blunder, and hastened to decree that this control of food supplies should not apply in any way to imports (p. 559).

contents of the cargo, but neutral correspondence as well, was subjected to inspection. The failure of the American Government to protect its nationals against these extreme and unwarranted proceedings left their merchants no alternative but to conform to whatever exactions Great Britain might dictate.

Lacking the protection of their Government, which limited its interposition to verbal protests,[1] neutral shippers preferred to confine their trade to the territory of the Allies and the few neutral countries remaining in Europe. But here again the neutral shipper found himself in conflict with belligerent exactions, for if articles of such a nature as possibly to become conditional contraband were permitted to arrive freely in the neutral territory adjoining Germany, it would only be necessary for the German Government, through its agents, to purchase freely the supplies it needed in the open market. It need not be so unwary as to have the goods consigned directly to its agents. It might even purchase only those goods which existed in the neutral territory, yet the consequent increase in price would affect the normal course of trade and replace these articles by others from beyond the seas. This facility in Germany's hands rendered practically useless any attempt to cut off her supplies of contraband, by the application of the recognized right of belligerents, including the existing rule of continuous voyage.[2] Furthermore the transforma-

[1] The American protests set forth the recognized law, and condemned the British violations of American neutral rights. As, however, the American Government has not used the resources at its command to oppose an adequate resistance to Great Britain's belligerent exactions, it may be considered that a precedent in favor of Great Britain's course has been established. After the termination of the war, Great Britain will perhaps be willing to pay the cost of the few seizures she has made. This trifling expense will be to her as nothing compared with the advantage which she has derived from the interruption of neutral commerce. International law it is true does not justify a claim for indirect damages, but the losses to neutral trade have been principally due to the strangulation of trade and the lost opportunities of acquiring new markets, caused by Great Britain's illegal action in this matter. In future wars Great Britain's course may serve as a precedent, authorizing belligerents to seize all neutral commerce, provided payment be made after the war is over of the actual cost of the goods so confiscated. Great Britain cannot — to use her own words — have it both ways. The beds that nations make for their enemies, they may themselves have to lie in.

[2] Unquestionably the purpose of the Allies was to effect an interdict or a so-called blockade of Germany, and starve her into submission, but since no blockade has been announced it is necessary to discuss the subject from the point of view of contraband trade. This course also serves the better to illustrate the difficulties which have arisen relative to the application of the existing rules governing contraband.

tion in the methods of industry and the reduction of the cost of land transportation now make it possible for a highly developed country to manufacture all it needs of arms, ammunition, and other absolute contraband, provided it enjoy unrestricted supplies of raw material in adjacent neutral markets. This new condition has deprived of its former significance the belligerent right of confiscating trade in absolute contraband. Under modern conditions, the principal interest of the power in control of the sea has become that of cutting off the supply of certain primary products or raw materials required in the manufacture of the explosives or armaments necessary to the prosecution of military operations.

In view of the above conditions, and in pursuance of an unavowed desire to blockade Germany, without accepting the incidental obligations and disadvantages of blockade, Great Britain suggested and applied, although she did not formally enunciate, the doctrine of ultimate consumption; that is to say, the doctrine, in accordance with which she reserved the right, whenever the imports to a neutral country were found to exceed the amount reasonably required for the needs of the neutral country itself, to assume or presume that any excess over this amount would reach Germany.[1]

Even though Great Britain has thus applied in this obscure though effective manner the doctrine of ultimate consumption, she has been careful to leave herself another leg to stand upon—reprisals, that *deus ex machina* to whom appeal is made to extricate its devotees from the restrictions of recognized rules. This aspect of the question has been considered under other headings.[2]

[1] Great Britain graciously agreed not to apply this presumption in those cases where the neutral country should at its dictation enforce regulations to prevent the export of the supplies in question. Furthermore she did not insist upon the right to confiscate articles which might possibly become conditional contraband by application of this doctrine of ultimate consumption, but instead she claimed to exercise the milder right of preëmption. By means of detention in the prize courts, and various other interferences, eventually perhaps with the purchase of the cargo, Great Britain has been enabled so to inconvenience innocent neutral commerce as to effect her purpose of intercepting all supplies bound for Germany. Neutral commerce has more to fear from the alleged concessions and "milder measures" that belligerents come bearing to them than they do from a rigid insistence by belligerents upon their full rights.

[2] Reprisals can be alleged to justify almost any course, but the principles of the

§ 32. BLOCKADE

THE *COLUMBIA*

The High Court of Admiralty, January 17, 1799

THIS was a case of an American vessel taken on a voyage from Hamburg to Amsterdam, August 20, 1798.

Sir William Scott [*Lord Stowell*] delivered the opinion of the court:

"There is pretty clear proof of neutral property in this case, both of the ship and cargo. But the vessel was taken attempting to break a blockade.

"It is unnecessary for me to observe, that there is no rule of the law of nations more established than this: that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all books of law, and in all treaties. Every man knows it. The subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge.

"This vessel came from America, and, as it appears, with innocent intentions on the part of the American owners. For it was not known at that time in America, that Amsterdam was in a state of investment, and therefore there is no proof immediately affecting the owners. But a person may be penally affected by the misconduct of his agents, as well as by his own acts; and if he delegates general powers to others, and they misuse their trust, his remedy must be against them.

institution do not permit the employment of reprisals to the detriment of third parties who cannot be considered as sharing in the responsibility for the acts complained of. Consequently Great Britain has no right to interfere with innocent neutral commerce on the ground of retaliation, however justified, against the conduct of the German Government. If driven to bay by the logic of this argument, the British champions might allege that interference with American commerce is the price of the services which they render in vindicating that law of nations upon which rests the common security. Whatever be the true explanation of the actions of the Governments concerned, this would seem to be the only refuge from admission that the action taken has constituted a pure abuse of force.

"The master was by his instructions to go north about to Cuxhaven. This precaution is perhaps liable to some unfavorable interpretation. The counsel for the claimant have endeavored to interpret it to their advantage; but at the best, it can be but a matter of indifference. When he arrived at Cuxhaven, he was to go immediately to Hamburg, and to put himself under the direction of Messrs. Bouè and Company. They therefore were to have the entire dominion over this ship and cargo. It appears, however, they corresponded with persons at Amsterdam, to whom farther confidential instruction had been given by the owners; and these orders are found in a letter from Messrs. Vos and Graves of New York to Bouè and Company informing them that the *Columbia* was intended for Amsterdam — consigned to the house of Crommelin, to whom Bouè and Company are directed to send the vessel on *if the winds should continue unsteady, and keep the English cruisers off the Dutch coast.* If not, they were to unload the cargo, and forward it by the interior navigation to Amsterdam. Bouè and Company accordingly direct the master to proceed to Amsterdam, if the winds should be such as to keep the English at a distance. There is also a letter from the master to Bouè from Cuxhaven, in which he says: 'Amsterdam is blockaded.'

"We have this fact then, that when the master sailed from Amsterdam, the blockade was perfectly well known both to him and the consignees; but their design was to seize the opportunity of entering whilst the winds kept the blockading force at a distance. Now, under these circumstances, I have no hesitation in saying, that the blockade was broken. The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade; but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud.

"But it has been said that, by the American treaty, *there must be a previous warning.* Certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then be-

comes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel appear to have been sufficiently informed of this blockade, and, therefore, they are not in the situation which the treaty supposes.

"It is said also, that the vessel had not arrived, that the offense was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade of the *Texel* was beginning to execute that intention; and is an overt act constituting the offense. From that moment the blockade is fraudulently invaded. I am, therefore, on full conviction, of opinion, that a breach of blockade has been committed in this case; that the act of the master will affect the owner to the extent of the whole of his property concerned in the transaction. The ship and cargo belong, in this case, to the same individuals, and therefore they must be both involved in the sentence of condemnation."

(C. Robinson: *Admiralty Reports*, vol. 1, pp. 154–57.)

THE *OCEAN*

High Court of Admiralty, May 16, 1801

THIS was a question arising on the blockade of Amsterdam, respecting a cargo shipped for America at Rotterdam.

Sir William Scott (*Lord Stowell*), delivering the opinion:

"I am inclined to consider this matter favorably, as an exportation from Rotterdam only, the place in which the cargo first becomes connected with the ship. In what course it had traveled before that time, whether from Amsterdam at all, and if from Amsterdam, whether by land carriage or by one of their inland navigations, Rotterdam being the port of actual shipment, I do not think it material to inquire. On this view of the case it would be a little too rigorous to say, that an order for a shipment to be made at Amsterdam, should be construed to attach on the owner, although not carried into effect. It has been said from the letter of the correspondent at Amsterdam, that the agents there had informed their correspondents in America, that the blockade was

not intended to prevent exportation. The representation of the enemy shipper could not have availed to exonerate the neutral merchant, if otherwise liable. Were this to be allowed, it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that egress as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in breaking it.

"It happens in this case, that the intended exportation did not take place. The only criminal act, if any, must have been the conveyance from Amsterdam to Rotterdam. It would be a little too much to say, that by that previous act, the goods shipped at Rotterdam are affected. The legal consequences of a blockade must depend on the means of blockade, and on the actual or possible application of the blockading force. On the land side Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation. If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of Amsterdam."

"*Restored.*"

(C. Robinson: *Admiralty Reports*, vol. III, 297–98.)

THE *NANCY*

High Court of Appeals, July 6, 1809

THIS was a leading case of several appeals from Vice-Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of blockade of the island of Martinique, in the year 1804.

The attestation of the master, who was the claimant of the vessel for himself and other American citizens, and of the cargo as the property of John Jubel, also of New York in America, proved that he had, under charter-party, agreed to sail with a cargo from New York to the port of St. Pierre's in Martinique, unless the same

should be blockaded, and to bring from thence a return cargo of the produce of the island, for the sole account and risk of Jubel and other American citizens. That in case the island should be blockaded he had agreed to proceed to St. Thomas's, from whence he had orders to procure a return cargo from the proceeds of the outward. In pursuance of this agreement, he arrived off Martinique on the 29th of March, and finding no ships of war there, and not being given to understand that there existed any blockade at that time, he, in consequence of the vessel's having sprung a leak, repaired to the port of Trinity in that island to refit, from whence he set sail, and arrived at that of St. Pierre's on the third of April. That while in the island he was informed the blockade had been removed, and the squadron had gone on an expedition to Trinidad. No vessel of war, whatever, had appeared off the island during his stay; nor was there any notice given of a blockade then existing. Having completed his cargo on the 15th, he sailed for New York, in which voyage he was captured and carried into Halifax in Nova Scotia, when the vessel and cargo were condemned as prize. This statement was supported by the evidence of a passenger on board the vessel, by some of the crew, and by the tenor of a correspondence between persons in France, New York and Martinique, which proved that the blockade was at that time removed, or at least so far relaxed that no armed vessels had been seen off these ports during the period the vessel remained in the island.

For the captors it was contended — that although the blockading fleet had been dispatched to Surinam, a force had been left off the island to continue the blockade, and apprize vessels of its existence. This appeared even by the correspondence exhibited by the claimants, one of the letters admitting that a British fifty-gun ship continued off the island, and was now and then seen by the inhabitants.

The Court held that to constitute a blockade the intention to shut up the port should not only be generally made known to vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communi-

cating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels, and with such unparalleled rigor, that no vessel whatever had been able to enter the island during its continuance. Their Lordships were therefore pleased to order that the ship should be restored, the proof of property being sufficient, but directed further proof as to the cargo claimed for the American citizens mentioned.

(Textually as reported in Acton: *Reports of Prize Cases*, vol. 1, pp. 57–59.)

THE *FRANCISKA*

Judicial Committee of the Privy Council, November 30, 1855

Dr. Lushington, Judge in the High Court of Admiralty, in the case of the *Franciska*, ordered further proof in regard to the existence of the blockade, for the alleged violation of which the vessel was seized and brought in, and when proof satisfactory to the court had been furnished, Dr. Lushington condemned the vessel and cargo for breach of the blockade.

An appeal was taken by the claimant, and the arguments were chiefly upon these two points:

"First, whether at the hearing of the claim further proof as to the time at which the port of Riga was put in a state of blockade ought to have been allowed to the captor. . . .

"Secondly, whether upon the further proof there was sufficient evidence that the port of Riga, if at all in a state of blockade at the time of the capture of the *Franciska*, was so known to be by those in charge of the ship, and if the conduct imputed to them constituted such a breach of blockade as made the ship liable to condemnation."

The Rt. Hon. T. Pemberton Leigh, delivering the opinion of the court:

". . . As to the first point, the course of proceeding to be observed on the original hearing is very clear. In everything that regards the ship and cargo the case is to be considered in the first instance exclusively upon the evidence furnished by the ship itself, namely, the papers on board and the examination on the standing interrogatories of the master and some of the crew. If the case be clear upon this evidence, restitution or condemnation is decreed at once, If upon such evidence the case be left in doubt further proof is usually allowed to the claimant only, but it may also be allowed to the captors if, in the opinion of the judge who hears the case, such a course appears to be required. With respect to matters which cannot appear upon evidence furnished by the ship, as the existence or non-existence, the sufficiency or insufficiency, of a blockade, the court must necessarily resort to other means of information. . . ."

Under all the circumstances of the case, their Lordships were of the opinion that the learned judge (Dr. Lushington) was perfectly right in the course he took when he "allowed 'further proof, but only with respect to the blockade, to both parties.'"

The court continued:

"The second question is, what is the effect of the whole evidence ultimately before the court?

"Whatever may be the demerits of the ship she cannot be condemned, unless at the time when she committed the alleged offense the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner."

Making a more concrete application to the facts under consideration the court said:

"It is not contended by the captors that after the ship sailed from Copenhagen she received any notice to affect her with knowledge of the blockade, and the questions, therefore, are:

"First, was the port of Riga on the 14th of May legally in a state of blockade?

"Second, if so, had the master or owner at that time such notice of the fact as to subject his ship to condemnation?"

With respect to the first point, the evidence showed that "the admiral did establish, by a competent force properly stationed for the purpose, an effective blockade of the ports of Libau,

Windau, and the Gulf of Riga; that, with the exception of the 3d and 4th of May, on which days all the blockading ships were absent from their stations, the blockade was maintained to a time subsequent to that at which the *Franciska* was seized, and their Lordships agree with the learned judge in the court below in thinking that the admiral must be presumed to have carried with him from England authority from her Majesty's Government to institute such blockade of the Russian ports as he might deem advisable.

"But while the admiral was taking these measures in the Baltic, the English and French Governments were taking measures at home of which he was ignorant, and which it is contended seriously affect the validity of the blockade in point of law."

After the court had investigated the trade which was authorized from Russian ports by the British Orders in Council, and had considered the effects of these orders in the light of all the attendant circumstances, including the issuance of the French ordnance and the Russian ukase which also related to this trade, the court declared its opinion relative to the effects of these proclamations:

"In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the law of nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection?

"That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review: 'The argument stands thus: By the law of nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede, and I should regret to think if any authority could be cited from the decisions of any British Court administering the

law of nations, which could be with truth asserted to maintain a contrary doctrine.' "

Passing to the question of the effect of the issuance of licenses to carry on a limited trade with blockaded ports, the court thought it necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rested. "That right," in the court's opinion, "was founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded."

For the purpose of making clear the principles and of supporting its opinion the court quoted from the views expressed by Grotius, Bynkershoek, Vattel, and Wheaton, and gave extracts from the opinions of Lord Stowell in the cases of the *Frederick Molke*, the *Betsy*, the *Vrouw Judith*, the *Rolla*, and the *Success*.

The court continued:

"It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favor, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the court, it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

"The counsel on both sides at their Lordships' bar understood that the learned judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet, if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

"Again, it is not easy to answer the objections which a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself."

Upon the supposition that the blockade was open to no objection in point of law, the court proceeded to discuss whether "the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it."

Relative to the special warning in the case of egress from a port blockaded *de facto* only, their Lordships declared:

"If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation — propositions which are free from doubt — the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary."

In regard to the notice which the claimant had received in the case under consideration, the court was of opinion that the im-

pressions and rumors consequent upon the acts accomplished by the belligerent authorities would occasion a belief which "must necessarily be that whatever the blockade might be it was general, and extended to all the Russian ports in the Baltic, and was not confined to a few ports, or to a particular division of the coast," and their Lordships found evidence that this actually was the belief created.

The court made the following statement:

"If this view had been presented to the judge in the argument in the court below, it is probable that it would have commanded his assent, since he entirely approves of the principles on which it is founded. But unfortunately the argument before him took a different direction. The contention then appears rather to have been that there had been no blockade of any Russian ports which could have been known at Copenhagen on the 14th of May; and that if any knowledge, however accurate, had been acquired by the master, through the channel of notoriety, it would not have formed a legal ground of condemnation for an attempt to enter a blockaded port. At all events, their Lordships have the satisfaction of believing that the conclusion at which they have arrived upon this point is not opposed to the authority of the eminent judge whose decision they have to review.

"But, further, although the Government and commercial classes of Denmark could hardly have been ignorant on the 14th of May that the commerce of neutrals had been subject to interruption, and that captains of British ships of war had interfered with their vessels, on the allegation of a blockade of Russian ports, there were not wanting circumstances which might reasonably excite grave doubts whether any such blockade had been established with sufficient authority, or would ultimately be recognized by the British Government."

After these grounds for doubt had been given, their Lordships thought they were such that they "might with great justice affect the credit of any reports in circulation at Copenhagen, and create a not unreasonable doubt whether any blockade of Russian ports had yet been established by a competent authority."

In accordance with the views above expressed, the court decided that "they must advise a *restitution of the ship* (*or rather of*

the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party."

(Abridged statement, including the most important extracts from the opinion, prepared from Roscoe: *English Prize Cases* [London, 1905], vol. II, pp. 346–70; reproducing the original report, Moore: *Privy Council Report*, vol. X, p. 37 *ff.*)

THE *WREN*

Supreme Court of the United States, December, 1867

Mr. Justice Nelson delivered the opinion of the Court:

"The court below condemned the vessel on the ground that she was the property of the enemies of the United States. And this is the only question in the case. For, although it was insisted on the argument that the condemnation might have been placed on the ground that the vessel was taken in contemplation of law *in delicto*, for violating the blockade of the port of Galveston, Texas, the position is founded in a clear misapprehension of the law. The doctrine on this subject is accurately stated by Chancellor Kent. 'If a ship,' he observes, 'has contracted guilt by a breach of blockade, the offense is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the return voyage; and, if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent force to vindicate the law.' And the modern doctrine is now well settled, that the only penalty annexed to the breach of a blockade is the forfeiture of vessel and cargo when taken *in delicto*. The earlier doctrine was much more severe, and inflicted imprisonment and other personal punishment on the master and crew."

In regard to the ownership of the vessel, in spite of suspicious circumstances which made it "not unnatural or unreasonable to suspect that the so-called Confederate States, or their agents, had some connection, if not interest in her," the court concluded: ". . . But in the view we have taken of the case there is no foundation of legal proof of the ownership of the vessel in the

Confederate States on which these circumstances can rest, or be attached, as auxiliary considerations to influence the judgment of a court.

"Our conclusion is, that the decree below must be reversed, and the vessel restored, but without costs."

(An extract of the principal part of the opinion. Wallace: *Supreme Court Reports*, vol. VI, pp. 582–88.)

THE SO-CALLED BLOCKADE OF GERMANY (1915–16)

THE Allies have not had recourse to an international law blockade of Germany, but have made use of their effective control of the sea to intercept trade to and from that country, alleging this action to be upon the ground either of seizure as contraband or justifiable retaliation against Germany for her methods adopted "against peaceful traders and noncombatant crews with the avowed object of preventing commodities of all kinds including food for the civil population from reaching or leaving the British Isles or Northern France. . . . The British and French Governments will," so the British Ambassador notified the American Government, ". . . hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation. The treatment of vessels and cargoes which have sailed before this date will not be affected."

(Extract from note of British Ambassador to the Secretary of State, March 1, 1915, relative to the German War Zone decree.) The action so taken is studied and discussed under *The Doctrine of Ultimate Consumption* (*supra*, p. 418) and the *British Interdict* (*post*, p. 596.)

§ 33. RESERVED TRADE

THE *EMANUEL*

High Court of Admiralty, April 9, 1799

Sir William Scott [*Lord Stowell*] delivered the opinion of the Court:

"This is a case of a ship sailing under Danish (neutral) colors, and taken with a cargo of salt, on a voyage from Cadiz to Castropel in Galicia. The ship has been restored, reserving the question of freight and expenses. The cargo has been condemned as the property of the King of Spain, and the question now is, under these circumstances, whether freight and expenses shall be allowed to the neutral ship."

The court first pointed out that in certain cases, such as the carriage of contraband, there would not be application of the ordinary rule according to which "where a capture is made of a cargo, the property of an enemy, carried in a neutral ship, the neutral shipowner obtains against the captor those rights which he had against the enemy."

After proceeding with the discussion it was pointed out how jealously the European countries had adhered to the policy of restricting the coasting trade to their own navigation. In consequence thereof, the court considered that, the *onus probandi* did at least lie upon those engaging in such a trade to show that it "was not a mere indulgence, and a temporary relaxation of the coasting system of the state in question; but that it was a common and ordinary trade, open to the ships of any country whatever." Applying this principle to the present case, *Sir William Scott* asked if there were "nothing like a departure from the strict duties imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory. Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a

direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice? Is this so clearly within the limits of impartial and indifferent conduct, that if a neutral ship is taken in an office of this kind, she is entitled to claim against the captor, whom she is thus counteracting and almost defrauding, the very same rights which she possessed against the claimant, to whom she is giving this extraordinary and irregular assistance?

"It is said in argument that this principle, which applied likewise to the colonial trade between the mother countries and their plantations in the West Indies — that being equally a trade guarded by a monopoly in time of peace, and having been likewise occasionally relaxed under the pressure of a war — has been in a good measure abandoned in the decisions of the Lords Commissioners of Appeal. I am not acquainted with any decision to that effect; and I doubt very much whether any decision yet made has given even an indirect countenance to this supposed dereliction of a principle apparently rational in itself, and conformable to all general reasoning on the subject.

. . . . . .

"As to the coasting trade — supposing it to be a trade not usually opened to foreign vessels — can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said that this is not importing any thing new into the country, and it certainly is not. But has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures, and for the necessities of domestic life, in this metropolis. Is it possible to describe a more direct and a more effectual opposition to the success of French hostility, short of an actual military assistance in the war? What is the present case? It is still more. It is the direct con-

veyance of a commodity belonging immediately to the King of Spain, for the purpose of public revenue. The vessel is employed not merely in the private traffic of individuals, but in the revenue service of the state. The King of Spain, disabled from employing Spanish vessels in the collection of his revenues, enlists foreign vessels under this necessity. Salt is a royal monopoly in Spain, as it formerly was in France; and it is distributed on the government account to the various provinces. This foreign ship is employed in the distribution, and by the employment becomes an actual revenue cutter of the King of Spain. It should seem to be no very harsh treatment of such a vessel, if, on the capture, she is restored, and is only left to pursue her demand of freight against her original employers.

". . . It is conformable to more ancient judgments upon the subject, which have pronounced that neutrals are not to trade on freight between the ports of the enemy. To this principle I shall adhere in the present case, leaving the party to such remedy for his demand of freight as he may think fit to pursue, either against the captor by appeal in this country, or against his freighter in the country where he was employed."

(C. Robinson: *Admiralty Reports*, vol. I, pp. 296–303.)

THE *IMMANUEL*

High Court of Admiralty, August 15, 1800

THIS vessel, owned by a neutral merchant of Hamburg, was seized on August 14, 1799, on a voyage from Hamburg to Santo Domingo *via* Bordeaux, where she took on some additional cargo bound for Santo Domingo. Various questions arose in regard to the neutral ownership of the cargo, its contraband character and the political status of Santo Domingo, then alleged to have acquired its independence from France under Toussaint. After the court had permitted both parties to supply evidence to determine the ownership of the goods and the condition of Santo Domingo, the case was heard on August 5, 1800.

After hearing full arguments for the captors and the claimants, the court held that the neutral character of the goods was estab-

lished and that they could not be considered as in the nature of contraband. It was furthermore the opinion of the court, derived from the *Gazette* and other "legitimate evidence," that Santo Domingo continued a French colony and that, if there were "parts of the island not under French dominion, it does not at all appear that it was in the view of the present parties to trade with those parts exclusively." The court admitted the justice of the contention "that an Englishman trading with this French colony must at all events be deemed an authorization of the same trade to the subjects of other countries," but observed that "a trading between the dominions of Great Britain and Santo Domingo could authorize no more than a trading between the neutral country itself and that colony."

Passing finally to the question of the reserved or colonial trade, *Sir William Scott* (*Lord Stowell*) gave the opinion of the court as follows:

"Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, viz.: Whether a neutral property engaged in a direct traffic between the enemy and his colonies is to be considered by this court as liable to confiscation? And first with respect to the goods.

"Upon breaking out of a war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned) and of their ships being liable to visitation and search; in which case however they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But

without reference to accidents of the one kind or other, 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. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking."

The court then expatiated upon the manner in which colonial trade, generally speaking, was shut up to the exclusive use of the mother country "so far as any direct communication or advantage resulting therefrom. Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon." The court continued:

"Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course — and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and to say, 'True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has effected; supplies shall be sent and their

products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.'

"Upon these grounds, it cannot be contended to be a right of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of French councils, but of British force.

"Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing, on which the prohibition had been legally enforced in the war of 1756; a period when Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in Europe."

After entering into a full discussion of the other arguments which had been suggested against the prohibition, *Sir William Scott* decided:

"Upon the whole view of the case as it concerns the goods shipped at Bordeaux, I am of opinion that they are liable to confiscation. I do not know that any decision has yet been pronounced upon this subject; but till I am better instructed by the judgment of a superior tribunal, I shall continue to hold that I am not authorized, either by general legal principles applying to this commerce, or by the letter of the King's instructions, to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy and its colonies. I see no favorable distinction between an outward voyage and a return voyage. — I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specifically mentioned."

Since the neutral had "acted without notice of former decisions upon the subject" the court went "no further than to pronounce for a *forfeiture of freight and expenses, with a restitution of the vessel.*"

(Extracts and abridgment from C. Robinson: *Admiralty Reports*, vol. II, pp. 186–206. A condensed statement of the facts and of a portion of the omitted parts of the opinion is given.)

THE *MONTARA*

Yokosuka Prize Court, November 4, 1905
Decision on Appeal to the Higher Prize Court, February 13, 1906

BEFORE the Russo-Japanese War, trade in the Komandorski Islands and along the neighboring coast was closed to foreign ships. During the progress of the war the Russian Government permitted two Russian companies to employ foreign ships in this trade. Acting under this permission, one of these companies, the Kamschatka Commercial and Industrial Company, chartered the *Montara*, a United States ship, for the purpose of engaging in this trade, and also of carrying supplies to the neighborhood, under the company's contracts with the Russian Government.

The charter-party was dated March 22, 1905, and was for a period of about five months, running from May 1. The *Montara* left San Francisco on July 9, and called at various Kamschatkan ports, discharging part of her cargo, and taking in furs and other articles. On August 16, 1905, she was captured while discharging the remainder of her cargo at Nikolski Roads, Behring Island. The cargo on board at the time was the property of the charterers.

The treaty of peace was signed on September 5, 1905.

Under Article 6 (2) of the Japanese Regulations relating to Capture at Sea, "ships which sail under the enemy's flag, or with a special license from the enemy," were to be considered as enemy ships.

Claims were entered by the shipowners for the release of the ship, and by the English underwriters of the cargo for the release of the cargo.

The case came before the Yokosuka Prize Court on Novem-

ber 4, 1905, when judgment was given condemning the ship and cargo.

[The "facts and reasons" including the arguments are omitted.]

The Court: "When a belligerent gives to certain ships a license to trade in a district closed to foreign vessels in time of peace, the other belligerent may condemn vessels, even of neutral ownership, sailing under such license, as having acquired enemy character, and also the goods on board as enemy property. This is recognized by the practice and theory of international law. The Komandorski and other islands, where the *Montara* was trading, were formerly closed to foreign vessels. But on the outbreak of the Russo-Japanese War the Russian Government gave a license to the Kamschatka Commercial and Industrial Company and the Eastern Siberia Company, permitting vessels chartered by the two companies to sail in those districts, because Russian vessels alone were not sufficient to carry provisions there. The *Montara* sailed to the Komadorski Islands and other places by virtue of this license. This is proved from the evidence given by Grenvenitski. She was actually captured at anchor in Nicolski Roads, in the Komandorski Islands. She must, therefore, be considered as an enemy ship, and the goods on board as enemy goods, being the property of the Kamschatka Commercial and Industrial Company, the charterers of the ship.

"The claimants request the release of the ship on the ground that the owners and the master had no intention of infringing neutrality. But whether or not the ship sailed under a Russian license is a question of fact, to be decided by the acts of the ship herself, and the intention of the owner or the master has nothing to do with it."

[The court then discussed the evidence which it considered to prove that the vessel "sailed in the prohibited districts by virtue of a license, and therefore has enemy character." The court continued:]

"The claimants argued that the ship should not be condemned, because her voyage was made in the interests of humanity. But it was in performance of the ordinary business of the Kamschatka Commercial and Industrial Company of carrying supplies to those islands, and was a commercial transaction. No charity or philanthropy can be recognized in the undertaking.

"The claimants argued that captures at sea should not be made after the restoration of peace, and that the ship and cargo are not subject to the jurisdiction of the Prize Court, and they should consequently be released. But the precedents cited were cases in which the mutual relations of the belligerents had been determined by special conventions, or in which particular enemy ships were released by special ordinance, and they do not apply to this case. The belligerent right of capture ceases with the restoration of peace, but the validity of captures already made is unaffected. A distinction must be made between the act of capture and the act of judging whether or not a capture was valid.[1] Therefore, a Prize Court, unless bound by some special convention or ordinance, should continue to deal with cases of both neutral and enemy ships, and give decisions of condemnation or release, even after the restoration of peace. The case of the *Yik-sang*, in the Chino-Japanese war of 1894–95, as well as the practice and theory of international law, shows the correctness of this view.

"For the above reasons the ship and cargo are liable to condemnation, and as to the other contentions of the claimants the court sees no necessity for giving any explanation.

"*Judgment is therefore given as above.*"

Both the claimants appealed to the Higher Prize Court.

The Higher Prize Court rendered its judgment on February 13, 1906:

[Several of the interesting points raised in the argument relative to the points discussed in the decision of the lower court were not noticed in the decision of the higher court, which confined itself to a discussion in regard to the nature of the trade in which the *Montara* was engaged. After a careful study of the evidence the opinion ends as follows:]

"The court holds, however, that a license need not necessarily be given to each particular vessel. If permission to engage in a trade which was formerly closed is granted to vessels belonging to a certain specified company, such a permission is a license to the vessels who engage in that trade. As stated elsewhere, the

[1] See the case of the *Doelwyk*, *supra*, p. 406.

trade to the Komandorski Islands and the coast was closed to foreign ships, and since this prohibition was removed only in the case of vessels chartered by the Kamschatka Commercial and Industrial Company and one other company, it cannot be doubted that the *Montara* sailed to that coast under a license granted by the Russian Government. Since neutral ships which sail under a special license from the enemy may, under international law, be condemned as having acquired enemy character, the release of the ship in this case cannot be granted merely because there are no provisions either in the American, German, or Russian Prize Regulations for the condemnation of vessels who had engaged in trading which was prohibited in time of peace.

"For the above reasons the court finds that the Prize Court was justified in condemning the *Montara* as having acquired enemy character, together with her cargo, as being enemy property, and it is not necessary to deal with the other points raised by the appellants.

"*This appeal is therefore dismissed.*"

(Abridged statement of facts and opinion from Hurst and Bray: *Russian and Japanese Prize Cases*, vol. II, *Japanese Cases*, pp. 403–15.)

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§ 34. UNNEUTRAL SERVICE

THE *FRIENDSHIP*

High Court of Admiralty, August 20, 1807

THIS was a case of an American ship bound on a voyage from Baltimore and Annapolis to Bordeaux, with thirty tons of fustic, and 4414 hogsheads staves, and 90 passengers, being French mariners, shipped under the direction of the French Minister in America. The ship was claimed for a Mr. Guestier, a Frenchman by birth, but a subject of the United States. . . . [Arguments omitted.]

Sir William Scott [*Lord Stowell*]: "This is an American ship with a few goods of small bulk and little value, about 30 tons of fustic,

and some staves, which are frequently taken as dunnage, or ballast, but very seldom as a principal cargo. But there is a cargo on board of a different kind, ninety passengers, one American, five French merchants, and the rest French military officers and mariners. . . .

[After considering the various circumstances of the nature of the cargo and the answers made to the questions of the interrogatory, *Sir William Scott* concludes:]

"Under these circumstances, I am of opinion that this vessel is to be considered as a French transport. It would be a very different case if a vessel appeared to be carrying only a few individual invalided soldiers, or discharged sailors, taken on board by chance, and at their own charge. Looking at the description given of the men on board, I am satisfied that they are still as effective members of the French marine as any can be. Shall it be said then that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps, to renew their activity on our own shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made, in some measure, prisoners in a distant port of their own colonies in the West Indies? It is asked, will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this court, nor any other British tribunal has ever laid down the principle to that extent. This is a case differently composed. It is the case of a vessel letting herself out in a distinct manner, under a contract with the enemy's government, to convey a number of persons, described as being in the service of the enemy, with their military character traveling with them, and to restore them to their own country in that character. I do with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a course of trade,

which cannot be considered to be permitted to neutral vessels, and without hesitation pronounce this vessel subject to condemnation. The fustic and staves were condemned also."

On prayer, that the master's adventure might be restored, the Court [*Sir William Scott*] said: "I shall leave him to the mercy of the captors. He is a man who has not made an ingenuous disclosure of the facts in his possession."

(C. Robinson: *Admiralty Reports*, vol. VI, pp. 420–29.)

THE *ATALANTA*

High Court of Admiralty, March 4, 1808

THIS was a case of a Bremen ship and cargo, captured on a voyage from Batavia to Bremen, on the 14th of July, 1807, having come last from the Isle of France, where a packet containing dispatches from the Government of the Isle of France to the Minister of Marine at Paris was taken on board by the master and one of the supercargoes, and was afterwards found concealed, in the possession of the second supercargo, and, as *Sir William Scott* (*Lord Stowell*) stated at the conclusion of his examination of the circumstances, "the fact of a fraudulent concealment and suppression [of the dispatches] is most satisfactorily demonstrated."

Sir William Scott continued giving the opinion of the court as follows:

"The question then is, what are the legal consequences attaching on such a criminal act, for that it is criminal and most noxious is scarcely denied? What might be the consequences of a simple transmission of dispatches I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple carrying of dispatches between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance

of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and, I may add, for the supply of civil assistance also and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up in time of peace? By ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that, in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.

[The court then proceeded to examine the previous decisions bearing upon the point under consideration: *The Constitution*, *The Sally*, *The Hope*, *The Trende Sostre*, *The Lisette*, and concluded as follows:]

"In all these cases the principle was uniformly asserted, although the circumstances under which the fact appeared did not lead the court to consider it with that particularity which the nature of the present case requires. Unless, therefore, it can be said that there must be a plurality of offenses to constitute the delinquency, it has already been laid down by the Superior Court, in the *Constitution*, that the fraudulent carrying the dispatches of the enemy is a criminal act which will lead to condemnation. Under the authority of that decision, then, I am warranted to hold that it is an act which will affect the vehicle, without any fear of incurring the imputation which is sometimes strangely cast upon this court, that it is guilty of interpolations in the laws of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation, but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles; the cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized by just corollaries, may be infinite, but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances. If, therefore, the decision, which the court has to pronounce in this case, stood on principle alone, I should feel no scruple in resting it on the just and fair application of the ancient law. But the fact is that I have the direct authority of the Superior Court for pronouncing that the carrying of the dispatches of the enemy brings on the confiscation of the vehicle so employed.

"It is said that this is more than is done even in cases of contraband, and it is true with respect to the very lenient practice of this country, which in this matter recedes very much from the correct principle of the law of nations, which authorizes the penalty of confiscation. This is rightly stated by Bynkershoek to

depend on this fact, whether the contraband is taken on board with the actual or presumed knowledge of the owner — I say presumed knowledge, because the knowledge of the master is, in law, the knowledge of the owner: '*Si sciverit, ipse est in dolo, et navis publicabitur.*' (Bynkershoek, vol. I, c. 12, p. 95.) This country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offense of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the dispatches, which constitutes the penalty in contraband, would be ridiculous. There would be no freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

"Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors, not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo are directly involved in the knowledge and conduct of this guilty transaction. On the circumstances of the present case, I have to observe that the offense is as much the act of those who are the constituted agents of the cargo as of the master, who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the court to obtain the restitution of any part of his property involved in the same transaction. It is said that the term 'interposition in the war' is a very general term, and not to be loosely applied. I am of opinion that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favorable distinction, but makes them pre-eminently the object of just punishment. The conclusion there-

fore is, that I must pronounce the ship and cargo subject to condemnation."

The court observed afterwards: "I will mention, though it is a circumstance of no great consequence, that I have seen the dispatches in this case, and that they are of a noxious nature, stating the strength of the different regiments, etc., and other particulars entirely military."

(C. Robinson: *Admiralty Reports*, vol. VI, pp. 440–60; E. S. Roscoe: *English Prize Cases* [London, 1905], vol. I, pp. 607–15.)

THE *MANOUBA*

The Permanent Court of Arbitration at The Hague, 1913

EARLY in January, 1912, during the war between Italy and Turkey, the Turkish Ambassador at Paris requested the French Government to guarantee free passage to Tunis for a medical mission which the Ottoman Red Crescent Society was intending to send to Tripoli. The French Government granted this request on condition that the non-combatant character of the mission was beyond question. A list of its members was furnished by the Turkish Government to the French Foreign Office and sent by the latter to the French representatives at Tunis and Constantinople in order to verify its identity and to prevent any change in personnel. This list, however, was not sent either to the Italian Foreign Office or to the Italian Ambassador at Paris.

On January 17, the French mail-steamer *Manouba* sailed from Marseilles for Tunis, having among her passengers twenty-nine Turkish subjects, said to be members of the Red Crescent mission. The same day M. Tittoni, the Italian Ambassador at Paris, informed M. Poincaré, the French Minister for Foreign Affairs, that the *Manouba's* passengers were in reality officers and soldiers in the Turkish forces, and he entered protest against their transportation. M. Poincaré at once gave orders to have them identified at Tunis, and if found to have the character attributed to them by the Italian Government, to prevent them from going on to Tripoli. Next day, however, the *Manouba* was stopped by the Italian destroyer *Agordat* on the high seas south of Sardinia and,

on suspicion that the Turkish passengers were embodied in the forces of the enemy, was captured and taken to Cagliari. On arrival there, the master of the *Manouba* was summoned to deliver up the twenty-nine Ottomans to the Italian authorities, and on his refusal the *Manouba* was temporarily seized.

On receiving news of the incident, M. Poincaré made prompt protest, through the French representative in Italy, against the seizure of the Ottoman passengers on the ground that, conformably to Article 10 of the Hague Convention of 1907 for the adaptation to naval war of the principles of the Geneva Convention, they were inviolable by reason of their character as members of the Red Crescent. Meanwhile, the French Chargé at Rome, through a misunderstanding, had instructed the French Vice-Consul at Cagliari to have the Turkish passengers handed over to the Italian authorities in accordance with Article 47 of the Declaration of London, which the Italian Government had invoked. The master of the *Manouba* did so with reluctance and was then allowed to resume his voyage on the evening of January 19.

Energetic representations, however, were made by France against the surrender, and, in consequence, on January 26 it was agreed in a joint note signed by the Italian Foreign Minister and the French Ambassador at Rome to refer the questions raised by the capture of the *Carthage* (see p. 416) and the *Manouba* to arbitration, the agreement with reference to the latter being as follows:

"That as regards the seizure of the steamer *Manouba* and of the Ottoman passengers who were embarked thereon, this action having been taken according to the Italian Government by virtue of the rights which it declares it possesses under the general principles of international law and under Article 47 of the Declaration of London of 1909, the special circumstances under which this action was taken and the consequences flowing therefrom shall likewise be submitted for examination to the high jurisdiction established at The Hague; that, in order to restore the *status quo ante*, as regards the seized Ottoman passengers, these latter shall be delivered to the French Consul at Cagliari, that they may be taken back under his care to the place of embarkation, upon the responsibility of the French Government, which shall take the

necessary measures to prevent Ottoman passengers not belonging to the Red Crescent but to fighting forces, from sailing from a French port to Tunis or to the scene of military operations."

Accordingly, Italy restored the Ottoman passengers to the French Vice-Consul and they were sent back to Marseilles, where they underwent a strict examination to establish their qualifications for service in the Red Crescent. As a result only one was found ineligible and compelled to withdraw, the others being permitted to embark for Tripoli.

By virtue of the *compromis* of March 6 the case of the *Manouba* was referred to a tribunal chosen from the members of the Permanent Court of Arbitration at The Hague.[1] The following were the questions submitted for consideration:

"1. Were the Italian naval authorities in general and according to the special circumstances under which the action was taken, within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer *Manouba*, as well as the arrest of twenty-nine Ottoman passengers thereon embarked?

"2. What should be the pecuniary or other consequences resulting from the decision of the preceding question?"

On the assumption that the Italian authorities had not been within their rights, the French agent prayed the tribunal to award damages in favor of France as follows:

1. One franc as compensation "for the offense offered the honor of the French flag."

2. 100,000 francs "as penalty and reparation for the political and moral injury resulting from the violation by the Royal Italian Government of its general and special conventional engagements, particularly the Convention of The Hague of October 18, 1907, *relative to certain restrictions on the right of capture in maritime warfare*, Article 2; the Geneva Convention of July 6, 1906, *for the amelioration of the condition of the wounded and sick in armies in the field*, Article 9; and the verbal agreement between the two governments of January 17, 1912, relative to the control of the passengers embarked on the steamer *Manouba*."

3. 108,601.70 francs in payment of indemnities claimed by

[1] For the personnel of the tribunal see the case of the *Carthage*, p. 416.

private individuals "interested either in the steamer *Manouba* or in its voyage."

The Italian agent, on the other hand, denying any financial responsibility on the part of Italy for proceedings which, he maintained, were within her belligerent rights, asked the tribunal to decide that France was wrong in her claim to the surrender of the Ottoman passengers and, in consequence, to award to Italy 100,000 francs "as a penalty and reparation for the material and moral injury resulting from the violation of international law, especially in so far as concerns the right of the belligerent to verify the character of individuals suspected of being soldiers of the enemy, when found on board neutral commercial vessels." The tribunal was further asked to hold France liable to pay a trifling sum for expenses incurred in connection with the seizure of the *Manouba*.

In the award, which was rendered May 6, 1913, the tribunal, after attributing good faith to both governments in the arrangements for the transportation of the Red Crescent mission, but finding that, in the absence of special agreement, the Italian naval authorities were free to act according to the customary rules governing the matter, proceeded to discuss the case in three phases: (1) the capture of the *Manouba*, (2) the temporary seizure, and (3) the arrest of the Ottoman passengers.

1. On the first point the tribunal held that the Italian naval authorities, while having probable cause for suspecting the character of the Ottoman passengers and while having the right to demand their surrender, had not taken the proper measures to secure that right, but had proceeded to capture without summoning the master to surrender the passengers. It was not lawful to make such a capture "unless it were for the purpose of arrest and after the captain had refused to obey a summons to surrender the Ottoman passengers."

2. The temporary seizure at Cagliari, however, was considered legal, after summons to surrender had been duly made, but legal "only to the extent of a temporary and conditional sequestration."

3. The Italian naval authorities, according to the tribunal, had the right to arrest the twenty-nine Ottoman passengers.

Hence of the three phases only the first was illegal, and in the opinion of the tribunal, "the illegality in capture and taking of

the *Manouba* to Cagliari did not vitiate the successive phases of the action," though the capture, on the other hand, "could not be legalized by the regularity, relative or absolute, of these last phases considered separately."

With respect to compensation, the tribunal considered, as in the case of the *Carthage* (p. 417), that it was sufficient penalty for a state to be found to have failed in the fulfillment of its obligations without having to give reparation in the way of moral or political damages.

For these reasons the tribunal declared and pronounced as follows:

"As regards the action as a whole, covered by the first question raised by the *compromis*,

"The different phases of this action ought not to be considered as connected with each other in the sense that the character of any one, in this case, should affect the character of the others.

"As to the various phases of the said action considered separately,

"The Italian naval authorities were not, in general and according to the special circumstances under which the act was committed, within their rights in proceeding, as they did, to the capture of the French mail steamer *Manouba* and in taking it to Cagliari;

"When once the *Manouba* was captured and brought into Cagliari, the Italian naval authorities were, in general and according to the special circumstances under which the act was committed, within their rights in proceeding, as they did, to the momentary seizure of the *Manouba* to the extent that this seizure did not pass beyond the limits of a temporary and conditional sequestration in order to compel the captain of the *Manouba* to deliver the twenty-nine Turkish passengers who were embarked thereon.

"When once the *Manouba* was captured, brought into Cagliari and seized, the Italian naval authorities were, in general and according to the special circumstances under which the act was committed, within their rights in proceeding as they did to the arrest of the twenty-nine Ottoman passengers who were on board.

"As regards the second question raised by the *compromis*,

"The Royal Italian Government shall be held, within three

months from the present award, to pay to the Government of the French Republic the sum of four thousand francs, which after deduction of the amount due the Italian Government for custody of the *Manouba* is the amount of the losses and damages sustained by the individuals interested in the vessel and its voyage, by reason of the capture of the *Manouba* and in taking it to Cagliari.

"There is no reason to comply with the other claims contained in the motions of the two parties."

(G. G. Wilson: *The Hague Arbitration Cases*, pp. 326–51; *Journal du Droit International Privé*, vol. XXXIX [1912]; pp. 449–86; *Revue de Droit International*, vol. XLV [1913], pp. 128–38; *Jahrbuch des Völkerrechts*, vol. I [1913], pp. 539–67; *American Journal of International Law*, vol. VII [1913], pp. 629–37.)

THE *TRENT* AFFAIR (1861)

On November 7, 1861, at Havana, the *Trent*, a British mail-packet plying regularly between Vera Cruz and St. Thomas in the Danish West Indies, took on board as passengers Messrs. Mason and Slidell, designated by the President of the Confederate States as Commissioners to Great Britain and France respectively. Next day, in the Bahama Channel, about nine miles from the coast of Cuba, she was stopped by the U.S.S. *San Jacinto*, Captain Wilkes, and a search party sent on board to look for the Confederate envoys. The captain of the *Trent*, when requested to reveal the passenger list refused, but the Commissioners were recognized, and, amid angry demur, were, with their secretaries, forcibly removed to the *San Jacinto*, the *Trent* herself being permitted to resume her voyage. The prisoners were taken by the *San Jacinto* to Boston and placed in military confinement in Fort Warren.

Captain Wilkes stated the reasons for his action in his report to the Secretary of the Navy. He had, he said, no doubt as to his right to capture a vessel bearing written dispatches when the master was privy to their carriage, but some question had arisen in his mind as to whether he had the right to seize the persons of the Commissioners. But though not dispatches in the literal

sense, he decided to treat them as the "embodiment of dispatches" and hence subject to capture. He forbore, however, to seize the vessel in consequence of his "being so reduced in officers and crew, and the derangement it would cause innocent persons."

The news of the affair was received with great rejoicing in the North. Its legal significance was not at first perceived even by members of the Cabinet, only one of whom, Blair, saw in it a violation of British sovereign rights.[1] Welles, the Secretary of the Navy, sent a congratulatory message to Wilkes, but admonished him, with respect to his omission to bring in the *Trent* herself, "that the forbearance exercised in this instance must not be permitted to constitute a precedent hereafter for infractions of neutral obligations." Congress tendered its thanks to Wilkes and adopted a resolution to imprison Mason and Slidell by way of reprisal.

Mr. Seward, Secretary of State, at first shared in the general elation, but his dispatch of November 30 to Mr. Adams showed that he fully realized the gravity of the situation. He gave no instructions to the minister, however, preferring to await British representations, but thought it proper that Mr. Adams should know that Captain Wilkes had acted without any authorization from his Government and that consequently the subject was "free from the embarrassment which might have resulted if the act had been specially directed by us."

In Great Britain popular indignation over the *Trent* affair was profound and ominous, comparable only to that excited by the Dogger Bank incident many years later. Preparations for war were begun, troops embarked for Canada, and the naval establishments in North America reinforced. On the very day that Seward had written to Adams, Lord Russell, British Foreign Secretary, sent two dispatches to Lord Lyons at Washington.

[1] Lincoln, however, recognized the international import. In conversation on the very day the news was received at Washington he said:

"I fear the traitors will prove to be white elephants. We must stick to American principles concerning the rights of neutrals. We fought Great Britain for insisting, by theory and practice, on the right to do precisely what Captain Wilkes has done. If Great Britain shall now protest against the act, and demand their release, we must give them up, apologize for the act as a violation of our doctrines, and thus forever bind her over to keep the peace in relation to neutrals, and so acknowledge that she has been wrong for sixty years." (Harris: *The Trent Affair*, p. 125.)

The first — the original tone of which had been modified by the Queen — stated that "certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral power, while such vessel was pursuing a lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law"; and Lord Russell further indicated that the British Government would expect such redress "as alone would satisfy the British nation, namely, the liberation of the four gentlemen, and their delivery to your Lordship in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed." The second dispatch, which was private, informed Lord Lyons that he might consent to a delay of seven days, should Mr. Seward ask time for consideration. Failing to receive an answer at the end of that time, he and the members of his legation were to leave Washington immediately for London.

But interest in the affair was not confined to the parties directly concerned. The question was of vital importance to all neutrals, for which reason the Governments of France, Prussia, and Austria expressed their views to the Government of the United States through dispatches to their respective ministers at Washington. All disapproved of the seizure and advised a concession to the British demands.[1] The Russian Government was also of the

[1] The note which the French Government instructed their representative to communicate to the American Government expressed the opinion that the "Washington Cabinet cannot, without infringing principles which it is to the interest of all neutral Powers to have respected, or without appearing to act contrary to its own conduct up to the present time, approve the action of the commanding officer of the *San Jacinto*."

In case the American Government did not comply with the British "demands," the minister broadly hinted that the French Government "would see in such a course a deplorable complication in all respects of the difficulties, with which the Washington Cabinet already has to struggle, and a precedent calculated seriously to disquiet all the Powers remaining outside of the present dispute, . . ."

In case it turned out that Captain Wilkes had acted under orders, the Prussian Government declared ". . . to our great regret we should find ourselves constrained to see in it not an isolated fact but a public menace offered to the existing rights of all neutrals."

The Austrian note also condemned the seizure and admonished the Government of the United States to take "counsel of the rules governing international relations, as well as of considerations of an enlightened policy, rather than by seeking guidance from manifestations caused by an over-excitement of national feeling." (Extracts from the notes regarding the *Trent* affair as reprinted in the *American Journal of International Law, Supplement*, April, 1916, pp. 67–72.)

same opinion, though not giving expression to it in a public dispatch.

Mr. Seward replied to Lord Russell on December 26. The question at issue, he said, involved the following inquiries:

"1st: Were the persons named and their supposed dispatches contraband of war?

"2nd: Might Captain Wilkes lawfully stop and search the *Trent* for these contraband persons and dispatches?

"3rd: Did he exercise that right in a lawful and proper manner?

"4th: Having found the contraband persons on board, and in presumed possession of the contraband dispatches, had he a right to capture the persons?

"5th: Did he exercise that right of capture in the manner allowed and recognized by the law of nations?"

The first four questions were answered by Seward in the affirmative. According to Sir William Scott, he said, "you may stop the ambassador of your enemy on his passage." "Dispatches," argued Seward, "are not less clearly contraband, and the bearers or couriers who undertake to carry them fall under the same condemnation." It was not denied by any one that Captain Wilkes had the right to search the *Trent*. Nor, said Seward, was there implied any claim to take rebels or enemies through an exercise of ocean police. It had been done solely under the belligerent rights of search and capture, and, finding the contraband, Captain Wilkes had the right to seize. There remained the fifth question, and it was here that Seward found it impossible for the United States to defend Wilkes's action, consistently with its own practice and with the recognized principles of international law. Wilkes, Mr. Seward admitted, should have brought the *Trent* before a prize court, for there alone could the status of captured persons be determined, and that only incidentally to the determination of the status of the ship, for prize proceedings could be taken against the vessel alone. The United States had always denied the right to take persons from neutral vessels, and to claim it now would be to reverse its whole history.[1] The release

[1] "If I decide this case in favor of my own Government, I must disallow its most cherished principles, and reverse and forever abandon its essential policy. The country cannot afford the sacrifice. If I maintain those principles and adhere to that

of the vessel was the personal act of Wilkes and was made from motives of comity, but its legal effect was to render the seizure of Mason and Slidell unjustifiable, and effectually to prevent "the judicial examination which might otherwise have occurred." For these reasons, said Seward, Mason and Slidell would be "cheerfully liberated," and Lord Lyons was asked to indicate a time and place for receiving them.

Mr. Seward's answer was accepted by Lord Lyons as closing the incident. On December 30, the prisoners were taken from Fort Warren to Provincetown and there placed on board the British warship *Rinaldo*, ultimately reaching their European destination. Lord Russell ratified the action of Lord Lyons in his dispatch of January 10, 1862, but, differing from Mr. Seward in his statement of principles, proceeded, in his note of January 23, to set forth the points of difference. The character and office of the persons captured, he said, did not make them contraband, and they were not such in any sense of the word. They were diplomatic agents, and neutral nations had an interest in maintaining diplomatic relations, imperfect though they be, with commissioners or other agents from *de facto* governments. An enemy's ambassador might be stopped only within enemy jurisdiction; within neutral jurisdiction both he and his dispatches were immune.[1] In the case of the *Trent*, the destination was

policy, I must surrender the case itself. It will be seen, therefore, that this Government could not deny the justice of the claim presented to us in this respect upon its merits. We are asked to do to the British nation just what we have always insisted all nations ought to do to us." (Seward to Lord Lyons, Dec. 26, 1861.)

"Historicus" is, however, of a different opinion:

"Mr. Seward claims to be entitled to seize the persons of the Commissioners in the exercise of a belligerent right and to treat them as contraband of war. He suggests no other ground; he makes no other case. In the instance of the impressment of seamen, Great Britain claimed to exercise, not a belligerent, but a municipal right; and it is needless to say that she did not regard her own sailors as contraband of war.

"The two cases, then, have nothing to do with one another. In denying the doctrine of Mr. Seward we do not re-affirm, still less do we withdraw, the pretensions of 1812. We merely leave it [them] on one side as wholly irrelevant to the present question. If the claim of impressment was sustainable then, it is sustainable just as much after the demand for the restitution of the Southern Commissioners as before, because their capture raises a wholly different dispute. If our pretension on that head was questionable in 1812, it is questionable now; but it is wholly unaffected by a transaction which in no manner or sort touches it at all." (*Letters by Historicus*, p. 197.)

[1] Citing Sir William Scott's decision in the *Caroline*, 6 C. Rob. 468.

neutral and, further, its character as a mail-packet ought to have exempted it from visit and search unless for "the very gravest cause." Hence, said Lord Russell, the British Government could not "acquiesce in the capture of any British merchant ship in circumstances similar to those of the *Trent*."

(*Diplomatic Correspondence*, 1862, *passim; British and Foreign State Papers*, vol. LV, pp. 602–57; *Parliamentary Papers* [1862], Vol. 34, *North America*, No. 5; *Official Records of the Union and Confederate Navies*, Ser. I, vol. I, *passim;* Harris: *The Trent Affair;* Mountague Bernard: *Neutrality of Great Britain during the American Civil War*, pp. 187–205; *Letters by Historicus*, pp. 187–98; Moore: *Digest of International Law*, vol. VII, pp. 768–79, especially extracts from the opinions of Dr. Heinrich Marquardsen [p. 775] and Woolsey [p. 777].)

THE *CHINA* (1916)

THE facts of this case are set forth in the following dispatch of February 23, 1916, from the Secretary of State of the United States to the American Ambassador at London:

"Mr. Lansing informs Mr. Page that the Department is advised by American consuls in Hongkong, Nagasaki, and Shanghai, and by the owners of the American steamship *China*, that on the 18th instant the British cruiser *Laurentic* stopped the *China* on the high seas, about 10 miles from the entrance to the Yangtze-kiang, boarded her with an armed party, and, despite the captain's protest, removed from the vessel 28 Germans, 8 Austrians, and 2 Turks, including physicians and merchants, and took them to Hongkong, where they are detained as prisoners in the military barracks. As it is understood that none of the men taken from the *China* were incorporated in the armed forces of the enemies of Great Britain, the action of the *Laurentic* must be regarded by this Government as an unwarranted invasion of the sovereignty of American vessels on the high seas. After the notice given to the British Government of this Government's attitude in the *Piepenbrink* case in March last, which was based upon the principle contended for by Earl Russell in the *Trent* case, this Government is surprised at this exercise of belligerent power on the high seas

far removed from the zone of hostile operations.[1] Ambassador Page is directed to present this matter to the Government of Great Britain at once and to insist vigorously that if facts are as reported, orders be given for the immediate release of the persons taken from the *China*."

The British Foreign Secretary, Sir Edward Grey, replied on March 16, 1916. Great Britain, he said, had, at the beginning of the war, adhered to Article 47 of the Declaration of London as the latest attempt to define the law in the matter, accepting the interpretation placed upon it by the Report of the Drafting Committee of the International Naval Conference to the effect that "the term, 'embodied in the armed forces of the enemy,' should be considered as not including reservists not yet attached to their military units."[2] He reminded Mr. Lansing, however, that that interpretation had been reached upon practical, not legal, grounds and left the adhering government free, in case of its abrogation of the article, to take other action, provided such action conformed to the general principle of international law. When the German authorities began to remove "able-abodied persons of military age from the occupied portions of France and Belgium," the British Government had felt itself obliged to depart from the original interpretation of Article 47 and to remove "all enemy reservists found on board neutral ships on the high seas, no matter where they might be met." The principle that certain enemy persons may be removed from a neutral ship without violation of neutral sovereignty was now generally admitted, Sir Edward contended, and this altogether apart from any question of unneutral service. The present war had developed a new type of

[1] Piepenbrink, a steward on the American steamer *Windber*, was taken from that vessel on the high seas in November, 1914, by officers of the French cruiser *Conde*, as being a German of military character, and was handed over to the British authorities at Kingston, Jamaica. On protest by the Government of the United States, the Allied Governments gave orders for his release "as a friendly act, while reserving the question of principle involved." (See *American Journal of International Law, Supplement*, July, 1915, pp. 353–60.)

[2] Article 47 is as follows:

"Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel."

(For the Report on the Declaration of London, see Pearce Higgins: *The Hague Peace Conferences*, pp. 567–613.)

enemy agent — the emissary sent abroad to injure his opponent in defiance of neutral sovereignty. Such a development implied a corresponding modification "in the precise description of enemy subjects whom it is lawful to arrest, supposing such a precise description can be said to have existed in any binding form." Of this type were the persons removed from the *China*. They had been detected in a plot to foment insurrection in India, and, suspecting discovery, were about to shift their operations from Shanghai to Manila. The *Laurentic*, therefore, had removed them as "in effect persons whose past actions and future intentions deprived them of any protection from the neutral flag under which they were sailing."

The case of the *Trent*, Sir Edward maintained, was essentially dissimilar. In 1861, no agreement as to removal of enemy individuals from a neutral ship had been reached. Further, "the nature of the persons concerned in the episode of the *Trent* was entirely different from that of the individuals removed from the *China*. Messrs. Slidell and Mason were proceeding to Europe, according to their contention, as the diplomatic representatives of a belligerent; at that time the suggestion that the functions of a diplomatic representative should include the organizing of outrages upon the soil of the neutral country to which he was accredited was unheard of, and the removal of the gentlemen in question could only be justified on the ground that their representative character was sufficient to bring them within the classes of persons whose removal from a neutral vessel was justifiable. The distinction between such persons and German agents whose object is to make use of the shelter of a neutral country in order to foment risings in British territory, to fit out ships for the purpose of preying on British commerce, and to organize outrages in the neutral country itself is obvious."

In conclusion, Sir Edward expressed his confidence that after the foregoing explanations the Government of the United States would not "feel disposed further to contend that this action was not justified."

The Government of the United States, however, repeated its demand for the unconditional release of the men taken from the *China* "on the ground that none of the British arguments in favor

of their detention has any validity." The State Department, it was understood, declined "to consider any argument respecting their detention which does not seek to prove that these persons were combatants actually on the way to the scene of fighting," and it refused "to discuss the charge that they were engaged in plots designed to harm the British Empire." It was further stated that the attention of the British Government had been called to the fact "that the men, although en route to Manila, could not have reached that port on board the *China*, but would have been compelled to have transshipped at Nagasaki, where they would have been within the jurisdiction of Japan, England's ally, and that therefore the seizure not only was unjustifiable, but unnecessary." Finally, on May 5, the British Government announced that it would accede to the demands of the Government of the United States and release the men at once. The formal note in reply was, however, to be "carefully framed so as not to admit the general right of belligerents to enjoy the protection of a neutral flag." In the case of the *China* it was admitted that Great Britain was wrong with respect to the facts as stated in the American protest, but "no general precedent is established and British doctrines in regard to the seizure of individuals of hostile nationality on board neutral ships will be safeguarded." [1] (New York *Times*, May 3–6, 1916.)

(*White Papers*, published by the Government of the United States.)

[1] The later notes have not yet been published (October, 1916). — *Ed.*

CHAPTER IX

CAPTURE: APPROACH; VISIT; SEARCH; AND SEIZURE

§ 35. THE OBLIGATION TO SUBMIT TO VISIT AND SEARCH

THE RIGHTFUL EXERCISE OF VISIT AND SEARCH ON THE HIGH SEAS (1914)

THE Government of the United States readily admits the full right of a belligerent to visit and search on the high seas the vessels of American citizens or other neutral vessels carrying American goods and to detain them *when there is sufficient evidence to justify a belief that contraband articles are in their cargoes;* but His Majesty's Government, judging by their own experience in the past, must realize that this Government cannot without protest permit American ships or American cargoes to be taken into British ports and there detained for the purpose of searching generally for evidence of contraband, or upon presumptions created by special municipal enactments which are clearly at variance with international law and practice.

This Government believes, and earnestly hopes His Majesty's Government will come to the same belief, that a course of conduct more in conformity with the rules of international usage, which Great Britain has strongly sanctioned for many years, will in the end better serve the interests of belligerents as well as those of neutrals.

(Textual extract from the communication which the Secretary of State, in a telegram of December 26, 1914, instructed the American Ambassador to make to the British Government. [*White Paper*, No. 1, p. 40.] In the entire note, which is long, the only words *underlined* are those as above.

§ 36. RESISTANCE TO VISIT AND SEARCH

THE *NEREIDE*

Supreme Court of the United States, 1815

THIS was an appeal by Manuel Pinto, from the sentence of the Circuit Court for the District of New York, affirming (*pro forma*) the sentence of the District Court which condemned that part of the cargo which was claimed by him.

The facts of the case are thus stated by the *Chief Justice* in delivering the opinion of the court:

"Manuel Pinto, a native of Buenos Ayres, being in London, on the 26th of August, 1813, entered into a contract with John Drinkald, owner of the ship *Nereide*, whereof William Bennett was master, whereby the said Drinkald let to the said Pinto the said vessel to freight for a voyage to Buenos Ayres and back again to London, on the conditions mentioned in the charter party. The owner covenanted that the said vessel, being in all respects seaworthy, well manned, victualed, equipped, provided, and furnished with all things needful for such a vessel, should take on board a cargo to be provided for her, that the master should sign the customary bills of lading, and that the said ship being laden and dispatched, should join and sail with the first convoy that should depart from Great Britain for Buenos Ayres; that on his arrival the master should give notice thereof to the agents or assigns of the said freighter, and make delivery of the cargo according to bills of lading; and, that the said ship, being in all respects seaworthy, manned, etc., as before mentioned, should take and receive on board at Buenos Ayres all such lawful cargo as they should tender for that purpose, for which the master should sign the customary bills of lading; and the ship being laden and dispatched, should sail and make the best of her way back to London, and on her arrival deliver her cargo according to the bills of lading. . . .

"Under this contract a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres, and in part to Brit-

ish subjects, was taken on board the *Nereide*, and she sailed under convoy some time in November, 1813.

"Her license, or passport, dated the 16th of November, states her to mount ten guns and to be manned by sixteen men.

"The letter of instructions from the owner to the master is dated on the 24th of November, and contains this passage: 'Mr. Pinto is to advance you what money you require for ship's use at River Plate, and you will consider yourself as under his directions so far as the charter party requires.'

"On the voyage, the *Nereide* was separated from her convoy, and on the 19th of December, 1813, when in sight of Madeira, fell in with, and after an action of about fifteen minutes, was captured by the American privateer the *Governor Tompkins*. She was brought into the port of New York, where vessel and cargo were libeled; and the vessel and that part of the cargo which belonged to British subjects were condemned without a claim. That part of the cargo which belonged to Spaniards was claimed by Manuel Pinto, partly for himself and partners, residing in Buenos Ayres, and partly for the other owners residing in the same place. On the hearing, this part of the cargo was also condemned. An appeal was taken to the Circuit Court, where the sentence of the District Court was affirmed, *pro forma*, and from that sentence an appeal has been prayed to this court."

[After *Chief Justice Marshall* had disposed of three incidental points he closed his opinion with a discussion of the fourth as follows:]

"(4) Has the conduct of Manuel Pinto and of the *Nereide* been such as to impress the hostile character on that part of the cargo which was in fact neutral?

"In considering this question the court has examined separately the parts which compose it.

"The vessel was armed, was the property of an enemy, and made resistance. How do these facts affect the claim?

"Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially; but there

is no reason to believe that he was instrumental in arming her. The owner stipulates that the *Nereide* 'well manned, victualed, equipped, provided and furnished with all things needful for such a vessel,' shall be ready to take on board a cargo to be provided for her. The *Nereide*, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

"Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance.

"It has been argued that he had the whole ship, and that, therefore, the resistance was his resistance.

"The whole evidence upon this point is to be found in the charter party, in the letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in preparatorio*.

"The charter party evinces throughout that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master and stipulates for every act to be performed by the ship, from the date of the charter party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her.

"The letter of instructions to the master contains full directions for the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation of his power by the terms of the charter party. Consequently he had no share in the government of the ship.

"But Pinto says in his answer to the 6th interrogatory that 'he had control of the said ship and cargo.'

"Nothing can be more obvious than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo so far as respected her lading. A part of the cargo did not belong to him, and was not consigned to him. His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any author-

ity in the management of the ship. So far from exercising any during the battle, he went into the cabin where he remained till the conflict was over. It is, then, most apparent that when Pinto said he had the control of the ship and cargo, he used those terms in a limited sense. He used them in reference to the power of lading her, given him by the charter party.

"If, in this, the court be correct, this cause is to be governed by the principles which would apply to it had the *Nereide* been a general ship.

"The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

"That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. 'Since it is not,' says Vattel, 'the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy.'

"Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration, because he enters into the inquiry whether a knowledge of the hostile character of the vessel can affect the owner of the goods.

"The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

"It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

"In point of fact, it is believed that a belligerent merchant

vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy, is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

"The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defense, and the implements of war were so light and so cheap that scarcely any would sail without them.

"A belligerent has a perfect right to arm in his own defense; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm — ought he to be accountable for the exercise of it?

"By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control?

"The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

"Previous to that examination which the court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

"It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

"What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

"Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a means justified by the end. It has been truly denominated a right growing out of, and ancillary to, the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question.

"But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

"And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search? In so doing there is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

"To the argument that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy and assumes the hostile character; it is answered that no such connection exists.

"The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his — it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and

would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

"It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

"The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

"It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

"The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

"The case of the *Catharine Elizabeth* approaches more nearly to that of the *Nereide*, because in that case as in this there were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge and

not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

"If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

"It cannot escape observation that in argument the neutral freighter has been continually represented as arming the *Nereide* and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The court does not so understand the case. The *Nereide* was armed, governed, and conducted by belligerents. With her force or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

"With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance.

"The *Nereide* has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights and subject to all the dangers of belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation; the hazard of being taken into port, and obliged to seek another conveyance should its carrier be captured.

"In this it is the opinion of the majority of the court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. *The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property be dismissed.*"

[Associate Justice Johnson wrote a concurring opinion, but Justice Story wrote a vigorous dissenting opinion in regard to the effect of the arming of the *Nereide* upon her neutral cargo.]

(Cranch: *Supreme Court Reports*, vol. IX, pp. 388–455. Statement of facts as in original report.)

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§ 37. CONVOY

NEUTRAL CONVOY (*Adams*)

"CALHOUN asked [at a Cabinet meeting on October 26, 1822] if we could authorize the merchant vessel itself to resist the belligerent right of search. I said, no; and the British claimed the right of searching convoyed vessels, but that we had never admitted that right, and that the opposite principle was that of the armed neutrality. They maintained that a convoy was a pledge on the

part of the convoying nation that the convoyed vessel has no articles of contraband on board, and is not going to a blockaded port; and the word of honor of the commander of the convoy to that effect must be given. But, I added, if we could instruct our officer to give convoy at all, we cannot allow him to submit to the search by foreigners of a vessel under his charge; for it is placing our officer and the nation itself in an attitude of inferiority and humiliation.

"The President agreed with this opinion, and Mr. Calhoun declared his acquiescence in it; and it was determined that the instructions to Biddle should be drawn accordingly."

(*Memoirs of J. Q. Adams*, vol. VI, p. 86, from Moore: *Digest of International Law*, vol. VII, p. 492.)

GERMANY SUGGESTS THAT THE UNITED STATES CONVOY HER VESSELS (1915)

In the note of February 16, 1915, relative to the German measures in the waters surrounding England, the German Government submitted the following suggestion for the consideration of the United States:

"In order to meet in the safest manner all the consequences of mistaking an American for a hostile merchant vessel the German Government recommended that (although this would not apply in the case of danger from mines) the United States convoy their ships carrying peaceable cargoes and traversing the English seat of maritime war in order to make them recognizable. In this connection the German Government believe it should be made a condition that only such ships should be convoyed as carry no merchandise which would have to be considered as contraband according to the interpretation applied by England against Germany. The German Government are prepared to enter into immediate negotiations with the American Government relative to the manner of convoy.[1] They would, however, be particu-

[1] Among the most important questions considered in the discussions at the London Naval Conference was that of neutral convoy. France and certain of the other continental powers, which at the time of the League of the Armed Neutrality had cham-

larly grateful if the American Government would urgently advise their merchant vessels to avoid the English seat of maritime war, at any rate until the flag question is settled."

(*American Journal of International Law, Supplement*, July, 1915, p. 95.)

§ 38. THE TRANSFORMATION OF MERCHANTMEN INTO VESSELS OF WAR

THE *PETERBURG* AND THE *SMOLENSK* (1904)

By the Declaration of Paris, privateering is and remains abolished. Instead, the more modern practice is to hold the mercantile marine, or a part of it, in such relation to the state that, in the event of war, it may be taken over as auxiliary to the regular

pioned neutral rights including convoy, seemed ready to forego the exercise of this latter right, but Admiral Stockton, First American delegate, let it be clearly understood that he would not sign any convention which did not recognize this protection for neutral commerce which the United States and other powers had defended so vigorously and persistently. As a result of this firm attitude the provisions, as finally adopted, accorded a complete recognition of the right of neutral convoy. (See Articles 61 and 62 of the Declaration.)

When serious objection to the ratification of the London Declaration was raised on the part of certain governments, through fear that the application of the presumption of Article 34, relative to the hostile military destination of conditional contraband, would result in a burdensome interference with neutral commerce, the defenders of the Declaration pointed to the following paragraph in Professor Renault's Official Report, in which he said relative to convoy:

"Differences of opinion may occur between the two officers, particularly in relation to conditional contraband. The character of a port to which a cargo of corn is destined may be disputed. Is it an ordinary commercial port, or is it a port which serves as base of supply for the armed forces? The situation which arises out of the mere fact of the convoy must in such a case be respected. The officer of the cruiser can do no more than make his protest, and the difficulty must be settled through the diplomatic channel." (See Charles: *Treaties* [Washington, 1913], vol. III, p. 318.)

This statement is particularly important because the official report explaining an international convention has, under international law, the same standing as the terms of the convention itself.

Since the London Declaration has not been ratified, its provisions are not binding upon the nations except in as far as they may be considered to set forth existing law.

In her naval prize regulations of July 15, 1915, Italy has included a full recognition of the neutral right of convoy in accordance with the provisions of the London Naval Conference. (*American Journal of International Law, Supplement*, April, 1916, p. 126.)

naval forces.[1] Such was the status of the Russian Volunteer Fleet during the Russo-Japanese War. "These vessels," says Lawrence in his *War and Neutrality in the Far East*, "belong nominally to an Association, but practically they are at the disposal of the Minister of Marine. The first three of them were bought by public subscription, raised in 1878; but since 1895 the funds of the Association have been derived chiefly from a Government subsidy of about £62,000 per annum. When the present war [the Russo-Japanese War] broke out the Volunteer Fleet consisted of fourteen cruisers and four transports. Their captains and second officers belong to the Imperial Navy. Their crews are under naval discipline, and one-third of them must consist of men who have served for five years in the Active Fleet and have re-enlisted for two years. At all times they are in the service of the state, and act under orders received from state authorities. They are used in times of peace to take troops and criminals from Odessa and other Black Sea ports to the Far East. The tea trade and the passenger trade between these distant points are in their hands. Stores are kept for them at Vladivostock, Libau, and Odessa, the last port being their headquarters. They habitually pass through the Dardanelles and the Bosphorus as merchantmen; but since the war began they have carried their guns and ammunition in

[1] Hall gives the following account of the precedent upon which this practice is based: "§ 181. A measure taken by Prussia during the Franco-German War of 1870 opens a rather delicate question as to the scope of the engagement not to employ privateers by which the signataries of the Declaration of Paris are bound. In August of that year the creation of a volunteer navy was ordered by decree. The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services. The French Government protested against the employment of private vessels in this manner, as an evasion of the Declaration of Paris, and addressed a dispatch on the subject to the Government of England. The matter was laid before the law officers of the Crown, and they reported that there were substantial differences between a volunteer navy as proposed by the Prussian Government and the privateers which it was the object of the Declaration to suppress. Lord Granville in consequence declared himself unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered." (William E. Hall: *International Law* [4th ed., London, 1895], pp. 547–48.)

their holds, and were thus ready to assume a warlike character at any moment."

While merchant vessels may pass freely through the Bosphorus and the Dardanelles, these straits are closed to ships of war under the Convention of Paris, of 1856, and the Treaty of London, of 1871. (See *Neutralization of the Black Sea, International Cases*, vol. I, p. 134.)

On July 4, 1904, the *Peterburg*, a steamer of the Volunteer Fleet, on her way through the straits, under the commercial flag of Russia, was stopped by the Turkish authorities, but after a delay of a few hours was allowed to proceed. Two days later the *Smolensk* passed through, also in the character of a merchant vessel, which character both maintained until they were through the Suez Canal. Thereafter, in the Red Sea, they were converted into warships, the Russian naval ensign was hoisted, guns hitherto concealed were mounted, and visit and search of neutral commerce actively entered upon. On July 13 the *Peterburg* captured the *Malacca*, a steamship of the Peninsular and Oriental line, bound from London to China and Japan with a miscellaneous cargo of 4000 tons, of which 23 tons were military supplies, the property of the British Government, intended for the dockyards at Hong Kong and Singapore. The passengers and crew were landed at Port Said, with the exception of the chief officer and two others, while the captured vessel was sent through the Canal in charge of a prize crew and under the Russian flag, "though," Lawrence remarks, "in the absence of any sentence of a prize court condemning her, she was still in law a British vessel." [1] The intention was to send her before the prize court at Libau, but as a result of vigorous protest made by the British Government, in which the right of the *Peterburg* to make any capture at all was peremptorily questioned, the *Malacca* was released at Algiers and she resumed her voyage to the East on August 6.

Replying to questions in Parliament, Lord Lansdowne, Secretary for Foreign Affairs, made an official statement on July 28, regarding the situation arising out of the seizure, as follows:

"Our representation was based mainly upon the character and

[1] For a discussion of this phase of the case, see *International Law Situations*, Naval War College [1907], pp. 46–59.

antecedents of the ship by which the seizure was made. That ship belonged to the Russian Volunteer Fleet. She had lately passed through the Dardanelles; and, in our view, it would have been impossible for her without a breach of the laws of Europe to pass through these Straits if she had at the time been a ship of war. If on the other hand it were assumed that she was, at the time of her passage through the Straits, a peaceful vessel, it seemed to us intolerable that within a short space of time she should be transformed into a ship of war and should be found harrying neutral commerce in the waters of the Red Sea. We mentioned, as a subsidiary point in our protest, the fact that the munitions of war on board of her were the property of the Government and therefore could not be regarded as contraband of war.

". . . The result of our remonstrance was as follows. We received, in the first place, from the Russian Government an assurance that the *Malacca* would be released as soon as orders for her release could be conveyed to those on board. She had left Port Said before these orders could reach her, and she did not touch port again until she reached Algiers, at which place she arrived yesterday. I am glad to say she was released last night, and, I believe, at this moment flies the British flag. The second result of our representations was that orders were given by the Russian Government to prevent a recurrence of any similar captures by ships of the Volunteer Fleet; and it was also explained to us that, if any such captures should occur before the orders to prevent them could reach their destination, those captures would be regarded as *non avenus* [as if they had not taken place] and as the result of a misunderstanding. In compliance with that assurance the *Ardova* and the *Formosa*, two other steamers which had been seized, I believe by the same Russian vessel, were released yesterday. We have also been informed that these Volunteer ships are to be withdrawn from the Red Sea to some other destination, and we understand that it is not intended that they shall in the future be employed upon a similar service." (*Parliamentary Debates*, 4th Series, vol. 138, pp. 1434–36.)

On August 8, Mr. Balfour, the Prime Minister, made the following additional statement: "The actual arrangement arrived

at was, as regards the *Malacca*, in the nature of a compromise. The Russian Government gave up the idea of taking her to a Russian port, and they gave up the idea of having an examination of her cargo, and they gave up the idea of trying her before a prize court. They agreed that she was to be taken to a neutral port, and after a purely formal examination, should be then and there released. It was also arranged that these two ships belonging to the Volunteer Fleet were no longer to act as cruisers." (*Parliamentary Debates*, 4th Series, vol. 139, p. 1372.)

With respect to other vessels of the Volunteer Fleet in the Black Sea, Lord Lansdowne stated on August 11 that "the Turkish Government appears to have obtained from the Russian Government an official statement that these vessels will fly during their whole voyage, as hitherto, the commercial flag, that they will not contain either munitions of war or armament, and that they will not be changed into cruisers." (*Parliamentary Debates*, 4th Series, vol. 140, p. 155.)

Lawrence makes the following comment upon the seizure of the *Malacca* and the status of the *Peterburg:* "The position thus occupied by the British Government was impregnable. It raised no questions as to the exact definition of a ship-of-war and the exact formalities required to turn a merchantman into a belligerent cruiser. Instead, attention was concentrated on the really important fact that the particular vessel whose conduct was impugned had obtained access to the waters which were the scene of her operations as a merchantman, and could have obtained it in no other way. If she were a man-of-war, her proper place was the Black Sea. If she were a vessel of commerce, she could not lawfully make captures. Assuming her to have been in reality a cruiser when she passed the straits, she could not be allowed to take advantage of her own wrong in deceiving the Turkish authorities. She must retain her simulated character, at least till the termination of the cruise which she had commenced, by writing herself down a merchantman before all the world. If she could lawfully repudiate her immediate past, and change into a ship-of-war directly she was clear of all inconvenient obstacles, what was there to prevent her from resuming her commercial character as soon as any difficulties could be surmounted by means of it?

A ship cannot be allowed to masquerade about the seas as a quick-change artist. It must be either one thing or the other for some reasonable time." (*War and Neutrality in the Far East*, pp. 208–10.)

This case of the Russian Volunteer vessels decided nothing about the general principle of conversion into ships of war, as the chief point at issue was the import of certain provisions of the public law of Europe. The settlement was avowedly a political compromise, not a recognition of a legal principle. In 1907, however, at the Second Hague Conference, an attempt was made to formulate some agreement as to the time, place and manner of conversion of merchant vessels into warships, but it resulted in a convention expressed only in general terms, leaving the important question — that of the place where transformation may be made — as yet undecided, as well as the question of re-conversion. There was similar failure of agreement at the International Naval Conference in 1909.[1]

[1] The British note of August 4, 1914, contained the following warning to the American Government:

"It is known, however, that Germany, with whom Great Britain is at war, favors the policy of converting her merchant vessels into armed ships on the high seas, and it is probable, therefore, that attempts will be made to equip and dispatch merchantmen for such conversion from the ports of the United States.

"It is probable that, even if the final completion of the measures to fit out merchantmen to act as cruisers may have to be effected upon the high seas, most of the preliminary arrangements will have been made before the vessels leave port, so that the warlike purpose to which they are to be put after leaving neutral waters must be more or less manifest before their departure.

"In calling your attention to the above-mentioned 'Rules of the Treaty of Washington' and the Hague Convention, I have the honor to state that His Majesty's Government will accordingly hold the United States Government responsible for any damages to British trade or shipping, or injury to British interests generally, which may be caused by such vessels having been equipped at, or departing from, United States ports."

In reply the American Government in a note of August 19, 1914, set forth its views in part as follows:

"In acknowledging this communication, it does not seem appropriate to enter into any discussion as to what may or what may not be the policy of Germany in the matter of converting its merchant ships, which may be within the jurisdiction of the United States, into ships of war after they have left American ports and have reached the high seas. The assertion of the right so to convert merchant ships upon the high seas, made by Germany at the Second Hague Conference and maintained at the London Naval Conference, does not of itself indicate an intention on the part of the German Government to exercise this right, and this Department does not feel justified in its correspondence with foreign governments, to assume, in the

It may be added that the *Smolensk* attracted further international attention when on July 15, 1904, she stopped the German mail-steamer *Prinz Heinrich* in the Red Sea, and took from her several bags of mail. After a leisurely examination of them, two bags destined for Japan were confiscated and the others forwarded by the P. and O. steamer *Persia*, which the *Smolensk* stopped for

absence of specific information, an intention on the part of Germany so to do. The Department will, however, carefully examine the facts and circumstances of any particular case when it is called to its attention.

"The question of the place where the belligerent right of conversion may be exercised, difficult in itself, is complicated by the fact that there has been a difference of opinion among the maritime states parties to the present war, and that at the conferences, to which reference has been made, the British delegation stated that there was no rule of international law on the question. Germany and Austria-Hungary insisted at the conferences upon the right to convert merchant vessels upon the high seas. France and Russia, allies of Great Britain in the present war, likewise insisted upon the right so to convert. Great Britain and Belgium intimately associated with France and Russia in the prosecution of hostilities against Germany and Austria-Hungary, opposed the right of conversion on the high seas at the Second Hague Conference, where both these nations were represented; and at the London Naval Conference, to which Belgium was not invited and in which it did not participate, Great Britain maintained its previous attitude. It is thus seen that the right to convert merchant vessels upon the high seas was asserted in international conferences by four of the maritime countries now at war and that two of the maritime nations now at war opposed this contention. It is further seen that the maritime nations at war with Germany and Austria-Hungary are evenly divided on this question.

"At the Second Hague Conference, the British delegation, opposing conversion on the high seas, stated that there was no rule of international law on the question; that in its carefully prepared memorandum presented to the Powers invited to the London Naval Conference, the British Government held that 'no general practice of nations has prevailed in the past on this point from which any principles can be deduced and formulated as the established rules of international law. So far as can be ascertained there are no precedents on the subject.'

"In the official report of the conference, drafted by Mr. Renault, it is stated that agreement on conversion upon the high seas was impossible; and, in the report of the British delegates to their Government, it is said:

> 'We were met with a refusal to make any concessions or to abate one jot from the claim to the absolutely unfettered exercise of the right, which its advocates vindicate as a rule forming part of the existing law of nations. In these circumstances we felt that we had no option but to decline to admit the right, and the result is that the question remains an open one.'

"It is obvious that the subject of conversion must be carefully examined and considered, and, in view of these circumstances, it is deemed by the Department of State inexpedient to declare a policy as to what measures it will take in a contingency which has not yet arisen, and that it may well content itself, in so far as this matter is concerned, with an acknowledgment of your note."

(*White Book, No. 2*, pp. 37–39; *American Journal of International Law, Supplement*, July, 1915, pp. 223–27.)

that purpose. The *Smolensk* continued to visit and search neutral commerce long after the agreement to withdraw her had been made, it having been found impossible for the Russian authorities to get into communication with her. Finally, early in September, a British cruiser conveyed the notification to her off Zanzibar and she desisted from further naval activity.

(*Parliamentary Debates*, 4th Series, vols. 138–40, *passim;* Lawrence: *War and Neutrality in the Far East* [2d ed.], pp. 195–97, 202–18; *International Law Situations*, Naval War College, vol. VI [1906], pp. 92, 119–20; vol. VII [1907], pp. 48–50; Pearce Higgins: *The Hague Peace Conferences*, pp. 308–21; Hershey: *International Law and Diplomacy of the Russo-Japanese War*, pp. 138–42, 148–52.)

§ 39. WAR ZONES OR STRATEGIC AREAS

WAR ZONES (1915)

In warfare, especially in naval warfare, the ever-present problem is to reconcile the military necessity of the belligerents with the personal and commercial rights of neutrals. The belligerent state must be free to put effective pressure upon its antagonist, but the rights of a neutral state, being inherent in sovereignty, may not be abridged by belligerent action. These principles, if rigidly insisted on, would produce inevitable clash; hence experience has suggested compromise, and international law has accorded to the belligerent the right of visit and search with a view to prevent carriage of contraband or unneutral service, as well as the more extreme right of blockade.

The actual zone of battle, on sea as on land, has always been considered as interdicted to neutrals, and if damage is sustained through necessary acts of war no claims for indemnity arise. But it is unsafe to press the analogy further, for while on land the theatre of operations is always under the jurisdiction either of the local sovereign or the military occupant, naval warfare is conducted in large part upon the high seas which lie outside the

jurisdiction of any state and upon which all, neutrals and belligerents alike, have an equal right to be.

The restriction implied in the war zone, however, is primarily a result of new methods of warfare, such as the mine, the submarine, and the use of radiotelegraph. It was employed for the first time in the Russo-Japanese War both by way of the laying of mines on the high seas and the designation of strategical areas through which the passage of all vessels was regulated and in certain cases prohibited. Japan established 12 or more such areas, but in all cases the essential purpose was defense, though "in several areas the boundaries seem to have run outside the 3-mile limit and even 10 miles from land seems to have been included in some instances." The conclusion drawn from a discussion of the subject at the Naval War College was that a "belligerent may be obliged to assume in time of war for his own protection a measure of control over the waters which in time of peace would be outside of his jurisdiction." (*International Law Situations*, United States Naval War College [1912], pp. 114–29.)

The policy of the belligerents in the Great War went far beyond this limited idea of defense sea areas. Charging each other with violation of international law, they proceeded, on the basis of reprisals, to preëmpt for hostile uses large areas of the high seas. These areas were mined in many cases and became the scene of an unregulated submarine warfare. Early in October, 1914, the British Government advised mariners that it had authorized a mine-laying policy in the southern part of the North Sea, in retaliation for a similar policy pursued by Germany. On November 3 notice was given that the whole of the North Sea was to be considered a military area, and all vessels were warned against entering it except under admiralty directions. This step was taken, it was stated, because of indiscriminate German mine-laying on the high seas on the trade route between Liverpool and America, the admiralty feeling it necessary "to adopt exceptional measures appropriate to the novel conditions under which the war is being waged." On Feb. 4, 1915, the German Government announced a further extension of this policy by proclaiming as a war zone the waters surrounding Great Britain and Ireland, the

English Channel included. "On and after Feb. 18, 1915," according to this proclamation, "every enemy merchant ship found in the said war zone will be destroyed without its being always possible to avert the danger threatening the crews and passengers on that account. Even neutral ships are exposed to danger in the war zone, as in view of the misuse of neutral flags ordered on January 31 by the British Government and of the accidents of naval war, it cannot always be avoided to strike even neutral ships in attacks that are directed at enemy ships."

The United States was prompt to protest against the proposed policy in so far as it might affect American life and property. Such a course of action, it pointed out, could not be viewed in "any other light than as an indefensible violation of neutral rights," and all steps would be taken to secure to American citizens the full enjoyment of their acknowledged rights on the high seas.

This policy of the war zone, rigorously pursued, led to a prolonged diplomatic controversy.[1] Meanwhile a principle just beginning to secure recognition in international law was extended, through reprisals, far beyond its original purpose, in defiance alike of the recognized laws of warfare and the long-established rights of neutrals.[2]

(*International Law Situations*, United States Naval War College [1912]; World Peace Foundation: *War Zones* [Pamphlet Series, Boston, 1915], being the official documents as published by the United States Government.)

[1] See the case of the *Lusitania*, p. 571.

[2] This account, prepared for the *New International Encyclopædia* by H. F. Munro, is used here, slightly modified, with the kind permission of the Editor.

CHAPTER X

PRIZE COURTS AND PRIZE PROCEEDINGS

§ 40. ORGANIZATION AND FUNCTION OF PRIZE COURTS

THE INTERNATIONAL PRIZE COURT (1907)

THE function of prize courts was primarily to secure for the government its lawful proportion of the profits accruing to privateers from prizes made upon enemy commerce. Incidentally also it served the useful purpose of a check upon privateers and protected the belligerent government from their outrageous violations of the rights of neutrals, such as might have led the latter to have recourse to reprisals, or to make common cause with the enemy. The judicial procedure of prize courts qualified them likewise to apportion fairly the bounty or prize money, with which the national municipal regulations of belligerent states rewarded the officers and crew of warships for captures of vessels and cargoes liable to confiscation.

With the development of civilization, privateering virtually disappeared, and prize money,[1] if it cannot be considered extinct, may at least be said to have rapidly declined in importance. But the need of an orderly procedure, with some guarantee of impartiality,

[1] Several states, among them the United States, have abolished prize money. At the Second Hague Conference a proposal of the French Delegation sought to incorporate such a prohibition in an international convention containing other provisions limiting the right to capture enemy property. The French proposal was objected to on the ground that prize money was a matter of municipal regulation, and that the adoption of a half-way measure such as that proposed might block the realization of the hopes of those who advocated the entire abolition of the right of confiscation of private property in naval warfare.

In the House of Commons, as reported in the London *Times* of May 24, 1916, in reply to a question in regard to prize money in the navy, it was announced that instead of awarding prize money to the actual captor, the net value would be pooled and distributed among the whole fleet engaged in the war at the close of hostilities.

such as even belligerent institutions judicially organized sometimes afford, has preserved for prize courts the full importance of their function. More recently, however, jurists and statesmen have come to recognize the need for a fairer application of international law as a protection to neutral commerce against the greedy arbitrariness of belligerent exigencies. Hence the increasing demand for the establishment of some really impartial tribunal to hold the balance even, and reasonably to apply the law between the belligerents and neutrals.[1]

At the Second Hague Conference, Great Britain and Germany, two of the greatest naval powers, taught by their experience of belligerent interference with innocent commerce in the Russo-Japanese War, made proposals for the establishment of an International Prize Court.

The two projects were submitted to a triumvirate of jurists: M. Louis Renault, Dr. Kriege, and Mr. Eyre Crowe, as familiar

[1] In the case of the *Zamora* (see p. 502), *Lord Parker*, delivering the opinion of the Judicial Committee of the Privy Council, discussed the nature of the law applied by prize courts. He declared that the law administered "was not the national, or, as it was sometimes called, the municipal law, but the law of nations — in other words, international law."

In this connection the court discussed the redress which courts of prize offered to one aggrieved by the acts of a belligerent power in times of war, and stated that an appropriate remedy was "provided by the fact that, according to international law, every belligerent power must appoint and submit to the jurisdiction of a prize court, to which any person aggrieved had access, and which administered international as opposed to municipal law — a law which was theoretically the same, whether the court which administered it was constituted under the municipal law of the belligerent power or of the sovereign of the person aggrieved, and was equally binding on both parties to the litigation. It had long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent power cognizable in a court of prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the prize courts of the belligerent power.

"A case for such intervention arose only if the decisions of those courts were such as to amount to a gross miscarriage of justice. It was obvious, however, that the reason for that rule of diplomacy would entirely vanish if a court of prize, while nominally administering a law of international obligation, were in reality acting under the direction of the executive of the belligerent power.

"It could not, of course, be disputed that a prize court, like any other court, was bound by the legislative enactments of its own sovereign state. A British prize court would certainly be bound by acts of the Imperial Legislature. But it was none the less true that if the Imperial Legislature passed an act the provisions of which were inconsistent with the law of nations, the prize court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a prize court." (The *Zamora*, *Times Law Reports*, vol. XXXII, p. 440.)

with the practice and practical requirements of their respective governments as they were with the basic principles of neutrality. Under M. Renault's guidance, a convention was prepared for the establishment of an International Court of Prize, which was perhaps the highest achievement of the Conference. This project received the support of the American Delegation. It was no easy matter, however, to find an acceptable plan for the selection of fifteen judges from forty-five jealous states.[1] Nevertheless the project was finally adopted by the Conference.

Dr. T. J. Lawrence gives the following lucid summary of the procedure and jurisdiction of the court:

"The Convention contemplates that in the future, as in the past, questions of maritime capture should go in the first instance before the courts of the captor state. If by its law there is an appeal from the court of first instance to a higher court, such appeal may be made; but the case cannot be heard more than twice in the national courts.[2] Any further decision that is wanted must be sought from the International Court; and 'if the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.' But it follows from what has been said before with regard to the conclusiveness of force between opposing belligerents that as a general rule there can be no appeal from a national court to the International Prize Court when enemy property is concerned. The only exceptions occur where neutral as well as belligerent interests are involved, or where the question at issue depends on the interpretation of treaties or unilateral documents

[1] Article 15 of the Convention, which regulated the composition of the court, took into account the importance of the states from a naval point of view. Eight of the fifteen judges were selected from the following powers: Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, while the judges selected from the less important states sit for a portion of the term of twelve years, or are designated as alternates, to fulfill their functions in the event of the absence of the regular judge.

Because of objection to this article, the Convention was not signed by all the states, and numerous reservations were made relative to it by others when ratifying.

[2] Some time after the close of the Hague Conference the American Government, to avoid certain difficulties of a constitutional nature in regard to appeals from the decisions of the Supreme Court in prize cases, suggested that the action of the International Prize Court should take the form of a suit *de novo*, that is to say, a new action for indemnity. This was, however, more a question of form than substance, and the signatory powers agreed to the suggested change of procedure.

dealing with other than purely domestic affairs. On the other hand, appeals are allowed in all cases when the judgment of the national court affects the property of a neutral state or a neutral individual. The same distinction appears again in the regulations with regard to the parties by whom appeals may be brought. The belligerent powers are ruled out altogether, and belligerent subjects also, unless the judgment affects their property seized on board a neutral ship, or taken in alleged violation of a convention between the belligerent states or of an enactment issued by the captor state. Neutral powers, however, may appeal whenever they deem the judgment injurious to their property and that of their subjects, or if the capture of an enemy vessel is alleged to have taken place in their territorial waters. Neutral individuals, too, have the right to appeal in protection of their property if their governments do not move; and the International Court will hear them unless they are forbidden by their own state to carry on the case. All these carefully drawn regulations proceed on the principle that neutrals are entitled to legal decisions in cases between themselves and belligerents." (Lawrence: *The Principles of International Law* [4th ed., Boston, 1910], pp. 489–90.)

In regard to the law which the Court shall apply, Article VII of the Convention provides:

"If a question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said Treaty.

"In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

"The above provisions apply equally to questions relating to the order and mode of proof.

"If, in accordance with Article III (2) (c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

"The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is

of opinion that the consequences of complying therewith are unjust and inequitable."

THE LONDON DECLARATION (1909)

After the Second Hague Conference had adjourned, the far-reaching consequences of the exercise of the powers with which the International Prize Court was entrusted made certain countries, notably Great Britain, hesitate to ratify until the principles to be applied by the court should have been more clearly defined. In regard to the definition of certain minor questions of procedure and detail, it was evident that the function of the court would prove universally acceptable. On the other hand, where, as in the case of blockade, contraband, unneutral service, convoy, etc., there existed certain differences of theory and practice in regard to the rules applicable, it was evident from the terms of Article VII that the Prize Court would in the case of dispute exercise the power of arbiter in defining the law of neutrality, it was feared that it might, by its decision, sweep aside some of the most important doctrines and rules, which certain states considered essential to the maintenance of their traditional system. To obviate this uncertainty in respect to the definition of the most important rules regarding blockade, contraband, etc., Great Britain called a conference of the principal naval powers, for the purpose of reaching a common agreement in regard to the definition of the law which the court should apply.

The Conference met in London on December 4, 1908, with an entire lack of circumstance and pomp. In a spirit of equitable compromise, the assembled jurists worked assiduously for several months, until they had succeeded in reaching a remarkable agreement in regard to almost all the questions included in their program. Only the conditions of the transformation of merchantmen into war-ships and the rules for the determination of the enemy character of property were left unsolved. To these two, however, should be added the important question of reserved (coasting or coastwise) trade, which was not included in the program, and found no place among the articles agreed upon.

The importance of the London Declaration soon became apparent and gave rise to a strong movement of opinion against the ratification of the treaty on the part of those who objected to certain of the provisions. Others objected in principle to such a serious limitation upon the freedom of belligerent action.

In consequence of these objections, the Prize Act, which the British Government introduced in Parliament to make the modification necessary to permit the ratification of the Declaration, was rejected in the House of Lords. In the presence of this failure of ratification by the principal naval power, the United States was the only power which took the necessary steps to authorize ratification.

On July 28, 1914, at the outbreak of the war between Austria and Servia, the former, in her notification to neutrals, promised that she would observe the Declaration if her enemy did likewise. (*British White Paper, Miscellaneous, No. 6, 1914*, No. 50.)

As early as August 6, 1914, Secretary Bryan telegraphed to the American representatives at London, St. Petersburg, Paris, Berlin, Vienna, and Brussels, asking whether the Governments to which they were accredited would observe the laws of naval warfare as laid down by the Declaration of London. The representatives were instructed "to state that the Government of the United States believes that an acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents. Mr. Bryan adds that it is earnestly hoped that this inquiry may receive favorable consideration."

The Teutonic Powers signified their willingness to apply the Declaration of London provided its provisions were not disregarded by other belligerents. (Ambassador Gerard's telegram of August 22, 1914.) From St. Petersburg the American Chargé reported on August 20 that the Russian Foreign Office did not expect Great Britain would decide to observe the London Declaration. Just a week later Ambassador Page transmitted a dispatch from the British Foreign Office declaring, for the Government, "that they have decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations."

The "certain modifications and additions" alluded to had the result of abrogating some of the most important and fundamental articles of the Declaration. The Order in Council of August 20, 1914, relative to the Declaration of London, announced these modifications, which left the Declaration little more than its name after the British Government had worked its will upon it.

The Allied Governments hastened to accept the London Declaration as emasculated by the British Orders. The articles of the Declaration excepted or modified included some of the concessions on contraband, that had constituted the *quid pro quo* for other articles, which either incorporated the traditional British doctrines or made certain desired innovations, such, for example, as the articles in regard to the transfer of ships, which extended belligerent rights beyond what Great Britain's own doctrines had ever authorized.[1]

It soon became apparent to the American Government that its neutral interests were disastrously affected by this one-sided application of the Declaration, the very purpose of which had been the protection of neutral commerce.

October 22 the Department of State instructed Ambassador Page to inform the British Government that under the "circumstances the Government of the United States feels obliged to withdraw its suggestion, that the Declaration of London be adopted as a temporary code of naval warfare to be observed by belligerents and neutrals during the present war; that therefore this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London."

October 29, 1914, the British Government issued another Order in Council repealing the order of August 20, but reënacting its provisions with amendments alleged to be "in order to minimize, so far as possible, the interference with innocent neutral trade occasioned by the war."

Even this second British edition of the London Declaration, for some reason not sufficiently explained, proved unsatisfactory to its publishers, and in an Order in Council of July 8, 1916, the Brit-

[1] See the case of the *Dacia*, p. 364.

ish Government enacted a new Order in Council, designated as "Maritime Rights Order-in-Council, 1916," the purpose of which is announced as follows:

"The Allied Governments, forced to recognize the situation thus created, therefore decided they must confine themselves simply to applying the historic and admitted rules of the law of nations."

As quoted in the New York *World* (Saturday, July 1, 1916) Lord Robert Cecil, Minister of War Trade, explained this action of the British Government:

"Two chief reasons led us to abandon the Declaration. First, there was the *Zamora* decision, which, while developing no [*sic*] application by English courts of international law, plainly showed that the Privy Council was unsatisfied with existing Orders in Council, which, based on the Declaration of London, might diminish but could not strengthen our rights. The second point was due to the fact that it was not an easily defendable position for the British Government to say it would adopt some clauses of the Declaration while ignoring or qualifying others. . . . The American critic who said the torpedoing of the Declaration of London was an effort to tighten our legal position rather than to tighten the actual blockade was quite correct in his diagnosis."

The nature of the London Declaration has been obscured because in its preliminary provision it is stated that "the Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law."

The affirmation is, however, true only in part. The London Declaration is in fact composed of the following distinct elements: (1) a careful codification of certain portions of the recognized law of neutrality; (2) certain innovations recognized as of general advantage to neutrals without serious inconvenience to belligerents; (3) certain rules embodying a compromise between the systems or doctrines hitherto advocated by the two groups, Anglo-American (and Japanese) and Continental or French; (4) certain new provisions which may be considered as a *quid pro quo* for certain other new articles.

The compromise nature of the whole convention is shown by

the requirement of Article 65, which reads: "The provision of the present Declaration must be treated as a whole, and cannot be separated."

Lacking ratification by the powers, the London Declaration did not, at the commencement of the present war, express international law as it had previously existed, but because of the reasonableness of its various compromises and its clear enunciation of certain rules, and also because of the masterful exposition of its meaning contained in the general report of M. Louis Renault, the London Declaration has exercised a great influence, and will continue so to do, irrespective of whether or not its provisions secure recognition by the contending powers.

It is necessary, however, to bear in mind that when the London Declaration was elaborated the alliances between certain of the negotiating powers were not so closely drawn as they have since become through belligerent coöperation. If the Entente and Teutonic groups persist beyond the present period of hostilities the fundamental change in the political grouping of the world, even though it is not likely to change the appearance and formal existence of the society of independent states, as previously constituted, will nevertheless exercise a great influence upon the rules of neutrality, and consequently upon the provisions of the Declaration signed at London, February 26, 1909.

(See *American Journal of International Law, Supplement*, July, 1915, pp. 1–8, 14.)

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§ 41. THE BURDEN OF PROOF AND PRESUMPTIONS

THE *SALLY*

Before the Lords Commissioners of Appeals, 1795

[The Lords Commissioners of Appeals present were Earl of Mansfield, Sir R. P. Arden, Sir W. Wynne.]

This was a case of a cargo of corn shipped March, 1793, by Steward and Plunket, of Baltimore, ostensibly for the account and risk of Conyngham, Nesbit and Co., of Philadelphia, and

consigned to them or their assigns: — By an endorsement on the bill of lading, it was further agreed that the ship should proceed to Havre de Grace, and there wait such time as might be necessary the orders of the consignee of the said cargo (the Mayor of Havre), either to deliver the same at the port of Havre, or proceed therewith to any one port without the Mediterranean, on freight at the rate of 5*s*. per barrel on delivery at Havre, and 5*s*. 6*d*. at a second port; the freight to be settled by the shippers in America according to agreement.

Amongst the papers was a concealed letter from Jean Ternant, the Minister of the French Republic to the United States, in which he informs the Minister of Foreign Affairs in France, "The house of Conyngham and Co., already known to the Ministers by their former operations for France, is charged by me to procure without delay a consignment of 22,000 bushels of wheat, 8,000 barrels of fine flour, 900 barrels of salted beef from New England. The conditions stipulated are the same as those of the contract of 2nd November, 1792, with the American citizens Swan and Co. for a like supply to be made to the Antilles, namely, that the grain, flour, and beef are to be paid at the current price of the markets at the time of their being shipped; that the freights shall be at the lowest course in the ports; that an insurance should be on the whole; and that a commission of five per cent. shall be allowed for all the merchant's expenses and fees. It has been moreover agreed, considering the actual reports of war, that the whole shall be sent as American property to Havre and to Nantes, with power to our government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered in our ports, I shall provide each captain with a letter to the mayor of the place."

There was also a letter from J. Ternant to the mayor of the municipality of Havre: "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship the *Sally*, is laden with a cargo of wheat, of which he will deliver you the bill of lading."

To the 12th and 20th interrogatories the master deposed,

"that he believes the flour was the property of the French Government, and on being unladen, would have immediately become the property of the French Government."

In the argument it was insisted, on the part of the claimants, that the cargo was to be considered as the property of the American merchants; that it had been ordered of them, to be supplied and delivered at a certain place; and that under the general principle of law, property was not considered to be divested between the vendor and vendee till actual delivery. It was contended, that the contract remained executory till the completion by delivery in Europe; that the payment was contingent on the completion of the contract in this form, and that no money had passed, nor any compensation or agreement had intervened to produce an absolute conversion of the property; and it was prayed that the court would admit further proof to ascertain that circumstance.

On the part of the captors it was replied, that the general rule of law subsisting between vendor and vendee in a commercial transaction, referring only to the contracting parties, and not affecting the rights of third persons, could not apply to contracts made in time of war, or in contemplation of war, where the rights of a belligerent nation intervened; that the effect of such a contract as the present would be to protect the trade of the contracting belligerent from his enemy; and that if it could be allowed, it would put an end to all capture. It was said to be a known principle of the Prize Court, that neutral property must be proved to be neutral at all periods from the time of shipment, without intermission, to the arrival and subsequent sale in the port of the enemy; that the 12th and 20th interrogatories were framed with this view to inquire "whether on its arrival, etc. it shall and will belong to the same owner and no other, etc.," and a reference was made to the case of the *Charles Havernerswerth* in 1741, in which the form of attestation was directed to be prepared by the whole bar, and was established in the present form to ascertain the property at the several periods of shipment, and arrival in the enemy's ports, — in cases where affidavits were to be received to supply the defects of the original evidence, in the place of plea and proof.

The Court said: "It has always been the rule of the prize courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of a war, no such rule exists. But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchant; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, that on arrival the goods would become the property of the French Government, and all the concealed papers strongly support him in this testimony. The *evidentia rei* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery, capture is considered as delivery. The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which prize courts can proceed, this cargo must be considered as enemy's property."

"*Condemned.*"

(C. Robinson: *Admiralty Reports*, vol. III, p. 300 *n.*; Roscoe: *Reports of Prize Cases determined in the High Court of Admiralty*, vol. I, pp. 28–31. Unabridged statement of facts and opinion.)

THE *WICO* (1915)

In reply to instructions to present a vigorous protest of the American Government against the detention of the *Wico* "without any evidence showing that her cargo has an illegal destination," Ambassador W. H. Page telegraphed to Secretary of State Bryan on April 8, 1915, as follows:

"Foreign Office replies to my representations in the premises stating that it has been decided in this case to permit this vessel

to proceed to her destination, and instructions in that sense have already been issued. It is further stated that it is desired to point out that British Government feels that in event of further cargoes going to Stockholm being seized by German ships, the whole question of permitting oil cargoes to proceed to that destination will have to be seriously reconsidered."

The answer of the British Foreign Office to the further representations of the American Government is discussed in the following note of May 16, 1915, addressed to the American Ambassador:

"I have the honor to acknowledge the receipt of the note of the 16th ultimo, in which Your Excellency stated, in connection with the detention of the American ship *Wico*, that the Government of the United States considered that any question arising out of the seizure of American cargoes by the German authorities would be a matter for adjustment between the two Governments, and could not afford justification for the seizure of American cargoes by British authorities.

"I regret that my note of the 7th instant did not explain with sufficient clearness the attitude which His Majesty's Government feel constrained to adopt in the matter. They had no intention of claiming the right to interfere with neutral vessels on their way to neutral ports, on the ground that such vessels were liable to be captured by enemy cruisers. I should have stated that the recent seizures of a number of such vessels and their diversion to German ports were effected in circumstances which left no doubt that there was collusion between the parties interested in the cargoes and the German authorities.

"The right which His Majesty's Government claim, and which they feel confident will not be questioned by the United States Government, is that neutral ships may be held up in cases where there are good grounds to suspect that their ostensible destination is not the genuine destination, and that fraudulent arrangements have been concerted with the enemy cruisers for delivering ship and cargo into their hands."

(*American Journal of International Law, Supplement*, July, 1915, pp. 346–49. See also the case of the *Franciska*, *supra*, p. 430.)

§ 42. DELAYS, COSTS, AND COMPENSATION

THE *SEGURANCA* (1915)

Secretary of State Bryan to Ambassador W. H. Page, April 9, 1915

[Extract from paraphrase of telegram]

AMBASSADOR PAGE is instructed to inform the Foreign Office that this Government, on behalf of the owners of the *Seguranca*, objects to its detention, as the shipper's manifest shows that the entire cargo was consigned to named consignees in Holland and is accompanied by a certificate of the British Consul General at New York; the loading of the vessel having, moreover, been supervised by said Consul General's inspector, and the vessel containing no cargo except what is specified in the manifest. The Ambassador is further instructed to advise the Foreign Office that this Government will support claims of owners of the vessel and cargo for damages for detention, as this Government does not admit the right of British Government to require that this cargo be reconsigned to the Netherlands Oversea Trust.

Ambassador Page to Secretary of State Bryan, April 28, 1915

[Telegram]

Replying to my representations of 17th instant Foreign Office advises me as follows:

"The steamship *Seguranca* was allowed to proceed on April 22, all the consignees having agreed to receive their goods through the Netherlands Oversea Trust.

"While His Majesty's Government do not 'require' cargoes to be consigned to the Netherlands Oversea Trust, they do accept a consignment in that form as proof that the cargo is intended for *bona-fide* consumption in Holland, and they find by experience that no objection to that course is raised by reputable shippers and consignees.

"As this practice has greatly facilitated and expedited the release of vessels bound for Dutch ports when brought in or calling

for examination, it is hoped that the United States Government will not do anything to interfere with its smooth working in the future."

Secretary of State Bryan to Ambassador Page, May 6, 1915

[Telegram — Paraphrase]

Ambassador Page is instructed to inform the Foreign Office that the owners of the *Seguranca* advise the Department that though the British Consul General supervised the loading of the vessel, he failed to advise them of the practice of consigning shipments to the Netherlands Oversea Trust, and that if the British Government desires the practice followed as a matter of convenience, it should bring the same to the knowledge of shippers.

Ambassador Page is also instructed to inform the Foreign Office that the United States Government does not object to the consignment of American shipments to the Netherlands Oversea Trust, provided the plan be voluntarily acquiesced in by the shippers, but that it does object to the holding up by British Government of noncontraband cargoes until reconsigned to Netherlands Oversea Trust, and maintains also that shipments consigned to other consignees in Holland have the same legal status as those consigned to Netherlands Oversea Trust; that the United States Government finds no legal justification for the detention of noncontraband cargoes and that in the circumstances of this case the burden of proof is not on shipper to establish the noncontraband character, but is on the British Government to show contraband character of shipments.

(*American Journal of International Law Supplement*, July, 1915, pp. 343–44.)

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§ 43. APPEAL

THE *ZAMORA*

The Judicial Committee of the Privy Council, April 7, 1916

THIS was an appeal from an order of the President of the Admiralty Division of the High Court in Prize of June 14, 1915

(*Times Law Reports*, vol. 31, p. 513), by which it was ordered that the War Department should be at liberty to requisition on behalf of his Majesty four hundred tons of copper, part of the cargo of the Swedish steamship *Zamora*, subject to appraisement in accordance with Order 29 of the Prize Court Rules.

The appellants were the Swedish Trading Company, of Stockholm. The copper was bought in America from an American company and was stored there for some months. It was shipped in the *Zamora* at New York in March, 1915. The vessel while on the voyage to Stockholm was stopped by a British cruiser and was taken, first, to Kirkwall and then to Barrow, where the copper, without condemnation, was requisitioned by the War Office. It was alleged that the copper was contraband of war and was enemy property and had an enemy destination. The President made the order now appealed against.

Lord Parker, delivering the opinion of the Judicial Committee of the Privy Council, first considered a question of British constitutional law: Whether the King in Council had the power to make the rule upon which the order was based. After a review of the history of prize courts and the Acts of Parliament relative thereto, the presiding judge reached the conclusion that the Crown had no authority to control the decisions of the Prize Court,[1] and decided as follows:

"On this part of the case, therefore, their Lordships hold that Order 29, Rule 1, of the Prize Court Rules, construed as an imperative direction to the court, is not binding."

Lord Parker next decided that the order could not "be justified under any power inherent in the Prize Court as to the sale or realization of property in its custody," for the reason that the duty of the court in exercising this power was to preserve the property (*res*) for delivery to the persons who should establish their title.

Passing next to the consideration of the right of the Crown, independently of the Order, to requisition vessels or goods in the custody of the Prize Court, Lord Parker discussed the legislation and the practice of other states and rendered the decision:

[1] This part of the opinion discussed also the nature of the law administered by prize courts. (See p. 489 *n.*)

"On the whole question their Lordships have come to the following conclusion: A belligerent power has by international law the right to requisition[1] vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

"With regard to the first of these limitations, their Lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition or urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see Warrington, L.J., in the case of *In re a Petition of Right, Times Law Reports*, vol. 31, p. 666), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

"With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hearing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for

[1] For the discussion of requisition and preëmption, see *post*, p. 556.

release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their Lordships' opinion the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard, of course, to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

"With regard to the third limitation, it is based on the principle that the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the court will, at the instance of any party aggrieved, compel them so to do. From the moment of seizure, the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbor for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbor for the purpose of search — a practice which is justifiable because search at sea is impossible under the conditions of modern warfare — were held to give rise to rights which could not arise if the search took place at sea.

"It remains to apply what has been said to the present case.

In their Lordships' opinion, the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court, but because the judge had before him no satisfactory evidence that such a right was exercisable. . . ."

Lord Parker, toward the end of his opinion, made another ruling on still another important question of prize procedure and administrative law that "in proceedings to which, under the new practice, the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown."

(Statement of facts and extracts from the opinion are taken textually from the report of the case by Sir W. J. Soulsby, as printed by the *Times Law Reports*, vol. XXXII, pp. 436–46.)

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§ 44. THE EFFECTS OF A JUDGMENT: THE DIVESTMENT OF TITLE

THE *FLAD OVEN*

High Court of Admiralty, January 16, 1799

THIS was a case of an English prize ship carried into a neutral country, and there sold, under a sentence of condemnation by the French Consul, and taken the 12th of January, 1798, on a voyage from Bergen to St. Martins.

The claim was given on behalf of the purchaser, a Danish merchant.

Sir William Scott (*Lord Stowell*), delivering the opinion of the court, first discussed the sale, and concluded:

"I am of opinion that it was no actual transfer, but that the ship remained the property of the French captors, and was going to France to be put into their possession; and therefore upon that part of the case I should have very little doubt in pronouncing a sentence of condemnation.

"But another question has arisen in this case, upon which a

great deal of argument has been employed; namely, Whether the sentence of condemnation which was pronounced by the French Consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been *bona-fide* made? I directed the counsel for the claimants to begin; because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

"It has frequently been said, that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others the bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession for twenty-four hours, or carried *infra presidia*. The contrary has been more generally held; and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser: that if she has been taken as a prize, it should appear also that she has been, in a proper judicial form, subjected to adjudication.

"Now in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world that, in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country. In my opinion, if it could be shown, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough; more must be proved; it must be shown that it is conformable to the usage and practice of nations.

"A great part of the law of nations stands on no other foundation. It is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent; and, if it stops there, you are not at liberty to go farther, and to say that mere general speculations would bear you out in a farther progress. For instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other, modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.

"Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country, I must take my stand on the ancient and universal practice of mankind; and say that as far as that practice has gone, I am willing to go; and where it has thought proper to stop, there I must stop likewise."

. . . . . .

Accordingly the court considered that it was its duty "to reject such a sentence as inadmissible." The rest of the court's opinion was taken up with a discussion distinguishing between the present case and the precedents alleged to support a different view, notably the condemnation of prizes carried into Lisbon and Leghorn.

Upon this argument *ad hominem*, *Sir William Scott* remarked:

"Now, as to these condemnations of prizes carried to Lisbon and Leghorn, it has been said, that if the courts of Great Britain venture this degree of irregularity, other countries have a right to go farther. That consequence I deny: the true mode of correcting the irregular practice of a nation is, by protesting against it, and by inducing that country to reform it: it is monstrous to suppose that, because one country has been guilty of an irregu-

larity, every other country is let loose from the law of nations; and is at liberty to assume as much as it thinks fit."

Comparing the procedure of the regularly organized courts in those cases with the present instance, *Sir William Scott* remarked:

"There the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other states may be concerned."

As to the "consequences of such a pretended concession by the neutral sovereign" the opinion continues:

"It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity. Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility."

In accordance with the opinion as above expressed, *Sir William Scott* ordered that the "*ship must be restored to the British owners upon the usual salvage*"; and added: "I dismiss the claim of Mr. Krohn upon both grounds, as well upon the legality of the sentence, as upon the want of reality in the pretended transfer from the French captors. . . ."

(C. Robinson: *Admiralty Reports*, vol. 1, pp. 134–45; abridged statement with extracts from the opinion. — *Ed.*)

CHAPTER XI

DESTRUCTION OF NEUTRAL PROPERTY AND INTERFERENCE WITH ITS USE

§ 45. DESTRUCTION OF NEUTRAL PROPERTY ON ENEMY VESSELS

THE *LUDWIG* AND THE *VORWÄRTS* (1870)

On October 21, 1870, during the war between France and Germany, the *Desaix* captured and burned two vessels, the *Ludwig* and the *Vorwärts*, flying the German flag. The commander took care to draw up a report setting forth the necessity for the destruction of the vessels. By its decision rendered on February 27, 1871, the Conseil des Prises, sitting at Bordeaux, decided that the vessels belonged to German subjects, and were good prize; that the security of the captors' operations made necessary the destruction of the vessels; that there was no reason to award compensation for the benefit of those whose property had been taken; that, though the captors had applied a rule which was harsh, it was one which was in accordance with the laws of war, and commanded by the instructions which they carried.

The owners of the vessels and cargoes appealed to the Conseil d'État, asking that the value be restored to them. The consignee and shippers of the cargo based their appeal as neutrals upon Article III of the Declaration of Paris, signed April 16, 1856:

"(3) Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."

The provisional commission, which had been substituted in place of the Council of State, on March 16, 1872, rejected both these appeals, upon the following grounds:

"Though by the terms of the Declaration of Paris of April 16, 1856, a neutral cargo is not liable to seizure on board an enemy

ship, this only means that a neutral who places his goods on such a ship has a right to recover his goods, or when they are sold, to receive the amount realized; but the Declaration is not to be interpreted as permitting the neutral to claim an indemnity because of the loss which he may have suffered, either as a result of the capture of the vessel, when the capture is judged good, or from the acts of war which took place during or after the capture.

"It appears from the papers submitted that the capture of the *Ludwig* and the *Vorwärts* was held to be good, and that the destruction of the vessels and their cargoes took place by order of the commander of the capturing vessel, for the reason that the security of the warship made it impossible — owing to the great number of prisoners on board — to spare a portion of the crew to conduct the prize into a French port.

"Under the circumstances the destruction of these prizes was an act of war, the reasonableness of which the owners of the cargo cannot be permitted to discuss, nor can they make it the basis of a claim for indemnity."

(Translated and prepared from the account given by Charles Calvo: *Le Droit International* [4th ed., Paris, 1888], vol. v, pp. 278–80, sec. 3033. The opinions of the prize commission as cited by Calvo are given in full.)

GERMAN PRIZE CASES (1915–16)

THE *Glitra* was a British steamer destroyed by a German submarine while on a voyage to Norway. The concluding paragraph of the decision of the Hamburg Prize Court was as follows:

"There can be no doubt that the destroyed merchantman could only be sunk, in view of the manner of capture, at a great distance from a German port and, in view of the fact that the capturing war vessel was a submarine, if it was to be taken away from the enemy at all. The cargo was, therefore, rightfully (legally) sunk, at the same time without the owners of same, even if they are neutrals, having a right to claim indemnification."[1] (From the New York *Journal of Commerce*, March 26, 1915.)

[1] The decision in the *Glitra* was affirmed by the *Oberprisengericht* of Berlin [Berlin Prize Court of Appeals] on July 10, 1915, as given in *Zeitschrift für Völkerrecht*, vol. IX

In the case of the British steamer *Indian Prince*, the Hamburg Prize Court of first instance decided July 3, 1915, that the vessel was legally destroyed, and refused to entertain the claim on the part of the neutral American owners of innocent cargo for indemnification.

The court of second (highest) instance, rejecting the appeal, affirmed the decision of the lower court and decided in conformity with the opinion delivered in the case of the *Glitra*, that neutral property owners could not recover for the loss incurred through the justifiable sinking of a prize. The court held that the prize regulations afforded no ground upon which to base such a claim. In support of this opinion one of the grounds was that since the cargo had to sustain any loss resulting from the justifiable capture of a vessel, there appeared to be no reason why this same general principle, recognized by Article 64 of the London Declaration,[1] should not be applied as well in the case of the destruction of a prize. The court also entered into an interesting examination of the question of the application of Article 12 of the treaty of May 1, 1828, between Prussia and the United States (the claimants being citizens of the United States). Although the court declared that the existing treaty provisions must govern the case, it did not consider that the treaty applied and accordingly it was held that it could not be made the basis of a claim for indemnification.

(A very free and condensed outline of the decision, which is too long to be included in full. Copies of the decisions of the *Indian Prince* in first and second instances were kindly communicated by Mr. Norvin E. Lindheim, of the firm of Hays, Kaufmann & Lindheim, New York City.)

[1916], p. 403, to which we had access too late to include in this account. The same number gives the decision in the case of the *Maria* in first instance, April 17, 1915, (p. 408), and on appeal, October 5, 1915, (p. 413). It also contains the decision in the case of the *Indian Prince* in first instance, July 3, 1915, (p. 416).

[1] Article 64: "If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods."

§ 46. THE DESTRUCTION OF NEUTRAL PRIZES

THE *KNIGHT COMMANDER* (1904)

On February 14, 1904, the Russian Government announced the rules which it intended to apply during the war with Japan. Among the articles considered contraband of war were the following:

"(8) Every kind of fuel, such as coal, naphtha, alcohol, and other similar materials.

"(9) Articles and material for the installation of telegraphs, telephones, or for the construction of railroads.

"(10) Generally, everything intended for warfare by sea or land, as well as rice, provisions, and horses, beasts of burden, and other animals, which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy." (*Parliamentary Papers* [1905], *Russia*, No. 1, p. 4.)

In the exercise of belligerent rights, the Russian naval commanders were governed by the Regulations on Maritime Prizes, sanctioned by the Emperor on March 27, 1895, as well as by the special instructions on procedure in stopping, examining, and seizing merchant vessels, approved by the Council of the Admiralty on September 20, 1900. Article 40 of the latter was as follows:

"In the following and other extraordinary cases the commander of the imperial cruiser has the right to burn or sink a detained vessel after having previously taken therefrom the crew, and, as far as possible, all or part of the cargo thereon, as well as all documents and objects that may be essential in elucidating the matter in the prize court:

"1. When it is impossible to preserve the detained vessel on account of its bad condition.

"2. When the danger is imminent that the vessel will be recaptured by the enemy.

"3. When the detained vessel is of extremely little value, and its conduct into port requires too much waste of time and coal.

"4. When the conducting of the vessel into port appears difficult owing to the remoteness of the port or a blockade thereof.

"5. When the conducting of the detained vessel might interfere with the success of the naval war operations of the imperial cruiser or threaten it with danger.

"The officer prepares a memorandum under his signature and that of all the officers concerning the circumstances which have led him to destroy the detained vessel, which memorandum he transmits to the authorities at the earliest possible moment.

"Note — Although Article 21 of the Regulations on Maritime Prizes of 1895 permits a detained vessel to be burned or sunk 'on the personal responsibility of the commander,' nevertheless the latter by no means assumes such responsibility when the detained vessel is actually subject to confiscation as a prize, and the extraordinary circumstances in which the imperial vessel finds itself absolutely demand the destruction of the detained vessel." (*Foreign Relations of the United States, 1904*, p. 752.)

In accordance with these instructions, several neutral merchant ships were destroyed by Russian cruisers during the war, the most notable case being that of the *Knight Commander*, a British steamer on her way from New York to Japan with a mixed cargo, consisting in large part of machinery and railway material. On the morning of July 24, 1904, she was met by the Vladivostok squadron, then out on one of its raids, and was compelled to stop for visit and search, though not until several shells had been fired at her. After a hasty examination of her papers, she was made prize on the ground of carriage of contraband, but instead of taking her before a prize court for adjudication, the Russian commander proceeded to sink both cargo and vessel, after having taken the officers and crew on board a Russian cruiser. Justification for this action was set forth in the official report of Admiral Skrydloff, as follows:

". . . A visit made to the vessel showed that the captain had no charter and no manifest and that the certified copies of these documents presented by the captain showed cargoes for Kobe and Yokohama. It was established that the vessel was chartered from America to Japan with a cargo of railway material and machinery, which was contraband of war.

"The vessel was therefore deemed liable to confiscation. The proximity of the enemy's port, the lack of coal on board the vessel

to enable her to be taken into a Russian port, and the impossibility of supplying her with coal from one of the Russian cruisers, owing to the high sea running, obliged the commander of the Russian cruisers to sink the *Knight Commander*. . . ." (London *Times*, August 8, 1904.)

The sinking of the *Knight Commander* was promptly condemned by public opinion in Great Britain and elsewhere as a violation of neutral rights entirely without warrant in international law. The British Government made immediate protest that no action could be taken against ship or cargo without legal process in a prize court; in no event, it maintained, was the mere opinion of a naval commander sufficient to decide the character of his prize. The Russian view, said Lord Lansdowne in a statement to Parliament, was one "which the Government of this country have never accepted; it is a view which I believe has been repudiated, although perhaps not so distinctly by other Powers; it has certainly not been accepted by the Government of the United States. . . . We are altogether unable to admit that the sinking of the *Knight Commander* was justifiable according to any principles of international law by which this country has ever regarded itself as bound." (*Parliamentary Debates*, 4th Series, vol. 140, p. 157.) On August 10, in a dispatch to Sir Charles Hardinge, the British Ambassador at St. Petersburg, Lord Lansdowne, discussing the "indiscriminate molestation of neutral traders," intimated that the question was "rapidly assuming a shape in which it will be impossible for the Government of this country to rest content with the prospect of obtaining pecuniary compensation for the sufferers." Characterizing the general situation with respect to contraband as "one of the utmost gravity," the British Foreign Secretary made specific representations on the destruction of neutral merchant vessels as follows:

". . . The position, already sufficiently threatening, is aggravated by the assertion on behalf of the Russian Government that the captor of a neutral ship is within his rights if he sinks it, merely for the reason that it is difficult, or impossible, for him to convey it to a national port for adjudication by a prize court. . . . We understand that this right of destroying a prize is claimed in a number of cases. . . . It is unnecessary to point out . . . the

effects of a consistent application of these principles. They would justify the wholesale destruction of neutral ships taken by a ship of war at a distance from her own base upon the ground that such prizes had not on board a sufficient amount of coal to carry them to a remote foreign port — an amount of coal with which such ships would probably in no circumstances have been supplied. They would similarly justify the destruction of every neutral ship taken by a belligerent vessel which started on her voyage with a crew sufficient for her own requirements only, and therefore unable to furnish prize crews for her captures. The adoption of such measures by the Russian Government could not fail to occasion a complete paralysis of all neutral commerce. . . .

"You should explain to the Russian Government that His Majesty's Government . . . object to and cannot acquiesce in, the introduction of a new doctrine under which the well-understood distinction between conditional and unconditional contraband is altogether ignored, and under which, moreover, on the discovery of articles alleged to be contraband, the ship carrying them is, without trial and in spite of her neutrality, subjected to penalties which are reluctantly enforced even against an enemy's ship. . . .

"You should make it clear that, should the Russian Government act upon their extreme contentions with regard to contraband of war, and the treatment of vessels accused of carrying it, His Majesty's Government will be constrained to take such precautions as may seem to them desirable and sufficient for the protection of their commerce." (*Parliamentary Papers* [1905], *Russia*, No. 1, p. 12.)

As a result of the British protest assurances were given by the Russian Government that no more neutral prizes would be sunk. (Pitt Cobbett: *Cases* [3d ed., 1913], p. 437.)

Condemnation of the *Knight Commander* was made by the Prize Court at Vladivostock August 16, 1904, and sentence was confirmed at St. Petersburg December 5, 1905. The decisions are thus summarized by Hurst and Bray (*Russian and Japanese Prize Cases*, vol. 1, p. 54):

"Held by the Vladivostock Court and by the Supreme Prize Court that more than half the cargo was contraband and that the ship was consequently liable to condemnation, and that the ques-

tion of the regularity of the sinking of a captured ship was a matter only for the superior officer of the person who gave the order for the sinking and not for the Prize Court. . . .

"Held by the Supreme Court . . . that all the articles enumerated in Article 6 of the Imperial Order of the 14th February, 1904, were absolute contraband except those included in clause 10.

In March, 1905, the British Ambassador at St. Petersburg presented a claim for £100,000 as compensation for the sinking of the *Knight Commander*. So far as ascertained, this claim has never been recognized by the Russian Government. On the contrary, according to Holland, "it has remained firm on the point and in 1908 declined to submit the case to arbitration." [1]

(*Parliamentary Papers* [1905], *Russia*, No. 1; *Parliamentary Debates*, 4th Series, vols. 138–40 [1904], *passim;* Hurst and Bray: *Russian and Japanese Prize Cases*, vol. 1, pp. 54–95; Takahashi: *International Law Applied to the Russo-Japanese War*, pp. 310–17; Lawrence: *War and Neutrality in the Far East*, pp. 250–59; Holland: *Letters on War and Neutrality*, pp. 161–70; Hershey: *International Law and Diplomacy of the Russo-Japanese War*, *passim*.)

THE *WILLIAM P. FRYE* (1915)

THE diplomatic conduct of this case involved a discussion of the treaty relations between Germany and the United States and of the provisions of the Declaration of London with respect to the destruction of neutral prize. A preliminary statement of the articles and provisions in point is therefore necessary before setting forth the facts.

In commercial treaties made by the United States during the early years after independence, the contracting parties often conceded reciprocal privileges which in some respects were more liberal than is the practice to-day, especially in the case where one of the parties was neutral in a war in which the other was engaged. Three such treaties were made with Prussia, the last —

[1] Pitt Cobbett states that the claim for compensation "was rejected as regards the interests of the owners of the vessels but admitted as regards the interests of owners of innocent cargo on board." (*Cases* [3d ed., 1913], vol. II, p. 437.)

that of 1828 — being still in existence, together with certain articles from the earlier treaties of 1785 and 1799. The provisions applicable to the case under discussion are the following:

I. Article 12 of the Treaty of 1785, revived by Article 12 of the Treaty of 1828:

"If one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects and citizens of the party remaining neutral with the belligerent powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, in so much that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy."

The Treaty of 1785 expired by its own limitations in 1796, but a similar treaty was negotiated in 1799. This second treaty was also for a term of ten years, expiring in June, 1810. Its thirteenth article, however, was, with others, revived in the Treaty of 1828. It provided as follows:

II. "And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores

so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

". . . In general whatever is comprised under the denomination of arms and military stores, of what description soever, shall be deemed articles of contraband."

During naval warfare, one of the questions certain to arise is that of the right, in extreme cases, of destroying neutral prizes.[1] It came in for careful discussion at the International Naval Conference in 1908–09 and agreement was reached in the following provisions of the Declaration of London:

"Article 48. A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights as regards the validity of the capture.

"Article 49. As an exception, a neutral vessel captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.

"Article 50. Before the destruction, the persons on board must be placed in safety, and all the ship's papers and other documents which those interested consider relevant for the decision as to the validity of the capture must be taken on board the ship of war.

"Article 51. A captor who has destroyed a neutral vessel must, as a condition precedent to any decision upon the validity of the capture, establish in fact that he only acted in the face of an exceptional necessity such as is contemplated in Article 49. Failing to do this, he must compensate the parties interested without examination as to whether or not the capture was valid.

"Article 52. If the capture of a neutral vessel, of which the

[1] See case of the *Knight Commander*, p. 513.

destruction has been justified, is subsequently held to be invalid, the captor must compensate those interested, in place of the restitution to which they would have been entitled."

The Declaration of London had not been ratified by any of the powers when the War of 1914 broke out. On August 6, the American representatives at the chief European capitals were instructed by Mr. Bryan, Secretary of State, to inquire whether the respective belligerents would be willing to conduct naval warfare in conformity with the rules laid down therein and were further instructed to state "that the Government of the United States believes that an acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents." On August 22 the German Government stated that it would apply the Declaration of London "provided its provisions were not disregarded by other belligerents." Austria had previously replied in the same sense. On August 27 the British Government informed the Department of State that they had decided "to adopt generally the rules of the Declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations." France made substantially the same reservations in its note of September 3, while Russia on August 27 had stated that it accepted the Declaration "with exact modifications adopted by England and France." Accordingly, the Government of the United States withdrew its suggestion of August 6 and notified the belligerent governments that it would insist "that the rights and duties of the Government and citizens of the United States in the present war be defined by existing rules of international law and the treaties of the United States without regard to the provisions of the Declaration and that the Government of the United States reserves to itself the right to enter a protest or demand in every case in which the rights and duties so defined are violated or their free exercise interfered with by the authorities of the belligerent governments."

On March 10, 1915, the German cruiser *Prinz Eitel Friedrich* arrived at Newport News with information that during her cruise of several months she had sunk a large number of mer-

chant vessels, including one of American nationality, the *William P. Frye*. The Government of the United States at once took up the matter diplomatically and on March 31, 1915, presented, on behalf of the owners and captain, a claim against the German Government for $228,059.54 with interest from January 28, 1915, for damages sustained through the destruction of the vessel. The facts upon which the claim was based were stated in the note as follows:

"The *William P. Frye*, a steel sailing vessel of 3374 tons gross tonnage, owned by American citizens and sailing under the United States flag and register, cleared from Seattle, Washington, November 4, 1914, under charter to M. H. Houser, of Portland, Oregon, bound for Queenstown, Falmouth, or Plymouth for orders, with a cargo consisting solely of 186,950 bushels of wheat owned by the aforesaid Houser and consigned 'unto order or to its assigns,' all of which appears from the ship's papers which were taken from the vessel at the time of her destruction by the commander of the German cruiser.

"On January 27, 1915, the *Prinz Eitel Friedrich* encountered the *Frye* on the high seas, compelled her to stop, and sent on board an armed boarding-party, who took possession. After an examination of the ship's papers the commander of the cruiser directed that the cargo be thrown overboard, but subsequently decided to destroy the vessel, and on the following morning, by his order, the *Frye* was sunk."

The claim was itemized as follows:

Value of ship, equipment, and outfit	$150,000.00
Actual freight as per freight-list, 5034 $\frac{1000}{12240}$ tons at 32 – 6 – £8180 – 19 – 6 at $4.86	39,759.54
Traveling and other expenses of Captain Kiehne and Arthur Sewall and Company, agents of the ship, in connection with making affidavits, preparing and filing claim	500.00
Personal effects of Captain H. H. Kiehne	300.00
Damages covering loss due to deprivation of use of ship . . .	37,500.00
Total	$228,059.54

In its reply of April 5, the German Government justified the action of the German commander as in conformity with (1) the

Declaration of London and (2) the German Prize Ordinance. Under both, wheat was in the category of conditional contraband. The British ports to which the wheat was consigned were fortified and served as bases for the military and naval forces. Hence destination combined with nature of goods to give to the cargo of the *Frye* a contraband character in accordance with Articles 33 and 34 of the Declaration of London and Articles 32 and 33 of the German Prize Ordinance. Proof to the contrary could not be adduced on the spot because the consignment was "to order." The destruction of the ship was therefore justifiable (Declaration of London, Article 49, and German Prize Ordinance, Article 113), and all duties preliminary to destruction had been fulfilled (Declaration of London, Article 50, and German Prize Ordinance, Article 116). The legality of the measures taken was to be examined by the German prize court to be held at Hamburg, which would decide (1) whether destruction was necessary; (2) whether the property sunk was liable to capture, and (3) whether and to what extent indemnity was to be awarded to owners. Proof could there be adduced that the cargo had an innocent destination and hence was not contraband. Otherwise, Germany would not be liable for compensation under the general principles of international law. However, in view of the special situation arising out of the treaties between Prussia and the United States, Germany would give compensation, even should the cargo be shown to be contraband. Nevertheless, prize proceedings were "not rendered superfluous, since the competent prize court must examine into the legality of the capture and destruction and also pronounce upon the standing of the claimants and the amount of the indemnity."

The Government of the United States replied on April 28. It understood, it said, that the German Government admitted its liability for damages, but it was of the opinion that the prize proceedings suggested "would be inappropriate in the circumstances of this case and would involve unnecessary delay." The destruction was a violation of treaty obligations and all the questions arising out of it lent themselves to diplomatic negotiation, by which means the question of liability had already been settled. No claim was being made for the loss of the cargo, though under

the treaties Germany was liable on that score as well. The Government of the United States promised to produce all additional evidence possible as to American ownership of the vessel and the claim to damages, but as this evidence was more accessible in the United States, it suggested that negotiations be transferred to the German Embassy at Washington. In conclusion, it refused to enter into any discussion as to the applicability of the Declaration of London to the case, the treaties being sufficient to establish liability. Furthermore, the German Government was reminded that the Government of the United States did not consider the Declaration of London to be in force.

In its next communication (June 7) the German Government refused to admit any violation of treaty stipulations in the destruction of the *Frye*. These treaties did not intend to deprive either party "of the right of stopping the supply of contraband to his enemy when he recognizes the supply of such articles as detrimental to his military interests. On the contrary, Article 13 of the Prussian-American Treaty of July 11, 1799, expressly reserves to the party at war the right to stop the carrying of contraband and to detain the contraband; it follows then that if it cannot be accomplished in any other way the stopping of the supply may in the extreme case be effected by the destruction of the contraband and of the ship carrying it." Of course, the obligation to pay compensation still remained. But it was necessary to hold prize proceedings in the case, for "according to general principles of international law, any exercise of the right of control over the trade in contraband is subject to the decision of the prize courts, even though such right may be restricted by special treaties." The Prussian-American treaties did not stipulate how the compensation was to be fixed, but treaty obligations would be complied with if the prize court awarded equitable indemnity. Even should it not do so, the German Government "would not hesitate to arrange for equitable indemnity notwithstanding." Prize proceedings were further necessary to settle enemy and other neutral claims. For these reasons the American claimants were advised in the German note to enter their claims "in the competent quarter, in accordance with the provision of the German code of prize procedure."

The Government of the United States, replying on June 24, expressed regret that it was unable to concur in the contention of the German Government. The only question at issue, it considered, was the method of ascertaining the amount of indemnity due. The destruction of the *Frye* found no warrant in the treaty; on the contrary, "these treaty provisions do not authorize the destruction of a neutral vessel, in any circumstances. By its express terms the treaty prohibits even the detention of a neutral vessel carrying contraband if the master of the vessel is willing to surrender the contraband." This was the case with the *Frye*. The question of the contraband or non-contraband character of the cargo was not essential, for in neither case was there any right to destroy. The point at issue, since Germany's liability to pay compensation had been admitted, was a question of interpretation of treaties, always a subject for diplomatic discussion and settlement. Reparation for a breach of treaty was not within the jurisdiction of the German prize court nor was its decision binding upon the United States. Reparation, as understood by the Government of the United States, necessarily included "indemnity for the actual pecuniary loss sustained," and such indemnity, it was stated, if promptly paid, would be considered as reparation, "but it does not rest with a prize court to determine what reparation should be made or what reparation would be satisfactory to the Government of the United States." The claim was "for an indemnity for a violation of a treaty, in distinction from an indemnity in accordance with the treaty." Other neutral or enemy claims, urged as reasons for prize proceedings, were of no concern to the Government of the United States, whose claim, it was again suggested, was properly the subject for direct settlement by diplomacy.

In its third note (July 30) the German Government reaffirmed its former contentions. The general principles of international law justified destruction of the *Frye*, which principles, as set forth in the Declaration of London, were "recognized at that time by the duly empowered delegates of all the nations in the conference, including the American delegates, to be declarative of existing international law." As for the treaties, Article 12 of the Treaty of 1785 merely laid down a general principle of freedom of inter-

course; Article 13 of the Treaty of 1799 gave the specific rule for contraband, which, in effect, was a compromise between the military interests of the belligerent and the commercial interests of the neutral. The belligerent had the means, under the treaties, of preventing contraband reaching his enemy (1) by detention, (2) by taking it over for his own use on payment of full value. The right of sinking was not mentioned, hence "on this point the party stipulations must be supplemented by the general principles of international law." It was not to be thought that a belligerent would allow the carriage of contraband to the enemy against his own military interest, and delivering over the contraband could not be considered if the delay imperiled the existence or the operations of the captor. The legality of the action of the German commander should be examined by the prize court in accordance with (1) the general principles of international law; (2) Article I of the Convention establishing the International Prize Court, and (3) Article 53 of the Declaration of London. In fact, a German prize court had heard the case on July 10 and had delivered a judgment sustaining the contention of the German Government, but had not fixed the indemnity from lack of data upon which to base an estimate. The German Government, however, suggested that the amount due be determined by two experts to be appointed by the respective parties, payment to be regarded not as constituting "satisfaction for the violation of American treaty rights, but a duty or policy of this Government founded on the existing treaty stipulations." Failing this method of settlement, the German Government expressed its readiness to submit the question of treaty interpretation to the Permanent Court of Arbitration at The Hague.

These suggestions for settlement were welcomed by the Government of the United States in its note of August 10, but it proposed that the two methods be combined. First, the two experts should determine the amount of indemnity, referring the matter to an umpire, if necessary, it being understood that the acceptance of indemnity was not to prejudice the contention that the sinking of the *Frye* was not legally justified. Secondly, this question of justification should be settled by the arbitral means proposed by the German Government. Meanwhile, pending

arbitration, it was necessary to arrive at an understanding as to future German action under similar circumstances.

On September 19 the German Government accepted these proposals, suggesting, however, that in case of disagreement between the experts, the matter be settled, not by an umpire but by direct negotiation. In accepting the offer to arbitrate the question of treaty interpretation, it thought it best that the *compromis* of arbitration be arranged between the German Foreign Office and the American Ambassador at Berlin, because of the difficulty of instructing the German Ambassador at Washington. With respect to the request for an understanding for the future, while holding itself justified in destroying American ships carrying contraband, even while the arbitration was pending, it announced its intention to compromise, as follows: "Nevertheless the German Government, in order to furnish to the American Government evidence of its conciliatory attitude, has issued orders to the German naval forces not to destroy American merchantmen which have loaded conditional contraband, even when the conditions of international law are present, but to permit them to continue their voyage unhindered if it is not possible to take them into port. On the other hand, it must reserve to itself the right to destroy vessels carrying absolute contraband whenever such destruction is permissible according to the provisions of the Declaration of London."

The Government of the United States, however, was not yet satisfied. In its note of October 12 it declared that it could not consider that passengers and crews of merchant vessels were removed to a place of safety, as required by international law, by merely putting them in small boats on the open sea, as was the German practice in its submarine warfare. But on the understanding that Germany would give assurance that life should not be endangered by the destruction of ships carrying absolute contraband, the Government of the United States agreed to refer the question of treaty interpretation to arbitration, expressing its preference for the method of summary procedure provided for in Articles 86–90 of the Convention of 1907.

The German Government replied on December 2. While still unwilling to agree to the appointment of an umpire in the matter

of ascertaining the amount of indemnity, it submitted a draft of a *compromis* for the arbitration of the principles at issue. But it declined the suggestion to employ summary procedure because the latter "is intended only for differences of opinion of inferior importance, whereas the German Government attaches very particular importance to the interpretation of the Prussian-American treaties which have existed for over 100 years." On the question of destruction of merchant vessels, the German Government shared the view of the American Government "that all possible care must be taken for the security of the crew and passengers of a vessel to be sunk. Consequently, the persons found on board of a vessel may not be ordered into her life-boats except when the general conditions, that is to say, the weather, the condition of the sea, and the neighborhood of the coasts afford absolute certainty that the boats will reach the nearest port."

The *compromis* submitted provided for a tribunal of five to be chosen from the Permanent Court at The Hague. Two were to be designated by each party, only one of whom could be a national. These four were to choose an umpire within four weeks after they had been notified of their nomination; failing a choice, the President of the Swiss Federal Council was to be requested to select the umpire. The tribunal was designated to meet at The Hague on June 15, 1916, charged with the decision of the following question:

"Whether, according to the treaties existing between the parties, in particular Article XIII of the Prussian-American treaty of amity and commerce of July 11, 1799, the belligerent contracting party is prevented from sinking merchant vessels of the neutral contracting party for carrying contraband when such sinking is permissible according to general principles of international law."[1]

(*American Journal of International Law, Supplement*, July, 1915, pp. 180–93; also, later *White Papers*, published by the Government of the United States.)

[1] The arbitration in the case of the *William P. Frye* has not yet taken place (November, 1916). — *Ed.*

§ 47. SALVAGE FOR RESCUE

THE *PONTOPOROS* (1916)

High Court of Justice, Admiralty Division, April 3, 1916

In September, 1914, the *Pontoporos*, a Greek steamer with a cargo of coal belonging to British merchants, was captured by the German cruiser *Emden*, while on a voyage from Calcutta to Karachi. For a month or more she was compelled to follow the *Emden* and her supply ship, the *Markomannia*. On October 14, while the latter was receiving coal from the *Pontoporos*, they were sighted by the British cruiser *Yarmouth*, which at once bore down upon them, captured and sank the *Markomannia* and recaptured the *Pontoporos*. Two days later she was transferred to the charge of a French cruiser and taken to Penang. In due time the Prize Court of the Straits Settlements restored the ship to her owners, subject to bail in respect of a claim for prize salvage entered by the officers and crew of the *Yarmouth*. The proceeds of the cargo were also restored to its owners after a deduction of one-eighth as salvage in accordance with the Naval Prize Act, 1864. The value of the vessel was fixed at £44,000 and that of the cargo at £6,000.

The claim to salvage in the case of the vessel was based upon the contention that otherwise she would have been lost to her owners as being lawful prize under the German Prize Code. The defendants maintained that she would have been released by the German captors after her cargo of coal had been transshipped, and hence had been rescued from no peril that could give rise to a claim for salvage.

The President (*Sir Samuel Evans*) delivered his judgment, in part, as follows:

". . . This is the first case in which proceedings for prize salvage have been taken during the present war. The claim is made only against the owners of the vessel, and not against the cargo owners.

"By the law of nations, the general rule is that no salvage is

due for the recapture of neutral vessels, upon the principle that the liberation of a *bona-fide* neutral from the hands of the enemy is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized. (See Wheaton: *International Law*, edited by Dana, par. 364.) To this general rule, however, an important exception has been made for more than a century in the case when the vessel recaptured was practically liable to be confiscated by the enemy, whether rightfully or wrongfully. Lord Stowell explains the foundation of the rule, and the ground of the exception, in his judgment in the *Sansom* (C. Robinson: *Admiralty Reports*, vol. VI, p. 413). This exception had been stated by Lord Stowell in earlier cases, and has been generally recognized since that time. (*See* Wheaton, par. 366, and Wildman: *International Law*, vol. II, p. 286.)"

After a review of the facts to see whether the rule or the exception should apply, the *President* continued:

"Upon these facts the defendants contended that the proper conclusions were:

"(1) That the *Emden* would have released the *Pontoporos* on or about October 13, and that she was therefore in no presumptive peril.

"(2) That if the vessel had been taken before a German Prize Court she would not have been condemned.

"(3) That if she was not taken to such a court she would not have been sunk, or appropriated by the German cruiser.

"The consequential contention was that she should be restored to the owners without payment of salvage. . . ."

Having failed to find any evidence of intention on the part of the German captors either to release the *Pontoporos* or to send her before a prize court, the President concluded, as follows:

"Under Article 13 [German Prize Code] the commander of the cruiser would be entitled to destroy the neutral vessel if he considered it subject to condemnation for carrying contraband, and if bringing the vessel into port would subject the cruiser to danger, or be liable to impede the success of its operations; and this would be assumed if the captured vessel could not follow the war vessel and was therefore liable to recapture, or if the proximity of the

enemy forces gave ground for a fear of recapture, or if the war vessel was not in a position to furnish an adequate prize crew to take the vessel to a German port. . . .

"The opinion of the court is that the recapture of the *Pontoporos* in these circumstances saved the ship for its owners from condemnation in any prize proceedings and from the almost certain risk of destruction if she were dealt with upon the high seas without even the opportunity of placing her case before any judicial tribunal. Upon the strictest legal grounds, as well as upon every ground of equitable dealing, I decide that restitution to the Greek owner should have been upon payment of reasonable salvage. For such salvage I award one-sixth of the value, which is £7,333."

(*The Times Law Reports*, vol. XXXII, pp. 414–16.)

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§ 48. PILLAGE

SHRIGLEY'S CASE

Chilean Claims Commission: Treaty of August 7, 1892

CLAIMANT, a citizen of the United States, claimed $12,717.50 as damages from Chile for the destruction and appropriation of his property. It appeared that during the civil war in Chile in 1891 he removed his family from his residence at Miramar, leaving the house in charge of his servants; that on August 14, 1891, certain troops of the Balmaceda Government, under command of their officers, occupied the premises and despoiled and carried away property to a considerable amount; that on the night of August 23 the house was again taken possession of by the Balmaceda forces, who put the servants out in order to occupy it themselves; that horses of the regiment were quartered in the garden and park; that trees, plants, and fences were destroyed, and the house completely sacked.

The agent of the United States, maintaining the liability of Chile, cited Wharton's *Digest*, sec. 223, pp. 579, 580, and 598; *ibid.* sec. 225, p. 599; Halleck's *Int. Law*, vol. II, p. 37; *Willett* v.

Venezuela, Venezuelan Report, pp. 96–112; *Jean Jeanneaud* v. *The United States*, *Report of the French Claims Commission*, p. 132; *Joseph Chourreau* v. *The United States*, French Claims Commission, pp. 134–146; *Bertrand* v. *The United States*, French Claims Commission, p. 147; *Meng* v. *The United States*, French Claims Commission, p. 189.

The agent of Chile contended that claimant must show beyond a reasonable doubt not only that he was in possession of the property which he specified as having been lost, but also that it "was taken or destroyed by the Chilean army, acting under the orders of duly authorized officers, or that it was taken by the Chilean army under such circumstances that the officers of the army were bound in good faith to have prevented the pillage."

The commission unanimously rendered the following decision:

"This claim leads us to the consideration of two questions — one of law, the other of fact.

"In regard to the first, we must determine to what point Chile must be considered liable for the acts of her troops or soldiers.

"In view of the decisions rendered by similar commissions that have met at this capital, as a result of the treaties signed by the United States and Mexico, Great Britain, and France, we are of opinion that the following propositions can be accepted as correct:

"(*a*) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owner of the property to demand compensation from the government exercising such authority.

"(*b*) Neutral property destroyed or taken by soldiers of a belligerent with authorization, or in presence of their officers or commanders, gives a right to compensation, whenever the fact can be proved that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it.

"(*c*) Acts of simple marauding or pillage practiced by soldiers absent from their regiments and from the close vigilance of their commanders do not affect the responsibility of governments. Such acts are considered as common crimes, subject only to ordinary penalties.

"In view of these principles, and having before us the evidence submitted by both parties, we consider that the claimant, W. S. Shrigley, is entitled to compensation for the losses suffered, and we award him the sum of $5,086, in United States gold coin."

(Taken textually from Moore: *International Arbitrations*, vol. IV, pp. 3711–12.)

THE CLAIM OF MESSRS. LAURENT AND LAMBERT AGAINST THE UNITED STATES (1907)

DURING the Spanish American War certain property belonging to Messrs. Laurent and Lambert was destroyed and the American troops established their camp on the property. In reply to the French Ambassador's request for an equitable examination, Secretary Root transmitted (May 18, 1907) a report and opinion in regard to the case prepared by General George B. Davis, Judge-Advocate-General of the Army, setting forth the facts in considerable detail. Summarizing the report Mr. Root wrote:

"The authorities of the War Department, as will be seen, have not been able to satisfy themselves that the losses which the claimants sustained were caused by American troops, but even if such were the case, the Judge-Advocate-General of the Army is of the opinion that the acts could only be considered as those of soldiers in their personal capacity, to which no responsibility attaches on the part of their Government."

To this Ambassador Jusserand made answer in a letter of June 20, the concluding paragraph of which was as follows:

"As for the proposition that the soldiers against whom these facts are charged acted 'in their personal capacity,' I look upon it as one difficult to accept, and if it were maintained I could but draw my Government's attention to it as establishing a precedent which should eventually be invoked, under similar circumstances, against the authorities who had availed themselves of it. I cannot bring myself to believe that your excellency can consider this a logical and equitable distinction, with the consequence it would naturally involve, viz., that dispossessed parties would be justified in forcibly resisting soldiers of the United States indulging in such operations. It might happen, in such cases, that build-

ings be really torn down by order; by what token could the interested parties know that the exigencies of defense demanded such acts or that, on the contrary, the soldiers were acting spontaneously, in their private capacity, and that the owners would consequently be justified in using force for the protection of their property from members of the regular army who, while wearing the national uniform and commanded by officers of the United States, should be dealt with as marauders?"

In a communication of October 4, the State Department insisted upon maintaining its decision, and enclosed a memorandum prepared by the Solicitor of the Department in which it was said: "The principle that a government is not responsible for acts of private soldiers committed in their personal capacity is one which is almost universally sustained by the judgments of international claims commissions from a period even antedating the Civil War."

The memorandum then cited various cases principally taken from Moore's *International Arbitrations*, and, after a criticism of the views brought forward by the French Ambassador, concluded as follows:

"A noncombatant owner can always demand of the parties causing him damage whether they act under the authority of a superior, in which case there is generally exhibited the written authority of the commander, and in any event the injured party has a right to make immediate complaint to the commanding officer. The question whether he shall himself seek his remedy with his own hands by forcible resistance is not materially different from the ordinary case where a private citizen decides for himself forcibly to resist those who, as the ostensible servants of government, he may think are acting against him without due process of law. It is the risk which any individual incurs who places himself in forcible opposition to others, who are proceeding against him under color of law, and whose authority he questions or denies.

"To admit the principle contended for by the French embassy would make a government responsible for every wanton or unauthorized act of every private soldier, regardless of every effort of the most vigilant commander directed toward the restraint of

his men. It would make a government practically an insurer, as against the act of any soldier, of all private property along a line of march, except such as might be destroyed in the course of military operations or regularly requisitioned by the commander. Such a principle finds no support in the United States, nor is it thought to be in accordance with the leading decisions of arbitral tribunals, nor with the views of the best writers on international law."

(*Foreign Relations of the United States, 1907*, Part 1, pp. 392–98.)

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§ 49. PROPERTY DESTROYED IN THE COURSE OF MILITARY OPERATIONS

RIGGS'S CASE

Mexican Claims Commission: Convention of July 4, 1868

[*Sir Edward Thornton, Umpire*]

DAMAGE done to property in consequence of battles being fought upon it between the belligerents is to be ascribed to the hazards of war, and cannot be made the foundation of a claim against the government of the country in which the engagement took place.

(As given by Moore: *International Arbitrations*, vol. IV, p. 3668.)

THE MANILA CABLE (1899)

JANUARY 16, 1899, the Secretary of State requested the opinion of the Attorney-General relative to the obligation of the United States to pay a claim for damages to the amount necessary to repair the Manila cable belonging to the British Eastern Extension Australasia and China Telegraph Company cut by Admiral Dewey in territorial waters during the war with Spain.

On February 1, 1899, Attorney-General Griggs gave his opinion in part as follows:

"It is true, as suggested in that opinion, that a cable is a new

and peculiar species of property and that a precedent based upon the cutting of a cable is difficult to find; but the strict law applicable to the case does not, on that account, become doubtful.

"Property of a neutral permanently situated within the territory of our enemy is, from its situation alone, liable to damage from the lawful operations of war, which this cutting is conceded to have been, and no compensation is due for such damage.

"It is said, however, that this rule has never been applied to a cable; that the whole utility of the cable over many miles is as much destroyed by cutting it in territorial waters as by cutting it on the high seas, which last act, it is claimed, would undoubtedly entitle the owners to compensation; and that the United States admiral did not merely aim at preventing the use of the cable by the Spaniards, but also at using it himself.

"Do these reasons withdraw this property from the rule which has been stated?

"In the first place, that is a rule applying to property of a neutral which he has placed within the territory of our enemy, which property our necessary military operations damage or destroy. It takes no account of the character of the property, but only of its location, and no account of any motives of its owner or of the military officer who finds it necessary to meddle with it in hurting the enemy. He sees it across his path and brushes it away, and the rule cited says that the owner, by putting his property in the country, took the chance of a war against it and of all lawful military acts to carry it to a successful issue.

"It argues nothing that cables have not heretofore been the subject of any discussion of this rule. The same might be said of many kinds of property, either because they happened not to be injured or because the rule was so well understood that a discussion was deemed superfluous. It is necessary to show why the cable property is exempt from the rule, and not that the rule has ever been applied to it.

". . . If the act within territorial waters had effectually and permanently paralyzed the whole cable it might possibly be regarded," said the Attorney-General, "as one whole thing, and not situated in the enemy's country."

But because of the circumstances of the case under consideration he considered that the argument, based upon the assertion that the injury resulted from the cutting of the cable within territorial waters, did not apply to or affect "the belligerent's rights with regard to [neutral property] . . . within the enemy's country." The opinion concluded as follows:

"To say that the American Admiral desired to use the cable himself, as well as to prevent the Spanish Government from using it, is but to attribute to him a motive in addition to one which justified his act. This can in no way diminish the right to cut the cable, nor, seeing that he did not use it, can it give rise to any different rule as to compensation.

"I am of opinion, therefore, that, upon the law of the case, there is no ground for the claim to indemnity."

(*Opinions of the Attorneys-General*, vol. XXII, pp. 315–18.)

THE CASE OF WILLIAM HARDMAN

American and British Claims Commission, June 18, 1913

[*Award of the Tribunal*]

On or about July 12, 1898, during the war between the United States and Spain, while the town of Siboney, in Cuba, was occupied by the United States armed forces, certain houses were set on fire and destroyed by the military authorities in consequence of sickness among the troops and from fear of an outbreak of yellow fever. In one of these houses were some furniture and personal property belonging to a certain William Hardman, a British subject, which were entirely destroyed with the house itself.

The British Government claim, on behalf of the said William Hardman, the sum of £93 as the value of the said personal property and furniture, together with interest at 4 per cent. for thirteen years from March, 1899, when the claim was brought to the notice of the United States military authorities in Cuba, to the 26th of April, 1912, when the schedule to the Pecuniary Claims Agreement, in which the claim was included, was confirmed, i.e., £49 — the full claim being, therefore, for the total sum of £142.

The United States denies that it is liable in damages for the destruction of the personal property of William Hardman, and contends that the United States military authorities who were conducting an active campaign in Cuba, had a right, in time of war, to destroy private property for the preservation of the health of the army of invasion and that such authorized destruction constituted an act of military necessity or an act of war, and did not give rise to any legal obligation to make compensation.

The two parties admit the facts as above related and agree as to those facts. The British Government do not contend that Hardman's nationality entitled him to any special consideration. At the hearing of the case they did not maintain their former contention that there is no sufficient evidence of the same interest to destroy the furniture as the house. They admit that necessary war losses do not give rise to a legal right of compensation. But they contend that the destruction of Hardman's property was not a war loss in that it did not constitute a necessity of war, but a measure for better securing the comfort and health of the United States troops, and that in that respect no private property can be destroyed without compensation.

The question to be decided, therefore, is not whether generally speaking the United States military authorities had a right, in time of war, to destroy private property for the preservation of the health of the army, but specially whether under the circumstances above related, the destruction of the said personal property was or was not a necessity of war, and an act of war.

It is shown by an affidavit of Brigadier General George H. Torney, Surgeon General, United States Army (United States answer, Exhibit 3), who personally was present at that time at Siboney and familiar with the sanitary conditions then existing in that place, that the sanitary conditions at Siboney were such as made it advisable and necessary to destroy by fire all buildings and their contents which might contain the germs of yellow fever. No contrary evidence is presented against this statement, the truth of which is not questioned.

In law, an act of war is an act of defense or attack against the enemy and a necessity of war is an act which is made necessary by the defense or attack and assumes the character of *vis major*.

In the present case, the necessity of war was the occupation of Siboney, and that occupation which is not criticized in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures, i.e., the destruction of the houses and their contents.

In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.

In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war, and, according to the principle accepted by the two governments, it does not give rise to a legal right of compensation.

On the other hand, notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitary conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in that way, there may be a moral duty which cannot be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect. In this connection the Tribunal cannot refrain from pointing out the various benevolent appreciations given by the Department of State in this particular case, and commends them to the favorable consideration of the Government of the United States as a basis for any friendly measure which the special condition of the sufferer may justify.

Upon these motives, the decision of the Tribunal in this case is that the claim of the British Government be disallowed.

The President of the Tribunal,

[Signed] HENRI FROMAGEOT.

OTTAWA, *June 18, 1913.*

(*American Journal of International Law*, October, 1913, pp. 879–82.)

§ 50. REQUISITIONS AND FORCED LOANS

JACOBS'S CASE

American and British Claims Commission: Treaty of May 8, 1871

"In the case of David Jacobs, No. 236, large claims were made for watches, jewelry, silks, and other valuable goods, liquors and tobacco, alleged to have been taken by General Sherman's army at Columbia, on the capture of that city, as well as for the destruction of other property by the burning of that city.

"An award was made, Mr. Commissioner Frazer dissenting, for the tobacco taken from this claimant, on proof that it was carried off in army wagons, tobacco being allowed as an army ration. All the other claims for property taken from this claimant were disallowed."

(Moore: *International Arbitrations*, vol. IV, pp. 3688–89, giving extract from Hale's *Report*, p. 44.)

CASE OF FRANCIS ROSE *v.* MEXICO (1875)

United States and Mexican Claims Commission: Convention of July 4, 1868

Sir Edward Thornton, Umpire, September 13, 1875, rendered (MS. Op. VII, p. 418) the following decision: "With regard to the case of Francis Rose *v.* Mexico, No. 344, as the question of forced loans has been so earnestly discussed the umpire thinks it right to make some further observations. But he cannot see that there is any force in the argument that his predecessor has given different decisions upon such questions. He regrets that it should be so, but if these matters are to be settled entirely by such precedents the umpire does not understand why, where there has been a decision upon the matter by a previous umpire, the question should be referred to the present umpire at all. It can only be with the intention that he should express his unbiased opinion upon the matter.

"The umpire has already expressed his opinion in other cases that United States citizens residing in Mexico are not by treaty exempt from forced loans. This opinion he maintains. But he must explain his understanding of a forced loan. A forced loan is a loan levied in accordance with law. It is equally distributed amongst all the inhabitants of the country, whether natives or foreigners. It is a tax which becomes smaller or greater according as it is repaid sooner or later, partially or not at all. If the foreigner is reimbursed at the same time as the native, or if neither of them are reimbursed at all, the foreigner has no ground for remonstrance. As long as the foreigner is placed upon the same footing as the native he cannot complain. But if there be unfairness in the distributing of the loan or in its repayment, and if any preference be shown to the native, the foreigner has good ground for complaint. A forced loan equitably proportioned amongst all the inhabitants is a very different thing from the seizure of property from a particular individual.

"In the case now under consideration it is not shown that there was any partiality shown against the claimant or that Mexicans were not in as bad a position as himself. Indeed, although witnesses alleged that the claimant was made to pay a forced loan of $550, no receipt is shown for that amount, and there is no proof that he was not reimbursed.

"With regard to the other sums which are stated to have been exacted as forced loans, and for a portion of which receipts are shown, no proof is even given that they were really forced loans, the receipts themselves purporting that the money was freely given.

"But the mode employed by the authorities of enforcing the payment of the forced loan of $550 the umpire does not think justifiable. If the forced loan was legally imposed, there must have been means of enforcing its payment by judicial proceedings, and the arrest and subsequent detention of the claimant, though it is not proved that the latter was of long duration, and the menaces to which he was subjected, were not justifiable and entitled him, in the opinion of the umpire, to some small compensation.

"The umpire therefore awards that there be paid by the Mexican

Government on account of the above claim the sum of five hundred Mexican gold dollars ($500)."

(Taken textually from Moore: *International Arbitrations*, vol. IV, pp. 3421–22.)

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§ 51. DEVASTATION

THE *YORK*

American and British Claims Commission: Treaty of May 8, 1871

THE British ship *York*, while stranded on the coast of North Carolina, having been driven ashore by stress of weather while proceeding in ballast from Valencia, Spain, to Lewes, Delaware, was destroyed by two United States cruisers to prevent her from falling into the possession of the enemy. An award was unanimously made of $11,935 in gold, based on the value of the wreck at the time of its destruction.

(Taken textually from Moore: *International Arbitrations*, vol. IV, p. 4378.)

ELLIOTT'S CASE (1871)

United States and Mexican Claims Commission: Convention of July 4, 1868

Dr. Francis Lieber, Umpire, April 24, 1871: "General Corona had undoubtedly a right to appropriate Elliott's property, if necessary for the defense of the country against the French invaders, or to devastate it, if the war required it. The demands of war are even more absolute than those to save one's life, and, nothing appearing to the contrary, he was obliged to do it. But in all such cases it is expected that the government will repay for the injuries done as much as may be in its power, so that claimant seems to be fairly entitled to a compensation, however highly he may have estimated his losses in his valuation."

(Moore: *International Arbitrations*, vol. IV, pp. 3720–21.)

§ 52. EMBARGO (ARRÊT DE PRINCE)

THE *LABUAN*

American and British Claims Commission: Treaty of May 8, 1871

"BAILEY & LEETHAM, claimants, No. 386. The claimants were the owners of the British steamship *Labuan*, which, on the 5th of November, 1862, was in the port of New York laden with a cargo of merchandise destined for Matamoras. On that day her master presented the manifest to the proper officer of the custom-house at New York for clearance, but such clearance was refused, and the refusal continued up to the 13th of December, 1862, on which day it was granted. The memorial alleged that this detention was by reason of instructions received by the custom-house officers from the proper authorities of the United States to detain the *Labuan*, in common with other vessels of great speed destined for ports in the Gulf of Mexico, to prevent the transmission of information relative to the departure or proposed departure of a military expedition fitted out by the authority of the said United States. The memorial claimed damages for the detention, $38,000, being at the rate of $1000 per day, the memorial alleging that on a former seizure and detention of the same vessel, from February to May, 1862, when libeled as prize, this rate of compensation for the detention had been awarded to the owners by the district court of the United States.

"On the part of the United States it was contended that the detention of the *Labuan*, under the circumstances alleged in the memorial, was within the legitimate and recognized powers of the United States; that it was no infringement upon the rules of international law or upon any treaty stipulations between the United States and Great Britain, and that it gave no right of reclamation in favor of the claimants against the United States; that the right of self-protection, by temporarily refusing clearance to vessels through which information of great importance in regard to military movements is likely to reach the enemy, must be regarded as of necessity permissible to a government engaged in

war; that at the time of this detention important military movements then in progress in connection with the occupation of New Orleans by the Federal forces, including the dispatch of General Banks, with large reinforcements, to supersede General Butler in the command there, were in progress, and made it of the utmost importance that these movements should be carefully kept secret from the rebels; that the detention of the *Labuan* was not by any discrimination against her as a British vessel or against British vessels as such. All vessels capable of such a rate of speed as to make their departure dangerous in this regard were detained alike; that no claim had ever been made by the British Government, through the usual diplomatic channels, upon the United States for compensation; and that it could not be believed that such a claim would not have been made if Her Majesty's Government had considered such a claim valid. The counsel for the United States cited, in this connection, the letter of Mr. Stuart, Her Majesty's Minister at Washington, to Mr. Seward, of 1st August, 1862 (*U. S. Dip. Cor. 1862, 1863*, Part 1, p. 273), upon a somewhat analogous question, in which Mr. Stuart says: 'I have been instructed to state to you that Her Majesty's Government, after considering these dispatches, in connection with the law officers of the crown, are of opinion that it is competent for the United States, as a belligerent power, to protect itself within its own ports and territory by refusing clearances to vessels laden with contraband of war or other specified articles, as well as to vessels which are believed to be bound to Confederate ports; and that so long as such precautions are adopted, equally and indifferently in all cases, without reference to the nationality or origin of any particular vessel or goods, they do not afford any just ground of complaint.'

"The case of the detention of the *Labuan*, it was contended on the part of the United States, was governed by the same principles and justified by the same rules as the cases referred to by Mr. Stuart. The counsel referred to the decision of the commission upon the American claims against Great Britain, growing out of the prohibition of the exportation of saltpetre at Calcutta (American Claims, Nos. 11, 12, 16, 18), hereinbefore reported, and in which such prohibition was held by the commission not to

involve a violation either of international law or of treaty stipulation, and urged that the principles which would sustain the validity of such prohibition must also include such a case as the detention of the *Labuan*.

"The counsel for the claimant maintained that the detention of the *Labuan* was in effect a deprivation of the owners of the use of their property for the time of the detention for the public benefit; that it was in effect a taking of private property for public use, always justified by the necessity of the state, but likewise always involving the obligation of compensation. He cited 3d Phillimore, 42, and Dana's Wheaton, 152 *n.*

"The commission unanimously made an award in favor of the claimant for $37,392."

(Moore: *International Arbitrations*, vol. IV, pp. 3791–93, citing Hale's *Report*, p. 171.)

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§ 53. ANGARY

THE DUCLAIR INCIDENT (1870–71)

In the course of military operations during the Franco-Prussian War, the Prussian troops occupied Rouen early in December, 1870. Some English vessels then in port, anticipating danger, went down the river, but returned when informed through the British Vice-Consul that the Prussian commander, Major Lachs, by an order of December 7, had authorized the English colliers in the river bound for Rouen to enter that harbor and discharge their cargoes. In accordance with this permission, the colliers went up to Rouen and unloaded and were taking on the usual return cargo of ballast chalk, when, on December 14, the following letter to the Vice-Consul announced a change of policy on the part of the military authorities:

"*Chief Command, 1st Army, Head-Quarters, Rouen,*
"*December 14, 1870.*

"In reply to the esteemed letter from the Vice-Consulate of this day's date, with respect to the permission requested for the Eng-

lish coal ships to enter Rouen and go out therefrom, the Undersigned is commissioned to state that His Excellency, General Manteuffel expresses his regret that Major Sachs, who commanded the place up to this day, should have previously granted authorization to English ships to freely effect the going up and down the Seine.

"If, on the contrary, it should be said that His Excellency himself had verbally given that permission, there must be thereon, in any case, a misunderstanding, for nothing of the sort has taken place on his part.

"His Excellency is, in truth, ready to grant the entry of the port to the ships, but finds himself compelled to refuse their going out, because that is not in conformity with the usages of war.

"His Excellency has done everything in order to spare the consuls of the powers all the burdens which were the consequence of the occupation of Rouen, and only regrets the more that he cannot give effect to the request made to him.

"Accept, etc. By order,

"Von Lewinski,

"*Commander of the General Staff.*

"*To the Vice-Consulate of England, Rouen.*"

In consequence the vessels were prevented from leaving at a time when French ships of war were menacing the German operations at Rouen by steaming up and down the river at will. In the opinion of the German commanders, it became a matter of military necessity to block the channel of the Seine, which could be done only by sinking "high-built sea ships." Accordingly, orders were issued to seize all sea ships off Duclair (below Rouen) this measure being necessary, according to the German report made on the affair, "because if a requisition had been made for ships to the mayoralty here, probably all the ships, timely warned, would have gone to Havre. . . . In the urgency of the matter, researches could not then be made how far the neutral flag covers ships also in rivers, and lying especially between belligerent parties: the suitable ships were pointed out for sinking." In execution of the orders, on December 21–22, six British vessels were seized by Prussian troops, in spite of energetic protests by the

captains, and were scuttled in the river off Duclair. Another British vessel, the *Sylph*, was seized on the 24th at Rouen. In all cases the captains were asked to put a valuation on their vessels, and certificates, written in German, acknowledging the requisition and stating the estimated values, were given by the military officers.

As first reported to the British Government by the Acting Vice-Consul at Rouen, the fact of seizure was aggravated by charges of ill-treatment. "The crews," he said, "were forced ashore and had to sleep in the open air during a frosty night. Time was hardly given the men to save their effects, which many of them have lost, together with money, etc. . . . I may add that some of the vessels were fired upon by Prussian soldiers, the crew narrowly escaping from being struck." The incident created intense indignation in Great Britain, which was reflected in the first instructions of Lord Granville, Foreign Secretary, to Lord Loftus, the British representative at Berlin. "I have to instruct you," he wrote on December 28, "to lose no time in calling the attention of the Prussian Government to this matter. With the information now before them, Her Majesty's Government cannot but consider the seizure and sinking of those vessels to be altogether unwarrantable, and the firing upon them, if it took place, a matter which requires the fullest explanations. You will express the hope that immediate inquiry will be made into the transaction, and the conviction that if no satisfactory explanation of the proceeding is given by the Prussian General, the Prussian Government will at once take such steps as the case, as it now stands, appears to call for."

On the 29th it was officially stated, in answer to protests lodged at the Consulate, that no financial responsibility for the losses incurred would be assumed by Prussia or Germany. The following letter to one of the masters indicated the German point of view:

"ROUEN, *December 29, 1870.*

"As I have sent back the protest made with the English Vice-Consul here, Mr. Herring, against the seizure of your ship, I inform you that no indemnity from the Prussian-German side can be granted to you.

"The sinking of the English ships is the consequence of the closing of the course of the Seine.

"These measures were ordered by the military authority after that the French ships of war had advanced from Havre as far as Duclair, and as for the closing large ships only could be used, the seizure of yours was inevitable.

"This measure being purely in order to prevent the French ships of war from advancing, it is manifest that France is alone responsible for the damage with regard to the owner of the ship and its crew.

"I can therefore only tell you to prosecute your rights to indemnity against the French Government.

"The Royal Prefect of the Department of the Seine Inférieure.

"H. CRAMER."

The case for the owners was stated in a memorandum drawn up on December 31 and transmitted to the British Government. The captains, it said, had relied on the commander's authorization, otherwise they would not have placed their vessels in danger. In war, the element of surprise should not be employed against neutrals. Reason and equity demanded that the captains should have been permitted to depart before the operations in the river Seine were undertaken. Premeditation on the part of the Prussian authorities was charged. Neither the usage of war nor the desire to protect the vessels was the motive for the detention; it was rather "to keep them under hand with the object, so soon realized, of making them serve for the barrier of the river which they meditated." Nor could the violation of neutral rights be made regular by a professed purchase which was later repudiated. The captains did not have the power to sell and "they only took the papers which were presented to them, and of the content of which they were ignorant, after they were already dispossessed or convinced of the inutility of their resistance, which is superabundant proof of the illegality of their dispossession." The memorandum asserted in conclusion that after due reparation had been made, it would "remain for the nations of the civilized world to examine whether the law respecting neutrals is still subsisting or whether it is no more than a dead letter."

In order further to strengthen their legal claims to compensation, the captains also addressed a protest to the French Government at Bordeaux, in part, as follows:

" . . . Being victims of a violation of the law of neutrals and of the faith which we naturally placed in the authorizations of the Prussian authorities, it appears to us that we ought to be indemnified for the losses we have sustained, and for the interruption of our voyages by the Prussian Government; but that in any case this is a question of an act of war from which we ought not to suffer, since, if the Prussian commandant had not had our vessels with which to bar the Seine and prevent your gun-boats from ascending it, he would have taken French smacks, the charge of which you would not refuse.

"Consequently, and in as far as is necessary to shelter our responsibility as captains, we pray you now to take our claim into consideration, and we trust that you will accede to it if, contrary to our expectation, we are unsuccessful in obtaining our indemnity from His Majesty the King of Prussia. . . ."

As soon as the British protest reached him, Bismarck was prompt to express regret at the incident. In a dispatch on January 8 to Count Bernstorff, the German representative at London, he admitted the claim to indemnification and promised payment without waiting to decide who should finally be held responsible, France or Germany. "Should it be proved," he added, "that excesses have been committed which were not justified by the necessity of the defense, we should regret it still more, and call the guilty persons to account." On the same day, in a conversation with the British representative at German headquarters at Versailles (Lord Odo Russell),[1] Bismarck reiterated his intention to give reparation, but justified the Prussian action on the ground of necessity. "The Law Officers," he found, "held that a belligerent had a full right, in self-defense, to the seizure of neutral vessels in the rivers or inland waters of the other belligerent, and that compensation was due by the vanquished power, not by the victors. If conquering belligerents admitted the right of foreigners and

[1] Lord (then Mr.) Odo Russell was at Versailles at the time making representations to Bismarck upon the subject of the threatened abrogation by Russia of the Treaty of Paris of 1856. (See vol. 1, p. 134.)

neutrals to compensation for the destruction of their property in the invaded state, they would open the door to new and inadmissible principles in warfare. Claims for indemnity were submitted to him daily by neutrals holding property in France which he could never admit. He valued, however, the friendship and good-will of England too highly to accept this interpretation of law in the present case, and preferred to adopt one that would meet the wishes of Her Majesty's Government and give full satisfaction to the people of England."

On receipt of the report of the First Army Corps on the sinking of the ships, Bismarck transmitted a copy of it to Count Bernstorff, with the request that it be communicated to the British Foreign Secretary together with his thanks "to Her Majesty's Government for the just appreciation of the military necessity with which Lord Granville has apprehended and treated the matter." In his dispatch Bismarck expressed the satisfaction "that the measure in question, however exceptional its nature, did not overstep the bounds of international warlike usages." "The report," he said, "shows that a pressing danger was at hand, and every other means of averting it was wanting; the case was, therefore, one of necessity, which, even in time of peace, may render the employment or destruction of foreign property admissible, under reservation of indemnification. I take the opportunity of calling to mind that a similar right in time of war has become a peculiar institute of law, the *jus angariæ*, which so high an authority as Sir Robert Phillimore defines thus: that a belligerent power demands and makes use of foreign ships, even such as are not in inland waters, but in ports and roadsteads within its jurisdiction, and even compels the crews to transport troops, ammunition or implements of warfare."

The British Government received the assurances of Bismarck in a spirit of conciliation and empowered the Board of Trade to examine the several claims and to put them in a shape suitable for presentation to the North German Government. This procedure met with the approval of the latter and the German Consul at Sunderland was instructed to place himself at the disposal of the British officials. The Board of Trade proceeded at once to investigate the claims, which in some cases were inflated to four

or five times their reasonable value, and was ready with its report on April 15. To help it in arriving at an appraisal, it secured valuations from the surveyors at Lloyds as well as an opinion from one of the officials of the Court of Admiralty (Mr. Rothery) on the legal questions involved. In answer to an inquiry relative to the certificates given to the masters of the vessels destroyed, the German Embassy stated that they had "no other object than to leave in the hands of the owners a voucher that their ships had actually been seized for purposes of warfare" and that the statements of value in them were only "one-sided declarations or demands of the owners, which were necessarily reserved for future agreement or judicial decision." This was also the view of them taken by the Board of Trade.

The German contention that the seizure of the vessels had been justifiable was considered correct by Mr. Rothery in his memorandum. "It seems now to be generally admitted," he said, "that the German Government were entitled, provided that they made full compensation to the owners, to take possession of these vessels, and to sink them for the purpose of protecting themselves against the hostile attacks of the French vessels of war; and, moreover, that in the exercise of that right they committed no unnecessary, arbitrary or offensive acts, although the contrary was at first affirmed. . . . It is, therefore, clearly not a case for penal, or, as it is sometimes called, vindictive damages; on the other hand, the parties are entitled to a full and liberal compensation for the losses sustained, or *restitutio in integrum*, and that, as I understand, the German Government are willing to give."

On the basis of this memorandum and the valuations by the surveyors, the Board of Trade arrived at the sum of £7088 6*s*. 5*d*. as the equitable value of the claims. The market value of the ships at the time they were sunk was taken "on the assumption that the ships and equipments were in good order and fair condition." But as they were taken under what was practically a forced sale, 25 per cent of the estimated valuation was added in each case "to compensate the owner for the inconvenience and loss to which he will necessarily have been put by having been so suddenly deprived of his vessel." The value of the cargoes was assessed on the basis of the market price of the chalk in the Tyne. After

deduction for the dues and charges not incurred, the sum of 3*s.* 6*d.* per ton was fixed on as a fair compensation. In the case of two of the vessels, however, which had not taken on their cargoes, the estimate under this head was reduced to 2*s.* 6*d.* per ton. Small sums were allowed for legal and consular expenses as well as interest on the amounts awarded at the rate of five per cent from January 1. The claims for compensation on the ground of loss of future earnings, either of ships or men, were rejected, together with claims for loss of personal effects. The former were not considered to have a legal basis, the latter to have little, if any, foundation in fact. However, to cover actual damage sustained, small gratuities were awarded to the masters and crews. There were also included the expenses incurred by the British Government in sending the seamen home.

A trifling deduction was made because of the sale of the ships' boats by the captains to a Frenchman at Rouen. The sale had been made without the knowledge of the British Consul, and later the German authorities claimed them as part of the property passing to the German Government when it agreed to pay the claims of the owners. This contention was accepted by the British officials, and as the boats had been allowed to remain in the possession of the French purchaser, an amount corresponding to the price paid for them (£15 2*s.*) was deducted from the total.

The award of £7073 6*s.* 5*d.* thus fixed upon by the Board of Trade was accepted by the German Government and payment duly made to the British Foreign Office on May 19, 1871.

(*Parliamentary Papers* [1871], (35), *Correspondence respecting the Sinking of British Vessels in the River Seine by Prussian Troops.*)

THE *PETROLITE* (1915)

On December 6, 1915, the commander of the U.S.S. *Des Moines* sent the following message from Canea, Crete, to the Navy Department at Washington:

"*Des Moines* has received the following radiogram from the American ship *Petrolite*, bound from Alexandria, Egypt, for New York: 'Attacked by submarine this (Sunday) morning about

5:20 in latitude 32 degrees 35 minutes north, longitude 26 degrees 8 minutes east. One man wounded, not seriously. (Signed) Thompson, Master.' In answer to my inquiry I have received the following information: 'Submarine carried Austrian flag. Officers said she looked like a big cruiser. Man wounded by an exploding shell. *Petrolite* belonged to Standard Oil Company and was commissioned April 14, 1915. At the time she was attacked she was about 350 miles west of Alexandria and just southeast of the Island of Crete, distant about 120 miles.'"

A few days afterwards a cablegram from the American Consul at Algiers (where the *Petrolite* arrived on December 10) confirmed the report, adding that the captain of the *Petrolite* had been compelled to furnish the submarine with provisions. The captain afterwards declared that one of the *Petrolite's* crew had been kept on board the submarine until the provisions were delivered over. (New York *Times*, December 8–13, 1915.)

In consequence of this information the Government of the United States sent a note to the Austro-Hungarian Government, asking for an explanation of the attack. The latter, in reply, stated that the *Petrolite* had been attacked because she had changed her course, making it appear that she was about to ram the submarine. The commander of the latter had believed that the *Petrolite* was flying the American flag "as a trick." He denied, however, that the provisions had been taken forcibly; on the contrary, they had been furnished voluntarily and pay for them had been refused by the captain of the *Petrolite*. (New York *Times*, February 26, 1915.)

The Government of the United States, June 21, 1916, telegraphed Ambassador Penfield a general denial of the facts alleged, as follows:

"Evidence obtained from the captain and members of crew of the steamer *Petrolite*, and from examination made of the vessel under direction of the Navy Department, convinces this Government that the Austro-Hungarian Government has obtained an incorrect report of the attack on the steamer. With particular reference to the explanation made by the Foreign Office, the following information, briefly stated, has been obtained from sworn statements of the captain and members of crew:

"No shot was fired across the bow of the steamer as a signal to stop. When the first shot was fired the captain was under the impression that an explosion had taken place in the engine room. Not until the second shot was fired did the captain and crew sight the submarine, which was astern of the steamer and therefore they positively assert that neither the first nor the second shot was fired across the bow of the vessel.

"The steamer did not swing around in a course directed toward the submarine as alleged in the report obtained by the Austro-Hungarian Government, but the captain at once stopped the engines and swung the vessel broadside to the submarine and at right angles to the course of the vessel, in order to show its neutral markings, which was manifestly the reasonable and proper course to follow, and it ceased to make any headway. On the steamer was painted its name in letters approximately 6 feet long, and the name of the hailing port, and, as has previously been made known to Austro-Hungarian Government, the steamer carried two large flags some distance above the water line which it is positively stated by the officers and crew were flying before the first shot was fired, and were not hoisted after the first shot, as stated by the submarine commander.

"The submarine commander admits that the steamer stopped her engines. The captain of the *Petrolite* denies that the vessel was ever headed toward the submarine, and the examination of the steamer made by an American naval constructor corroborates this statement, because, as he states, the shell which took effect on vessel, striking the deck-house which surrounds the smokestack, was fired from a point forty-five degrees on the starboard bow. This was one of the last shots fired and indicates that ship was not headed toward the submarine even up to the time when the submarine ceased firing. The captain states that the submarine appeared to be maneuvering so as to direct her shots from ahead of the steamer. The submarine fired approximately twelve shots. The majority of the shots were fired after the ship had stopped and had swung broadside, and while, as even the commander of submarine admits, the steamer was flying the American flag. The captain of the steamer denies that he advised the commander of the submarine that the damage to

the steamer was insignificant. He states that he advised him that steamer had been damaged, but that he not then had an opportunity to ascertain the extent of the damage. The seaman who was struck by a fragment of shell sustained severe flesh wounds.

"If the ship had intended to ram the submarine, she would not have stopped her engines and this must have been evident to the submarine commander. Naval authorities here agree that there could have been no danger of the ship ramming the submarine until it was headed straight for the submarine and was under power, and even then the submarine could have so maneuvered as to avoid collision. The *Petrolite* was two miles away from the submarine. The engines and funnel of the *Petrolite* were at the stern, and from the general appearance of the ship no experienced naval officer could have believed that it had opportunity or sufficient speed to attack even if it had been steaming directly toward the submarine. The conduct of the submarine commander showed lack of judgment, self-control, or wilful intent amounting to utter disregard of the rights of a neutral.

"According to the sworn statements of the captain of steamer and a seaman who accompanied him to the submarine, the commander of the latter stated that he mistook the steamer for a cruiser. This statement is at variance with the statement in the Austro-Hungarian Government's note that the captain of the submarine asserted a false maneuver on the part of the steamer prompted the submarine to continue fire.

"The captain of the steamer swears that he informed the commander of the submarine that he had only sufficient provisions to reach the port of Algiers, and that he would deliver provisions only under compulsion. He states positively in his affidavit and in conversation with officials of the Department that he did not give provisions readily nor did he say it was the duty of one seaman to help another, and that he refused payment because he felt that he was being compelled to deliver food in violation of law. The statement of the captain of the *Petrolite* is entirely at variance with the report of the submarine commander. The correctness of the captain's opinion that the wounded seaman was held as hostage to guarantee the delivery of food seems clear.

Obviously the commander of the submarine had no right to order the seaman to remain on board. The fact that this order was given showed that the commander insisted that food was to be delivered to him, otherwise the seaman would naturally have accompanied the captain back to his vessel. The outrageous conduct of the submarine commander and all the circumstances of the attack on the *Petrolite* warranted the captain in regarding himself as being compelled in order to avoid further violence to deliver food to the commander of the submarine.

"In the absence of other and more satisfactory explanation of the attack on the steamer than that contained in the note addressed to you by the Foreign Office, the Government of the United States is compelled to regard the conduct of the commander of the submarine in attacking the *Petrolite* and in coercing the captain as a deliberate insult to the flag of the United States and an invasion of the rights of American citizens for which this Government requests that an apology be made; that the commander of the submarine be punished; and that reparation be made for the injuries sustained, by the payment of a suitable indemnity.

"Please communicate with Foreign Office in sense of foregoing.

"You may add that this Government believes that the Austro-Hungarian Government will promptly comply with these requests, in view of their manifest justness and the high sense of honor of that Government which would not, it is believed, permit an indignity to be offered to the flag of a friendly power or wrongs to its nationals by an Austro-Hungarian naval officer without making immediate and ample amends.[1]

"LANSING."

(*White Paper*, communicated by the Department of State.)

[1] The case of the *Petrolite* is still unsettled (November, 1916).

PREËMPTION

In the course of the opinion in the case of the *Zamora* (see p. 502) *Lord Parker*, speaking for the Judicial Committee of the Privy Council, said: "Some stress was laid in argument on the cases cited in the judgment in the court below upon what is known as 'the right of preëmption,' but in their Lordships' opinion these cases have little, if any, bearing on the matter now in controversy. The right of preëmption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such stores were only contraband if destined for the use of the enemy government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognized as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase money paid into court. It is obvious, therefore, that this 'right of preëmption' differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect the question whether the vessel or goods should or should not be condemned as prize." (*Times Law Reports*, vol. XXXII, p. 444.)

It is to be regretted that the learned judge did not give his authorities in support of the statement that the British contention in regard to preëmption "at last came to be recognized as fully warranted by international law." In the case of the *Neptune*, which came before the International Claims Commission organized

in accordance with Article VII of the Anglo-American (Jay) Treaty of November 19, 1794, contrary opinions were expressed in arguments, which, as far as is known, have never been answered. (See Moore: *International Arbitrations*, vol. IV, p. 3843 *ff.*)

M. Kleen states: "The former custom of belligerents, practiced under the name of preëmption, by which they take possession of innocent neutral goods for value but by force, claiming to act by reason of necessity or for the purpose of preventing the goods from falling into the hands of the enemy, is prohibited as contrary to the law of property and the law of nations.

"Only in cases where international law permits confiscation may it be replaced by preëmption, out of consideration for extenuating circumstances."

In his subjoined historical account of the claim of preëmption Kleen says: "Great Britain it was who in the eighteenth century reintroduced this method of exploiting (*exploiter*) neutral nations." (Translation from Richard Kleen: *Lois et Usages de la Neutralité* [Paris, 1900], pp. 704–05.)

It is true that the regulation adopted by the Institute of International Law at its Venice session, 1896, recognized a right of sequestration or preëmption, but the greatest authorities upon the subject of maritime law either were not present at the meeting or did not register their vote in favor of the proposal. It is with justice that Westlake says of the action taken: "The change was made in spite of strong opposition from the late Dr. Perels, who held an eminent position in international law both from his talents and from his being a director in the German ministry of Marine. And we are thus entitled to say that if the doctrine which had its origin in France has become widely spread, at least it cannot claim to be regarded as that of the whole continent." (*International Law*, Part II, *War* [Cambridge, 1913], p. 286.)[1]

[1] For the discussion of preëmption by the Institute, see *Annuaire de l'Institut de Droit International*, vol. XIII [1894–95], pp. 72–73, 123–24; vol. XV [1896], pp. 222–27, 230–31.

§ 54. EXCEPTION OF HOSTILE SERVICE

SIMONSON'S CASE

United States and Mexican Claims Commission: Convention of July 4, 1868

A CLAIM was made for the value of some salt seized by the Mexican authorities.

Mr. Wadsworth, the United States Commissioner, said:

"The Government does not show any right in January, 1867, to confiscate salt sold to the parties in 1865, by one of the belligerents in firm possession at the time. Undoubtedly sales by a belligerent of his personal effects, fairly made, within his own or a neutral jurisdiction, will pass the title. In 1867 the Government sold the salt, and sold it to pay its troops. That was the trouble. I have observed that most seizures, sacks, and pillages were made by troops that had not been paid. That was the usual resource of the Spanish troops of Alva and the Duchess of Parma in the Netherlands. When their pay was behind and they could not wait any longer, they took a city and plundered it. The people called such an affair 'a Spanish fury.' In this case the city of Tehuantepec on the 7th of January, 1867, was sacked and burnt, and the population driven to the woods, Simonson's property going with the rest, and Woolwich's store suffering particularly. So the cargoes of salt were sold off in lots to pay the troops, and finally closed out to one purchaser. In my opinion the claimant is entitled not only to 1000 cagas, but one-half of 6666 cagas, at their value, with 6 per cent. interest."

It appeared that the salt was delivered by the imperialists to the claimant in repayment of money which he had advanced to them.

The Umpire, Sir Edward Thornton, held that under the circumstances the Mexican authorities were justified in seizing the salt in question, and that the Mexican Government could not be made responsible for the loss alleged to have been suffered by Simonson.

(Taken textually from Moore: *International Arbitrations*, vol. IV, pp. 3724–25.)

§ 55. REPRISALS CAUSING LOSS OF NEUTRAL PROPERTY

THE *WILHELMINA* (1915)

THE *Wilhelmina* was an American-owned ship which sailed from New York for Hamburg on January 22, 1915, with a cargo of foodstuffs, the sole owner of which was the W. L. Green Commission Company, an American corporation, with an extensive commercial connection in Germany. According to the sworn statement made by the manager of the company, the cargo was to be sold to private purchasers and "not to any belligerent government nor armed forces of such government, nor to any agent of a belligerent government or of its armed forces."

Three days later, on January 25, the German Federal Council issued a decree under which all grain and flour in Germany were taken over, and their distribution regulated by the German Government, with the exception of grain or flour imported from abroad after January 31. The latter, however, could be sold only to municipalities or "specially designated organizations by the importers." The object of this provision was stated by the German Government to be "simply to throw imported grain and flours into such channels as supply the private consumption of civilians and . . . to protect the civilian population from speculators and engrossers."

In consequence of this decree the *Wilhelmina*, on directions from the British Government, was taken into Falmouth and its cargo seized as contraband, on the grounds that under the terms of the decree the cargo was really going to an enemy government. The owners of the cargo at once denied the British contention and the State Department in its note of February 15, 1915, took up the case on their behalf. "They point out," it said, "that, by a provision of the order in question as originally announced, the regulations in relation to the seizure of food products are made inapplicable to such products imported after the 31st January, 1915. They further represent that the only articles shipped

on the *Wilhelmina* which are embraced within the terms of these regulations are wheat and bran, which constitute about 15 per cent. of the cargo as compared with 85 per cent. consisting of meats, vegetables, and fruits. The owners also assert that the regulations contemplate the disposition of foodstuffs to individuals through municipalities; that municipalities are not agents of the Government, and that the purpose of the regulations is to conserve the supply of food products, and to prevent speculation and inflation of prices to non-combatants."

At the same time the American note drew the attention of the British Government to a communication received from the German Government explanatory of the decree. "Municipalities," it was explained therein, "do not form part of or belong to the Government, but are self-administrative bodies, which are elected by the inhabitants of the commune in accordance with fixed rules and therefore exclusively represent the private part of the population and act as it directs." But, to leave no room for doubt, the German Government announced that the part of the decree dealing with the exclusive sale of imported cereals to municipalities had been rescinded. And in a later communication assurance was given that "all foods imported into Germany from the United States directly or indirectly, which belong to the class of relative contraband, such as foodstuffs, will not be used by the German army or navy, or by the Government authorities, but will be left to the free consumption of the German civilian population, excluding all Government purveyors." For these reasons the Government of the United States requested the release of the *Wilhelmina* and cargo.

The British Government replied in a memorandum handed to the American Ambassador February 19, 1915. One of the grounds for the seizure, it said, was the ship's destination — Hamburg, a free city of the German Empire, "the government of which is vested in the municipality." The repeal of Article 45 of the original decree was not known to the British authorities at the time of the detention of the cargo, and was made, it was suggested, "for the express purpose of rendering difficult the anticipated proceedings against the *Wilhelmina*." The relation of the decree to the question of contraband was a suitable matter

for judicial investigation. But other reasons for the British Government's action were set forth, as follows:

After pointing out that hitherto the British Government had neither declared foodstuffs absolute contraband nor had "interfered with any neutral vessels on account of their carrying foodstuffs, except on the basis of such foodstuffs being liable to capture if destined for the enemy forces or governments," the British note proceeded to recite the instances in which the distinction between combatants and non-combatants, "of late universally upheld by civilized nations," had been "swept away by the novel doctrines proclaimed and acted upon by the German Government." "If, therefore," it concluded, foreshadowing the Order in Council soon to be put in force, "His Majesty's Government should hereafter feel constrained to declare foodstuffs absolute contraband, or to take other measures for interfering with German trade, by way of reprisals, they confidently expect that such action will not be challenged on the part of the neutral states by appeals to laws and usages of war whose validity rests on their forming an integral part of that system of international doctrine which as a whole their enemy frankly boasts the liberty and intention to disregard, so long as such neutral states cannot compel the German Government to abandon methods of warfare which have not in recent history been regarded as having the sanction of either law or humanity."

The case of the *Wilhelmina's* cargo was settled out of court. The situation was changed with the issue of the Order in Council of March 11, 1915, forbidding all commercial intercourse with Germany, and there was no longer any purpose in continuing prize proceedings, especially as the owners of the cargo were in any event "to be treated as if their claim was good." Accordingly, in a communication to Ambassador Page on April 8, 1915, the Prime Minister proposed an agreement between the Crown and the claimants on the following terms:

"His Majesty's Government having undertaken to compensate the claimants by paying for the cargo seized on the basis of the loss of the profit the claimants would have made if the ship had proceeded in due course to Hamburg, and by indemnifying them for the delay caused to the ship so far as this delay has been due

to the action of the British authorities, all proceedings in the prize court shall be stayed, on the understanding that His Majesty's Government buy the cargo from the claimants on the above terms. The cargo shall be discharged and delivered to the proper officer of the Crown forthwith. The sum to be paid shall be assessed by a single referee nominated jointly by the ambassador of the United States of America and His Majesty's Principal Secretary of State for Foreign Affairs, who shall certify the total amount after making such inquiries as he may think fit, but without formal hearing or arbitration."

This offer was accepted by the claimants and proceedings were discontinued in accordance with its terms.

Viscount Mersey was selected as referee, and after he had examined briefs presented June 4 by both sides, he made his award July 13 of £78,400 to the W. L. Green Commission Co., owners of the cargo, virtually covering the entire amount of the claim, which was £86,181. Interest at the rate of 5 per cent. was also allowed from September 13, 1915, to the date of the payment of the award. The British Government had already advanced £21,200 on account.

In the meantime the *Wilhelmina* was sunk July 5, 1916, through collision with a Brazilian naval transport in the harbor of Rio de Janeiro (New York *Times*, July 14, 1916).

(*American Journal of International Law, Supplement*, July, 1915, pp. 173–79.)

THE *NECHES* (1915)

Note Verbale from the British Embassy

BRITISH EMBASSY,
WASHINGTON, *August 6, 1915.*

COMMENTS have reached His Majesty's Government from various quarters that a misapprehension seems to have arisen with regard to the British note of July 31 concerning the steamer *Neches* which it was asserted had been interpreted as stating that the cargo of the vessel had been seized as a reprisal measure against Germany's submarine policy.

Sir Edward Grey has requested me to explain that the misun-

derstanding arises no doubt from the brevity of the note. The note admits no illegality of procedure. The seizure was not meant in the nature of a reprisal but was based solely on the British contention of the absolute legality of the Orders in Council as explained in the note of July 23, to which the *Neches* note refers.

It is also explained that in stating that the British Government does not yet know what steps neutrals have taken against German submarine policy, no reference was intended to the action of the United States Government but to other neutrals, who have lost more ships than the United States but of whose action nothing is known by the British Government.

It should be further explained that in making reference to the German submarine policy the British Government only desired to point out that from its standpoint it was hardly just or reasonable that it should be asked by neutrals to abandon any of its legal rights while Germany commits illegalities both on Great Britain and on neutrals, though it is admitted and regretted that interference with German trade however legal may be inconvenient to neutrals.

(*White Paper*, communicated by the Department of State.)

THE ALLIES' EMBARGO ON NEUTRAL PROPERTY BOUND TO OR FROM GERMANY (1915)

In a note of March 1, 1915, Sir Cecil Spring-Rice, British Ambassador at Washington, after discussing the German war-zone declaration, and describing the nature of submarine warfare, concluded as follows:

"The German declaration substitutes indiscriminate destruction for regulated capture. Germany is adopting these methods against peaceful traders and non-combatant crews with the avowed object of preventing commodities of all kinds, including food for the civil population, from reaching or leaving the British Isles or northern France.

"Her opponents are therefore driven to frame retaliatory measures in order in their turn to prevent conmmodities of any kind from reaching or leaving Germany. These measures will,

however, be enforced by the British and French Governments without risk to neutral ships or to neutral or non-combatant life and in strict observance of the dictates of humanity. The British and French Governments will therefore hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation. The treatment of vessels and cargoes which have sailed before this date will not be affected."

A declaration in practically identical language was presented by the French Ambassador at the same time. Ambassador Sharpe telegraphed from Paris, March 14, an explanation relative to the retaliatory action which the Government had in view. The intentions of the French Government were made public in a Decree signed by President Poincaré on March 13, 1915, which by its terms authorized French cruisers to stop goods bound to or from Germany, either directly or by transit through adjoining territory. When belonging to neutrals, the cargoes were to be reshipped to the port of departure or sent to certain specified French ports. Property recognized as belonging to Germans was ordered placed under sequestration or sold, and the proceeds deposited to the owners' account to be held until the conclusion of peace. The Decree did not apply in the case of contraband.

(Prepared from Official Documents communicated by the Department of State.)

CHAPTER XII

NEUTRAL RIGHTS RELATIVE TO INTERNATIONAL COMMUNICATIONS, TRAVEL, AND TRADE

§ 56. THE FREEDOM OF INTERNATIONAL COMMUNICATIONS

BRITISH CENSORSHIP OF CABLEGRAMS (1915)

THE Department of State has made public a voluminous correspondence respecting the censorship and suppression of cable communications. The following is one instance:

On May 13, 1915, Secretary of State Bryan informed Ambassador Page of the non-delivery of nine code telegrams concerning coffee shipments to the United States, giving the names and addresses, and instructed him as follows:

"Bring to attention Foreign Office, pointing out suppression purely commercial cablegrams of neutral character exchanged between United States and South America can only serve as detriment to legitimate business entirely outside war zone. Request early investigation and reason in each case why message stopped, directing attention to British Government's assurance that censors were instructed last September to pass telegrams exchanged between North and South America. Please reply by cable."

The Foreign Office, after some explanations, telegraphed by the American Ambassador, May 27, 1915, "concludes by saying that the attention of the censors concerned abroad, as well as in the United Kingdom, has been called to the necessity of observing the instructions already issued on this subject, and it trusts that no further inconvenience will be experienced by American firms in this respect."

(*American Journal of International Law, Supplement*, July, 1915, pp. 312–13.)

NEUTRAL MAILS (1916)

From time to time during the European War of 1914, complaint was made that Great Britain and France were detaining and searching neutral mail-steamers in violation of international law, especially as set forth in the Hague Convention providing for the inviolability of postal correspondence. In consequence, on January 4, 1916, the Secretary of State of the United States instructed the American Ambassador at London to "lay this matter immediately before the British Government in a formal and vigorous protest and press for a discontinuance of these unwarranted interferences with inviolable mails." Specific instances were given of the seizure both of parcel mails and of "entire mails, including sealed mails and presumably the American diplomatic and consular pouches." As to parcel post articles, the State Department was inclined to regard them "as subject to same treatment as articles sent as express or freight in respect to belligerent search, seizure, and condemnation. On the other hand, parcel post articles are entitled to the usual exemptions of neutral trade, and the protests of the Government of the United States in regard to what constitutes the unlawful bringing in of ships for search in port, the illegality of so-called blockade by Great Britain, and the improper assumption of jurisdiction of vessels and cargoes apply to commerce using parcel post service for the transmission of commodities."

On the seizure of mails in general, the Department could not "admit the right of British authorities to seize neutral vessels plying directly between American and neutral European ports without touching at British ports, to bring them into port, and, while there, to remove or censor mails carried by them. Modern practice generally recognizes that mails are not to be censored, confiscated, or destroyed on high seas, even when carried by belligerent mail ships. To attain same end by bringing such mail ships within British jurisdiction for purposes of search and then subjecting them to local regulations allowing censorship of mails cannot be justified on the ground of national jurisdiction. In cases where neutral mail ships merely touch at British ports, the Department believes that British authorities have no inter-

national right to remove the sealed mails or to censor them on board ship. Mails on such ships never rightfully come into the custody of the British mail service, and that service is entirely without responsibility for their transit or safety."

The Allied Governments made reply on April 3, 1916, their respective Ambassadors being instructed to transmit identic memoranda to the Secretary of State. In these they examined the nature of the postal services as well as the reasons underlying the Hague Convention of 1907. Post parcels, in the opinion of the Allied Governments, were "clearly not withdrawn in any way from the exercise of the rights of police, supervision, visitation, and eventual seizure which belong to belligerents as to all cargoes on the high seas." In this view they were in agreement with the Government of the United States as was shown by the correspondence over the destruction of the parcels mail on the French vessel *Floride* by the German cruiser *Prinz Eitel Friedrich*. As regards other mail, the Allied Governments cited several instances where search had disclosed "the presence in the wrappers, envelopes, and mail matter of contraband articles particularly sought after by the enemy," especially rubber. Thus the inviolability of the Hague Convention (which was not applicable according to the contention and the practice of the German Government) was being used to impose upon the postal authorities of neutral states and it would be given "a wider scope than it possesses if it were regarded as exempting from any supervision goods and articles shipped by mail, even though they were contraband of war." Inviolability applied only to "correspondence," that is to say, "missive letters."

For these reasons the two Governments announced:

"1. That from the standpoint of their right of visitation and eventual arrest and seizure, merchandise shipped in post parcels needs not and shall not be treated otherwise than merchandise shipped in any other manner.

"2. That the inviolability of postal correspondence, stipulated by the Eleventh Convention of The Hague of 1907 does not in any way affect the right of the allied Governments to visit and, if occasion arise, arrest and seize merchandise hidden in the wrappers, envelopes, or letters contained in the mail bags.

"3. That true to their engagements and respectful of genuine 'correspondence,' the Allied Governments will continue, for the present, to refrain on the high seas from seizing and confiscating such correspondence, letters, or dispatches, and will insure their speediest possible transmission as soon as the sincerity of their character shall have been ascertained."

Mr. Lansing answered the joint memorandum on May 24, 1916. While agreeing with the Allied Governments that "general correspondence" mail was inviolable, the Government of the United States could not admit "that belligerents may search other private sea-borne mails for any other purpose than to discover whether they contain articles of enemy ownership carried on belligerent vessels or articles of contraband transmitted under sealed cover as letter mail, though they may intercept at sea all mails coming out of and going into ports of the enemy's coasts which are effectively blockaded." It was not, however, the principle that was the cause of difference so much as the application of the principle. The Government of the United States again had to insist "that the British and French Governments do not obtain rightful jurisdiction of ships by forcing or inducing them to visit their ports for the purpose of seizing their mails, or thereby obtain greater belligerent rights as to such ships than they could exercise on the high seas." The joint memorandum, in effect, was "merely notice that one illegal practice had been abandoned to make place for the development of another more onerous and vexatious in character." Historically, the rule was to exempt mails from visitation or detention. The interference practiced by the Allies occasioned great inconvenience and loss to neutral business; "not only are American commercial interests injured, but rights of property are violated and the rules of international law and custom are palpably disregarded."

The principle, in Mr. Lansing's opinion, being "clear and definite," it remained only to state the American position in more detail, as follows:

"The Government of the United States is inclined to the opinion that the class of mail matter which includes stocks, bonds, coupons, and similar securities is to be regarded as of the same nature as merchandise or other articles of property and subject

to the same exercise of belligerent rights. Money orders, checks, drafts, notes, and other negotiable instruments which may pass as the equivalent of money are, it is considered, also to be classed as merchandise. Correspondence, including shipping documents, money-order lists, and papers of that character, even though relating to 'enemy supplies or exports,' unless carried on the same ship as the property referred to, are, in the opinion of this Government, to be regarded as 'genuine correspondence,' and entitled to unmolested passage."

In conclusion, said Mr. Lansing, "the Government of the United States . . . expects the present practice of the British and French authorities in the treatment of mails from or to the United States to cease and belligerent rights, as exercised, to conform to the principle governing the passage of mail matter and to the recognized practice of nations. Only a radical change in the present British and French policy, restoring to the United States its full rights as a neutral power, will satisfy this Government."

(*Diplomatic Correspondence*, published as *White Book, No. 3* [Government Printing Office, Washington, 1916], pp. 145–56.)

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§ 57. PASSENGER TRAVEL

HOVERING IN THE VICINITY OF AMERICAN PORTS (1915)

THE following extract from Secretary of State Bryan's letter of January 20, 1915, gives the complaint transmitted in Senator Stone's letter of January 8, and Mr. Bryan's answer:

[Complaint:] *British warships are permitted to lie off American ports and intercept neutral vessels.*

[Answer:] "The complaint is unjustified from the fact that representations were made to the British Government that the presence of war vessels in the vicinity of New York Harbor was offensive to this Government and a similar complaint was made to the Japanese Government as to one of its cruisers in the vicinity

of the port of Honolulu. In both cases the warships were withdrawn.

"It will be recalled that in 1863 the Department took the position that captures made by its vessels after hovering about neutral ports would not be regarded as valid. In the Franco-Prussian War President Grant issued a proclamation warning belligerent warships against hovering in the vicinity of American ports for purposes of observation or hostile acts. The same policy has been maintained in the present war, and in all of the recent proclamations of neutrality the President states that such practice by belligerent warships is 'unfriendly and offensive.'"[1]

(*Senate Executive Documents*, 63d Cong., 3d Sess., No. 716.)

THE REFUSAL OF BRITISH LINES TO CARRY GERMANS FROM CHILEAN PORTS (1914)

The British Pacific Steam Navigation Company refused to transport German and Austrian subjects residing in Chile between Chilean ports. The individuals concerned appealed to the Chilean authorities, and on August 27, 1914, the Minister for Foreign Affairs declared that the company could carry those it wished.

In response to a request from the German Legation of September 18, 1914, that the Chilean Government ask the company to change its decision, the Minister for Foreign Affairs answered in a note September 25 as follows:

"My Department has received a note from the German Legation of September 18, in which Your Excellency requests the Chilean Government to take action for the purpose of obliging

[1] ". . . The grounds for the objection of the Government of the United States to the continued presence of belligerent vessels of war cruising in close proximity to American ports are based, not upon the illegality of such action but upon the irritation which it naturally causes to a neutral country. The continued presence of British ships in the offings of the great American commercial centers is, I believe your Government will agree, an inevitable source of annoyance and offense. The cases of the *Vinland* and *Zealandia* show how belligerent vessels may be the cause of offense, and illustrate how the presence of vessels in such close proximity to the coast of a neutral country may easily become the cause of controversy." (Secretary of State to the British Ambassador, April 26, 1916, *White Book, No. 3*, p. 140.)

the English Steamship Company to modify its decision not to take German and Austrian passengers on its vessels. In reply I would point out to Your Excellency that in time of peace the company mentioned is free, according to our laws, to accept or refuse to carry certain individuals as passengers, and that in accordance with the articles of the Commercial Code they may enter into a contract to carry them, or refuse to do so. Consequently in time of war it is not possible to limit them in the exercise of this liberty of choice in regard to the transportation of citizens of the country with which the nation whose flag they fly is at war.

"Having no power according to our laws to intervene in this matter, my Government regrets that it is unable to comply with Your Excellency's request."

(Alejandro Alvarez: *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 275–76; translation — abridged statement of facts, with the Chilean note in full. — *Ed.*)

THE *LUSITANIA* (1915)

THE outbreak of war in 1914 found American passenger and freight traffic dependent in large part upon foreign shipping companies, chiefly British and German. The early disappearance of German commerce from the ocean only emphasized this dependence of the United States upon the other belligerents. While in all wars passengers are more or less inconvenienced, no serious interference with travel, as such, had occurred prior to the War of 1914. The Civil War did not affect transatlantic passenger traffic seriously, nor did the other great conflict involving maritime warfare on a large scale — the Russo-Japanese War. In any event the ordinary rules of visit and search were applied and the lives of neither belligerents nor neutrals were placed in immediate jeopardy. Of course there was always the chance that the commander of a passenger vessel might resist visit and search by flight or legitimate resistance, and thereby endanger the lives of his passengers. Or, again, the captor might decide to sink the vessel and take the passengers and crew on board the capturing warship, as

did German cruisers operating in the South Atlantic. In such case all on board would undergo a risk of hostile attack by the other belligerent.

These dangers have always been incident to travel during maritime warfare. The War of 1914, however, developed new problems up to that time not anticipated, still less provided for in international agreements. The employment of the submarine in the so-called war zone (see p. 487) revealed its inability to exercise the principle of visit and search. The unprecedented export of contraband, often on ships carrying passengers, raised a question which became acute when the belligerents began to step outside of legal practices and to indulge in reprisals. It was, however, the German policy of war zones and the controversy over the definition and status of armed merchant ships that focused the attention of neutrals and belligerents alike upon the principles underlying the right of non-combatants to be upon the high seas in time of war.

The German decree relative to the war zone was issued on February 4, 1915. (See p. 584.) On February 10, the Secretary of State of the United States, in a note to the American Ambassador at Berlin, instructed him to call the attention of the German Government to "the very serious possibilities of the course of action apparently contemplated under that proclamation" and to the "critical situation . . . which might arise were the German naval forces . . . to destroy any merchant vessel of the United States or cause the death of American citizens." The principles involved and the consequences of infringing them were thus set forth by Secretary Bryan:

"It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Govern-

ment of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized. . . .[1]

"If the commanders of German vessels of war should act upon the presumption that the flag of the United States was not being used in good faith and should destroy on the high seas an American vessel or the lives of American citizens, it would be difficult for the Government of the United States to view the act in any other light than as an indefensible violation of neutral rights which it would be very hard indeed to reconcile with the friendly relations now so happily subsisting between the two governments.

"If such a deplorable situation should arise, the Imperial German Government can readily appreciate that the Government of the United States would be constrained to hold the Imperial German Government to a strict accountability for such acts of their naval authorities and to take any steps it might be necessary to take to safeguard American lives and property and to secure

[1] These principles were more fully stated in the following declaration, issued March 1, 1915, by the British and French Governments and presented to the leading neutral governments:

". . . The law and custom of nations in regard to attacks on commerce have always presumed that the first duty of the captor of a merchant vessel is to bring it before a prize court, where it may be tried, where the regularity of the capture may be challenged, and where neutrals may recover their cargoes. The sinking of prizes is in itself a questionable act, to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew or passengers (if there are passengers on board). The responsibility for discriminating between neutral and enemy vessels, and between neutral and enemy cargo, obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo, and to preserve all papers before sinking or even capturing it. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation upon every belligerent. It is upon this basis that all previous discussions of the law for regulating warfare at sea have proceeded.

"A German submarine, however, fulfills none of these obligations. She enjoys no local command of the waters in which she operates. She does not take her captures within the jurisdiction of a prize court. She carries no prize crew which she can put on board a prize. She uses no effective means of discriminating between a neutral and an enemy vessel. She does not receive on board for safety the crew and passengers of the vessel she sinks. Her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war. The German declaration substitutes indiscriminate destruction for regulated capture."

to American citizens the full enjoyment of their acknowledged rights on the high seas."

Amid decrees and counter-decrees from belligerents and protests from neutrals, the stage was rapidly being set for a crisis. But with every sign portending serious complications, no one was prepared for the tragedy which followed. On May 8, 1915, the whole world was shocked to learn that the *Lusitania*, one of the largest of ocean liners, had been torpedoed and sunk by a German submarine off the southwest coast of Ireland, and that over a thousand non-combatants, many of them women and children, had lost their lives in the disaster. At once, and with unanimity, the opinion of mankind execrated the deed in an outburst of indignation without parallel in the life of nations. Of the victims more than a hundred were American citizens. It devolved, therefore, upon the Government of the United States to hold the German Government to "a strict accountability" in the sense of the American protest of February 10. The following communication was accordingly, on May 13, addressed to the German Minister for Foreign Affairs:

"In view of recent acts of the German authorities in violation of American rights on the high seas, which culminated in the torpedoing and sinking of the British steamship *Lusitania* on May 7, 1915, by which over 100 American citizens lost their lives, it is clearly wise and desirable that the Government of the United States and the Imperial German Government should come to a clear and full understanding as to the grave situation which has resulted.

"The sinking of the British passenger steamer *Falaba* by a German submarine on March 28, through which Leon C. Thrasher, an American citizen, was drowned; the attack on April 28 on the American vessel *Cushing* by a German aeroplane; the torpedoing on May 1 of the American vessel *Gulflight* by a German submarine, as a result of which two or more American citizens met their death; and, finally, the torpedoing and sinking of the steamship *Lusitania*, constitute a series of events which the Government of the United States has observed with growing concern, distress, and amazement. . . .

"The Government of the United States . . . assumes . . . that the Imperial Government accept, as of course, the rule that

the lives of non-combatants, whether they be of neutral citizenship or citizens of one of the nations at war, cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unarmed merchantman, and recognizes also, as all other nations do, the obligation to take the usual precaution of visit and search to ascertain whether a suspected merchantman is in fact of belligerent nationality or is in fact carrying contraband of war under a neutral flag.

"The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity, which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they cannot put a prize crew on board of her, they cannot sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats. These facts, it is understood, the Imperial German Government frankly admit. We are informed that in the instances of which we have spoken time enough for even that poor measure of safety was not given, and in at least two of the cases cited not so much as a warning was received. Manifestly submarines cannot be used against merchantmen, as the last few weeks have shown, without an inevitable violation of many sacred principles of justice and humanity.

"American citizens act within their indisputable rights in taking their ships and in traveling wherever their legitimate business calls them upon the high seas, and exercise those rights in what should be the well-justified confidence that their lives will not be endangered by acts done in clear violation of universally acknowledged international obligations, and certainly in the confidence that their own Government will sustain them in the exercise of their rights. . . .

". . . The Government of the United States . . . confidently expects, therefore, that the Imperial German Government will

disavow the acts of which the Government of the United States complains, that they will make reparation as far as reparation is possible for injuries which are without measure, and that they will take immediate steps to prevent the recurrence of anything so obviously subversive of the principles of warfare for which the Imperial German Government have in the past so wisely and so firmly contended. . . ."

"The Imperial German Government will not expect the Government of the United States to omit any word or any act necessary to the performance of its sacred duty of maintaining the rights of the United States and its citizens and of safeguarding their free exercise and enjoyment." [1]

The German Government replied on May 28. In the cases of the *Cushing* and the *Gulflight* it promised indemnification, if the facts should be found to warrant it; that is, if mistakes had been made by German submarines. The sinking of the *Falaba*, it contended, was justified because the captain "disregarded the order to lay to and took to flight." With regard to the *Lusitania*, the German Government having "already expressed its deep regret to the neutral Governments concerned that nationals of those countries lost their lives on that occasion," desired, before proceeding to a consideration of principles, to be informed as to certain facts which might have escaped the attention of the Government of the United States. The *Lusitania*, it alleged, had guns on board "which were mounted under decks and masked." Like other British merchant vessels, it was instructed by the British Admiralty to fly neutral flags and to attack German submarines by ramming them. Furthermore, the *Lusitania*, it asserted, was transporting Canadian troops and carrying 5,400 cases of ammunition, thus violating "the clear provisions of American laws which expressly prohibit, and provide punishment for the carrying of passengers on ships which have explosives on board." For these

[1] Shortly before the *Lusitania* sailed from New York, a notice was published, on the authorization of the German Embassy at Washington, in various American newspapers, warning citizens of the United States that they would travel at their own peril within the zones where German submarines were operating. But, contended the American note of May 13, "no warning that an unlawful and inhumane act will be committed can possibly be accepted as an excuse or palliation for that act or as an abatement of the responsibility for its commission."

reasons the German Government reserved "final statement of its position with regard to the demands made in connection with the sinking of the *Lusitania*" until a reply was received from the Government of the United States.

The reply was sent June 9. After expressing gratification that Germany was prepared "to acknowledge and meet its liability" in the cases of the *Cushing* and the *Gulflight*, it continued:

"With regard to the sinking of the steamer *Falaba*, by which an American citizen lost his life, the Government of the United States is surprised to find the Imperial German Government contending that an effort on the part of a merchantman to escape capture and secure assistance alters the obligation of the officers seeking to make the capture in respect of the safety of the lives of those on board the merchantman, although the vessel had ceased her attempt to escape when torpedoed. These are not new circumstances. They have been in the minds of statesmen and of international jurists throughout the development of naval warfare, and the Government of the United States does not understand that they have ever been held to alter the principles of humanity upon which it has insisted. Nothing but actual forcible resistance or continued efforts to escape by flight when ordered to stop for the purpose of visit on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew. The Government of the United States, however, does not understand that the Imperial German Government is seeking in this case to relieve itself of liability, but only intends to set forth the circumstances which led the commander of the submarine to allow himself to be hurried into the course which he took. . . ."

As to the facts alleged in the German note with reference to the *Lusitania*, Mr. Lansing (who signed the American reply as Secretary of State *ad interim*) assured the German Government that it had been "misinformed" and that the Government of the United States had performed its duty and "enforced its statutes with scrupulous vigilance through its regularly constituted officials."

Proceeding to a discussion of principles, the American note maintained its position thus:

"Whatever may be the contentions of the Imperial German

Government regarding the carriage of contraband of war on board the *Lusitania* or regarding the explosion of that material by the torpedo, it need only be said that in the view of this Government these contentions are irrelevant to the question of the legality of the methods used by the German naval authorities in sinking the vessel.

"But the sinking of passenger ships involves principles of humanity which throw into the background any special circumstances of detail that may be thought to affect the cases, principles which lift it, as the Imperial German Government will no doubt be quick to recognize and acknowledge, out of the class of ordinary subjects of diplomatic discussion or of international controversy. Whatever be the other facts regarding the *Lusitania*, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. . . . The Government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every Government honors itself in respecting and which no Government is justified in resigning on behalf of those under its care and authority. Only her actual resistance to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the Government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity as well as upon the law founded upon this principle that the United States must stand. . . .

"The Government of the United States cannot admit that the proclamation of a war zone from which neutral ships have been

warned to keep away may be made to operate as in any degree an abbreviation of the rights either of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality. It does not understand the Imperial German Government to question those rights. It understands it, also, to accept as established beyond question the principle that the lives of non-combatants cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unresisting merchantman, and to recognize the obligation to take sufficient precaution to ascertain whether a suspected merchantman is in fact of belligerent nationality or is in fact carrying contraband of war under a neutral flag. The Government of the United States therefore deems it reasonable to expect that the Imperial German Government will adopt the measures necessary to put these principles into practice in respect of the safeguarding of American lives and American ships, and asks for assurances that this will be done."

The German Government replied for a second time on July 8. After traversing ground already made familiar by the controversy over reprisals, it proceeded to justify the sinking of the *Lusitania* and to suggest a solution of the problem of passenger travel in time of war, as follows:

"With all its efforts in principle to protect neutral life and property from damage as much as possible, the German Government has recognized unreservedly in its memorandum of February 4 that the interests of neutrals might suffer from submarine warfare. However, the American Government will also understand and appreciate that, in the fight for existence which has been forced upon Germany by its adversaries and announced by them, it is the sacred duty of the Imperial Government to do all within its power to protect and to save the lives of German subjects.

"The case of the *Lusitania* shows with horrible clearness to what jeopardizing of human lives the manner of conducting the war employed by our adversaries leads. In most direct contradiction of international law all distinctions between merchantmen and war vessels have been obliterated by the order to British merchantmen to arm themselves and to ram submarines and

promise of rewards therefor; and neutrals who use merchantmen as travelers have thereby been exposed in an increasing degree to all the dangers of war. . . .

"In order to exclude any unforeseen dangers to American passenger steamers, made possible in view of the conduct of maritime war on the part of Germany's adversaries, the German submarines will be instructed to permit the free and safe passage of such passenger steamers, when made recognizable by special markings and notified a reasonable time in advance. The Imperial Government, however, confidently hopes that the American Government will assume the guarantee that these vessels have no contraband on board. The details of the arrangements for the unhampered passage of these vessels would have to be agreed upon by the naval authorities of both sides.

"In order to furnish adequate facilities for travel across the Atlantic Ocean for American citizens, the German Government submits for consideration a proposal to increase the number of available steamers by installing in the passenger service a reasonable number of neutral steamers under the American flag, the exact number to be agreed upon under the same conditions as the American steamers above mentioned.

"The Imperial Government believes that it can assume that in this manner adequate facilities for travel across the Atlantic Ocean can be afforded American citizens. There would, therefore, appear to be no compelling necessity for American citizens to travel to Europe in time of war on ships carrying an enemy flag. In particular, the Imperial Government is unable to admit that American citizens can protect an enemy ship through the mere fact of their presence on board.

"Germany merely followed England's example when it declared part of the high seas an area of war. Consequently accidents suffered by neutrals on enemy ships in this area of war cannot well be judged differently from accidents to which neutrals are at all times exposed at the seat of war on land, when they betake themselves into dangerous localities in spite of previous warning.

"If, however, it should not be possible for the American Government to acquire an adequate number of neutral passenger

steamers, the Imperial Government is prepared to interpose no objections to the placing under the American flag by the American Government of four enemy passenger steamers for the passenger traffic between America and England. The assurances of 'free and safe' passage for American passenger steamers would then be extended to apply under the identical pre-conditions to these formerly hostile passenger ships. . . ."

The Government of the United States sent a third note to Berlin on July 21. It was keenly disappointed, it said, to find the German Government defending its action on the ground of retaliation for illegal British practices. Such arguments were irrelevant, for the issue was solely between the American and German Governments and might be stated thus:

"Illegal and inhuman acts, however justifiable they may be thought to be against an enemy who is believed to have acted in contravention of law and humanity, are manifestly indefensible when they deprive neutrals of their acknowledged rights, particularly when they violate the right to life itself.

"If a belligerent cannot retaliate against an enemy without injuring the lives of neutrals, as well as their property, humanity, as well as justice and a due regard for the dignity of neutral powers, should dictate that the practice be discontinued.

"If persisted in it would in such circumstances constitute an unpardonable offense against the sovereignty of the neutral nation affected. The Government of the United States is not unmindful of the extraordinary conditions created by this war or of the radical alterations of circumstance and method of attack produced by the use of instrumentalities of naval warfare which the nations of the world cannot have had in view when the existing rules of international law were formulated, and it is ready to make every reasonable allowance for these novel and unexpected aspects of war at sea; but it cannot consent to abate any essential or fundamental right of its people because of a mere alteration of circumstance. The rights of neutrals in time of war are based upon principle, not upon expediency, and the principles are immutable. It is the duty and obligation of belligerents to find a way to adapt the new circumstances to them. . . .

"In view of the admission of illegality made by the Imperial

Government when it pleaded the right of retaliation in defense of its acts, and in view of the manifest possibility of conforming to the established rules of naval warfare, the Government of the United States cannot believe that the Imperial Government will longer refrain from disavowing the wanton act of its naval commander in sinking the *Lusitania* or from offering reparation for the American lives lost, so far as reparation can be made for a needless destruction of human life by an illegal act. . . ."

The Government of the United States found itself unable to accept the proposals made by Germany with reference to security of ocean travel. "The very agreement," it said, "would, by implication, subject other vessels to illegal attack and would be a curtailment and therefore an abandonment of the principles for which this Government contends and which in times of calmer counsels every nation would concede as of course."

In conclusion, the American note stated that "friendship itself prompts it to say to the Imperial Government that repetition by the commanders of German naval vessels of acts in contravention of those rights must be regarded by the Government of the United States, when they affect American citizens, as deliberately unfriendly."

While the case of the *Lusitania* was pending, other cases, similar in principle though not so tragic in degree, became the subject of diplomatic representation to Germany on the part of the United States.[1] On May 25, 1915, the American steamer *Nebraskan* was attacked by a German submarine, but remained afloat. In this case the German Government expressed regret and "declared its readiness to make compensation for the damage thereby sustained by American citizens." On July 9 the British passenger steamer *Orduna* was fired upon by a submarine, but made good its escape. On August 19, however, a more serious situation was created by the sinking, through German submarine attack, of the British liner *Arabic*, resulting in the death of American citizens. On September 1, before making any explanations in this case, the German Ambassador at Washington addressed the following communication to the Secretary of State:

[1] The case of the *Lusitania* is still unsettled (November, 1916).

GERMAN EMBASSY,
WASHINGTON, *September 1, 1915.*

My dear Mr. Secretary:

With reference to our conversation of this morning I beg to inform you that my instructions concerning our answer to your last *Lusitania* note contain the following passage:

"Liners will not be sunk by our submarines without warning and without safety of the lives of non-combatants, provided that the liners do not try to escape or offer resistance."

Although I know that you do not wish to discuss the *Lusitania* question till the *Arabic* incident has been definitely and satisfactorily settled, I desire to inform you of the above because this policy of my Government was decided on before the *Arabic* incident occurred.

I have no objection to your making any use you may please of the above information.

I remain, etc.,

J. BERNSTORFF.

In its note of October 5 the German Government admitted that the attack upon the *Arabic* had been against instructions, and it expressed regret and promised indemnity.

Then followed the sinking of the *Ancona*, an Italian liner, by an Austrian submarine, with loss of American life. Protest was made by the Government of the United States and promise given by Austria to indemnify. During the winter of 1915–16 operations in the war zone were, in general, carried on conformably to accepted principles, but in March, 1916, another series of submarine attacks took place, culminating in the sinking of the Channel steamer *Sussex* on March 24. This precipitated a crisis second only to that caused by the sinking of the *Lusitania*. A strongly worded note sent to Berlin on April 18 declared that "unless the Imperial Government should now immediately declare and effect an abandonment of the present methods of submarine warfare against passenger and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether. This action the Government of the United States contemplates with the greatest reluctance, but feels constrained to take in behalf of humanity

and the rights of neutral nations." After a period of tense uncertainty the German Government replied on May 4, consenting to a further restriction of submarine warfare as follows:

"The German Government . . . notifies the Government of the United States that the German naval forces have received the following orders: In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance."

The German note, however, reserved "complete liberty of decision" in case the Government of the United States should not succeed in making Great Britain respect the rights of neutrals. But on this point the American note of May 8, while welcoming Germany's change of method, notified the German Government that the rights of American citizens upon the high seas should not "in any way or in the slightest degree be made contingent upon the conduct of any other Government affecting the rights of neutrals and non-combatants. Responsibility in such matters is single, not joint; absolute, not relative."

(*White Papers*, published by the Government of the United States; *American Journal of International Law, Supplement*, July, 1915, pp. 86–88, 129–41, 149–53, 155–57.)

THE USE OF THE AMERICAN FLAG (1915)

UNDER date February 4, 1915, the German Admiralty issued the following proclamation:

"1. The waters surrounding Great Britain and Ireland including the whole English channel are hereby declared to be war zone. On and after the 18th of February, 1915, every enemy merchant ship found in the said war zone will be destroyed without its being always possible to avert the dangers threatening the crews and passengers on that account.

"2. Even neutral ships are exposed to danger in the war zone as in view of the misuse of neutral flags ordered on January 31 by

the British Government and of the accidents of naval war, it can not always be avoided to strike even neutral ships in attacks that are directed at enemy ships.

"3. Northward navigation around the Shetland Islands, in the eastern waters of the North Sea and in a strip of not less than 30 miles width along the Netherlands coast is in no danger.

"VON POHL,

"*Chief of the Admiral Staff of the Navy.*"

For the purpose of protecting British shipping and perhaps also to embarrass Germany, the British Foreign Office, in a communication of February 8, 1915, announced that it was permissible for English vessels to raise a neutral flag to avoid capture.

In a telegram dated February 10, 1915, Secretary Bryan referred to these two publications and also to the "reports in the press that the captain of the *Lusitania*, acting upon orders or information received from the British authorities, raised the American flag as his vessel approached the British coasts, in order to escape anticipated attacks by German submarines."

The American Ambassador was instructed to point out to the British Government that "the occasional use of the flag of a neutral or an enemy under the stress of immediate pursuit and to deceive an approaching enemy, seems to this Government a very different thing from an explicit sanction by a belligerent government for its merchant ships generally to fly the flag of a neutral power within certain portions of the high seas which are presumed to be frequented with hostile warships. The formal declaration of such a policy of general misuse of a neutral's flag jeopardizes the vessels of the neutral visiting those waters in a peculiar degree by raising the presumption that they are of belligerent nationality regardless of the flag which they may carry.

"In view of the announced purpose of the German Admiralty to engage in active naval operations in certain delimited sea areas adjacent to the coasts of Great Britain and Ireland, the Government of the United States would view with anxious solicitude any general use of the flag of the United States by British vessels traversing those waters. A policy such as the one which His Majesty's Government is said to intend to adopt, would, if the declaration

of the German Admiralty is put in force, it seems clear, afford no protection to British vessels, while it would be a serious and constant menace to the lives and vessels of American citizens."

The British Government was informed that "earnest representations" were being addressed "to the German Government in regard to the dangers to American vessels and citizens if the declaration of the German Admiralty is put into effect."

In the communication above referred to (note of February 10, 1915) the Secretary of State warned the German Government that it would be held responsible for any injury to American lives and property resulting from the application of the proposed measures of retaliation against Great Britain. Mr. Bryan said:

"To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized. . . .

"If the commanders of German vessels of war should act upon the presumption that the flag of the United States was not being used in good faith and should destroy on the high seas an American vessel or the lives of American citizens, it would be difficult for the Government of the United States to view the act in any other light than as an indefensible violation of neutral rights which it would be very hard indeed to reconcile with the friendly relations now so happily subsisting between the two Governments.

"If such a deplorable situation should arise, the Imperial German Government can readily appreciate that the Government of the United States would be constrained to hold the Imperial German Government to a strict accountability for such acts of their naval authorities and to take any steps it might be necessary to take to safeguard American lives and property and to secure to American citizens the full enjoyment of their acknowledged rights on the high seas.

"The Government of the United States . . . expresses the confident hope and expectation that the Imperial German Government can and will give assurance that American citizens and their vessels will not be molested by the naval forces of Germany otherwise than by visit and search, though their vessels may be traversing the sea area delimited in the proclamation of the German Admiralty.

"It is added for the information of the Imperial Government that representations have been made to His Britannic Majesty's Government in respect to the unwarranted use of the American flag for the protection of British ships."

In its note of February 16, the German Government did not attempt to maintain that the measures which it proposed would be justified under ordinary circumstances, but they considered them as retaliation against Great Britain's illegal interference with neutral commerce bound for Germany.[1] They pointed out that Great Britain had given no heed to the protests of the United States and other neutrals against interference with their [neutral] commerce, whereas Great Britain herself continued to receive supplies of contraband unusual in amount. In view of this failure on the part of neutrals to make their rights respected, the German Government considered it but reasonable that they should not interfere with belligerent operations which Germany deemed necessary for her self-preservation. The assurance was given that, in as far as possible, every effort would be made not to endanger neutral vessels, though it might be impossible to avoid unintentional injury to them, especially if British vessels should continue to misuse neutral flags. In any event, it was remarked, there would be danger to all vessels passing through the zone, from floating mines. Incidentally it was suggested that the American Government might convoy its vessels.

In its memorandum of February 19, 1915, the British Government, although they did not directly admit or deny the truth

[1] The measures which Germany justified on the ground of retaliation were themselves made the ground for further retaliation on the part of the Allies.

In a communication of March 1, 1915, the British Ambassador at Washington announced that his Government would consider it necessary to frame retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany.

of the allegation that such instructions had been issued, excused the use of the American flag in the instance of the steamship *Lusitania*, and referred to the request of American passengers that their flag be raised. In general, the British Government considered that the raising of foreign flags was provided for by British regulations, and was consonant with the practice of other nations.[1] Sir Edward Grey remarked that his Government, when neutral, had not objected to the use of the British flag by the vessels of states at war to escape destruction, as was evidenced by instances of its use by American vessels in our Civil War. He disclaimed any intention to direct British merchant vessels to raise neutral flags, but said his Government did not consider that the United States could fairly expect them to order British merchant vessels to forego the means — always hitherto permitted — of escaping not only capture but the much worse fate of sinking and destruction. Such a prohibition would be unreasonable, especially in view of Germany's announcement that her naval commanders would sink British merchant vessels at sight, without complying with the requirements recognized by international law relative to the verification of the flag and the character of the vessel, and without regard to the obligation to provide for the safety of the crew and passengers. He pointed out to the American Government that any danger to neutrals from the use of their flag could only be the direct consequence of Germany's unlawful procedure. It seemed therefore meet that neutral governments should direct their complaints to the German Government.

[1] In these representations of February 10, the American Government reserved "for future consideration the legality and propriety of the deceptive use of the flag of a neutral power in any case for the purpose of avoiding capture." In its note of February 15, 1915, the Dutch Government lodged a formal protest against the use of its flag under any conditions whatsoever, stating that it considered such action as particularly unjustifiable in time of war, when it was too serious to escape the attention of the signatory powers of the Declaration of Paris. They pointed out that the Dutch regulations did not authorize the use of other flags, and declared that "in the absence of international regulations each state had the right to determine how its flag should be used." Although they recognized "that the British Government might not always be able to prevent its merchantmen from using a neutral flag, they considered themselves justified in expecting that the British Government would not authorize an abuse which might expose Dutch commerce to the perils of war." (The French text is given in *Revue Générale de Droit International Public*, March to August, 1916, *Documents*, p. 120.)

In his identic notes of February 20 to the British and German Governments, Secretary Bryan, in the interests of neutral shipping commerce, made certain proposals for the conduct of belligerent operations, notably in regard to the laying of mines; it was likewise suggested that Germany and Great Britain agree that "each will require their respective merchant vessels not to use neutral flags for the purpose of *disguise or ruse de guerre*."

The portion of the German reply (March 1, 1915) relating to the use of neutral flags was as follows:

"As provided in the American note, this restriction of the use of the submarines is contingent on the fact that enemy mercantile abstain from the use of the neutral flag and other neutral distinctive marks. It would appear to be a matter of course that such mercantile also abstain from arming themselves and from all resistance by force, since such procedure contrary to international law would render impossible any action of the submarines in accordance with international law." Germany made no reference to her own use of the neutral flag, perhaps because there had been no complaints of her action in this respect.

After the British Government had had an opportunity to consider the German answer, they devoted their reply principally to an attack upon Germany's treatment of Belgium and her methods of warfare, which were seemingly made a justification for the irregularities of her enemies. The suggested prohibition upon the use of foreign flags was passed over in silence.

(Prepared from the American, British, and German notes. See *American Journal of International Law, Supplement,* July, 1915, p. 55, *passim.* For the sake of brevity and clearness the exact terms and language of the original notes have not been always retained.)

§ 58. INTERNATIONAL TRADE

(See also Chapter VIII)

THE CONTINENTAL SYSTEM (1806–14)

On April 8, 1806, Mr. Fox, British Secretary for Foreign Affairs, informed Mr. Monroe, American Minister at London, that "in consequence of His Majesty the King of Prussia having taken possession of various parts of the Electorate of Hanover, and other dominions belonging to His Majesty [the King of Great Britain], in a forcible and hostile manner, and having also notified that all British ships shall be excluded from the ports of the Prussian dominions, and from certain other ports in the north of Europe, and not suffered to enter or trade therewith, in violation of the just rights and interests of His Majesty and his dominions, and contrary to the established law and practice of nations in amity with each other: His Majesty has judged it expedient to establish the most rigorous blockade at the entrances of the Ems, the Weser, the Elbe, and the Trave, and to maintain and enforce the same in the strictest manner, according to the usages of war, acknowledged and allowed in similar cases." And Mr. Monroe was requested "to apprise the American consuls and merchants residing in England that . . . from this time all the measures authorized by the law of nations, and the respective treaties between His Majesty and the different neutral powers, will be adopted and executed with respect to vessels attempting to violate the said blockades after this notice." (*Am. State Papers, For. Rel.*, vol. III, p. 267.)

This was followed, on May 16, 1806, by further notice that measures had been taken to blockade the coast, rivers and ports from the Elbe to Brest because of "the new and extraordinary means resorted to by the enemy for the purpose of distressing" British commerce. On September 25, 1806, however, so much of the blockade as extended from the Elbe to the Ems "was for the present discontinued."

Napoleon's answer to the British declaration of blockade was

the Berlin Decree, issued November 21, 1806. After a recital of alleged illegal practices on the part of Great Britain — among others, "that she declares blockaded, places before which she has not a single vessel of war, although a place ought not to be considered blockaded but when it is so invested as that no approach to it can be made without imminent hazard" — it was resolved to enforce against England "the usages which she has consecrated in her maritime code." To that end it was decreed:

"1. The British islands are declared in a state of blockade.

"2. All commerce and correspondence with the British islands are prohibited. In consequence, letters or packets addressed either to England, to an Englishman, or in the English language, shall not pass through the post office, and shall be seized.

"3. Every subject of England, of what rank and condition soever, who shall be found in the countries occupied by our troops, or by those of our allies, shall be made a prisoner of war.

"4. All magazines, merchandise, or property whatsoever belonging to a subject of England, shall be declared lawful prize.

"5. The trade in English merchandise is forbidden. All merchandise belonging to England, or coming from its manufactories and colonies, is declared lawful prize.

"6. One-half of the proceeds of the confiscation of the merchandise and property declared good prize by the preceding articles, shall be applied to indemnify the merchants for the losses which they have suffered by the capture of merchant vessels by English cruisers.

"7. No vessel coming directly from England, or from the English colonies, or having been there since the publication of the present decree, shall be received in any port.

"8. Every vessel contravening the above clause, by means of a false declaration, shall be seized, and the vessel and cargo confiscated as if they were English property.

"9. Our tribunal of prizes at Paris is charged with the definitive adjudication of all controversies which may arise within our empire, or in the countries occupied by the French army, relative to the execution of the present decree. Our tribunal of prizes at Milan shall be charged with the definitive adjudication of the

said controversies, which may arise within the extent of our kingdom of Italy.

"10. The present decree shall be communicated by our Minister of Exterior Relations to the Kings of Spain, of Naples, of Holland, of Etruria, and to our allies, whose subjects, like ours, are the victims of the injustice and the barbarism of the English maritime laws."

"The present decree," it was announced, "shall be considered as the fundamental law of the empire, until England has acknowledged that the *rights of war* are the same on land as on sea, that it cannot be extended to any private property whatever, nor to persons who are not military, and until the right of blockade be restrained to fortified places, actually invested by competent forces." (*Am. State Papers, For. Rel.*, vol. III, pp. 289–90.)

Great Britain replied to the Berlin Decree by the Orders in Council of January 7 and November 11, 1807. That of January 7 was, in part, as follows:

". . . His Majesty is thereupon pleased, by and with the advice of his privy council, to order, and it is hereby ordered, that no vessel shall be permitted to trade from one port to another, both which ports shall belong to or be in the possession of France or her allies, or shall be so far under their control as that British vessels may not trade freely thereat; and the commanders of His Majesty's ships of war and privateers shall be, and are hereby, instructed to warn every neutral vessel coming from any such port, and destined to another such port, to discontinue her voyage, and not to proceed to any such port; and any vessel, after being so warned, or any vessel coming from any such port, after a reasonable time shall have been afforded for receiving information of this His Majesty's order, which shall be found proceeding to another such port, shall be captured and brought in, and together with her cargo shall be condemned as lawful prize. . . ." (*Am. State Papers, For. Rel.*, vol. III, pp. 267–68.)

On November 11 further announcement was made that

". . . His Majesty is therefore pleased . . . to order . . . that all the ports and places of France and her allies, or of any other country at war with His Majesty, and all other ports or places in Europe, from which, although not at war with His

Majesty, the British flag is excluded, and all ports or places in the colonies belonging to His Majesty's enemies, shall, from henceforth, be subject to the same restrictions in point of trade and navigation, . . . as if the same were actually blockaded by His Majesty's naval forces, in the most strict and rigorous manner: and it is hereby further ordered and declared, 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. . . ." Exception, however, was made in favor of ships carrying on their commerce with the enemy by way of British ports. (*Am. State Papers, For. Rel.*, vol. III, p. 269.)

Napoleon promptly retaliated with the Milan Decree of December 17, 1807, by which it was declared:

"1. Every ship, to whatever nation it may belong, that shall have submitted to be searched by an English ship, or to a voyage to England, or shall have paid any tax whatsoever to the English Government, is thereby and for that alone declared to be denationalized, to have forfeited the protection of its king, and to have become English property.

"2. Whether the ships thus denationalized by the arbitrary measures of the English Government enter into our ports, or those of our allies, or whether they fall into the hands of our ships of war, or of our privateers, they are declared to be good and lawful prize.

"3. The British islands are declared to be in a state of blockade, both by land and sea. Every ship, of whatever nation, or whatsoever the nature of its cargo so may be, that sails from the ports of England, or those of the English colonies, and of the countries occupied by English troops, and proceeding to England, or to the English colonies, or to countries occupied by English troops, is good and lawful prize, as contrary to the present decree, and may be captured by our ships of war, or our privateers, and adjudged to the captor. . . ."

These measures, however, were to "cease to have any effect

with respect to all nations who shall have the firmness to compel the English Government to respect their flag;" and it was further declared that "the provisions of the present decree shall be abrogated and null, in fact, as soon as the English abide again by the principles of the law of nations." (*Am. State Papers, For. Rel.*, vol. III, pp. 290–91.)

The United States, being neutral and having a large commerce with both belligerents, naturally felt the full force of these illegal practices. In the opinion of Jefferson, as expressed in a communication to Congress on March 17, 1808, these decrees and orders "prove more and more the expediency of retaining our vessels, our seamen, and property within our harbors, until the dangers to which they are exposed can be removed or lessened," for already, by an act of Congress of December 22, 1807, an embargo had been laid on all shipping in the ports of the United States, preventing merchant vessels from sailing to any foreign port, with the exception of foreign ships in ballast. As usual, Napoleon was quick to take advantage of this anomalous situation. On April 17, 1808, by the Bayonne Decree, orders were given "to seize all American vessels now in the ports of France, or which may come into them hereafter," for the reason, as ingenious as it was novel, that "no vessel of the United States can now navigate the seas, without infracting a law of the said States, and thus furnishing a presumption that they do so on British account, or in British connection." (*Am. State Papers, For. Rel.*, vol. III, p. 291.)

The policy of the embargo was soon given up and that of non-intercourse took its place. Under an act of Congress of March 1, 1809, both ships and merchandise of the offending states were forbidden to enter the ports of the United States after May 20 of that year. But should either France or Great Britain relax its illegal restrictions upon American commerce, the President was authorized to suspend, by proclamation, the operation of the act with respect to the belligerent favoring the United States.

Napoleon made the Non-Intercourse Act the pretext for the Rambouillet Decree, issued March 23, 1810, and published in May of that year but going back in its effect to May, 1809. By this Decree it was ordered that:

"All vessels navigating under the flag of the United States, or possessed, in whole or in part, by any citizen or subject of that power, which, counting from the 20th May, 1809, have entered or shall enter into the ports of our empire, of our colonies, or of the countries occupied by our arms, shall be seized, and the product of the sales shall be deposited in the surplus fund (*caisse d'amortissement*).

"There shall be excepted from this regulation the vessels which shall be charged with dispatches, or with commissions of the Government of the said States, and who shall not have either cargoes or merchandise on board." (*Am. State Papers, For. Rel.*, vol. III, p. 384.)

Relying on promises given by the French Government to repeal the decrees, the Government of the United States, in November, 1810, freed French commerce from the restrictions of the Non-Intercourse Act, but proceeded to enforce it with respect to Great Britain. But the French promises proved ambiguous and, far from repealing the obnoxious measures, the French Government took steps to confiscate American ships and merchandise then sequestered in France or otherwise within French jurisdiction.[1]

After the restoration of peace, however, the United States presented the so-called "spoliation claims" against France, which, after years of delay and much diplomatic friction, were finally settled by the payment by France, in 1836, of $5,558,108.07.

All similar claims against Great Britain were, of course, liquidated by the War of 1812.

(*American State Papers, Foreign Relations*, vol. III, *passim;* Moore: *International Arbitrations*, vol. V, pp. 4447–85; *American Journal of International Law*, vol. X [1916], pp. 492–508; Henry Adams, *History of the United States, 1809–13*, vol. V, *passim.*)

[1] The secret decree of August 5, by which Napoleon put this climax upon his double-dealing, was later discovered by Gallatin, when American Minister at Paris. Had it been known at the time, he declared, the United States would not have taken the ground, relative to the Berlin and Milan Decrees, which ultimately led to war with Great Britain. This important and instructive episode is discussed by Henry Adams: *History of the United States, 1809–13*, vol. V, p. 259, *passim.*

THE BRITISH INTERDICT (1915–16)

By various enactments of confusing complexity and cunning composition Great Britain has succeeded in so strangling neutral trade with Germany as to constitute a virtual interdict against her. She has attained all the advantage of an effective blockade without accepting the recognized obligations imposed by that institution. The means by which Great Britain attained her purpose have been discussed under *The Doctrine of Ultimate Consumption* [1] (p. 418).

[1] Sir Frank Newnes, acting as Assistant Secretary of the Committee on Detention of Neutral Ships, in an address before the American Luncheon Club gave the following account of the means employed:

"Every ship east or west bound passing up or down the English Channel or by the north of Scotland, is stopped by one of the British men-of-war, boarded and examined. These ships are armed merchantmen and are on duty right across from the north of Scotland to Norway, one ship every twenty miles — they are manned by the Royal Naval Reserve men from the mercantile marine who are used to examining ships' papers and documents. A copy of the ships' manifest is then wired up to London — and to give you some idea of the labor involved some ships have between three hundred and six hundred different descriptions of goods on board, all of which have to be sent out — and thus these telegrams run to many thousands of words. The telegraphed manifest goes at once before the Contraband Committee, which sits every day and all day, presided over by E. M. Pollock, King's Counsel and Member of Parliament for Warwick. The committee considers each item, and if it has any reasonable suspicion that any items are destined for the enemy the ship will be detained and ordered to unload the suspected items at a suitable port. If she has nothing suspicious the ship can proceed at once; and I may say that the Contraband Committee works so expeditiously that its decision on the ship or goods is nearly always given the same day that the manifest is put before it.

"When the manifest is telegraphed to the Contraband Committee it is also telegraphed to the War Trade Intelligence Department, which has been created for the purpose of supplying information on which the Contraband Committee can decide whether certain goods should be allowed to go forward or not.

"In addition to the Contraband Committee there is the Enemy Exports Committee presided over by Commander Leverton Harris, M.P., which deals with goods exported from Germany. This is a much simpler task than dealing with imports into Germany, as American and other countries, for the purpose of their customs, already require that the country of origin shall be given, and the effect has been that the export trade of Germany was almost immediately killed, and there is no doubt that this has been one of the great causes in the fall of the mark, as it compels Germany to pay in gold and not in goods.

"When suspect goods are unloaded from a ship they are at once put into 'prize,' and the owner of the goods has to make a claim for their restitution and must bring an action for their recovery. Such actions are tried in the Admiralty Court, which is presided over by Sir Samuel Evans; and the goods are released, condemned, or dealt with as the court may deem just.

"I have already told you that the desire of the British Government is to carry out

In reference to the measures of the Allies, the German note of February 16, 1915, declares "that the intention of all these aggres-

this blockade with as little delay or inconvenience to neutrals as is possible, and I will now give you some of the arrangements made to insure this:

"(1) Guarantees by importers.

"Agreements have been made with representative associations of merchants in neutral countries, under which they undertake that goods consigned to them will not be exported to Germany nor be used in the manufacture of goods which are for export to Germany. The first of these was the Netherlands Oversea Trust, which was so successful that similar associations were formed in other countries — in Denmark the Danish Merchants' Guild, and in Switzerland the Société Surveillance Suisse.

"Goods can now be exported from this country practically under license only, and such licenses are usually granted if the goods are consigned to these associations.

"(2) Agreements with shipping lines: Agreements have been made with many shipping lines under which their ships are allowed to go forward, even if they have contraband on board or are carrying goods which our authorities suspect are for the enemy, on their undertaking to return such goods to this country for the prize court or to retain them in a neutral country until after the war. And in addition to this:

"(3) Bunker coal from any port in the British Empire is refused to neutral ships unless they comply with certain conditions, which insure that the goods they carry do not go to the enemy.

"Both these classes of ships are called 'White Ships,' and they are a large and increasing number, and most of the leading lines have made such arrangements. I would strongly advise any of you, when shipping goods, to see that the ship is a 'White Ship.' If a ship is not a 'White Ship,' there is of course a presumption that it is or may be carrying suspected goods, and thus it may be delayed and you suffer the suspicion attaching to other people's goods.

"(4) Skinner Scheme — This is a scheme which was suggested by Mr. Skinner, the American Consul General in London. It is this: A department has been opened in the British Embassy at Washington to which an American exporter can go and give particulars of the nature and amount of the goods he desires to export, and also the name of the consignee. The department will at once cable here to the Contraband Committee, who will cable him whether his goods would pass the blockade or not, and thus he can decide whether to ship them. If he ships the goods the papers are marked accordingly, and some American lines will now only take goods which have passed the *Skinner scheme*.

"(5) Rationing — It has been found that since the war broke out certain neutral countries have been importing a vastly increased amount of certain goods beyond their pre-war and normal requirements, and unless they were formerly importing large quantities of these goods from Germany and Austria there is an overwhelming presumption that they were imported for the purpose of re-export to Germany, and there is no doubt that this was done on a large scale.

"To avoid this the system of rationing has been adopted under which the import of a given article into a neutral country is limited to the amount of its true domestic requirements. It is a very fair system, allowing as it does any neutral to carry on its own legitimate trade and to supply its own wants.

"You will note thus that it may happen that when you apply to the War Trade Department for a license to export certain articles to neutral countries it may be refused not because there is any doubt in regard to your consignee, but for the reason that the country has already been supplied with the rationed amount of such goods."

(Extract from correspondence of the Associated Press (London, July 8) as printed in the New York *Times*, July 23, 1916.)

sions is to cut off Germany from all supplies and thereby to deliver up to death by famine a peaceful civilian population, a procedure contrary to law of war and every dictate of humanity."

In explanation of the reasons why the German Government felt compelled to employ submarines by way of reprisals against Great Britain's unwarranted interference with neutral trade, Count Bernstorff presented (March 8, 1916) a memorandum setting forth the specific violations alleged with references to the American notes of protest as supporting his assertions:

"Now Germany is facing the following facts:

"(*a*) A blockade contrary to international law (compare American note to England of November 5, 1915) has for one year been keeping neutral trade from German ports and is making German exports impossible.

"(*b*) For 18 months, through the extending of contraband provisions in violation of international law (compare American note to England of November 5, 1915), the overseas trade of neighboring neutral countries, so far as Germany is concerned, has been hampered.

"(*c*) The interception of mails in violation of international law (compare American memorandum to England of January 10, 1916) is meant to stop any intercourse of Germany with foreign countries.

"(*d*) England, by systematically and increasingly oppressing neutral countries, following the principle of 'might before right,' has prevented neutral trade on land with Germany so as to complete the blockade of the central powers intended to starve their civil population.

"(*e*) Germans met by our enemies on the high seas are deprived of their liberty no matter whether they are combatants or non-combatants.

"(*f*) Our enemies have armed their merchant vessels for offensive purposes, theoretically making it impossible to use our U boats according to the principles set forth in London Declaration (compare American memorandum of February 8, 1916)."

In the course of his speech before the Reichstag, April 5, 1916, the German Chancellor declared:

"In the effort to blockade us and starve us out, to extend the

war to the entire German nation, to our women and our children, Great Britain and her allies have ridden roughshod over all neutral rights of trade and intercourse with the Central European states. The American note of November 5, 1915, which contains a true description of the British violations of international law, has, as far as I know, not been answered by the British Government up to the present day. Like this, all the other protests of neutrals to our enemies have led to nothing but further violations of neutrality. England went so far as to forbid even such humane acts on the part of the American philanthropists as the sending of milk to German children! The last Order in Council threatens trade to neutral ports with new unlawful aggravations of the blockade rules, against the previous violations of which the American Government has already protested. No fair-minded neutral, no matter whether he favors us or not, can contest our right on our part to take measures of defense against this war of starvation, which is contrary to international law. No one can expect us to permit the arms of defense at our disposal to be wrested from us. We use them, and must use them. We respect the legitimate interests of neutrals in trade and commerce, but we expect that this respect be appreciated and that our right and our duty be recognized to use all means possible for retaliating against this policy of starvation which sets at defiance not only international law but the plainest duties of humanity."

(*International Conciliation*, No. 104; extract from speech of Von Bethmann Hollweg, Imperial German Chancellor, before the Reichstag, April 5, 1916. Translation furnished through the German Embassy.)

THE BLACK-LISTING OF AMERICAN MERCHANTS (1916)

On January 19, 1916, nearly a month after its enactment, Ambassador W. H. Page telegraphed the text of the Trading with the Enemy (extension of powers) Act,[1] 1915. On January 25 Secretary Lansing declared that the Department of State had reached the conclusion that the act "is pregnant with possi-

[1] See *supra*, p. 130.

bilities of undue interference with American trade, if in fact such interference is not now being practiced";[1] and the American Ambassador was instructed "to present . . . a formal reserva-

[1] The following extract from the New York *Times* (July 20) is a "special" from Washington dated July 19, based upon information from official sources: "In its investigation of the operation of the enemy trading blacklist the State Department has discovered that vessels engaged in the South American trade have been refusing to carry the goods of blacklisted persons because they have found that coal would be refused such vessels at Jamaica and other British ports. This is because the British subjects in Jamaica assert that if they furnish coal to ships that carry the goods of blacklisted firms it would be regarded by the British authorities as trading with the enemy. These merchants in Jamaica have set up the argument that the coal which they sell is their own coal; that they may sell it to whom they please and withhold it from sale to any persons to whom its delivery may be regarded as trading with the enemy or with persons in association with those who trade with the enemy.

"The investigation has shown that ships threatened with a refusal of coal under these circumstances have refused to carry the goods of persons in other neutral countries who have been blacklisted. On account of the great demand for ocean tonnage and the great profits now derivable from ocean freight transportation, companies thus threatened with refusal of coal have refused shipments of blacklisted firms in order to continue the coaling of their ships at Jamaica. Steamship companies now are able to make enough money to be able to choose their freight and to refuse certain shipments. Whether transportation lines leaving American ports will be able to refuse the shipments of American firms on the new blacklist without running the risk of violation of American law has not been determined and is being considered by officials in Washington.

"It was recalled by an official to-day that some months ago it was found that vessels flying the flags of Denmark and of Scandinavian countries were not subject to prosecution for refusing to take freight from this country when destined for German ports or [*sic*] ultimate destination. These ships had refused to take freight offered for shipment when destined ultimately to Germany, because if such shipments had been accepted the ships would have been detained at Kirkwall by the British Government. Rather than lose the day or days involved in such detention, these shipping companies refused to take shipments destined ultimately for delivery in Germany, regardless of whether the goods were contraband.

"In the case of these lines, more freight was offered than the lines could carry, and for that reason no loss was sustained in refusing to haul the goods whose transportation would have subjected the vessels to the loss that would be occasioned by the detention of the ships at Kirkwall for examination."

On the same date (July 20) the New York *Times* gave a very full account of the opinions expressed by members of the firms listed. Among these was the following statement:

"About six months ago we received intimations from correspondents in London that discrimination was being exercised against us. As we do business chiefly with South America and the West Indies, and are purely an American house, this naturally was surprising, especially as due carefulness had been taken since the beginning of the war to observe as far as possible the declarations of the British Order in Council.

"I went to Washington immediately and through the good offices of Government officials was able to discuss the matter with a Secretary of the British Embassy. I told him that I was an American born, while my partners were naturalized Americans of long residence in this country. 'If the fact that the house and the partners

tion . . . of the right to protest against the application of this Act in so far as it affects the trade of the United States. . . ." [1]

[1] The later protest of July 26 was directed against the interference with trade of American citizens and seemed to slight the national trade other than that carried on by nationals (*post*, p. 606 *n*).

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bear German names,' I said, 'has influenced the authorities to blacklist us, I can assure you that we are an American firm out and out.'

"'Names have nothing to do with it,' replied the Secretary. 'We have secured information showing that you have been doing business with houses in Germany.' Thereupon he showed me a copy of a cablegram, sent from New York by wireless, in which our firm had made inquiries of a Hamburg house in regard to a consignment of coffee.

"'That message,' I said, 'was sent for a client in South America, at his request, and our firm was not acting for itself in any respect.'

"The Secretary then mentioned another cable which was also sent by us for a client and when I said so, he acknowledged that it appeared as though cause was not shown why we should be blacklisted. I asked that our name be taken from the list. He replied courteously that the Embassy had no power to do this, but that if we wrote to the Foreign Office it was possible that our request might be granted. I said then:

"'This we certainly will not do. We would not lower our dignity to such an extent as to request permission of the British Government for an American firm to do business abroad. I am sure that my partners would agree with me that it would be better to close up our affairs rather than seek authority from a foreign Government to transact business.'"

Mr. David Lawrence (special Washington Correspondent of the *Evening Post* and at one time generally believed to be the unofficial mouthpiece of the State Department), in the *Post* of July 24 discusses the blacklist and states that officials of the Department were awake to the possible injury which might result from the Order in Council of November 10, 1915, which prohibited sailing from any foreign port to any other foreign port without securing a license from a Committee in Great Britain specially appointed by the President of the Board of Trade.

An extract from Mr. Lawrence's letter published in the *Evening Post* on December 31 is said to "record the feeling of the State Department on the subject":

"Almost unobserved by the world at large, but not unnoticed by Secretary Lansing and the officials of the State Department, Great Britain has put into effect a new Order in Council that practically prevents German-Americans as well as German subjects long resident in this country, or any Americans unfavorably disposed toward the Allies, from engaging in commerce with other neutral countries wherever British vessels are the only carriers between such foreign ports. . . . An American merchant who trades with Argentina and who is a member of a German firm in the United States, and has been in the habit of shipping his goods on British vessels to Buenos Aires, now may suddenly find that he is without transportation facilities for his wares. Neutral vessels are few and rates are high. The German merchant as a consequence must pay the higher rates or find that his trade has been swallowed by British merchants or American firms much more favorably disposed to the Allies. . . . The Order in Council can be operated therefore as a boycott and the American merchants will be none the wiser. In fact, it can be directed against any American merchants who happen to be in disfavor with the British Government, either on account of previously successful statements [*sic*] to get contraband into Germany or political agitation here unfavorable to the Allies. The British Committee can act secretly. It need give no account to anybody, least of all to any foreign Government, of its proceed-

Three weeks later (February 16, 1916) the Foreign Trade Department of the British Foreign Office furnished Ambassador Page with information relative to the effects of the Act. Mr. L. Worthington Evans, head of the bureau, explained that "the Act was framed with the object of bringing British trading with the enemy regulations into greater harmony with those adopted by

ings, of the reasons why it grants a license to one shipping country and not to another and of the stipulations under which it bestows a permit on a British vessel to carry the goods of certain American firms. There need be no proof — only suspicion."

The correspondent by way of additional comment to this previous statement says: "It was pointed out in the same connection at the time that officials of the Department were vexed, but recognized that England was quite within her rights in exercising authority over her own shipping. Some investigation was made of the international law on 'neutral domicile' and the doctrines of Daniel Webster were cited to show that American merchants, even of German birth, who had taken up permanent residence in the United States were entitled to protection against unfair discrimination." (*Evening Post*, July 24.)

The well-informed New York *Evening Mail* (July 26) printed an editorial on "The Real Blacklist," from which the following extract is taken:

"The real British blacklist and its method of operation are not realized in this country at all. The real blacklist is in the hands of British consuls in American ports. For fear of detention, no ship, British or neutral, will clear from an American port for any oversea destination until its manifest, or list of shipments, is officially approved by the British consul. It is therefore absolute arbitrator of the commercial lives of American business men in the foreign trade. That is why so many of those on the published blacklist expressed no surprise. They have been blacklisted all along.

"British consuls in our own ports, the British censors of European cable dispatches (which must all pass through London) and the British censors of American business letters stolen from sealed mail bags on the high seas — these are the agencies that have it in their hands to destroy what American firms they choose. Who can trade if he cannot correspond, cable or ship?"

The New York *Times* (July 25) gives the following account of the Textile Alliance, Inc., No. 45 East Seventeenth Street: "The Textile Alliance was formed shortly after the outbreak of hostilities for the express purpose of handling such wool as the British Government was willing or able to spare for the use of American wool-users. Russia placed an embargo on all wool shipments from the empire, while Great Britain and its colonies undertook to see to it that no wool produced in British territories found its way, either in the raw or in the manufactured condition, into Germany or Austria-Hungary. The embargoes of both Russia and Great Britain threatened for a time to cause a wool famine in this country. It was then decided, after urgent representations by American consumers, that the British Government would make shipments to American firms only through the medium of the Textile Alliance after that body had approved the applications for such supplies from the British dominions. The condition under which applications were accepted required the individual or firm to agree that no shipments of either wool or wool fabrics would be sent to 'enemies' of the Allies. In addition, merchants were required to pay first one per cent, and more recently one-half of one per cent, on the invoiced value of all British wool so received, to the Textile Alliance, this payment, it was explained yesterday, being merely to cover the expenses of the Alliance's service."

the French Government since the commencement of the war by applying in some degree the test of nationality in the determination of enemy character in addition to the old test of domicile, which experience has shown cannot provide a sufficient basis under modern conditions for measures intended to deprive the enemy of all assistance, direct or indirect, from national resources."

The communication further expressed for the British Government the opinion that they had abstained from using the full measure of their rights as belligerents,[1] but could not admit any limitation upon their right of restricting the "commercial activities of their nationals in any manner which may seem desirable to them by the imposition of prohibitions and penalties which are operative solely upon persons under their jurisdiction." [2]

Finally the assurance was given that care would be taken to

[1] Hitherto belligerents have applied either the rule of domicile or the rule of nationality to determine enemy character. It is doubtful whether a belligerent can in the course of hostilities change his traditional system to the detriment of neutrals, much less may he apply a new rule without abandoning the old.

[2] Even if the enforcement of the penalty is limited to persons under British jurisdiction, the fear of the penalty may operate powerfully on all British subjects actually under American jurisdiction. The consequence might mean a serious interference with the national economy. Such a violation of independence and rights of sovereignty is without precedent. The far-fetched instances to which allusion has been made are beside the point. (Proclamation of action of the United States, August 16, 1861; act of Congress May 28, 1833. See discussion in the New York *Times*, July 25, 1916.) This question is one of the conflict between the principle of nationality and that of territoriality. (See vol. I, pp. 373–90.)

The extensions of the principle of nationality as a basis of jurisdiction are almost limitless, as is shown by the following discussion relative to the application of the act in question: "Mr. Polk and the Ambassador also took up the case of a New York corporation, the bulk of whose stock is owned by a German corporation. Is this firm American or German? The question has not been decided. It is known, however, that the British courts have held that the corporation is a British corporation no matter who holds the stock. Will Great Britain therefore follow logic and hold that an American corporation is an American corporation even though the majority of the stock is owned by Germans? This and other points are still open for discussion between the two Governments. It is pointed out that if Great Britain rigidly enforced the prohibition against British subjects trading, directly or indirectly, with the enemy, a unique situation would arise which would practically bar British trade from the United States. Only by this means could the British Government be assured that no British money found its way into the coffers of enemy subjects. A rigidly strict enforcement of the British trading with the enemy act would bar Sir Cecil Spring-Rice or any other British diplomat from traveling from New York to Washington on the Pennsylvania Railroad, it is explained, because there are German stockholders in the company." (New York *Sun*, July 26, 1916.)

apply the act "with the greatest possible consideration for neutral interests."

On July 18 the Official London *Gazette* published the names of some eighty American individuals and firms placed upon a blacklist under the Trading with the Enemy Act. (New York *Times*, July 19.)

Without regard to political sympathies, the whole country was aroused at what was considered a serious invasion of American independence and the sovereign rights of American merchants and foreigners domiciled in the United States to trade with either belligerent.

At Washington in "official circles" it was considered that the blacklisting of American firms (including firms of German ownership "domiciled" in the United States) was an attempt to injure the trade of an enemy at the expense of a neutral country's trade, and must be challenged. According to the views expressed by "officials," one of the greatest elements of apprehension was that American and other neutral steamship companies would refuse to transport goods of the blacklisted firms, and thus shut them off from foreign trade. (New York *Times*, July 20, p. 1, column 3.) At the British Embassy, on the other hand, the blacklist was regarded more in the nature of a "white" than a "black" list, since the publication of the list would remove uncertainty and permit British subjects to trade with any firm not on the list. (*Ibid.*)

In Great Britain also the blacklist was severely condemned in certain quarters as causing injury to British trade and being inexpedient at a moment when France was raising a loan in the United States.

The Chief of the Department of Foreign Trade of the Foreign Office, Mr. L. Worthington Evans, defended the action of the Government upon the ground of expediency. He assumed that the legality of the government's course was beyond all question.[1] (New York *Sun*, July 23.)

The tension was somewhat relieved when the British Ambassador (July 25) gave the American Government certain as-

[1] It would seem that the assertion was not in conformity with the facts, whatever undisclosed arguments Mr. Evans may have at his disposal.

surances relative to the interpretation of the act. Sir Cecil Spring-Rice explained to Acting Secretary of State Polk that his Government's intention was not to direct the blacklist against neutrals, that it would not affect existing contracts,[1] and that American firms would not be barred from continuing their trade with British subjects because of the fact of their having business affiliations with blacklisted firms. (New York *Sun*, July 26.)

In the meantime, certain of the firms placed upon the blacklist had perfected an organization to take action for the protection of their rights. The resolutions adopted (July 25), condemning the illegality, the purpose, and the means by which the blacklist was applied, were sent to President Wilson.[2]

In a note of July 26 (made public July 31) the American Government made an emphatic protest against the blacklist, especially in regard to the indirect effects of the boycott upon the trade of Americans having trade affiliations with the firms included in the list. The assurances of the British Ambassador upon this head were perhaps received (July 25) after the note was written.[3]

[1] The following editorial comment from the *Evening Mail* indicates how necessary this explanation was:

"This story is being told in the financial district:

"A New York business man of prominence went to the office of the British consul.

"'Mr. Consul,' he said, 'I was born in the north of Ireland, and although my business is in New York, I still retain British citizenship. I owe money to Knauth, Nachod & Kuehne, the bankers. Now, that firm is on the British blacklist. If I pay the bankers I lay myself liable to prosecution when I return to the other side, as I hope to do some day. If I do not pay I shall not be discharging an honest debt, and besides K., N. & K. will have good grounds for a suit. What shall I do?'

"'My dear sir,' said the consul, 'I refuse officially to answer your question, but — '

"'But what?'

"'But if you care for my unofficial answer, it is pay your debt, man, pay your debt.'" (*Evening Mail*, July 27, 1916.)

[2] See New York *Times*, July 25, August 1, 1916.

[3] See the account in the New York *Times*, July 31, 1916. The *Sun* (July 30) prints the following from Washington under date of July 29:

"Sir Cecil also had another communication [the first was a 'curt message' that the British decision relative to the refusal to allow Messrs. Kelly and Smith to visit Ireland was irrevocable] to deliver to this Government. It was a formal communication from the British Foreign Office relative to the blacklisting of American firms. It makes it clear that Great Britain has already agreed to narrow the scope of the blacklist order so that it includes only the specified firms mentioned and is designed to show that any demands on this basis which this Government may make in its note, which is to be made public Monday, will simply be asking for something Great Britain already has promised to give.

"The British Ambassador made these restrictions clear to the State Department

After stating the law governing neutral rights of trade and the circumstances in which alone it is permissible for belligerents to interfere with the commerce of neutrals, the British procedure was characterized as "arbitrary and sweeping." The Government of the United States, it was declared, deemed "Great Britain to have too lightly and too frequently disregarded" the "well-defined international practices and understandings" limiting the rights of belligerents to restrict and penalize trade with their enemies.[1]

The most significant feature of the note is the emphasis laid upon the protection — not of American trade, but of the trade of American citizens.[2]

several days ago, with a view to obviating a general protest on these grounds, but after he had given the information to the State Department, unofficial forecast of the note published here and in London insisted that the President would elaborate on the injustice of not having the concessions which, according to the British view, Great Britain already has granted.

"The Ambassador is believed to have informed his Government that publication of the American note Monday morning is for reasons of domestic politics here.

"When asked about his visit to-day, Sir Cecil refused to make any comment or answer any question whatever. His silence was necessitated by a special request from the State Department that he say nothing to newspaper men."

[1] In the issue of July 24, Mr. David Lawrence, the well-informed correspondent of the *Evening Post*, says in reference to the note of January 25:

"Great Britain was unaffected by the American protest in this matter as she has been undisturbed, too, by American representations concerning other phases of interference with neutral trade or with neutral mails. President Wilson never had evinced the slightest intention of going beyond mere legal reservation of rights. And as for reprisals, the British Foreign Office, through its splendid information system, knew very well that the American Congress was not inclined to get tangled up in a discussion over reprisals such as an embargo on arms or foodstuffs. Even less would the Congress work itself up into a frenzy over British restrictions on American trade unless the President and executive branch of the Government showed some open sympathy with the move.

"So the British Government for many months quietly went about putting restriction after restriction on neutral trade, acting in most cases merely on a suspicion that measures could be taken in certain quarters to hurt Germany, but in reality merely following the advice of the alert British merchants who found the British Foreign Office a ready ally to their own private schemes and plans for throttling certain branches of American trade, whether or not any real connection with enemy trade existed."

[2] "The Government of the United States begs to remind the Government of his Britannic Majesty that citizens of the United States are entirely within their rights in attempting to trade with the people or the Governments of any of the nations now at war, subject only to well-defined international practices and understandings which the Government of the United States deems the Government of Great Britain to have too lightly and too frequently disregarded." (Extract from the note, see

As a consequence of the publication of the blacklist, Congress made provision for recourse to reprisals. Sections 805 and 806 of the Revenue Act of September 8, 1916, give the President, during the existence of a war, very wide powers of retaliatory action against unfair competition and discrimination against American trade. By section 804 of the act the President is authorized to retaliate by like action against countries prohibiting the importation of articles, "the product of the soil or industry of the United States and not injurious to health or morals." This recourse to reprisals is only in the event of prohibitions of imports and does not mention restrictions or discriminations as do sections 805 and 806. On the other hand, the exercise of the retaliatory action under section 804 is not limited to the existence of a war.

Section 26 of the Act to Establish a United States Shipping Board (approved, September 7, 1916) provides that the Shipping Board shall investigate complaints of the discriminatory action of foreign governments against American vessels. Section 36 of the same act, authorizing the Secretary of the Treasury to employ reprisals, is as follows:

"The Secretary of the Treasury is authorized to refuse a clearance to any vessel or other vehicle laden with merchandise destined for a foreign or domestic port whenever he shall have satisfactory reason to believe that the master, owner, or other officer of such vessel or other vehicle refuses or declines to accept or receive freight or cargo in good condition tendered for such port of destination or for some intermediate port of call, together with the proper freight or transportation charges therefor, by any citizen of the United States, unless the same is fully laden and has no space accommodations for the freight or cargo so tendered, due regard being had for the proper loading of such vessel or vehicle, or unless such freight or cargo consists of merchandise for which such vessel or vehicle is not adaptable."

New York *Times*, July 31, 1916.) This "modification of attitude" was remarked upon in the press as a ground of criticism. (*Ibid.*)

CHAPTER XIII

THE DEFENSE OF NEUTRAL RIGHTS

§ 59. INDEPENDENT ACTION TAKEN BY A STATE TO ENFORCE RESPECT FOR ITS NEUTRAL RIGHTS

SWEDISH REPRISALS (1915–16)

As soon as the Swedish Government learned that the British authorities at Kirkwall had removed bags of parcels mail bound on the *Stockholm* (Swedish) from Sweden to the United States and from the United States to Sweden on board the *Hellig Olav* (Danish), it notified the British Government, on December 18, 1915, as follows:

"The Royal Government, while protesting in the most formal manner against the seizure of the parcels in question, have to their great regret felt constrained to direct the Postal Administration in Sweden to detain all goods from or to England sent by the parcels mail in transit through Sweden. This measure will be maintained by the Swedish authorities till the matter is settled in a manner which the Royal Government consider satisfactory, and a guarantee is given against the repetition of an incident of this nature, so contrary to international law."[1] (Note of December 18, 1915, p. 2.)

The British Government complained of Sweden's course in having immediate recourse to reprisals without previous warning

[1] The public was early apprised of the nature of the controversy. The New York *Tribune* of December 20, 1915, printed a wireless dispatch from Berlin to the effect that Sweden had ordered all parcels post from England in transit across Sweden to be held up indefinitely, thus stopping the Anglo-Russian parcels post service until Great Britain should give heed to the Swedish protest against the taking of such sacks of parcels post mail from the steamer *Hellig Olav* on a voyage from New York and the removal of an entire parcels post from the outgoing steamer *Stockholm* which left Gothenburg a few days before.

or request for redress as "a somewhat arbitrary procedure" (note of January 1, 1916, p. 4), hardly consonant with the procedure between friendly governments. (Cf. note of January 31, 1916, p. 11.) The Swedish Government replied:

"On the contrary, the King's Government have presented protests and complaints, both general and specific, against these measures. The fact that these protests and complaints have not had the expected result cannot prevent them from intervening against fresh encroachments when they feel called upon by circumstances to do so."[1] (Note of January 21, 1916, p. 5.)

The correspondence relative to the right to remove, search, and seize parcels mail is difficult to follow because the two distinct situations of the mail bound to America (on board the Swedish vessel *Stockholm*) and that bound to Sweden (on board the Danish vessel (*Hellig Olav*) were discussed together.[2] Sweden pointed out that the general right of search had reference to contraband, of which there could be no question when goods were bound to America. (Swedish note of February 11, 1916, p. 12.)

The British Government, ignoring the question of the violation of Sweden's sovereign rights incident to the search of the American-bound mail, was content to proclaim the right of search[3] and answer that the mails taken from the *Stockholm* had been "forwarded to their destination with but slight delay." (British note of January 31, 1916, p. 10; cf. note of January 1, 1916, p. 4; note of April 25, 1916, p. 19.)

In regard to the seizures of parcels mail on board the *Hellig Olav* (Danish) bound to Sweden, Great Britain declared that

[1] The British Government admitted that the protest had been made (see p. 611 *n.*).

[2] Had Great Britain based her action upon an alleged blockade of Germany, the same principles would have applied to mails whether bound to or from that country. The British Government, however, made no attempt to apply the rules of blockade. (See Swedish note of January 21, 1916, p. 7; February 11, 1916, p. 12.)

[3] Search being part of the procedure to effect seizure is never justifiable when the possibility of seizure is absent. The seizure of goods bound to America could be legally made only on one of three grounds:

(1) Destination to Germany, which was of course out of question under the circumstances.

(2) Blockade of Germany. This had never been declared.

(3) Reprisals. Sweden anticipated any British arguments on this head by pointing out that reprisals could not be justified against neutrals and that she had protested against the legality of the British Order in Council of March 11, 1915. (Swedish note, January 21, p. 7; cf. British memorandum of February 28, p. 14.)

parcels mail was not exempted from seizure by the 11th Hague Convention, but subject to the same treatment as ordinary merchandise. (British note of January 1, p. 4; cf. pp. 3, 5, 9, 12–13.) When the search revealed 109 bags containing rubber consigned to Jonsson and Kraft, of Gothenburg, Sweden, the British Government placed the consignment in "the prize court, on the ground that it was believed to be destined for Germany." (British memorandum of December 30, p. 3.)

The Swedish Government objected that rubber could not be considered contraband, since it was not included among the articles of military use, as was indicated by placing it in the free list of the London Declaration. The Swedish Government further argued that at most rubber could be considered only conditionally contraband and liable to seizure when actually destined to the German military forces. Such a destination could not be considered to exist in the present instance, where the goods were consigned to a Swedish firm in Sweden. Furthermore, the prohibition of the export of rubber from Sweden added another argument against the likelihood that the rubber in question would reach Germany.[1] (Swedish note of January 21, p. 7.)

When the Swedish Government remarked, "The King's Government are pleased to believe that a day will come when Great Britain, as well as the other belligerent powers of the present day, will be grateful to Sweden that she has not thought it right to become a party — even passively — to the brushing aside of concluded treaties and of rules of international law which may

[1] The prohibition of export was a Swedish regulation which, as the British Government well said, could not prevent a belligerent from exercising the right of seizing contraband as recognized by international law. (British note of January 31, p. 10.) It did, however, have some bearing upon the proof of whether the Swedish destination was *bona fide*. To deny it would be to impugn the manner in which Sweden was enforcing the law. In sum it made Sweden better able to demand a strict compliance with the rules of international law prohibiting the seizure of articles conditionally contraband unless actually on the way to the military forces of the enemy. The rubber could not be condemned except through the application of the doctrine of continuous voyage (British note of January 31, p. 10), the legality of which had not been universally admitted in the case of articles conditionally contraband. This again strengthened the position of the neutral demanding that goods conditionally contraband should not be confiscated unless shown to be actually (and not merely constructively) destined to the enemy government (and not to civilians) for military purposes.

at a later date regain their value for them" (Swedish note of January 21, p. 8), Sir Edward Grey replied: "The charge implied in this suggestion is a grave one, unusual in diplomatic documents, and, on behalf of His Majesty's Government, I must repudiate it in the strongest and most categorical manner as altogether unwarranted." (British note of January 31, p. 9.)

The arguments of the British notes were accompanied by repeated requests for explanations and the release of the detained mail (pp. 4, 5, 11, 20, 22, 25), and when Sweden was not impressed with the justice of the British contentions the British notes assumed a menacing tone. In his note of January 31, 1916, Sir Edward Grey accused Sweden of violating her neutrality. "His Majesty's Government," said the British Minister, "do not suppose the Swedish Government deliberately meditated an unprovoked departure from their policy of neutrality of so grave a character for the purpose of creating friction with this country." (British note of January 31, pp. 10–11.) Any one familiar with the language of diplomacy will understand the significance of such a phrase.

The ostensible ground of the British complaint against Sweden's action seems to have been based upon the latter's preferring to employ reprisals rather than submit the controversy to the decision of the British courts of prize.[1] Further along in the same note the British view was stated:

[1] The following extract from the British memorandum seems also to have some bearing upon the British attitude:

"It is true that the Royal Swedish Government at the time when the blockade measures, instituted under the British Order in Council of the 11th March, 1915, came into force, notified His Majesty's Government that they did not recognize their validity in international law. But that they should now, nine months after these measures have been in operation, demand their immediate abandonment on pain of reprisals against British transit of mails to Russia, reveals an attitude which, considering that no reprisals have ever been suggested against the methods of warfare adopted by the enemies of Great Britain, whereby many Swedish vessels have been illegally destroyed and many innocent Swedish lives lost, can hardly be considered as logical or equitable, nor looked upon as one of strict and impartial neutrality." (British memorandum of February 28, p. 14.)

According to a Reuter dispatch from Stockholm dated January 19, 1916, the Swedish Government "prohibited the export of paper pulp, wet or dry, produced from wood."

In a dispatch the next day from Copenhagen it was stated that the prohibition was held at Stockholm to be a reprisal against Great Britain for her seizure of Swedish parcel packets on a Swedish steamer. (London *Times*, January 21, 1916.)

"If in the exercise of the belligerent's undoubted rights, such as the right of visit and search, it is thought by a neutral government that the British naval or other authorities have gone beyond what the law of nations enables them to do, I can only repeat that it would be more consonant with the principles governing the intercourse between two friendly governments if, before resorting to an open violation of British rights as a counter-measure to a supposed grievance, the correctness of the assumption on which the neutral based his complaint were brought to the test in the manner and by the machinery prescribed for this purpose by the consensus of all authorities of international law, as well as by the precedents set in every modern naval war. The rule that the legality of any act or interference with neutral ships or cargoes on the high seas must in the first instance be tested in a court of prize is one to which Great Britain, when herself neutral, has never failed to show obedience, often at the cost of considerable inconvenience and loss to British subjects and important British interests. She cannot in fairness be asked to agree to a contrary course now that she herself is at war." [1] (British note of January 31, p. 11.)

Sweden in reply pointed to the delays and inconveniences of British prize court procedure (Swedish note of March 13, p. 16), but she expressed her willingness to release the detained mail as soon as Great Britain should agree to the suggested arbitration, with the understanding that Great Britain refrain from further seizure "and so avoid to provoke fresh counter-measures." (Swedish note of February 11, p. 14; cf. Swedish note of March 13, p. 15.)

A somewhat extended correspondence was exchanged relative to arbitration, which Sweden wished to take place at once, while Great Britain insisted upon a postponement until after the war. (British note of January 31, p. 11; Swedish note of February 11, p. 14; British memorandum, February 28, p. 14; Swedish

[1] The British note of January 31 contained the following statement relative to the seizures: "A diplomatic protest against this procedure cannot claim to rest on any sanction of international law. On the contrary, it violates the cardinal principle of the law of nations that the legality of the detention or capture of neutral ships or cargoes must be tested in the belligerent's prize court before it can properly be made the subject of diplomatic intervention."

note of March 13, pp. 15–16.) Sweden then wished to have the arbitration include all disputes relative to British prize decisions (Swedish note of March 13, pp. 16–17), whereas Great Britain considered that she could not thus subject her whole naval policy to arbitration, since it was a vital question. She also declared that it was not included in the terms of the Arbitration Convention signed (August 11, 1904) between the two powers. (British note of April 25, p. 18; Swedish note of June 29, p. 21.)

On June 29 the Swedish Government declared that they were prepared to accept the "actual proposals of the British Government," i.e., submission to the prize court and, in case the decision should be unsatisfactory, appeal to arbitration after the war. "In doing so," the note continued, "they wish it to be expressly understood that they adhere entirely to their point of view with regard to the measures taken both by them and by the British authorities. The repeal of the order which had brought about the actual detention of certain postal parcels does not therefore imply the resumption of the transmission of postal parcels in general, but only that the parcels so detained will be forwarded to their destination, provided that there is no obstacle to this in the general prohibitions as to the export and transit of certain commodities. So long as the British Government maintains the measures, of which the Swedish Government is entitled to complain, with regard to postal parcels and postal correspondence, the King's Government do not see their way to renew permission for this transit, and must reserve to themselves the right to take other measures, should necessity arise." (Swedish note, June 29, pp. 21–22.)

In a harsh reply of July 6, Sir Edward Grey declared the Swedish proposal "entirely unsatisfactory as a reply to the demand which I had the honor to make in my communication of the 19th June." Continuing, the British Foreign Secretary notified the Swedish Government that the offers of arbitration must be withdrawn "unless the Swedish Government engage to carry out their obligations under the agreement of 1904 in the case of future parcels dispatched from the United Kingdom, or from Russia through Sweden" (p. 22.) The note closed with a formal notification of a demand for damages.

The Swedish Government replied, July 24, that they had already released the detained parcels, supposing that the agreement to arbitrate was virtually complete. The British Government had, however, added a new condition that the Swedish Government should "engage to carry out the Postal Agreement of 1904." Since the British Government had not been willing to remove the necessity of resorting to reprisals by desisting from the measures objected to, she ought not to be surprised if the Swedish Government reserved for itself the same liberty of action. Such an engagement would decide the arbitration in advance and render it an empty form. As for the matter of damages, the Swedish Government declared that they would have to be considered and would in the last resort depend "on the legality of the British measures which have, or may have, provoked, on the part of Sweden the retaliation in question" (p. 24). In concluding, the Swedish Government informed the British Government that it purposed "should the occasion arise, to publish the whole correspondence concerning the detention of postal parcels and the question of arbitration" (p. 25).

The release of the detained parcels seems to have relieved the tension. In a note of August 2, Viscount Grey informed the Swedish Government that the offer of arbitration would remain open as long as Sweden forwarded parcels between England and Russia. Instead of requiring Sweden to "engage" she was now "merely asked for a statement whether" she would henceforth cease to interfere with the transit of parcels. Upon the receipt of Sweden's answer, Viscount Grey hoped the two governments might regard the questions at issue as finally settled (p. 25).

In its note of August 17, the Swedish Government, on its side, hoped for a termination of the question through the application of the beneficent principle of arbitration. In conclusion the Swedish Government declared "that there was no need to state that they had always recognized the Agreement of 1904 as valid and obligatory at the same time that they had insisted upon their right to interrupt the application of the agreement when the circumstances were such as those under discussion." (*Swedish Blue Book*, pp. 64–65.)

(References are to the pages of the *British White Paper* [Cd.

8322], *Miscellaneous, No. 28* [1916]. The *Swedish Blue Book* alone contains the last note of August 17, 1916.)

§ 60. COLLECTIVE ACTION TO ENFORCE RESPECT FOR NEUTRAL RIGHTS

THE SCANDINAVIAN LEAGUE (1914–16)

EARLY in the War of 1914 the Scandinavian states began to feel belligerent pressure in various ways. On December 14, 1914, announcement was made at Copenhagen that, on suggestion of King Gustave of Sweden, the three Scandinavian Kings, with their Foreign Ministers, were to meet at Malmö "to discuss affairs of common interest which have arisen as a result of the war, and especially measures for helping the economical situation in Scandinavia." It was later announced that the chief object of the meeting was "to demonstrate that Scandinavia represents a military and economic entity, ready to resist outside pressure to take sides with any belligerent and able to defend its neutrality and resist violations of international law." (New York *Times*, December 15 and 16, 1914.)

The conference was held December 18 and 19, and the following official statement was issued as to its results:

"The meeting of the three monarchs was inaugurated Friday with a speech by King Gustave, who alluded to the unanimous desire of the kingdoms of the north to preserve their neutrality and pointed to the desirability of limited coöperation between the kingdoms as a safeguard to their common interests. He said that when he invited the monarchs of Norway and Denmark to meet him he was impressed with a deep sense of the responsibility which would be incurred in relation to the present and the future, if any measure which would contribute to the welfare of the three peoples were neglected. . . . The deliberations of the monarchs and ministers consolidated the good relations among the three kingdoms and also enabled an agreement to be reached on the special questions raised. It was finally agreed to pursue the

coöperation so happily begun and to arrange, when circumstances should occur, for fresh meetings between representatives of the three governments." (New York *Times*, December 21, 1914.)

At various times since the meeting at Malmö these three states have exchanged views or held conferences of statesmen and naval officers to decide on common policies on such matters as mines, war zones, convoys, and the use of neutral flags. In March, 1916, the Premiers and Foreign Ministers met at Copenhagen for the purpose of maintaining "loyal and impartial neutrality." "There was a wholesome agreement," it was announced, "that it was necessary to have complete and thorough understanding of the situation and to make a continual effort to place the neutrality of Scandinavia on such a high plane that it would have to be recognized as impartial by the belligerent countries." (New York *Times*, March 14, 1916.) After this meeting the following announcement was made as to measures to be taken by the three states in maintenance of their neutrality:

"One important outcome of the conferences was an agreement that the three Scandinavian Governments should take the initiative whenever the time was opportune in seeking to bring other neutral countries to join with them in arrangements to protect the legal rights of neutrals. In this connection the Scandinavian nations purpose to extend the limit of territorial waters from the present three miles to four miles. If this purpose is carried into effect it may close the narrow entrance of the Baltic Sea to hostile operations, and may cause Denmark, Sweden, and Norway to clear out explosive mines that have been strewn close to the outer edge of the three-mile limit of territorial jurisdiction. The conferences took up the question of retaliatory measures against belligerent nations that violated neutral rights. In this connection it was made known that Sweden had placed an embargo on the exportation of chemical wood pulp for making news print paper, and the suggestion was made that Denmark and Norway should follow suit. The action of Great Britain in detaining and searching mails was also considered." (New York *Times*, March 25, 1916.)

ARMED NEUTRALITY (1780, 1800)

DURING the naval wars of the eighteenth century certain principles of maritime law were applied which became increasingly the subject of complaint on the part of neutrals against belligerents, especially against Great Britain, who was usually able to assert her naval supremacy over enemy and neutral alike. The chief of these principles were the Rule of 1756, the seizure of enemy goods on neutral vessels (against which the principle, "free ships, free goods," was advanced), the seizure of neutral goods on enemy vessels ("enemy ships, enemy goods"), the proclamation of "paper" blockades, the extension of the lists of contraband of war, and the denial of the right claimed by neutral commerce to be convoyed.

At the beginning of 1780, Great Britain found herself at war with France and Spain, as well as with her former colonies in America. In her struggle for national existence she was enforcing her maritime power more rigorously than ever, as also were the other belligerents, though to a less degree. The restriction thus placed upon neutral commerce led the Empress Catherine of Russia to issue a declaration on February 28, 1780, wherein she indicated a resolve to set Russian commerce free by the use of all the means compatible with her dignity and the well-being of her subjects.[1] And she proceeded to enunciate the principles which she was prepared to follow, principles which she found "recorded in the fundamental law of nations (*le droit primitif des peuples*), which every nation is justified in invoking and which the belligerent powers cannot break without violating the laws of neutrality, and without disavowing the principles which they have adopted, especially in various treaties and public agreements." They were five in number, as follows:

[1] The events directly responsible for the declaration of the Empress were the seizure by Spain in December, 1779, of a Dutch merchant vessel, the *Concordia*, laden in part with Russian merchandise; the capture off Portsmouth, December 31, 1779, by a British squadron of a Dutch merchant fleet under convoy; and a few weeks later, the seizure of a Russian vessel — the *Saint Nicholas* — by the Spanish naval authorities, and the hurried sale of her cargo, in spite of protest by the Russian Consul at Cadiz. (Fauchille: *La Diplomatie Française et la Ligue des Neutres de 1780*, pp. 184–85, 312, 319–20.)

"1. Neutral vessels may freely sail from port to port and upon the coasts of nations at war.

"2. Goods belonging to the subjects of the said powers at war, are free on board neutral vessels, with the exception of contraband merchandise.

"3. With regard to the definition of the latter, the Empress adheres to that law laid down in Articles X and XI of her treaty of commerce with Great Britain, at the same time extending these obligations [of the treaty] to all the powers at war.

"4. To determine what constitutes a blockaded port, this denomination is employed only when, by reason of the dispositions made by the attacking power with vessels stationed in position and sufficiently near, approach is rendered manifestly dangerous.[1]

"5. These principles are to serve as a rule in the procedure and decisions with respect to the legality of prizes." (G. F. de Martens, *Recueil* [2d ed.], vol. III, p. 159.)

The declaration went on to say that, to maintain these principles against any one whomsoever, the Empress was sending forth a considerable naval force, which measure, however, would not detract from the "strict and rigorous impartiality" which she had observed and intended to observe unless provoked and compelled to depart from the bounds of moderation. "It is only in this extremity," it was asserted, "that the fleet will be ordered to proceed where honor, interest and necessity may summon it." Further, the hope was expressed that belligerents would issue to their officers instructions in conformity with the principles set forth.

Great Britain replied to the Russian declaration April 1. The King, it was stated, had given most stringent orders at the beginning of the war to respect the flag of Her Imperial Majesty "in accordance with the law of nations and the terms of the treaty with Russia" which had been "fulfilled with the most scrupulous

[1] This provision with respect to blockade was reproduced in the agreements of the Northern Powers in 1800, but in the treaty between Great Britain and Russia following the collapse of the Second Armed Neutrality, its effect was wholly destroyed by a significant change of particle, "or" being substituted for "and," so as to read "vessels stationed in position *or* sufficiently near." (See *Supplément au Recueil* [ed. 1802], vol. II, p. 478.)

exactitude." Fresh orders, however, had been issued and it was presumed that there would be no violations, but should there be, the courts of admiralty would give redress. (*Recueil* [2d ed.], vol. III, pp. 160–61.)

In the course of the same month France and Spain indicated their approval of the principles of the declaration, the latter making it conditional upon the recognition that the Spanish operations at Gibraltar constituted a real blockade. The Netherlands also gave approval, expressing a disposition to negotiate with Russia and other neutral powers upon measures to be taken "for the freedom of commerce."

Sweden, however, before taking definite action, asked for certain explanations. In what way were reciprocal protection and mutual alliance to be realized? Was each power to be under obligation to protect the general commerce of all or might it employ part of its forces to protect its own commerce? What would be the relation of the different squadrons to each other when united? Should it become necessary to make representations to belligerents, ought they to be made jointly or separately? If one of the members of a neutral league were forced to call upon the others for assistance, how would common action be taken? In the event of reprisals, was the mere wish of one of the parties to decide or the common suffrage of all? In the former case, one power could, at pleasure, involve the others against their inclination and interests, or by its action break up the league and bring back the former condition of affairs. (*Recueil* [2d ed.], vol. III, pp. 170–71.)

Russia explained in reply that what was proposed was a formal convention between neutral powers, which should assure to the ships of all nations the freedom of the seas. Each power was to work for the general safety of commerce. A merchant ship was always to be protected by the squadron escorting it, but it would be necessary to define limits and distances for each national fleet. There should be a chain of fleets, each able to assist the other, the specific arrangement to be kept to themselves [the neutral powers], though the rest of the agreement might be communicated to the belligerents. An injured party should make protest and the others support the protest in the strongest way

possible. If one of the allied powers were to act contrary to the principles of the agreement, it could not expect the league to support it, but if it should be treated by a belligerent in disregard of these principles, it would become the duty of all to make common cause for naval purposes only — land operations not being contemplated. The common will of all, based upon principles admitted and adopted by the contracting parties, ought to decide all questions. It was probable that such an agreement would be of the greatest consequence and that the belligerent powers would find it to their advantage to respect the neutral flag. (*Recueil* [2d ed.], vol. III, pp. 171–73.)

On July 8, 1780, Denmark issued a declaration in the sense of the Russian declaration and next day a convention was concluded between Russia and Denmark, which emphasized the importance of codifying into a "permanent and immutable system the rights, prerogatives, limits and obligations of neutrality," and which undertook to give "a solemn sanction to mutual engagements." The rules for contraband were to be strictly defined and enforced as provided for in existing treaties, and to be extended to France and Spain, as yet not bound by treaties with the contracting powers. Other commerce was to be free, and neutral vessels were to be stopped only for just cause and evident facts. The remaining principles of the convention were substantially those of the declaration of Empress Catherine. Each of the contracting powers was to equip a number of ships of war, which might be employed as convoys. Mutual aid was to be given in case of need and mutual support in diplomatic representations. The convention was concluded for the period of the war, but its principles were intended to be permanent and provision was made for the accession of other powers. Under separate articles the Baltic was to be closed for the purposes of war, and the contracting parties were to endeavor to get the system of neutrality adopted in the treaties of peace.

On August 1, 1780, a treaty was made between Russia and Sweden similar to that with Denmark, with separate articles also appended. On November 20, 1780, the United Provinces acceded to the treaties and some time later addressed a memorial to Sweden asking for the intervention of neutral powers in accord-

ance with the terms of the alliance, in consequence of the declaration of war upon them by Great Britain. The Netherlands asserted that Great Britain had taken this step because of their accession to the Armed Neutrality. Sweden proposed that representations be made at London but did not consider the situation to constitute a *casus foederis*. Russia pointed out that the declaration of war had preceded the accession and had grown out of anterior causes. Hence, in her opinion, the three courts were free to act as they deemed proper. Russia agreed, however, to join in common representations at London.

Similar treaties were made by Russia with Prussia, May 3, 1781, with the Empire, July 10, 1781,[1] with Portugal, July 13, 1782, and with the Kingdom of The Two Sicilies, February 10, 1783. The Armed Neutrality of 1780, however, did nothing but set forth a declaration of principles, for no action was taken by it against Great Britain during the war which ended in 1783. Yet it marked a period in the development of more liberal maritime practice by formulating for the first time in the way of specific agreements rules which, in the next century, were almost universally incorporated into the law of nations.

The Second Armed Neutrality in 1800 was in large part due to incidents which had arisen over the question of convoy, more especially over the seizure of merchant ships under Danish convoy, as well as the convoying frigate itself, by British ships of war. Two years before (1798), a whole fleet of Swedish merchant ships had been condemned by Sir William Scott because of an act of violence by the convoying vessel towards a British naval officer. (The *Maria;* C. Robinson: *Admiralty Reports*, vol. I, pp. 340–78.) In consequence of the seizure of the Danish vessels, Russia issued a declaration inviting Sweden, Denmark, and Prussia to conclude a convention for the reëstablishment of neutrality, and, on information that a British squadron had passed the Sound, proceeded to sequester British goods and, later, to place an embargo upon British vessels in Russian ports. Russia, further,

[1] As would appear from the text of a treaty given by De Martens (*Recueil* [2d ed.], vol. III, pp. 252–57), but for the authenticity of which he does not accept responsibility. Apart from any treaty, however, the Emperor acceded to the principles of the Armed Neutrality on October 9, 1781. (*Ibid.*, pp. 257–59.)

concluded three conventions (December 16–18, 1800) with Denmark, Sweden, and Prussia respectively, embodying virtually the same principles as the agreements of 1780, together with more specific stipulations with respect to convoy, whereby the declaration of the officer in command of a convoying squadron was to be accepted in lieu of the exercise of search. Ships, however, to claim a flag, had to be commanded by a master belonging to the nation whose flag was claimed, as also half the crew, and had to carry *bona-fide* passports. The provisions of these treaties were intended to be permanent and to apply to future wars. (*Supplément au Recueil* [ed. 1802], vol. II, pp. 389–413.)

Great Britain replied to these measures by decreeing an embargo upon Russian, Swedish, and Danish vessels and by dispatching a strong naval force against Denmark. The Battle of the Baltic (April 2, 1801), in which the power of Denmark was overthrown, dissolved the League of Neutrality, which in the course of a few months was followed by treaties between Great Britain and the three Northern Powers. In these agreements some of the principles for which the Armed Neutrality had striven were embodied, but the right to search ships under convoy was retained, though the right was to be exercised by national ships of war only, not by privateers.[1]

(G. F. de Martens: *Recueil de Traités* [2d ed.], vol. III, pp. 158–270; vol. VII [ed. 1801], 516–22; *Supplément au Recueil* [ed. 1802], vol. II, pp. 344–486; Fauchille; *La Diplomatie Française et la Ligue des Neutres de 1780* [Paris, 1893].)

[1] For the provisions on convoy see *Supplément au Recueil* [ed. 1802], vol. II, pp. 478–80.

CHAPTER XIV

PROTECTION OF THE GENERAL INTERESTS OF HUMANITY

§ 61. THE CARE OF THE GENERAL INTERESTS OF HUMANITY

GREAT BRITAIN PROTESTS AGAINST THE OBSTRUCTION OF CONFEDERATE PORTS (1861)

DECEMBER 20, 1861, Lord Russell, British Minister for Foreign Affairs, sent the following instructions to Lord Lyons, British Minister at Washington:

"I observe it is stated, apparently on good authority, that it is the intention of the President of the United States to send vessels laden with stones to be sunk at the mouths of the Southern harbors, with a view to choke up the passage to those harbors.

"It is stated that this is to be done, not with a view to assist military operations, and as a temporary measure of war, but with the declared object of destroying these harbors forever, and reducing to misery the numerous inhabitants of the cities connected with them.

"I must remark, in the first place, that this cruel plan would seem to imply utter despair of the restoration of the Union, the professed object of the war; for it never could be the wish of the United States to destroy cities from which their own country was to derive a portion of its riches and prosperity; such a plan could only be adopted as a measure of revenge and irremediable injury against an enemy.

"But even in this view, as a scheme of embittered and sanguinary war, such a measure is not justifiable. It is a plot against the commerce of nations, and the free intercourse of the Southern

States of America with the civilized world. It is a project worthy only of times of barbarism.

"I wish you to speak in this sense to Mr. Seward, who will, I hope, disavow the alleged project."

On January 14, in conformity with these instructions, Lord Lyons sent the following dispatch:

"Three days ago, in obedience to Your Lordship's orders, I spoke to Mr. Seward in the sense of Your Lordship's dispatch of the 20th ultimo, on the subject of the plan adopted by this Government of obstructing the entrance of some of the harbors in the Southern States by sinking vessels laden with stones in the channels.

"Mr. Seward observed, that it was altogether a mistake to suppose that this plan had been devised with a view to injure the harbors permanently. It was, he said, simply a temporary military measure, adopted to aid the blockade. The Government of the United States had, last spring, with a navy very little prepared for so extensive an operation, undertaken to blockade upwards of three thousand miles of coast. The Secretary of the Navy had reported that he could stop up the 'large holes' by means of his ships, but that he could not stop up the 'small ones.' It had been found necessary, therefore, to close some of the numerous small inlets by sinking vessels in the channels. It would be the duty of the Government of the United States to remove all these obstructions as soon as the Union was restored. It was well understood that this was an obligation incumbent on the Federal Government. At the end of the war with Great Britain that Government had been called upon to remove a vessel which had been sunk in the harbor of Savannah, and had recognized the obligation, and removed the vessel accordingly. Moreover, the United States were now engaged in a civil war with the South. He was not prepared to say that, as an operation in war, it was unjustifiable to destroy permanently the harbors of the enemy. But nothing of the kind had been done on the present occasion. Vessels had been sunk by the rebels to prevent the access to their ports of the cruisers of the United States: the same measures had been adopted by the United States, in order to make the blockade complete. When the war was ended, the removal of all these

obstructions would be a mere matter of expense; there would be no great difficulty in removing them effectually. Besides, as had already been done in the case of Port Royal, the United States would open better harbors than those which they closed.

"I asked Mr. Seward whether the principal entrance to Charleston Harbor had not been recently closed altogether by vessels sunk by order of this Government; and I observed to him that the opening of a new port, thirty or forty miles off, would hardly console the people of the large town of Charleston for the destruction of their own harbor.

"Mr. Seward said that the best proof he could give me that the harbor of Charleston had not been rendered inaccessible, was that, in spite of the sunken vessels and of the blockading squadron, a British steamer laden with contraband of war had just succeeded in getting in."

On January 16 Lord Russell referred to his instructions of December 20 and inclosed a copy of a representation which he had received from the Shipowners' Association of Liverpool against the sinking of a stone squadron in the main channel of Charleston Harbor. The dispatch continues:

"I have further to instruct Your Lordship to observe to Mr. Seward, with reference as well to the destruction of the entrance into Charleston Harbor, which seems to have been effected, as to similar operations said to be in contemplation against other harbors in the so-styled Confederate States, that the object of war is peace, and the purposes of peace are mutual good-will and advantageous commercial intercourse; but this barbarous proceeding deprives war of its legitimate objects, by stripping peace of its natural fruits.

"The present contest between the North and South must end either in the conquest of the South by the North, or a separation by mutual agreement. In the first case this operation is suicidal, by taking away from what will in that case be a part of the territory of the Union advantages which the bounty of Heaven has bestowed; in the latter case, this proceeding will have implanted undying hatred in the breasts of those who being close neighbors ought to be also firm friends."

Owing to the interruption of cable communication Earl Russell

at the time of sending the above dispatch was in ignorance of the action previously taken by Lord Lyons.

In a dispatch of February 17 to Minister Adams, Mr. Seward explained that while he was not prepared to recognize the right of other nations to object to the measure of placing artificial obstructions in the channels of rivers leading to ports which had been seized by the insurgents in their attempt to overthrow the Government, he went on to explain that these measures were not as extensive as had been apprehended (p. 36).

Similarly, after considering the "suggestions" concerning the artificial obstacles made in Charleston Harbor, presented by the French representative in a consultation at an interview solicited under instructions from the French Minister of Foreign Affairs, Mr. Seward informed him, February 20, that the obstructions referred to were temporary in their nature and that they did not block all of the channels leading to Charleston Harbor. At the same time Secretary Seward took occasion to express his appreciation that the French Minister of Foreign Affairs had generously refrained from requiring the French representative, Mr. Mercier, to make any formal complaint to the Government.

(*Parliamentary Papers* [1862], *North America*, No. 1, pp. 122–45; *Diplomatic Correspondence, 1862*, pp. 411–12.)

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