INTERNATIONAL LAW AND THE BLOCKADE

BY

W. E. HUME-WILLIAMS, K.C., M.P.

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To anyone approaching the questions of International Law, now daily arising, with the sincere desire,—a desire which animates both the English and the American people,—to discover the principles upon which such questions are to be determined in accordance with absolute fairness to every interest involved, the task is not without difficulty. This difficulty arises first from the fact, which cannot be too often stated, that, in the proper sense of the term, there is no such thing as International Law. The Laws of a country are created either by Statute or by the decisions of Judges enunciating principles which, because they appeal to the common sense of the community, have been adopted and acted upon by other Judges and by the community itself, and have so become part of its common Law. International Law is really international custom and nothing more.

Law has force behind it; once ascertained, its observance is obligatory and universal in the community to which it applies, and the community for its own protection sees that it is obeyed.

International Law, so called, has no such sanction. History shows that it has often been disregarded by the strong and appealed to in vain by the weak, and there has been no one concerned to enforce its observance. The first essential of law—that it must be obeyed, and obeyed by all—is absent.

It is true that International writers of distinction—largely American—have formulated some principles which arise from generally accepted custom and that English and American Judges have adopted and acted upon those principles, but the fact remains that International Law is in reality a dignified but inaccurate description of International Custom, and that, consequently, like all custom, it must change with the conditions to which it is applicable.

The task therefore is, to one attempting to be helpful and as far as may be impartial, to extract from the experience of the past and the decisions to which it gave rise, such principles as, with fairness to all, may be applied to present conditions.

The conditions themselves must first be stated. They are, of course, unlike any which the world has ever seen or probably any person imagined. Fighting on land is mainly a matter of scientific equipment. Munitions, transport and food, are more than ever the essential, indeed the dominant factor. Sea battles up to the present have been few and far between, and bear no proportion

to the size of the enemy fleets. English sea warfare has mainly consisted in guarding convoys and waiting for a fleet which does not appear. German sea warfare has consisted in what may not unfairly be termed guerilla attacks by submarines upon enemy and neutral vessels. Germany at the beginning of the war was certainly better equipped than the Allies with the engines of war on land, and has taken full advantage of her preparations. The fleets of the Allies hold practical possession of the sea, with the advantages which ought to accrue from such a position.

Such are the conditions at the time of writing. With the war on land, this article does not pretend to deal, but if it is true that the Allies hold practical possession of the sea, the question to be examined is, what in fairness are the advantages which they should in time of war derive from that possession, and secondly, how far can they be exercised in consonance with International Custom without interfering more than war necessitates with the rights of neutrals.

It will be admitted that it is the elementary right of a belligerent to stop, if he can, the transport to his adversary of all articles which will reinforce the adversary and enable him to prolong the struggle. The proposition meets with universal acceptance. It is equally true that it is not the right of a belligerent to stop the transport of any goods *bona fide* required for the consumption of a neutral. A great deal has been written on the subject of contraband and conditional contraband, of what is and what is not a continuous voyage, of what is and what is not a blockade. It is submitted that what common sense dictates and International Law tolerates is the simple proposition that you may stop what is really going to your enemy, and that you must release what is really going to a neutral. The difficulty, of course, is to distinguish.

The situation in the present war is further complicated by the fact that the principal belligerent among the Central Powers, Germany, has very few ports of her own, and has been accustomed largely to receive her supplies through such countries as lie between her and the North Sea. Those countries remain neutral, but it cannot be denied that supplies through such neutral countries continue to reach Germany in very considerable quantities. England is entitled to stop those supplies if she can. Have her attempts to exercise that right hitherto been such as ought to receive the sanction of the Law of Nations, and how are those attempts to be equitably continued ?

The English appear to have discovered quite early in the war —for them—namely, by August 20th, 1914, the danger with which they were threatened, and consequently on that date an Order in Council was published which, after adopting the Provisions of the Declaration of London, provided that the " destination " referred to in Article 33 of the Declaration—that is destination for the use of the armed forces or of a government department of the enemy State—may be inferred from any

sufficient evidence, and should be presumed to exist "if the goods are consigned to or for an agent of the enemy state, or to or for a merchant or other person under the control of the authorities of the enemy state."

By Clause 5 of the August 20th Order, England further provided, that conditional contraband goods, if shown to have the destination set out in Article 33, are liable to capture "to whatever port the vessel is bound and at whatever port the cargo is to be discharged."

This latter clause is not without interest for America and is in itself a compliment—possibly involuntary and certainly tardy—to American lawyers and indeed to the American people, for it contains a simple adoption of the principle laid down by the Supreme Court of the United States in the case of the *Bermuda* in 1865, a principle which has been repudiated in Europe until the actualities of the present war showed its wisdom and its necessity. "The interposition," said Chief Justice Chase in the Supreme Court, "of a neutral port between neutral departure and belligerent destination, has always been a favourite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or trans-shipments intervene." Similarly in the *Springbok*, decided in 1886, the Supreme Court of the United States went straight to the root of the matter when it determined that: "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.".

In the *Peterhof*, where the goods were consigned to a Mexican port from which there was inland communication with Confederate territory, the American Court decided, in 1866, that contraband goods are liable to confiscation if there is ground for the belief that they are to be transported across neutral territory.

Those decisions stand out as monuments of common sense and remain not only true but essentially applicable to modern conditions. Accordingly, having adopted and incorporated them in the Order in Council—England's somewhat individual method of declaring her intentions—she proceeded to put them into effect. She was at once met by the difficulty—a difficulty first felt by the American Courts and inherent in the subject—of how to discover, with fairness to owners and with the minimum of inconvenience to neutrals, what the real destination is of goods arrested *in transitu*. England had recourse to another Order in Council. On October 29th she declared that "conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy." The owners of the goods may, however,

by Article 4 of the same Order, in such case prove, it they can, that the ultimate destination of the goods was innocent. France and Russia adopted this Order in Council and issued similar decrees.

Now it is obviously just that when once a captor has proved, as in the *Kim*, that *prima facie* goods must be held to be intended for a belligerent, the onus should be on the owner or claimant to prove their title—that is to prove an innocent destination. Otherwise the principles of the *Bermuda* and the *Springbok* would be practically nugatory. Either the consignor or the consignee knows—probably both know—where the goods are really going to, and the ship should be provided with the proper evidence. The Order in Council, when it puts the onus on owners of proving an innocent destination only when the goods have no named consignee or have a consignee in enemy territory, seems unduly moderate.

England having thus provided for eventualities, let us see what happened. In September, 1914, the German Cruiser *Carlsruhe* sank the Dutch vessel *Maria* on a voyage from California to Dublin and Belfast carrying a cargo of grain. The German Prize Court justified this upon the ground that the cargo, although consigned to civilians, might be requisitioned by the British Government.

On January 25th, 1915, the German Federal Council published a decree whereby the German Government assumed the control of all food stuffs in the country and provided that all grain and flour imported into Germany after January 31st, 1915, should be delivered only to certain organisations directed by the Government or the Municipal Authorities.

On January 27th, 1915, the *Prinz Eitel Friedrich* sank the *William P. Frye* in the South Atlantic, carrying a cargo of wheat from Seattle to Queenstown. A little later the *Semantha* was sunk by the *Kronprinz Wilhelm* on a voyage from Portland, Oregon, to Great Britain with wheat. The *Unita* was also sunk by a submarine while proceeding from Fredriksstad to Hull with a cargo of timber.

On January 23rd, 1915, the American steamer *Wilhelmina* left New York for Hamburg with provisions consigned to an American citizen in Germany. She arrived at Falmouth on February 9th and was arrested. After she had sailed, the German Government rescinded their decree relating to the supplies of grain and flour. Ultimately the case of the *Wilhelmina* was settled by agreement between the British Government and the owners of the cargo, on the basis of the owners being indemnified for the delay caused to the ship and the shippers being compensated for any loss which they had incurred by the action of the British Authorities.

On February 9th, 1915, the German Government issued a decree declaring the waters round the British Isles a "War area," and threatening to destroy all enemy merchant ships found in that area.

The decree pointed out that it would not always be possible to avert peril to persons, cargoes and neutral shipping. The sinking of the *Lusitania*, the *Arabic*, the *Ancona* and the *Persia* and kindred actions in presumed pursuance of this decree do not need to be recalled. On March 11th an English Order in Council was issued declaring the intention of the British Government to divert all ships trafficking with Germany and to take them into port, without confiscating ship or cargo except where they would be otherwise liable to confiscation. It is also provided that such a vessel may receive a pass entitling her to proceed to some neutral or allied port. The rights of any person who may have goods of innocent destination among a cargo otherwise going to Germany, are carefully safeguarded by a provision to the effect that such a person may, on seizure of the cargo, issue a writ in the Prize Court and apply that the goods in their proceeds should be restored to him. This provision has been largely acted on.

Finally, on April 18th, 1915, a German contraband Order was issued adopting the British rule that an enemy destination of conditional contraband will be presumed if the goods are consigned to order, or to a consignee whose name does not appear in the ship's papers, or to a person residing in enemy territory.

Shortly stated, the foregoing is believed to be accurately the history of what England and Germany have respectively so far done in pursuance of their mutual desire to keep, each from the other, what may be useful for war purposes. It is not the purpose of this article to examine or to compare from the point of view of humanity the methods adopted by the one and the other in pursuance of the common plan. Such things must be left to the judgment of history. The real question is, how far has England been justified in the interference with neutral trade which her procedure has necessitated. Neutral vessels, as long as the Allied fleets hold practical control of the seas, are liable to be stopped at any time and at any place and taken to port to be searched. It must never be forgotten that the right of a belligerent to search a neutral vessel is one of the few principles of International Law, (the term is used for convenience), which is quite beyond question. That ablest of writers on International Law, Mr. Wheaton, sometime Minister of the United States at the Court of Prussia, states the principle thus :—

> " Right of visitation and search of neutral vessels is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war and vessels committing a breach of blockade"; and he quotes with approval the more general proposition of Sir W. Scott, who in the *Maria* says, " The right of visiting and searching merchant ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation."

Can it be doubted that the practice of taking neutral ships to port for the purpose of search is a necessity of modern shipping conditions ? The belligerent obviously would prefer to conduct a search at sea, could it be carried out with reasonable safety and be made reasonably effective. He would save the time and the cost of convoying vessels to port—vessels which are often released after search—at a time when his warships are badly needed on the high seas. The truth is that to effectively search the cargo of a modern vessel, loaded as ships are loaded in war time when every inch of space is valuable, on the high seas, in all weather, and without any means of unloading so as to get at buried cargo, is a physical impossibility, unless the vessel being searched is to be exposed to a risk nearly as great as that of being torpedoed, and far more certain. The right of search certainly exists, is indeed a necessity of war, but it must be exercised with every possible precaution to provide that the vessel searched shall not have danger added to annoyance. A *Lusitania* disaster might easily occur, not because of the belligerent's desire to sink the vessel, but despite his efforts to preserve her.

It has been suggested that neutrals would prefer, if their ships are to be stopped and cargo destined for a belligerent held up, that the thing be called a blockade so that they might know definitely what ports are open and what are not, and might take their chances accordingly. But a blockade, like a search at sea, is, under modern conditions, a physical impossibility.

Wheaton says :—

> " The definition of a lawful maritime blockade, requiring the actual presence of a maritime force stationed at the entrance of the port sufficiently near to prevent communications, as given by the text-writers, is confirmed by the authority of numerous modern treaties. . . . The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron produced by accident, as in the case of a storm, which does not suspend the legal operations of the blockade."

Also by the 4th Article of Declaration of Paris, 1856 :—

> " Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

The blockade to be lawful requires, therefore, the actual presence of a maritime force " stationed at the entrance of the port." How long would it remain there ? Imagine the joy of a belligerent at finding an enemy fleet obligingly remaining stationary off his coast. It would be a mere race between aeroplane and submarine as to which should first complete the work of destruction. Modern conditions require that a blockade, although in principle it is obviously still permissible, must be carried on

without what in other times was essential to make it legal, namely, the tightly drawn cordon. In effect the present British practice resembles a legal blockade as closely as modern conditions will allow. A blockade allowed neutral vessels carrying cargo really and finally for neutrals, to go through. So does England. A blockade allowed no goods for enemy consumption to pass in ships of any nationality. Neither does England. And finally, despite the most vigilant and well devised blockade, a certain amount of goods always get through to the enemy. They do still.

Suppose that America were at war with China and Japan, and that England remained neutral, what course would America be likely to pursue with reference to English shipments going, say, to Hong Kong? Would there be *much* hesitation in exercising the right of search, and the right of stopping conditional contraband which, in its aggregate, should exceed by one ounce the normal requirements of the colony?

The conclusion of the matter appears to be this, be the name what it may, the process of stopping neutral ships, taking them into port, searching the cargo and requiring reasonable evidence of its destination must, and always will, be a source of annoyance to neutrals. And so it will remain so long as nations continue to determine their quarrels by the primeval method of mutual destruction.

England has been, since the first day of war, transparently and obviously anxious not to quarrel with neutrals, and especially with America. But war is war; war almost universal, war with its difficulties and its dangers complicated both on sea and on land by the fact that each belligerent has gathered to his armoury every device, every wonder of modern science. Each day reveals some new engine of destruction, some new means of starving and harassing the enemy, undreamt of by those who have written on International Law. Happy the nation which is able to stand aloof, to watch, to learn and to prepare. The misfortunes of those who fight are the opportunities of those who watch—and of those who supply. If the commerce of neutrals is doubled and redoubled because their competitors are destroying each other; if a neutral country is flooded with prosperity because belligerents, who once made for themselves and the world, are now suppliants at neutral doors; is it too much to ask that those who prosper so greatly should accept inconveniences which are a necessary element of the situation and which are in infinitesimal proportion to the misfortunes of those who fight and the opportunities of those who do not?