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By

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Adjunct Professor of Government

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The benefits of education and of useful knowledge, generally diffused through a community, are essential to the preservation of a free government.

Sam Houston

Cultivated mind is the guardian genius of democracy. . . . It is the only dictator that freemen acknowledge and the only security that freemen desire.

Mirabeau B. Lamar

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The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship.

This principle is universally acknowledged by the laws of the nations. It lies at the foundation of all governments, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territory of a country with which our Government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation.

UNITED STATES SUPREME COURT.

## INTRODUCTORY NOTE ON THE GENERAL NEUTRALITY POLICY OF THE UNITED STATES

In the study of the policy of the Government of the United States since the inception of its national life one cannot fail to be impressed with the remarkable character of its positive contributions to thhe law of nations in its pursuit of the ideal of neutrality amid circumstances too often all but intolerable. It matters little that the policy of neutrality inaugurated by President Washington was guided in part by the considerations of internal policy, the uncertain financial conditions of the newly established Federal Government, and a distinct division of counsels in the cabinet, for the essential fact back of the adoption of the policy in the famous proclamation of neutrality was the resolve of the President "to adopt general rules, which should conform to the treaties, and assert the privileges, of the United States." These were, accordingly, laid down in systematic rules, as "there was reason to apprehend that our intercourse with those powers with whom the United States have the most extensive relations might be interrupted, and our disposition for peace drawn into question by the suspicions too often entertained by belligerent nations."[1]

Throughout, one thing stands out quite clearly—the firm desire of Washington to establish along clearly defined lines a policy which should embrace in its scope the recognition, as this nation understood them, of the principles of the law of nations as regards neutral powers. It is true that we had not incorporated in our treaty of peace with Great Britain the principles of the Armed Neutrality of 1780, although we had later committed ourselves in the treaties with the countries which composed it[2] to the acceptance of the doctrines promulgated by the Empress Catherine, and it was only in the articles of the Jay Treaty with England that we assented to the right of a belligerent to seize enemy

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[1] *American State Papers, Foreign Relations* I, 21.

[2] Moore, *Digest of International Law*, VII, 560.

property aboard a neutral ship. Under such circumstances, on the outbreak of war in Europe, it was an epochal step for Washington to take in seeking independently to determine, as far as our municipal jurisprudence was concerned, the exact stand that the United States would take in the interpretation of its rights and duties as a neutral power.

It was on this basis, therefore, that the first Neutrality Act of June 5, 1794, was passed, prohibiting the acceptance by citizens of the United States of commissions to serve a foreign state or prince; the enlistment or hiring of persons to enlist in the service of any other state; the fitting out and arming of vessels to be used against countries with which the United States was at peace; the commissioning of a vessel for such purpose; the augmenting of its forces; the setting on foot of military expeditions against foreign states within the territory or jurisdiction of the United States, and empowering the President to use such part of the land and naval forces of the United States as should be judged necessary to enforce the act. The courts of the United States were likewise given jurisdiction over cases of captures within the territorial waters of the United States, though the act was not to be so construed as to prevent the prosecution of treason or piracy as defined by treaty or by law of the United States.[3] This act, renewed in 1797, was made permanent by the Act of April 24, 1800. As a starting point for the enactment by other countries of neutrality laws, the Act of 1794 has been claimed as one of the most model acts that could have been contemplated for the true enforcement of neutrality, and has received unstinted praise from many eminent writers and statesmen.[4]

It is not the part of this endeavor to discuss in any detail the numerous occasions when the United States has found itself in a difficult position due to the violation of its

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[3] 1 *U. S. Statutes at Large*, 381.

[4] Cf. Fenwick, C. G., *The Neutrality Laws of the United States*, p. 27, and Hall, W. E., *International Law*, 4th Ed., p. 587.

neutral rights by belligerents in foreign wars, or due to the enterprises undertaken by its own citizens in aid of insurrections or revolutions in American countries. Suffice it to say that such notorious cases of filibustering as the Miranda expedition in 1806 brought from the pen of Jefferson on November 27, 1806, a neutrality proclamation as regards the wars of the Spanish American colonies and the attempt of American citizens to organize military expeditions in the United States with a view to furthering their insurrection against Spain.[5] Other proclamations and diplomatic notes between the United States and Spain followed in the course of the next decade, and the manifest deficiencies in the neutrality laws, as revealed both by the exigencies of the Napoleonic wars and by the revolt of the Spanish colonies, were brought to the attention of Congress by Madison in his message to Congress on December 26, 1816:

> It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties, and other unlawful acts on the high seas, by armed vessels equipped within the waters of the United States.
>
> With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped, or in a course of equipment, with a warlike force, within the jurisdiction of the United States; or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in military stores permitted by our laws, and which the law of nations does not require the United States to prohibit.[6]

The fruit of Madison's recommendations and the advice offered by Monroe, then Secretary of State, was the "Act

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[5]Richardson, *Messages and Papers of the Presidents*, I, 404.

[6]Fenwick, citing *Am. State Papers, For. Rel.*, IV, 103, *op. cit.*, p. 35.

more effectually to preserve the neutral relations of the United States" effective March 3, 1817.[7] This served to take away the burden of preventing expeditions against a friendly nation by insurgents, by the designation of "foreign prince, state, colony, district, or people" as the all-embracing group of those in whose behalf the laws were to be enforced, in lieu of the narrower designation "foreign state or prince" which had operated too one-sidedly against all insurgents hitherto.[7a] Finally, as a completing measure, Congress, by an Act of April 20, 1818, passed a law codifying all previous neutrality laws into one act, now embodied in the Revised Statutes of the United States, Sections 5284-5291.[8]

The next enactment dealing with the neutrality of the United States came as the result of President Van Buren's proclamation of January 5, 1838[9] warning American citizens against compromising the neutrality of the United States by interfering in the current insurrection in Canada against the British authorities, and a message urging Congress to make adequate provision for the case. Consequently, on March 10, 1838, Congress passed an act authorizing the detention of shipments of ammunition or other war material "which may be provided or prepared for any military expedition or enterprise against the territory or dominions of any foreign prince or state or of any colony district or people *coterminous with* the United States and with whom they are at peace."[10] This has been regarded in some quarters as the chief precedent for the action of the Congress of the United States, when, by joint resolution of March 14, 1912, it authorized the President to pro-

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[7]3 *Statutes at Large*, 370.

[7a]This marks, from a juridical standpoint at least, the turning point in the policy of the United States as regards the revolting colonies of Spain, by the assertion of its neutrality laws so as to protect them from being the victims of expeditions of repression supported by the United States through grants of aid to the mother country.

[8]3 *Statutes at Large*, 447.

[9]Richardson's *Messages*, III, 481.

[10]5 *Statutes at Large*, 212.

claim the illegality of export of munitions to any American country where, in his opinion, there existed "conditions of domestic violence which are promoted by the use of arms or munitions of war procured from the United States," until otherwise ordered by him or by Congress.[11]

More menacing to our neutrality were the mid-century filibustering expeditions of Lopez to Cuba in 1849, and of Walker to Nicaragua in the early fifties, the numerous attempts on the part of over-zealous Americans to aid Cuba in her protracted struggle for freedom against Spain, and sundry expeditions that have from time to time been made against Mexico. In each instance these served to call forth from the President a proclamation against the citizens who should so conspire to set at naught the laws of the United States maintaining her neutrality. As regards Cuba, so open were American sympathies in favor of the insurgents that Hamilton Fish, then Secretary of State, was "forced to admit with regret" that the United States had failed to exercise the "due diligence" in preventing the escape of an expedition bent on reaching Cuba, due to the extreme secrecy with which the insurgents had carried out their plans; furthermore, there were constitutional limitations as to the right of search and seizure, as well as to the suppression of free expression of opinion, which the United States Government could not itself trespass.[12]

The lessons taught the United States by the depredations of the *Alabama* in the Civil War, and by the neglect of Great Britain to take due diligence to prevent the departure of the Laird commerce destroyers from Liverpool, gave President Grant ample warrant for making the regulations as to the stay of belligerent war-vessels in the harbors of the United States as stringent as possible. Consequently, by means of a second proclamation of neutrality in the Franco-Prussian War, issued October 8, 1870, supplementing the very detailed proclamation which he had already

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[11]Fenwick, *op. cit.*, p. 58.

[12]House Executive Document No. 160, 41st Congress, 2nd Session, p. 133.

issued on August 22, 1870, President Grant declared that, as information subsequent to the original proclamation gave him "reason to apprehend an abuse of the hospitality of the ports of the United States by belligerent cruisers," he proclaimed and declared that "any use of the territorial waters of the United States by vessels of either belligerent for the purpose of preparing for hostile operations or as posts of observation must be regarded as in violation of the neutrality of the United States."[13] Further than this, the proclamation fixed the rule of a twenty-four hour stay in neutral ports for belligerent warships, in the wake of the practice adopted by Great Britain in her Neutrality Regulations of 1862, which also provided that the supplies to be taken aboard a belligerent vessel must be limited to provisions for her crew and as much coal as should be sufficient to carry the vessel, if without sail power, to the nearest European port of her own country, and that supplies of coal could not be furnished more than once in three months.[14] These regulations finally found their way into Convention XIII, adopted by the Second Hague Conference in 1907, relating to the Rights and Duties of Neutral Powers in Maritime War, thereby acquiring the sanctions of the law of nations for this hitherto purely municipal enactment.

The last important development of the position of the United States previous to the outbreak of the European war, with the exception of the proclamation as to Mexico already noted, is to be found in a proclamation issued by President Roosevelt on October 14, 1905, who declared "for good and sufficient reasons to me appearing, and by virtue of the authority conferred upon me by a joint resolution approved April 22, 1898, to prohibit the export of coal or other material used in war from any sea-port of the United States" that "the export of arms, ammunition, and munitions of war of every kind from any port in the United States or in Porto Rico to any port in the Dominican Republic, is prohibited, without limitation or exception, from

[13]Richardson, *Messages*, VIII, 87-89.
[14]Fenwick, *op. cit.*, 53.

and after the date of this my proclamation until otherwise ordered by the President or the Congress."[15]

These various steps are sufficient, for the purposes of this study, to show how the United States, by mere municipal enactments, has striven to fulfil, as best it knew, the strict obligations of neutrality.

Judged by the standards of other nations, as may be noted in reading the neutrality proclamations of all the neutral countries at the beginning of the Great War.[16] the standard of neutral conduct maintained by the United States is relatively high, consistent with the previous international practice of the most enlightened nations, and free from any regulations that have not as yet taken effect internationally—such as Latin American states have been wont to embody in their neutrality codes. Yet notwithstanding this high standard of neutrality laws and policy, the United States found, in the course of the Great War, that her municipal enactments must be broadened. To that end, the 63rd Congress, in its closing hours, passed a joint resolution to empower the President to better enforce and maintain the neutrality of the United States.[17]

This authorized the President to issue orders to the collectors of customs under the jurisdiction of the United States to withhold clearance from any vessel, American or foreign, which he had reasonable cause to believe to be about to carry fuel, arms, ammunition, men or supplies to any warship, or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral nation. The rush at the eleventh hour to pass some such blanket clause of authority when the eventful summer of 1915 was at hand is the only discreditable feature in regard to the conduct of our policy at the time, yet the powers entrusted to the President as the result of its passage were found sufficiently ample, for all the emergencies of the international situation, up till the time of

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[15]34 *Statutes at Large*, 383.

[16]107 *British and Foreign State Papers*, II, 795-865.

[17]*EW No. 2*, p. 20. (4.III.15).

the crisis over the armed neutrality bill two years later. The ignominous failure of the latter measure left the United States without any proper means to safeguard its neutrality towards other countries with which it remained at peace during the period of the war, consequently it became necessary to enact new measures fitted to safeguard the neutrality of the United States during time of war. In the Espionage Bill, passed during the first session of the 65th Congress, a special title was introduced to cover the situation, and embodied in it the gist of the best proposals for the better safeguarding of the neutral rights of the United States that had been made during the years of her neutrality. As their import does not bear on the issues under our consideration, it is sufficient here merely to refer to them, with the comment that it took the test of war itself to prove to the United States the flaws and weaknesses in its previous code of neutrality. At last, under the pressure of war-time enactments,[18] the United States has obtained a thoroughgoing code of neutrality laws sufficiently drastic and systematic in their operation to render amenable to law almost all the possible situations that might arise in time of either peace or war.[18a]

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[18]Title V, Chapter 30, *U. S. Statutes at Large*, 1917, p. 221.

[18a]For a review of the effects of the law of 1917 upon the older statutes, cf. Hyde, Charles Cheney, *International Law, Chiefly as Interpreted and Applied by the United States*, II, 703-708 *passim* (hereafter cited as Hyde, *International Law*).

# CHAPTER I. THE OUTBREAK OF WAR: INITIAL CONTROVERSIES

In the course of this conflict, let it be our endeavor, as it is our interest and desire, to cultivate the friendship of the belligerent nations by every act of justice and of innocent kindness; to receive their armed vessels with hospitality from the distresses of the sea, but to administer the means of annoyance to none; to establish in our harbors such a police as may maintain law and order; to restrain our citizens from embarking individually in a war in which their country takes no part; to punish severely those persons, citizen and alien, who shall usurp the cover of our flag for vessels not entitled to it, infecting thereby with suspicion those of real Americans and committing us into controversies for the redress of wrongs not our own; to exact from every nation the observance towards our vessels and citizens of those principles and practices which all civilized people acknowledge; to merit the character of a just nation and maintain that of an independent one, preferring every consequence to insult and habitual wrong. Congress will consider whether the existing laws enable us efficaciously to maintain this course with our citizens in all places and with others while within the limits of our jurisdiction, and will give them the new modifications necessary for these objects.

THOMAS JEFFERSON.

The outbreak of the European War found the United States suddenly encumbered with the heavy load of diplomatic relations of the various belligerent powers, who, feeling secure in entrusting their addled affairs to our care, had turned instinctively to the embassies or legations of the United States, feeling that, as we had always "stood apart, studiously neutral," in all previous European conflicts, we would now be the first to proffer our aid to those distressed civilians and exasperated statesmen whose feelings on the outbreak of war had left many a difficult situation for neutral diplomats to handle. America became the medium of exchange of thought and correspondence between the two great groups of belligerents, and her endeavors to straighten many tangled and thwarted affairs out of the impasses into which war had brought them was such as to make the work of our diplomats abroad and of our State Department at home signal in its achievements.

The most pressing situation abroad was, of course, the plight of American citizens marooned in the war area, devoid of means of identification—such had been the general neglect of passports in antebellum days. They were now seized or detained or left stranded in the most precarious situations, and our embassies were taxed to the limit in an endeavor to provide them safe means for return to the United States, both by the issuance of passports and by provision of money for them. To that end Mr. Bryan, then Secretary of State, sent a circular telegram to the embassies and legations in Europe on August 1, 1914, directing the issuance of emergency passports to American citizens requesting them, and advising all consular officials to register Americans at the consulates and to give them duplicate certificates of registration in case they did not have passports. Americans were urged to keep in touch and within reach of consular officials, and were to be given all possible protection under all circumstances.[19] Ten days later consuls were given authority to issue emergency passports, and to get blanks printed, while remitting all fees for passports.[20]

The subsequent misuse of passports by persons claiming to have been naturalized and therefore to be exempt from the jurisdiction of the country of their birth led Mr. Lansing, then Counsellor of the Department of State, to issue strict orders against the issuance of any passports to persons not duly authenticated, while doubtful cases were to be referred to the State Department.[21] On December 21, the passport regulations were supplanted by an entirely rigid set of rules devised from experience and aiming to make extremely difficult any false use of passports.[22] Similar care was to be used in regard to persons domiciled in European countries but desiring to have their passports renewed.[23] Special regard was paid to the case of

[19]*EW No. 2*, p. 155. (1.VIII.14).
[20]*Ibid.*, p. 155. (10.VIII.14).
[21]*Ibid.*, p. 155. (12.IX.14).
[22]*Ibid.*, p. 156. (21.XII.14).
[23]*Ibid.*, p. 158 ff. (8.II.15).

Americans going to Europe, and the Department of State issued several circulars urging our citizens to avoid actions or measures which might lead to suspicion:

> As belligerent countries are accustomed, for self-protection, to scrutinize carefully aliens who enter their territories, American citizens who find it necessary to visit such countries should, as a matter of precaution, and in order to avoid detention, provide themselves with letters and other documents in addition to their passports, showing definitely the objects of their visits . . . American citizens sojourning in countries which are at war are warned to refrain from any conduct or utterances which might be considered offensive or contrary to the principles of strict neutrality.[24]

Such were the measures taken abroad for the interests of our own citizenry, and their effectiveness soon put an end to all rumors of whatever nature to the effect that the United States had been helping belligerent governments to recruit their reservists, etc., by means of the surreptitious issue of false passports. Such charges were made sporadically but never actually proven. At home the efforts were different, and, if anything, even more impartially neutral. President Wilson issued the first proclamation of neutrality on August 4, and this was followed by an identic proclamation in every instance of a new declaration or state of war until our entry into the conflict.[25] But more than this, the President, in a message directed towards the maintenance of neutrality, urged every thoughtful man in America to be "impartial in thought as well as in action" for the sake of the enviable distinction that it would bring to the United States:

> The effect of war upon the United States will depend upon what American citizens say and do. Every man who really loves America will act and speak in the true spirit of neutrality and fairness and friendliness to all concerned. The spirit of the Nation in this critical matter will be determined largely by what individuals and society and those gathered in public meetings do and say, upon what newspapers and magazines contain, upon what ministers utter in their

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[24] *Ibid.*, pp. 162-3. (17.IV.15).
[25] *EW No.2*, pp. 15-17 (24.V.15).

> pulpits, and men proclaim as their opinions on the street. . . . Divisions among us would be fatal to our peace of mind and might seriously stand in the way of the proper performance of our duty as the one great nation at peace, the one people holding itself ready to play the part of impartial mediation and speak the counsels of peace and accommodation, not as a partisan, but as a friend. . . . The United States must be neutral in fact as well as in name during these days that are to try men's souls. We must be impartial in thought as well as in action, must put a curb . . . on every transaction that might be construed as a preference of one party to the struggle before another.
>
> My thought is of America . . . this great country ofours; (that) she should show herself in this time of peculiar trial a nation fit beyond others to exhibit the fine poise of undisturbed judgment, the dignity of self control, the efficiency of dispassionate action; a nation that neither sits in judgment upon others nor is disturbed in her own counsels and which keeps herself fit and free to do what is honest and disinterested and truly serviceable for the peace of the world. Shall we not resolve to put upon ourselves the restraints which will bring to our people the happiness and the great and lasting influence for peace we covet for them?[26]

It was the human values in the midst of a world of war that were sensed as the spirit of this proclamation on the part of the President, for it was but a keynote to the policy which has been habitually American, to pay a high regard for the human element in all things. In the controversies to follow the outbreak of the war our commercial and very material interests were threatened, on the one hand, by the Allied Governments, whose position of maritime supremacy was such as to menace any neutral that thwarted their plans or crossed their path at an inopportune moment, and, on the other hand, by the more immediately menacing control of the lives of human beings which the Imperial German Government capriciously exercised in an endeavor to wrest for itself that maritime supremacy which it sought to dispute in a new fashion by unexampled means. Whether the whole of our country thus grasped the theme of our

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[26]*Ibid.*, pp. 17-18 (19.VIII.14)

neutrality, whether the countries abroad were sufficiently dispassionate to interpret its meaning, it is impossible to estimate, but that our policy throughout the period of neutrality consistently upheld this view it is impossible to deny. It was a magnificent concept, but the responsibilities involved in it were many.

As regards Panama, and the interoceanic canal over which the United States exercises control, it immediately devolved upon the President and the Department of State to take measures to safeguard the neutrality of the Canal Zone and its adjacent waters. This was accomplished by the joint effort of the United States and Panama. On October 10, 1914, Mr. Lansing and Señor Morales, the minister of the Republic of Panama at Washington, entered into a formal protocol to arrange that belligerent war vessels and their tenders should be allowed to coal in Panamanian waters only once in three months.[27] Furthermore, President Wilson issued a proclamation on November 13, 1914, putting into effect a series of regulations governing use of the Panama Canal by vessels and belligerents and the maintenance of neutrality by the United States in the Canal Zone. These defined the vessels to which the rules were applicable and forbade the furnishing of fuel, lubricants or supplies for either vessel or crew except under the most rigid supervision and in the smallest quantities possible. No troops of any belligerent were to be disembarked unless absolutely necessary, and the twenty-four hour rule, in addition to the time taken in passing through the canal or necessitated by storms, etc., was to be rigidly adhered to. However, no war-vessel of one belligerent was to be allowed to depart within twenty-four hours after the departure of a war-vessel of the opposite belligerent.[28] Use of repair facilities was to be strictly limited to cases of urgent necessity. Radio installations were to be used only in canal business, and all air craft of a belligerent power, public or private, were forbidden to descend or arise within

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[27]*EW No. 2*, p. 18.
[28]*EW No. 2*, pp. 18-20.

the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above it.

Despite these careful precautions, a slight controversy with Great Britain arose over the cases of the *Mallina, Tremeadow* and *Protesilaus,* all British vessels which had gone through the Canal Zone, and whose alleged violation of American neutrality was brought to the attention of the Department of State by the German Ambassador at Washington.[29] Sir Cecil Spring-Rice, in a note of December 18, 1914, to Mr. Bryan cleared up the matter by a presentation of the facts which showed that the *Mallina* had put to sea without clearance papers, in violation of the canal regulations, because otherwise she would have been in the zone more than twenty-four hours, due to the delay in getting her papers through from the Canal Zone authorities, who were to send them to her along with some supplies. Fearing the possibilities of internment if she overstayed her time, she put to sea, preferring to violate the customs regulations of the Canal Zone rather than be interned, because she was particularly valuable to the Admiralty as a collier at this time. Concerning the *Tremeadow,* not even this allegation could be made, hence nothing was done in her case. In the case of the *Protesilaus,* accused of improper use of wireless in Panamanian waters, it was substantially proved that the *Protesilaus* had come into port without dismantling her wireless apparatus, as provided for by the Canal Zone regulations. While in port she received an Admiralty code message by wireless to be transmitted to the British Consul at Panama. She asked the land station to transmit the message in plain language, but was refused, whereupon her wireless was dismantled and not used again. These matters having been communicated to Mr. Lansing, he replied on January 2, 1915, acknowledging receipt of the British note to that effect, and the matter was dropped. The British allegation that the incidents were caused by tardiness of the United States in establishing neutrality rules for the

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[29]*Ibid.*, pp. 23-25.

Canal Zone seems to be sustained in point of fact, and the fact that no such incidents recurred after the Canal Zone Rules had been published by the Admiralty shows the intentions of the colliers concerned to have been substantially sincere in desiring to avoid any breaches of American neutrality.

The question of the use of wireless installations on land or in the territorial waters of the United States was a matter of no little concern to the United States, and the general attitude of the State Department is given in an appendix.[30] Much earlier, however, the President had issued executive orders preventing radio stations within the jurisdiction of the United States of America from transmitting or receiving for delivery messages of an unneutral nature, and from in any way rendering to any one of the belligerents any unneutral service during the continuance of hostilities. The enforcement of this order was left to the Navy Department.[31] By a later order, the United States, under the Radio Act of August 13, 1912, took over the high-powered radio stations for exclusive use and control over trans-Atlantic communication with Europe in code and cipher messages. This was in pursuance of the third, fifth and eighth articles of the Fifth Convention of 1907 signed at the Hague, whereby belligerents were forbidden (a) to erect on the territory of a neutral state a wireless telegraphy station or any other apparatus for the purpose of communicating with the belligerent forces on land or sea; (b) to use any installation of this kind established by them before the war on the territory of a neutral state for purely military purposes, and which had not been opened for the service of public messages, and neutrals were called upon to suppress such acts in violation of their neutrality if occurring on their territory, but were not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private indi-

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[30]Bryan to Stone (20.I.15), *EW No. 2*, p. 58 (p. 181, *infra*).
[31]*EW No. 2*, p. 71. (5.VIII.14).

viduals. This point can best be illustrated by the resolution of the British delegation at the Hague in 1907 that it be specified that "the liberty of a neutral state to transmit massages, by means of its telegraph lines on land, its submarine cables or its wireless apparatus, does not imply that it has any right to use them or permit their use in order to render manifest assistance to one of the belligerents."[32]

Almost concurrently arose a controversy, more dilettante than juridical, over the British and French censorship of messages transmitted by cable or wireless. The demands of the British censor that telegraph companies write out in full all addresses, the charging of expense to the sender for decoding and recoding, for translation and retranslation all led to protests from the State Department, but the chief complaint was made when the British censors started suppressing cable communications to and from neutral countries. This considerably curtailed American trade with neutral countries and the State Department was peculiarly insistent in stressing the hardships caused by suppressions when the senders were informed of nothing concerning the non-delivery of the massages—a claim which the British Government refuted by saying that to notify the sender of non-delivery of his telegrams would be to defeat the object of censorship. The legal grounds taken by Great Britain were that under Article 8 of the International Telegraphic Convention the contracting states reserved the right to suspend the telegraphic service for an indefinite period.

> Such a notice was issued by the British Government when the present emergency arose, but in order to avoid the inconvenience which would have arisen from a total stoppage of communication, it was decided as an *act of grace* to accept telegrams for transmission on the understanding that they were to be accepted at the sender's risk and subject to censorship by the British authorities; that is, that they might be stopped, delayed or otherwise dealt with by the

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[32]Scott, *Reports*, pp. 539-543, *passim*.

censors, and that no claim for reimbursement could be enterained.[33]

In other cases, the British Government asked particular instances to be furnished where redress was sought by neutral countries or merchants. As the only effective evidence was in the hands of the British censor, it was manifestly impossible for neutrals to fulfil the conditions laid down by the British Government as precedents to redress.

By December, 1914, the French Government began to relax its vigilance in the censorship of cablegrams and accepted code messages for France, Algiers, and Tunis, specifying the codes to be used. This lack of concerted measures between the British and French Governments led to representations made by the State Department to Great Britain on December 3, 1914, in regard to discriminations "against American cablers who desire to use American cables instead of those of the French company, which is a foreign concarn."[34] In reply, the British Government authorized several codes to be used for cotton transactions, which were still held to be transactions in non-contraband goods, and suggested the omission of technical words in ordinary uncoded telegrams, as these were likely to be regarded as suspicious or as endeavors to use a concealed cipher or code. Further protests were made to the British Government concerning the censorship of cables being forwarded to France, as this was a double consorship. Finally, on December 18, 1914, the British Government issued a memorandum permitting the resumption of code service between the United Kingdom and certain foreign countries, with, however, very considerable exceptions.[35] In reply to the request made by Ambassador Page at London that the Embassy be informed of telegrams stopped, with the reason for their being stopped, the British Embassy at Washington stated that "whenever the date of the despatch and addresses of sender

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[33]The British Post Master General to the Political Department of the Swiss Confederation, *EW No. 2*, p. 77 (2.XI.14).

[34]*EW No. 2*, p. 81. (3.XII.14).

[35]*Ibid*, pp. 84-5. (18.XII.14).

and destined receiver were given, the censor would inform the United States Ambassador in London whether the cable had been stopped and the reasons for stopping it."[36]

The censoring of messages passing from the United States to South America through British-owned cables outside of the European system was another source of grievance to the United States and formed the subject of several representations on the part of the State Department to the British Government.[37] In this respect at least, the Foreign Office heeded the protests of the United States and replied that the attention of the censors had been called to the existing regulations on the subject and that the British Government would pass all messages between North and South American countries sent by way of the United Kingdom, but Mr. Page was constrained to suggest, in his transmission of the memorandum, that Americans wishing to send messages to South American countries should be advised if possible to use non-British cables to escape annoyances.

A point in the controversy which is not altogether creditable to the United States is the charge brought by the British Government against the Department of State for having transmitted as official business commercial telegrams from American firms to British or neutral countries. The matter was brought to the attention of Mr. Page by Sir Edward Grey in a note verbale of November 17, 1914, which is not obtainable, to the effect that "certain telegrams from private individuals and commercial firms, detrimental to British interests were being sent through the State Department," and that "the censorship authorities had brought to Sir Edward Grey's notice the fact that this practice still continued." The Foreign Secretary went on to point out that as the State Department messages were given priority over ordinary messages of a commercial nature, this practice was unfair to British traders, besides afford-

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[36]*Ibid.*, pp. 85. (21.XII.14).

[37]*EW No. 2*, pp. 93-4. (13,27.V; 3.VI.15).

ing means of intercourse with the enemy which the British Government could not brook.[38]

On March 16, 1915, Mr. Bryan replied in a carefully prepared dispatch to Mr. Page, stating that the Department of State had sent instructions to all consular and diplomatic officers to discontinue, until they were further instructed, the forwarding of private commercial messages on the ground that the British Government had raised objections to such a practice. The United States understood, however, that the objections raised by the British Government were not based upon the suspicion that the messages were in private code or conveyed a double meaning, but that they were destined to enemy territory. While ignoring the charge that this practice was unfair to other traders, Mr. Bryan added that it was understood that the British Government recognized the importance, as a matter of policy and good relationship at least, of not exercising the right of censorship in a way to interfere with legitimate American commercial transactions with neutral countries.[39]

The last topic connected with the use of telegraphs was raised by the regulation of the British censors providing that only messages passing between diplomatic missions and their home government might go in cipher, and that all others must be open.[40] This of course deprived the Ambassador at Berlin of the privilege of communicating with Paris or London by cipher messages, and made it necessary to handle all the business entrusted to them in plain language. The commanding officer of the United States troops at Tientsin sent a code message on August 21, and one on August 22, to the commanding general in the Philippines via Hong Kong, so they were held up by the British censor and not allowed to go through. This was made the subject of a note from Sir Edward Grey to Ambassador Page, who forwarded them, under date of October 23, 1914, to the Department of State.[41] The seeming negligence of

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[38]*Ibid.*, p. 91. (5.III.15).
[39]*EW No. 2*, pp. 91-2. (16.III.15).
[40]*Ibid.*, p. 72 (27.VIII.14).
[41]*Ibid.*, p. 75. (23.X.14).

the Department of State in making these regulations known to all the diplomatic missions of the United States led to an informal request of the British Government that this be done, as Minister Reinsch at Peking had violated this propriety by sending a coded message to the American Consul General at Hong Kong.[42] This was brought to Minister Reinsch's attention with an injunction to remember the regulations.[43]

Akin to the question of telegrams and wireless messages is the subject of the transmission of mail of American diplomatic and consular officers. This formed the subject of correspondence between all the belligerent governments and the United States, as a result of which the various governments consented to regard the mail-pouches of the diplomatic missions of the United States as inviolable if they were under the seal of the office; if no correspondence of private individuals other than diplomatic or consular officers or employees of American missions or consulates addressed to private individuals in the United States were sent in the pouches; if all official correspondence of diplomatic and consular officers to individuals outside of the Department were marked "Official Business" and left unsealed; and if communications from either private individuals, American or alien, in belligerent countries to private individuals or agents in the United States were excluded from the pouches. These regulations were the result of agreements arrived at by diplomatic discussion and embodied in two circulars issued by the State Department, on December 18, 1914, and April 23, 1915, respectively. These regulations lasted throughout the period of American neutrality, after which the mail-pouches of missions in Allied countries were thrown open to use by all Americans.[44]

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[42]*EW No. 2*, p. 86. (29XII.14).
[43]*Ibid.*, p. 86. (2.I.15).
[44]*Ibid.*, pp. 67-8.

## CHAPTER II
## THE CONTROVERSY OVER MAIL SEIZURES

Concerning the seizures of mails bound for neutral countries by the British customs authorities, as a result of the ill-starred expedition of Henry Ford and the *Oscar II* and *Frederich VIII*, the United States opened a rather protracted correspondence with the Allied Governments, regarding this procedure as a very high-handed act on the part of the British authorities. In a dispatch dated January 4, 1916, Mr. Lansing brought the whole subject matter under discussion, instructing Ambassador Page to present these views to the British Foreign Office.[45]

This note dealt with the question of ordinary mail and of parcel post, the Department being "inclined to regard parcel post articles as subject to the same treatment as articles sent as express or freight in respect to belligerent search, seizure, and condemnation." This laid down a clear line of demarcation between ordinary drop-letter correspondence and "correspondence" capable of being made a vehicle for freight. But, "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 the 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 April 3, 1916, the Allied Governments submitted, through the French Ambassador at Washington, a memorandum on the subject of these seizures, stating that the Allied Governments had been compelled to resort to this procedure with respect to mail matter, "on account of the fraud and violence exercised along that line by their enemies."

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[45] *FRUS No. 3*, p. 145. (4.I.16.)

The viewpoint laid down with respect to the treatment of parcel post will first be examined, because of the policy enunciated by the United States to treat it as ordinary commerce.

> "The shipment of merchandise by parcel post," stated the Allied note, "is a mode of shipment and transportation analogous to shipment and transportation on way bills or bills of lading, with this difference, that the transportation is undertaken by the mail service, which moreover sometimes turns it over to common carriers, as is the case in France. In no wise do such 'parcels' constitute 'letters' or 'correspondence' or 'despatches,' and they clearly are not withdrawn in any way from the exercise of the rights of police, supervision, visitation, and eventual seizure which belong to all belligerents as to all cargoes on the high seas."

The note goes on to cite the destruction of parcel post on board the French liner *Floride,* sunk by the *Prinz Eitel Friedrich,* in which case the commander had declared that the post parcels on board the steamship *Floride* had been regarded as merchandise and not as correspondence; that that was the reason why he did not have them taken out of the *Floride,* but allowed them to sink with the vessel, basing his action on the Declaration of London, according to which parcels are merchandise and not correspondence.[46] It should be stated that this distinction alleged by the commander of the *Prinz Eitel Friedrich* does not appear either in the text or the Drafting Committee's Report annexed to the Declaration of London. In this instance, therefore, it may be assumed that the statement of the Second Assistant Postmaster General is inaccurate.[46a]

The Allied Governments, the note continued, had adopted the view of the commander of the *Prinz Eitel Friedrich,*

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[46]*EW No. 3,* pp. 146-151 at p. 150.

[46a]Several writers have wanted to put the whole category of mail into the class of those somewhat dubious "analogues of contraband," but the practice of nations has been to consider missive mail as capable of transmission to the enemy through neutral channels, without being captured. The only exception made is in the case of a vessel bound with mail for a blockaded port, which manifestly would be bound to suffer seizure. Cf. Scott, *Reports,* p. 732.

which, in their opinion, was fully founded in law and superabundantly justified by the facts. The carriage in parcel post packages of such substances as rubber, wool and other "worthless samples" of such nature in large quantities to Germany was particularly complained of. After citing these examples of subterfuge and surreptitious trafficking, the note adds that from a legal standpoint the right of the belligerent governments to exercise police supervision over vessels and their cargoes, of whatever nature, had never been subject to exceptions, up to the adoption of the Eleventh Hague Convention of 1907.

As a result of this, the Allied Governments held that from this standpoint of their right of visitation and eventual arrest and seizure, merchandise shipped in post parcels would not be treated in any other manner than ordinary merchandise; that the "inviolability of postal correspondence" stipulated in the Eleventh Convention would not affect the right of the Allied Governments to visit, and if occasion rose, to search, arrest and seize merchandise hidden in the wrappers, envelopes or letters contained in the mail bags;[47] otherwise the Allied Governments would continue to refrain from seizing and confiscating such correspondence, letters or dispatches, and would insure their speediest possible transmission, as soon as their genuineness and the sincerity of their character should have been ascertained.

In reply to this contention on the part of the Allied Governments, Mr. Lansing, in a note to the British and French Ambassadors, under date of May 24, 1916, stated that the United States did not consider that the Postal Union Convention of 1906 applied to the interference with mails of which complaint had been made. The United States was quite ready to admit that post parcels might be treated as merchandise subject to the exercise of belligerent rights as recognized in international law, but could not admit that

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[47]The British Government gave judicial sanction to this view in the case of *The Simla*, in which it was held that the Eleventh Hague Convention did not apply to post parcels. Cf., Trehern, *British and Colonial Prize Cases*, I, 281.

such parcels were subject to the exercise of belligerent rights "which belongs to belligerents as to *all cargoes* on the high seas."[48] Further than this, the United States was willing to concede "that the class of mail matter which includes stocks, bonds, coupons and similar securities was to be regarded as of the same nature as merchandise or other articles of property and subject to the same exercise of belligerent rights."[49] Under Article 24, (4), of the Declaration of London, gold and silver in coin or bullion, and paper money were regarded as conditional contraband, the report of the Drafting Committee holding that "paper money" included only inconvertible paper money, i.e., banknotes which might or might not be legal tender. *Bills of exchange and cheques were excluded.*[50] But almost in the same sentence the United States' position was further outlined: "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." This was, it would appear, a rather awkward admission on the part of the United States, as it in effect compromised every effort later to be made to secure liberty of passage for shipping documents and money order lists, etc., which the United States contended could not be classed as merchandise and must therefore be regarded as genuine correspondence. For this reason, the Allied Governments, in their final reply on October 12, 1916, took issue with the United States on the latter question and held that

> as a matter of fact, the lists of money orders mailed from the United States to Germany and Austria-Hungary correspond to moneys paid in the United States and payable by the German and Austro-Hungarian postoffices. Those lists acquainted those postoffices with the sums that had been paid there, which in consequence they had to pay to the addressees. In practice, such payment was at the disposal of the addressees and was effected to them directly the lists arrived, and without the requirement of the individual orders

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[48]*EW No. 3*, pp. 151-156, at p. 152.
[49]*Ibid., loc. cit.*, at p. 156.
[50]Cohen, *op. cit.*, pp. 96-97.

> having come into the hands of the addressees. These lists were thus really actual money orders transmitted in lump in favor of several addressees. Nothing, therefore, in the opinion of the Allied Governments, seemed to justify the liberty granted to an enemy country so to receive funds intended to supply by that amount its financial resisting power.[51]

Thus ended the considerations affecting post parcels and their alleged inviolability. In regard to ordinary correspondence, the viewpoints of the United States and the Allied Governments differed much more radically. In the first note above mentioned, the United States made complaint about the fact that in the cases of the Dutch steamer *Nieuw Amsterdam* (December 23, 1915) and other such vessels, "the entire mails, including sealed mails and presumably the American diplomatic and consular pouches, from the United States to the Netherlands, were removed by the British authorities." This treatment of the diplomatic mail of the United States the State Department held to be "an aggravating circumstance in a practice which is generally regarded as vexatiously inquisitorial and without compensating military advantage to Great Britain." In reply to this charge the Allied Governments made no admission of such acts, but stated that "should any abuses, grave errors or derelictions committed by the Allied authorities charged with the duty of inspecting mails be disclosed to the Governments of France and Great Britain, they are now as they ever were ready to settle responsibility therefor in accordance with the principles of law and justice which it never was and is not now their intention to evade."[52]

The case of the seizure of ordinary missive mail was much more difficult of adjustment and was the main subject of discussion between the United States and the Allied Governments. In this connection it may be of interest to review the status of postal correspondence under the

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[51] *EW* No. 4, p. 58.
[52] *EW No.* 4, p. 59.

Eleventh Hague Convention of 1907. Article I of Chapter I, which dealt with Postal Correspondence, states that:

> The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found *on the high seas* on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.
>
> The provisions of the preceding paragraph do not apply in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

Article II reads as follows:

> The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and the nonly with as much consideration and expedition as possible.[53]

The German delegation at the Second Hague Conference submitted to the committee dealing with these subjects the following proposition:

> ARTICLE I. Postal correspondence shipped by sea is inviolable, whatever its character, official or private, and whether it is the correspondence of neutrals or belligerents. In case of the seizure of the vessel carrying this correspondence, provision shall be made to forward it by the quickest route possible.
>
> ARTICLE II. Apart from the inviolability of postal correspondence, mail steamers are subject to the same principles as other merchant ships. Nevertheless, belligerents shall abstain, insofar as possible, from exercising the right of search with respect to them, and the search shall be pursued with as much consideration as possible.[54]

The fact that the final convention text is so similar to the German proposition was the fact that led the Allied Governments to doubt the sincerity of motive behind a proposition that looked so pacific. However, M. Fromageot,

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[53]Scott, *Reports*, p. 732.
[54]Scott, *Reports*, p. 741.

the reporter of the particular committee, said in his report on the Eleventh Convention:

> In the present state of international law, the transportation of postal correspondence at sea is not effectively guaranteed in time of war. A distinction is indeed made according to whether the correspondence is official or private, whether or not the senders and addressees belong to the enemy's service, whether or not the vessel is a regular mail carrier, and according to the place of departure and destination. The result is none the less that mail-bags carried by sea in time of war do in fact ordinarily undergo seizure, opening, rifling, confiscation, if need be, and at any rate, delay or even loss . . .
>
> As so many private commercial interests at the present day depend upon regular mail service, it is indispensible (in the eyes of the German delegation) to remove this service from the disturbances of naval warfare. The advantages to be gained by belligerents from the control of the postal service is out of all proportion to the harm done to inoffensive commerce. Telegraphy and radiotelegraphy offer belligerents more rapid and surer communications than mail.
>
> Altho dispatches are, by analogy, often considered articles of contraband, it is proper to note that the question is, on the whole, quite independent, since it arises, whatever may be the flag of the vessel carrying the mail, whether neutral or enemy. However, this distinction between enemy and neutral nationality had to be put in the text by reason of the apprehension of certain Powers in the matter of mail carried under an enemy flag. . . .
>
> The best guaranty to the postal service would assuredly have been to exempt regular mail carrying vessels from the right of search and from the ordinary treatment of merchant ships in time of war. But it was thought advisable to state that in case search of a mail-carrying ship is necessary, it should be done with all possible dispatch.[55]

In the light of this enlightened international attitude, the first protest of the United States presents the case quite strongly. The objections to parcel post seizures had been based on two grounds, (1) that while the United States regarded postal correspondence such as parcel post packages assimilable to merchandise, the unlawful bringing in of

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[55] *Ibid.*, pp. 735-736.

ships for search in port and improper assumption of jurisdiction over ships and cargoes could not be admitted, and (2) the case of blockade contemplated in the Hague Convention was inapplicable because the United States did not consider the "blockade" proclaimed by the British Government as legal. Now the State Department claimed that the Department could not admit the right of the British authorities to seize neutral vessels plying directly between American and European neutral ports without touching at British ports, to bring them into port and while there to remove or censor mails carried by them.

In the opinion of the Government of the United States modern practice generally recognized that mails were not to be censored, confiscated, or destroyed on the high seas, even when carried by belligerent mail-ships. To attain the 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 could not be justified on the ground of national jurisdiction. In cases where neutral mail ships merely touched at British ports, the Department believed that the British authorities had no international right to remove the sealed mails or censor them aboard ship. Mails on such ships never came rightfully into the custody of the British mail service, and that service was entirely without responsibility for their transit or safety.

The Allied Governments replied that, the Eleventh Hague Convention of 1907 not having been ratified by all the powers engaged in the war, they would regard it as inapplicable to the existing situation. As regards missive letters, etc., it was found that even in them rubber and other valuable articles were very frequently concealed. These the Allied Governments, as has already been shown, reserved the right to seize; otherwise they would refrain from seizure or confiscation of missive correspondence *on the high seas.* To this the United States was constrained to reply that it did not admit that belligerents might search other private sea-borne mails except for the purpose of dis-

covering whether they contained articles of enemy ownership carried on belligerent vessels, or articles of contraband transmitted under sealed covers as letter mail, though they might intercept at sea all mails coming out of or going into ports of the enemy's coasts which were *effectively* blockaded.

The note then took up the question raised by the practice of the Allied Governments of seizing and confiscating mail from vessels in port instead of at sea, thus compelling shipping lines through some form of duress to send their mail ships via British ports, or detaining all vessels merely by calling at British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. The removal of such correspondence to London for censorship to determine "the sincerity of their character" before forwarding it to its destination caused irreparable delay and damage. The legal distinction between the seizure of mails at sea, which the Allied Governments announced they had abandoned, and their seizures from vessels voluntarily or involuntarily in port, where the Allied Governments obtained greater belligerent rights than they could exercise on the high seas, was entirely gone, in the opinion of the Department of State, and amounted to an unwarranted limitation of the use of the free seas by neutrals for the transmission of correspondence. Contrary to previous American and French practice, and to the principles accepted by the Allied Governments in the case of the *Floride*, already cited, the United States held that these interferences were wrong both in principle and in practice. The loss of mails delayed in transmission by the British censorship was irreparable. American commercial interests were injured, the rights of property were disregarded, and the rules and practice of international law were palpably and continually violated. The United States Government therefore held that it would be compelled to press claims for full reclamation upon the attention of the British and French Governments.

> To submit to a lawless practice of this character would open the door to repeated violations of international law by

> the belligerent powers on the ground of military necessity of which the violator would be the sole judge. Manifestly, a neutral nation cannot permit its rights on the high seas to be determined by belligerents or the exercise of those rights to be permitted or denied arbitrarily by the Government of a warring nation. The rights of neutrals are as sacred as the rights of belligerents and must be strictly observed . . . Only a radical change in the present French and British policy, restoring to the United States its full rights as a neutral power, will satisfy this Government.[56]

The Allied Governments, in reply, while claiming that the treatment of vessels in port was on the same footing as that on the high seas, ignored completely the question of taking the mails off of the ships and censoring them on land; all ships touching in Allied ports, they alleged, were really "voluntarily" doing so. "In calling at an Allied port, the master acts not on any order from the Allied authorities, but solely carries out the instructions of the owner; neither are those instructions forced upon the said owner. In consideration of *certain advantages* derived from the call at an Allied port, of which he is at full liberty to enjoy or refuse the benefits, the owner instructs his captain to call at this or that port. He does not, in truth, undergo any constraint. . . . It is a rule generally accepted that merchant ships entering a foreign port place themselves under the laws in force in that port, whether in time of war or of peace, and when martial law is in force in that port." The tremendous importance of detecting the plans of the enemy as they might be concealed in correspondence was urged as the main motive for the vigilance of the Allied Governments in maintaining their attitude towards seizures. Aside from this, their endeavor was to avoid an encroachment by the exercise of their belligerent rights on the legitimate exercise of the rights of *innocent* neutral commerce. The rights of the United States as a neutral power could not, in their opinion, imply their protection, or the protection granted by the United States to correspondence having a hostile destination, as they held that it was their

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[56]*EW No. 3*, p. 156 (24.V.16).

belligerent right to exercise on the high seas the supervision granted them by international law to impede any transportation intended to aid their enemy in the conduct of the war, and to uphold his resistance.[57]

In this manner ended the controversy concerning mails, the maritime rights of the Allied Governments being vindicated by their possession of superior sea-power. Inexorable as it might seem, it was in effect the ancient law of the sea, and against that law the anathema of the neutral could not prevail.[58] A year earlier the Department of State had taken too indulgent an attitude toward the Allied Governments, and had lost the opportunity of making an effective protest. Thus the day of the neutral had come and gone, and the belligerents' view of the law of the sea prevailed.[59]

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[57]*EW No. 4*, pp. 53-9. (12.X.16). (Italics are the writer's).

[58]For a detailed and critical discussion of this and previous international practice as to mails, cf. Allin, C. D., "Belligerent Interference With Mails," 1 *Minnesota Law Review*, 293-313; Hershey, A. S., "The So-called Inviolability of Mails," 10 *AJIL* 581-4; Garner, J. W., *International Law and the World War*, II, 350-362; and Hyde, *Int. Law*, II, 444-451.

[59]*EW No. 2*, p. 58. (20.I.15).

## CHAPTER III.

## THE CONTROVERSY OVER THE DECLARATION OF LONDON

A discussion of the role played by the Declaration of London in the controversies between the United States and the Allied Governments respecting neutral rights and commerce necessarily involves a brief explanation as to the origin of the Declaration and its status on the outbreak of the World War. Inasmuch as serious divergences of opinion among the naval powers had revealed themselves at the Second Hague Conference in 1907 and the Conference failed to reach an agreement on various important points in the law of maritime war which were susceptible of a high degree of misinterpretation, the British Government, believing that this situation created a serious obstacle to the successful working of the proposed International Prize Court, suggested to the powers several topics which might form the basis of the program of a naval conference.

The circular embodying the British Government's suggestions was sent to Germany, the United States, Austria-Hungary, Spain, Italy, Japan, The Netherlands and Russia, and, meeting with favor in those countries, resulted in the assembling of such a conference on December 4, 1908, at the Foreign Office in London. The outcome of the deliberations of the delegates from the various countries was a code of the laws of naval warfare, in seventy-one articles, adopted February 26, 1909, and called the Declaration of London. The rejection of the Naval Prize Bill embodying the provisions of the Declaration by the House of Lords in 1911 prevented the ratification of the instrument by Great Britain, and, as the other naval powers had awaited the action of the British Government before ratifying, this failure to ratify the Declaration made it merely a projected

code, and not an internationally binding instrument at the beginning of the war.[60]

Whether the Declaration would have been ratified by the British Government in virtue of the terms of the Parliament Act, which would have permitted its approval without the consent of the House of Lords, must always remain problematic, though the debates in the House of Commons in May, 1914, reveal a strong tendency to secure the repassage of the Naval Prize Bill or at least to provide some new means of enforcing the terms of the Declaration. On the other hand, the memoirs of Mr. Asquith reveal that the British Government had planned in advance the various measures to be taken with respect to the interception of commerce intended for the enemy, and had actually drafted the proclamations and Orders in Council to be issued on the outbreak of war. For this reason, it would appear, the Foreign Office would not commit itself, on the eve of the war, as to whether it would accept the Declaration for the duration of hostilities, though it was besought most earnestly by members of the Government to do so.[60a]

In view of the indecisive attitude of Great Britain, Mr. Bryan, on August 6, 1914, formally asked the British Government whether it would be willing to agree that the laws of naval warfare as laid down by the Declaration in 1909 should be regarded as applicable to naval warfare in the ensuing conflict, provided that the Governments with which Great Britain might be at war also agreed to such an application. Because of that great uncertainty in which neutral governments were placed by the failure of the belligerent powers so to ratify the Declaration, it was the belief of the Government of the United States that an acceptance of these laws laid down in the Declaration of London by the belligerents would prevent grave misunderstandings. To

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[60]The United States, alone of all the signatories, obtained the advice and consent of the Senate to ratification on April 24, 1912, but withheld the deposit of its ratification, pending action by the other signatories.

[60a]*Cf.* Asquith, H. H., *The Genesis of the War*, pp. 117-118.

that end it was earnestly hoped that the suggestion he proffered would meet with acceptance by all the belligerent governments.[61]

Such was the stand that the United States took from the very beginning towards all the belligerents, but particularly towards Great Britain, inasmuch as it was her fiat that was law upon the uncharted continents of seven seas in regard to those subjects on which she deigned to pronounce an opinion. All her allies looked to her for guidance in the World War in the formulation of their maritime policy, and their action throughout was consistent with British practice, save in a few isolated instances.

In the confusion that followed the beginning of the war, the request of the United States was not heeded for nearly a month, and the first reports that were received, from Russia, indicated that the Declaration of London would not be accepted by the Allied Governments at its face value.[62] With the Central Powers, however, the case was exactly the reverse, and Germany, long before either Great Britain or France, replied to Mr. Bryan's inquiry that she would accept the Declaration of London integrally, on the terms suggested by the United States.

More than that, Germany, as if in serious expectation that the World War was about to break out, had already, on June 29, 1914, reaffirmed the adjustments made in her prize regulations of September 30, 1909, to make them keep pace with the developments of maritime law as laid down in the Declaration of London.[63] Thus, while Germany had not officially ratified the Declaration of London, she had done more than the British Government was able to do, and had made the entire set of the provisions of the Declaration an integral part of her *Prisenordnung* in a patent endeavor to consciously adapt her practices to the standards covenated upon between nations at London.[64] Thus Russia's unfavorable reply was dated August 20, Berlin's agreement to

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[61]*EW No. 1*, p. 5 (6.VIII.14).
[62]*Ibid.*, p. 5.
[63]Cf. 107 *British and Foreign State Papers*, 856.
[64]*EW No. 1*, p. 27. (4.IX.14).

the Declaration on August 22,[65] with a confirming note of September 4 relating the German Government's stand as of August 10. A slight evidence of disingenuousness on the part of Germany appears in the reservation apparently made in a note verbale of August 6, 1914, by the German Foreign Office to the American Embassy in Berlin, to the effect that Germany would add to her conditional contraband list, from the so-called "free list" of the Declaration, what articles she saw fit to include under that category. It is, however, very significant that Germany did not formally announce this until October 22, 1914, the very day when the United States came to its final conclusions regarding the practicability of the Declaration of London.[66]

That Germany's stand in favor of the Declaration was identic with that of Austria-Hungary is shown by the fact that Austria answered directly on August 13, 1914, that she had instructed her forces to observe the stipulations of the Declaration of London as applied to naval as well as land warfare during the existing conflict, conditional on like observance on the part of her enemies.[67] Similarly, Austria-Hungary did not in any way modify the lists of either absolute or conditional contraband as laid down in the Declaration in her published list of contraband articles, and made no additions thereto until January 14, 1915, long after the list had been subject to serious modifications at the hands of the Allied Governments.[68] Turkey, coming into the war at a much later date, and never having been consulted as to what, in her own opinion, would be the status of the Declaration, published a very much extended list of contraband, both absolute and conditional, and made no direct reference whatsoever to the Declaration.[69] Had the Declaration been in effect, no such notification would have been necessary, as the report of the drafting committee plainly shows, inasmuch as the lists agreed to were to

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[65] *Ibid.*, p. 5. (22.VIII.14).
[66] *Ibid*, p. 27. (22.X.14).
[67] *EW No. 1*, p. 5. (4.IX.14).
[68] *Ibid.*, p. 32. (7.IX.14).

be so treated without notification *(de plein droit)* and the provisions covering contraband were to become operative by the mere fact of war.[70]

In the hands of the Allied Governments the Declaration did not fare so well. Russia, on August 27, 1914, took the step of adopting the Declaration of London "with the exact modifications adopted by England and France."[71] This involved a rather embarrassing position for the moment, as the modifications adopted by England and France were by no means identic. Japan and Belgium, being inconsequential as far as any controversy we had with their Allies might affect them, notified no lists to our State Department, and the remaining governments were not in any position to declare maritime law either for themselves or on the basis of acceptance of British and French doctrines.

France, on August 11, 1914,[72] published in the *Journal Officiel* her lists of contraband, identic with those laid down in the Declaration save for the transfer of aircraft from conditional to absolute contraband. This slight modification, unimportant as it may seem by itself, constitutes the first serious infringement of the whole theory on which the Declaration of London was drawn up. The aim of the London Naval Conference to establish an agreement whereby the various articles useful or inutile in war might be denoted was the greatest safeguard to the neutral, in whose interest they were manifestly made. The fundamental idea was that of the limitation of the power of a belligerent to declare arbitrarily what would and what would not be considered contraband; a common covenated agreement had therefore been attempted. In this respect Article 23 of the Declaration may be said to have been wanting in sufficient strictness. It stated that articles exclusively used

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[69]*Ibid.*, pp. 33-35. It should be remembered, however, that by mutual consent both Italy and Turkey applied the Declaration without reservations during the Turco-Italian War, 1911-12. Cf. 20 *Revue Generale de Droit International Public* (1913), p. 652.

[70]Cohen, *op. cit.*, p. 93.

[71]*EW No. 1*, p. 7. (27.VIII.14).

[72]*Ibid.*, p. 8. (3.IX.14).

for war might be added to the list of absolute contraband by a declaration which must be notified. Such a notification must be addressed to the governments of other powers, or to their representatives accredited to the power making the declaration. As a matter of course, a notification made after the outbreak of hostilities was to be notified to neutral powers only.[73]

Wherein lay the menace of this action? In that it broke down the fundamental distinctions which the Declaration had attempted to achieve so as to protect neutrals; it opened the door to all manner of caprice at the hands of the belligerent governments, because once that a transition from the conditional to the absolute contraband list had been made, it opened the way for everything in the category of conditional contraband to follow. But a criterion was already laid down in this very article. The test was to be that of exclusive usefulness for war. On the respect of the belligerents for that provision hung the law and the future of maritime war. The drafting committee recognized this clearly.[74] Certain discoveries or inventions might make the list of absolute contraband insufficient. Additions might be made to it on condition that they concerned articles *exclusively used for war.* The right given to a power to make an addition by mere declaration had been thought too wide, hence declaration and notification were both ordered. "If a power claimed to add to the list of absolute contraband articles *not exclusively used for war,* it might expose itself to diplomatic remonstrances, because it would be disregarding an accepted rule." In addition, it would be quite possible for the powers notified to refuse to be bound by such declarations on the part of a belligerent, with an outcome which no international lawyer could wish to prophesy.[75]

Aside from that, four other conditions of acceptance were laid down in the French reply. In the first place, any

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[73]Cohen, *op. cit.*, p. 94.

[74]Cohen, *op. cit.*, p. 94.

[75]Bentwich, *Declaration of London*, p. 62.

neutral ship which might have succeeded in carrying contraband to the enemy by means of false papers might be seized for that reason if met with before completing its return journey. In regard to this, the Declaration of London provided, for both absolute and conditional contraband, that the ship's papers were to be conclusive proof as to the voyage on which she was engaged and, with respect to conditional contraband, also proof as to the port of discharge of the goods, unless the vessel were clearly out of the course indicated by her papers when she was found, and if she were unable to give adequate reasons to justify such deviation.[76]

Some explanation, however, is to be made as to the construction of these provisions, as their all too rigid application might have rendered nugatory any measures taken by a belligerent government against frauds perpetrated on it by neutral shippers. It was the intention of the Declaration to exclude the doctrine of continuous voyage for conditional contraband, and it was expressly stated that conditional contraband was not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it was not to be discharged in an intervening neutral port.[77]

> The doctrine of continuous voyage (comments Bentwich) is excluded for conditional contraband, which is only liable to capture when it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they can no longer be considered contraband, and no examination will be made as to whether they are to be forwarded to the enemy by land or sea from that neutral port. It is here that the case of absolute contraband is essentially different. . . .
>
> This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. . . . A search of the vessel may reveal facts which irre-

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[76]Cohen, *op. cit.*, pp. 104, 108-109.

[77]*Declaration of London*, Article 35.

> futably prove that her destination or the place where the goods are to be discharged is incorrectly entered on the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not, according to his judgment. To resume, the ship's papers are proof unless facts show their evidence to be false. This qualification for the value of a ship's papers as proof seems self-evident and unworthy of special mention . . .
>
> It does not follow that, because a single entry in the ship's papers is shown to be false, their evidence loses its value as a whole. The entries which cannot be proved false retain their value.
>
> In the light of this reservation, it may be taken that the ship's papers are not evidence either when they are found to be false, simulated or deceptive, or the ship is found out of the course indicated by them.[78]

In this connection the provisions of Article 36, that conditional contraband, if shown to have the destination referred to in Article 33 (the armed forces or government department of the enemy State), is liable to capture in cases where the enemy country has no seaboard, are to be noted, because of the facts later adduced to show that save for the narrow coastal strip of Heligoland Bight, Germany practically had no legally accessible seaboard. The case of the Baltic littoral will be discussed under the subject of blockade. So much for the moment as regards the meaning of "contraband."

The question of the treatment of a vessel which had carried contraband successfully to the enemy is abundantly covered by Article 38 of the Declaration, which states that a vessel may not be captured on the ground that she *carried* contraband on a previous occasion if such carriage is in point of fact at an end. To this the drafting committee added all too lucidly for the French Government that a vessel was liable to capture for carrying contraband, but not for having done so. Consequently, as regards this point in the French note of acceptance of the Declaration, it may be seen that the French Government sought from the very beginning to thwart the entire purpose of the Declaration,

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[78]Bentwich, *Declaration of London*, p. 65.

and to doubly render the carrying of conditional contraband difficult, if not impossible, for neutrals.

Second of the points in the French note was the statement that the purpose within the meaning of Article 33 of the Declaration might be inferred from any sufficient proof, and (besides the assumption contained in Article 34) should be considered as existing if the merchandise was consigned to or in the name of an agent of the enemy, or to or in the name of any dealer or of any person acting under control of the authorities of the enemy. Article 34 stated that the destination for the enemy's armed forces or government department was presumed to exist if the goods were consigned to enemy authorities, or to a contractor established in the enemy country, who, as a matter of common knowledge, supplied articles of such a kind to the enemy. A similar presumption was to arise if the goods were consigned to a fortified place belonging to the enemy, or to any other place serving as a base for the armed forces of the enemy. This was a point much labored in the debates on ratification in the British Parliament in 1911, because of the difficulty of ascertaining what was meant by an enemy base. No such presumptions arising, destination of both vessel and cargo was presumed to be innocent. The wide range of possibilities embraced by such phrases as "infered," "any sufficient proof," "acting under the control of the authorities" show what radical steps might be taken by the French Government under the guise of observance of the Declaration. In the course of the later controversy, any ground of suspicion was sufficient to permit the belligerent authorities to "infer" enemy destination; detention on suspicion was resorted to while search for proof was going on; while the entire enemy population, so long as it was not revolting against the Government, could be regarded as acting under its control.

A third point in the French note was that, notwithstanding the provisions of Article 35, which forbade examination of the ultimate destination of a cargo of conditional contraband if discharged in an intervening neutral port, if it

were proved that there was such an enemy destination as above mentioned, a cargo of conditional contraband was liable to capture, whatever might be the port of destination of the ship and the port where the cargo was to be unloaded. This meant, of course, on its very face, (as if the extensions of "purpose" and "destination" had not sufficiently covered it before) that the doctrine of continuous voyage was to be applied—and that most rigorously—to conditional contraband. Clearly against the spirit and the letter of the Declaration from the very beginning, not only did this acceptance of the Declaration with the reservations as to the making of conditional contraband absolute, and the extension of the doctrine of continuous voyage to conditional contraband destroy the entire usefulness of the Declaration in practice, but the cynical use which was made of the chapter on blockade was sufficient to overthrow the value of the Declaration altogether.

The closing point of the French note dealt with the question of the presumption of knowledge of blockade, stating that the existence of a blockade should be deemed known (a) for all ships starting from or touching at an enemy's port within a sufficient delay after notification of blockade to the local authorities to have allowed the enemy's government to make known the existence of the blockade; (b) for all ships which might have left or touched at a French or Allied port after publication of a declaration of blockade. Seemingly innocent in its nature, as an endeavor to walk clearly within the law, it in fact meant that the Allied Governments were not necessarily bound to notify the existence of a blockade to neutrals as provided by Article 11 of the Declaration, and that neutral vessels, in order to escape being seized for the carriage of contraband, or on the presumption of attempting to run the blockade, must perforce call at a French or Allied port, and there have their cargoes examined.

Such practices, while manifestly not mandatory upon neutral vessels from a standpoint of law, were in fact almost compulsory, if such ships, already beset by all the

hazards of war at sea, were to avoid the added dangers of seizure for breach of blockade, when no blockade had in fact been notified to neutral Powers. To say that neutral countries themselves would not be diligent in notifying their vessels about to sail for foreign or belligerent ports would be tantamount to a disregard of the accepted practice of nations, recognized plainly, in the report of the drafting committee as being "the duty of neutral Governments advised of the declaration of blockade to take the necessary measures to dispatch the news to the different parts of their territory, especially their ports."[79] Bentwich, reviewing the matter critically, points out likewise that

> the duty of the belligerent to declare a blockade is established by international usage; but English practice in the past has recognized a blockade *de facto*, constituted merely by the fact of investment without any public notification. Such *de facto* blockades cannot henceforth be enforced unless the commander of the blockading force issues a Declaration which is notified to the neutral powers and to the local authorities according to Article 11.[80]

The provisions of Articles 15 and 16 are also in point:

> Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time.
>
> If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour and the geographical position of the vessel at the time.[81]

Thus, comments Bentwich:

> Notification as well as declaration of blockade is now rendered compulsory on belligerents. Subject to the provisions of Articles 15 and 16, this notification is deemed to give notice of the blockade to all neutral ships and merchants, and to

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[79]Cohen, *op. cit.*, p. 80.

[80]Bentwich, *op. cit.*, pp. 50-51.

make them liable for any breach of blockade attempted subsequently.[82]

Such was the French acceptance of the Declaration of London. Innocent and fair-minded as it seemed, it was an attempt, in effect, to conceal plans for unnotified blockades and the transfer of conditional contraband to the class and the consequences of absolute contraband. Much as the French Prize Regulations of 1913 may have been modeled in outward form to suit an eventual operation of the Declaration of London, in substance the qualified acceptance of the Declaration was such as to make it all but meaningless in regard to the two most important subjects in its scope. The later experience of the *Dacia* was to show how seriously the other provisions were regarded.

It was on August 22, 1914, that Sir Eyre Crowe, answering for Sir Edward Grey, replied to the representations made by Ambassador Page, and stated the viewpoint of the British Government towards the Declaration of London in the following terms:

> His Majesty's Government, who . . . are animated by a keen desire to consult, so far as possible, the interests of neutral countries, have given this matter their most careful consideration and have pleasure in stating 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. A detailed explanation of these additions and modifications is contained in the enclosed memorandum.
>
> The necessary steps to carry the above decision into effect have now been taken by the issue of an Order in Council, of which I have the honor to enclose copies herein for Your Excellency's information and for transmission to your Government. . . .
>
> His Majesty's Government, in deciding to adhere to the rules of the Declaration of London, subject *only* to the aforesaid modifications and additions, have not waited to learn the intention of the enemy governments, but have been actuated by a desire to terminate at the earliest moment the condi-

[81]Cohen, *op. cit.*, p. 83.

[82]Bentwich, *op. cit.*, p. 51.

> tion of uncertainty which has been prejudicing the interests of neutral trade.[83]

Preliminary to an examination of the memoranda and the Orders in Council which follow, it should be stated that on August 4, 1914, on the very day of the entrance of Great Britain into the war, an Order in Council established the same list of contraband that had been given under the French acceptance declarations. Thus, the questions as to transfers of contraband from one category to the other make it essentially subject to the same criticism as the list published by the French Government. But besides this, the memorandum sets forth with much greater lucidity the reasons for the qualified acceptance of the Declaration on the part of Great Britain. One very important gain was that mentioned in section 5 of the memorandum, accepting the commentary on the Declaration drafted by M. Renault as authoritative. This was a step towards conformity to continental practice, and marked the beginning of that further fusion of English and French maritime practice which was to give rise to no little conflict.

The point already labored as to the capture of a vessel on its return voyage for having carried contraband successfully to the enemy on its outward voyage recurs in the memorandum.

> His Majesty's Government do not feel able to accept in its entirety the rule laid down . . . in the Declaration.[84] It has been the practice of the British Navy to treat as liable to capture a vessel which carried contraband of war with false papers if she was encountered on the return voyage, and to this exception His Majesty's Government feel it necessary to adhere.

The reason for the application of the doctrine of continuous voyage to conditional contraband was naïvely stated thus:

> The peculiar conditions in the present war due to the fact that neutral ports such as Rotterdam are the chief means

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[83] *EW No. 1*, p. 6. (22.VIII.14). (Italics are writer's.)

[84] *Declaration of London*, Article 38.

> of access to a large part of Germany and that exceptional measures have been taken in the enemy country for the control by the Government of the entire supply of foodstuffs have convinced His Majesty's Government that modifications are required in the application of Articles 34 and 35 of the Declaration. These modifications are contained in the accompanying Order in Council.
>
> Article 15 of the Declaration contains a provision as to presumptive knowledge of the blockade in certain cases if the vessel has sailed from a neutral port. No mention is made of British or allied enemy ports. These omissions are supplied by the Order in Council.[85]

This was the explanation by which the possibilities of undeclared blockades were camouflaged, for although the formal blockade was not announced until March 11, 1915, as affecting German ports, a limited blockade was practically sustained by virtue of this Order in Council, as no mention of the use or limitations of blockade would have been necessary unless a blockade was seriously being contemplated. The Order in Council announced the measures taken as being concerted action on the part of the allied Russian, French and British Governments with regard to neutral ships and commerce.

At last the Declaration of London was in a way of acceptance, in so far as might be practicable. The greatest maritime powers had accepted, in varying degrees, the propositions contained in that celebrated document. Yet the United States felt otherwise in the matter. It had had previous experience with Orders in Council of none too mild a nature. Many things had been done in the name of international law by Orders in Council that were travesties upon the accepted law of nations. Hence Mr. Lansing, taking for the first time his part in directing the current of our war-time policy, was impelled to write:

> Inasmuch as the British Government consider that the conditions of the present European conflict make it impossible for them to accept without modification the Declaration of London, . . . in the circumstances the Government

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[85] *EW No. 1*, p. 6.

> 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; . . . 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; and . . . this Government reserves to itself the right to enter a protest or demand in each case in which those rights and duties so defined are violated or their free exercise interfered with by the authorities of His Britannic Majesty's Government.[86]

This determination on the part of the United States was communicated to the Central Powers opportunely. The preliminary battle for its adoption had been half won, half lost; it remained for time to show the utter collapse of the Declaration.[87]

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[86]*EW No. 1*, p. 8. (22.X.14).

[87]For a critical discussion of the role of the Declaration of London in the late war cf. Garner, James Wilford, *International Law and the World War*, I, 27-34.

## CHAPTER IV.

## UNNEUTRAL ACTS AND UNNEUTRAL SERVICE.

The London Naval Conference of 1908-1909 grouped the various topics of maritime law under various headings, to enable the lines of distinction between certain acts of one kind and another to be more clearly drawn. Because of the virtual "acceptance" of the Declaration by the Allied Governments, it becomes convenient to classify under the respective chapters of the Declaration the main lines of controversy between the United States and the Allied Governments. For those purposes the topics of unneutral acts and service, contraband, enemy character, and blockade, will be so treated.

The general question of unneutral acts has been dealt with in the discussion of American neutrality laws. The specific instances in which these laws were violated, or in which the neutrality of the United States[88] was jeopardized will now be dealt with.

As early as September, 1914, correspondence between the Department of State and the various embassies of the belligerent governments took place, due to the allegations on the part of the various belligerents that the warships of their antagonists were receiving aid or supplies in American ports, or from tugs or tenders leaving American ports surreptitiously.[89] Thus the German cruiser *Leipzig*, leav-

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[88]Exclusive of the Canal Zone. For cases arising there, see Chapter I, pp. 17-18.

[89]In view of this fact, the Department of State, in a memorandum issued on September 19, 1914, dealing with *Merchant Vessels Suspected of Carrying Supplies to Belligerent Vessels*, defined its attitude in the matter. Coaling or the obtaining of supplies by a belligerent man-of-war, directly or by means of naval tenders, neutral or belligerent, from an American port more than once in three months operated, according to the memorandum, to create a presumption of the use of such port as a base of operations for belligerent warships. While rumors that merchant vessels laden with such supplies might be carrying them to belligerent warships on the high seas did not

ing American waters on the outbreak of the war, was forced to seek supplies from San Francisco in the month of September, 1914, and a barge-load of supplies was carried to her as she lay off the Golden Gate under cover of night, and in the path of the British cruiser *Rainbow*. The British Government, however, made no protest in the matter as far as officially disclosed. Shortly thereafter it was reported to the State Department that a British warship had communicated with the shore at New York a request for supplies. Thereupon Mr. Lansing notified the British Embassy that this would be considered a violation of American neutrality. In reply Sir Cecil Spring-Rice notified the State Department that the British Admirality had instructed their vessels on no account to telegraph to New York for supplies or newspapers.[90] On October 21, 1914, the German Embassy called the attention of the State Department to the departure of the tugs *F. B. Dalzell* and

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impose upon a neutral Government any obligation to detain such a vessel unless she had previously acted in this manner, circumstantial evidence, such as the presence of a belligerent warship, or the presumption of its presence off the particular port in question, the fact that the merchant vessel was of the same nationality as such a warship, the failure to arrive in port on a previous voyage with naval supplies, coal, etc., or the presence of a belligerent agent on board such a vessel, would be sufficient to warrant the detention and investigation of the vessel. Mere presence of a cargo of naval supplies on board the vessel was not sufficient evidence to withhold clearance, unless this had occurred twice within a period of three months, the essential idea of neutral territory becoming the base for naval operations being repeated departures from such territory of naval tenders or supply vessels. While such clearances might be made for another neutral country, and such cargoes might be transhipped there, the fact was not mandatory upon the neutral government first concerned to prevent such departure. Trade directly with the naval bases of a belligerent, by private citizens of a neutral state, was no ground for the detention of such vessel, as a neutral could be charged with unneutral conduct only when supplies furnished to a belligerent warship were furnished directly to it in the port of the neutral or through naval tenders or merchant vessels departing from such port. *Cf. EW No. 2*, pp. 43-4. (9.IX.14).

[90]*EW No. 2*, p. 29. (24.IX.14).

*G. H. Dalzell* from New York on the nights of September 31-October 1 and October 1-2 to carry provisions to the British cruiser *Essex*. In this way, the note alleged, forty tons of meat were supplied to the *Essex*, which was then about five miles off shore. Thhe German Government therefore requested the State Department to make an investigation and ascertain whether it constituted a violation of American neutrality.[91] In reply, Mr. Lansing wrote, on November 23, 1914, that an investigation had been made but that there was not sufficient evidence to show that the *F. B. Dalzell* had done any such acts as alleged. Nothing was said concerning the *G. H. Dalzell*. On this basis Count von Bernstorff dropped the discussion, as he was unable to adduce any further evidence in the matter.

Meanwhile, the British Ambassador had brought to the attention of the State Department the action of the Italian steamship *Amista* in leaving Newport News, October 17, 1914, for Montevideo via Barbados, laden with coal. The vessel was then under strong suspicion of being engaged in supplying German cruisers with coal. Having cleared for Barbados, she never arrived there, causing the British Embassy to confirm its previous suspicions as to the character of the vessel.[92]

"The systematic way in which neutral ships have left American ports in order to supply German cruisers, and have been allowed to operate freely in the ports of the United States, in spite of the warnings given," continued the note, "is a matter which causes grave anxiety to His Majesty's Government. In view of the usages of international law and the terms of the instructions of the United States Government to local authorities for the preservation of the neutrality of the United States," the Ambassador added, he had been instructed to request that "such measures as are possible may be taken to prevent the use of ports of the United States for this unneutral purpose."

In reply, Mr. Lansing wrote, on November 2, 1914, that

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[91] *Ibid.*, p. 29. (21.X.14).

[92] *Ibid.*, p. 29. (31.X.14). and reply, p. 30. (2.XI.14).

the Department would make a full investigation of the case of the *Amista,* and that as regards the unneutral services rendered by American vessels to belligerent war-vessels, every instance had been thoroughly investigated, when there was any basis of fact to confirm suspicions, to determine the bona fide character of such transactions as complained of.

> Further than this the Government of the United States does not understand that its duty in these matters requires it to go, for otherwise the war would impose on the United States the burden of enforcing restrictions which are not, in the opinion of the Government, prescribed by the rules of international law. The Government of the United States feels obliged to decline to accept any suggestion intimating that its vigilance in the maintenance of its neutral duties under international law has been relaxed so as to allow vessels engaged in violations of such duties to operate freely in the ports of the United States.

Once again, in March, 1915, the State Department was compelled to draw the attention of the British Embassy to the action of British cruisers operating in the North Atlantic, in a series of unofficial exchanges of views, concluding with a formal reply by the British Ambassador on March 24, 1915, to the effect that renewed orders had been issued by the Admiralty impressing naval officers with the duty of strictly observing the terms of the United States neutrality regulations.[93] Mr. Lansing replied on March 27, 1915, calling the attention of the Ambassador to the fact that several times during the preceding winter belligerent ships of war had 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, opposite California, and had had communication with the mainland in this locality. He specified the instance of the coaling by the British steamship *Bellerophon* of the British cruiser *Rainbow* within a mile of the western shore of Ancapa Island, while a launch left the vicinity of Hueneme, California, and communicated with the above-mentioned

[93] *EW No. 2,* p. 33 (27.III.15).

vessels. Mr. Lansing therefore requested the British Government to issue such instructions to their fleet as would make a recurrence of such violations of American neutrality impossible. Nothing further was heard of the matter, Sir Cecil Spring-Rice having once promised to bring it to the attention of the British Government.

A minor case involving the rigid maintenance of American neutrality may be instanced in the request of the British Government on December 20, 1915, for permission to let discharged, though uniformed, Canadian soldiers, returning to their homes from England, pass through the northern part of Maine from Vanceboro to Lowelltown, en route from St. John to other portions of Canadian territory. A similar request was made in the case of men invalided home, who, while still in the Canadian Expeditionary Forces, would be traveling as individuals and not as parties. Mr. Lansing replied to this on December 23, 1915, stating that the United States regretted to deny this request, but was compelled to do so "on account of the embarrassment which would almost surely follow if such passage were permitted." Here again the United States adhered to its strict policy of neutrality in lieu of rendering anything that might savor of unneutral service.[94]

Such comprise the cases of unneutral acts committed or alleged to have been committed in American waters on behalf of belligerents. The cases arising under the class of acts described as unneutral service in the Declaration of London will next be considered.

Under Article 45 of the Declaration of London, a neutral vessel is liable to condemnation "if, to the knowledge of either the owner, the charterer or the master, she is transporting . . . one or more persons, who, in the course of the voyage, directly assist the operation of the enemy." The determination of the obligations arising under this article is difficult and was so recognized in the report of the drafting committee.

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[94] *EW No. 4*, pp. 81-2.

> It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral governments would not unwillingly (sic) submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so. The transmission of intelligence in the interest of the enemy is to be treated in the same way as the carriage of passengers embodied in his armed force.

Likewise in Article 47 of the Declaration it is stated that "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 if there be no ground for the capture of the vessel." Concerning this, the report of the drafting committee stated:

> Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel when she is searched. . . . The belligerent cruiser cannot be compelled to set free active enemies who are physically in her power . . . She must naturally proceed with great discretion, and must act on her own responsibility in requiring the surrender of these individuals, but the right to do so is hers.[95]

The first instance to be mentioned under this heading is the case of the United Fruit Company's steamer *Metapan,* stopped by the commander of the French cruiser *Conde,* who arrested several suspected German reservists on board her, but ultimately released them on parole, when it was seen that some of them had exemption papers, and that the others promised not to take up arms in behalf of the Central Empires during the remainder of the war. The Department of State, on the basis of the consular report, whose substance is given in an appendix,[95a] made a formal protest to the French Government against the unwarranted actions of the *Conde* in so remote a region from the scene of war.

More important was the case of the detention of the American ship *Windber,* about November 13, 1914, in Caribbean waters, and the removal from her by officers of the

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[95]Cohen, *op. cit.,* pp. 119-126.

[95a]Cf. pp. 177-178, *infra.*

*Conde* of one August Piepenbrink, a German by birth, who had regularly filed his declaration of intention to become an American citizen at Sacramento, California, in 1910. He was subsequently taken to Kingston, Jamaica, and put in charge of British officials. On December 7, 1914, Mr. Bryan cabled Vice-Consul Bundy at Kingston to ask for the release of Piepenbrink, while on the same date he sent a dispatch to Ambassadors Sharp and Page, asking that the respective governments authorize such action. On January 4, 1915, the British Government replied that, in their opinion, Piepenbrink was still a German subject, inasmuch as he had not completed his naturalization. The French Government replied in the same tenor on January 22, 1915. Mr. Bryan now raised the point that under Section 2174 of the United States Revised Statutes every foreign seaman employed in the American merchant marine having declared intention of becoming a citizen was, for all purposes of protection as an American citizen, to be deemed such after the filing of declaration of intention to become such citizen. Furthermore, there was no evidence that anything under Article 47 of the Declaration of London applied to the case of Piepenbrink. It was contrary to the position taken by Great Britain and France in the *Trent* affair that:[96]

"If the real terminus of the voyage be bona fide in neutral territory, no British . . . or American authority could be found which had ever given countenance to the doctrine that either men or dispatches could be subject during such a voyage, and on board a neutral vessel, to belligerent capture as contraband of war."[97] A similar note to the French Government laid down the French precedent in the same case that[98]

> The destination of the Trent was not a point belonging to one of the belligerents. She had taken on her cargo and her passengers in a neutral country, and moreover had taken

[96]*EW No. 2*, pp. 133-4.
[97]Moore, *Digest*, VII, 772.
[98]Calvo, Fifth Edition, V, 94-95.

> them on in a neutral port. If it were admissible that under such conditions the neutral flag did not completely cover the persons and merchandise which it was transporting, its immunity would not longer be anything but an empty word; at any time the commerce and navigation of third powers would have to suffer from their harmless or even indirect relations with one or the other of the belligerents; the latter would no longer be entitled merely to require entire impartiality of a neutral and to forbid him from interfering in any way in the hostilities, but they would place upon his freedom of commerce and navigation restrictions the lawfulness of which modern international law has refused to admit.

On April 3, 1915, the British Government replied that, in common with the French Government, they had decided to liberate Piepenbrink as a friendly act, while reserving the question of principle involved. This was confirmed in a note of April 15, 1915, from the French Foreign Office.[99]

The last and most important instance of this kind was the case of the *China,* an American vessel plying between Shanghai and Nagasaki, which was stopped by the British cruiser *Laurentic* about ten miles from the Yangtzekiang on February 18, 1916. An armed party from the *Laurentic* boarded her, and despite the captain's protest removed from the vessel 28 Germans, 8 Austrians and 2 Turks, including merchants and physicians, and took them to Hongkong, where they were detained as prisoners in the military barracks.

On February 23, 1916, Mr. Lansing sent a vigorous note to the British Government protesting against the seizure and insisting that if the facts were as reported, immediate orders be given for the release of the men taken from the *China,* inasmuch as it was understood that none of the men seized were incorporated in the armed forces of the enemy, and it was regarded as an unwarranted invasion of the sovereignty of the United States on the high seas. After the assurances given in Piepenbrink's case, the United States was surprised at such action on the part of the Brit-

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[99]*EW No. 2,* p. 136.

ish authorities in exercising belligerent power on the high stas so far from the zone of hostile operations.[100]

The answer of the British Government was made on March 16, 1916, in a note stating the reasons for the measures taken. The British Government, it was pointed out, had adhered to the literal interpretation of Articles 45 and 47 of the Declaration of London as given by the drafting committee, reserving the liberty, as the Declaration was an unratified instrument, to cancel at any time their adherence, provided always that their subsequent action did not conflict with the general principles of international law. On November 4, 1914, the British Government had addressed a circular note to the neutral powers represented at London, stating that it was impossible to accept any longer the restrictions laid down in the drafting committee's report, and that thereafter they would arrest all enemy reservists found on board neutral ships on the high seas, no matter where they might be met.

It was evident . . . that the principle that there are certain persons who are not protected by the neutral flag on the high seas and may therefore without an invasion of the sovereign rights of the neutral be removed from a neutral ship was generally admitted. The carriage of such persons might in some cases amount to unneutral service, but even where this was not so, the removal of such persons from a neutral ship by a belligerent did not justify any complaint by the neutral power concerned. . . . From actual occurrences and information reliably received, it had been definitely established that the Germans resident in Shanghai had been engaged in gathering arms and ammunition to send clandestinely to India, and to fit out a ship as a commerce raider. Their plans having been frustrated in Shanghai by the British authorities, the Germans planned to shift the center of their activities to Manila, and hence embarked on the *China* for this purpose, as subsequent information had confirmed. In view of the British Government, therefore, it would not be disputed that these

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[100]Special supplement to 10 *AJIL*, p. 427.

men must be placed in the category of those who, without any infraction of the sovereignty of a neutral state, might be removed from a neutral vessel on the high seas. The object of their journey was to find another neutral asylum in which they might continue their operations against Great Britain. The acts which they desired to perform upon the soil of the United States were such as possibly to compromise the neutrality of the United States or to constitute an offense against its criminal laws. They were in effect persons whose past actions and future intentions deprived them of any protection from the neutral flag under which they were sailing.

> It is far from the wish and intention of His Majesty's Government to take any action involving an invasion of the sovereign rights of the United States Government; the above observations will have made it clear that no such invasion was involved in the action of H.M.S. *Laurentic*, and . . . that after the foregoing explanations in regard both to the general question involved, and to the removal of enemy subjects from the *China* the United States Government will not feel disposed further to contend that this action was not justified.[101]

This note closed the incident, which is the last that may be assimilated to the heading of unneutral service in the controversies formally arising between the United States and the Allied Governments.[102] American rights may have suffered slightly, but so far as the Government of the United States was knowingly involved, the neutrality of the United States had not been compromised.

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[101]Special Supplement to 10 *AJIL*, pp. 428-432. (16.III.16).

[102]Cf. Garner, *op. cit.*, II, 362-370, for a discussion of these cases and those of Garde and others, concerning which no documentary evidence was disclosed by the Department of State.

## CHAPTER V

## THE CONTROVERSY OVER ARMED MERCHANT SHIPS

One of the legacies of uncertainty bequeathed by the London Naval Conference to the belligerents and neutrals in 1914 was the problem of the treatment of armed merchant ships. Something had been done by way of prescribing the measures for conversion of merchantmen into men of war at The Hague in 1907, but the regulations to be applied to armed merchant ships had not been decided upon. The problem presented itself principally from the angle of neutrals, whose position, were merchantmen to be converted in their ports, would be drawn into question, and was complicated by the return of various governments to the habit of arming their liners defensively with the avowed object of mere self-protection. In view of the controversies which had arisen between the United States and Great Britain during the American Civil War, and the resultant rules regarding the responsibility of a neutral power for permitting the departure of potential warships from its ports, the United States felt a lively interest in the whole problem. The issue was raised simultaneously with the the entrance of Great Britain into the war. Not only in this instance was the United States deeply concerned, due to the special provisions of the Treaty of Washington, now altered only by the fact that America was the neutral and Great Britain the belligerent, but the fact that the subject had been covered in the discussions and the conventions of the Second Hague Conference of which both Great Britain and the United States were signatories involved a thoroughgoing consideration of our rights and duties in the matter. On August 4, 1914, therefore, Mr. Colville Barclay, the British Chargé d'Affaires in Washington, sent a formal note[103] to the Secretary of State, reminding the United

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[103] *EW No. 2*, p. 37. (4.VIII.14).

States of its duties under the Three Rules of the Treaty of Washington and the eighth article of the Thirteenth Hague Convention of 1907.[104]

In the report of the committee on the Thirteenth Convention, no mention is made of this question of conversion of merchantmen either in port or elsewhere, and in the Seventh Convention of The Hague of 1907, relating to the conversion of merchant ships into war-ships, no formal mention is made of the place where the conversion is to take place,[105] nor was any mention of reconversion put into the Convention. The right of a belligerent to convert his merchantman into warships being unquestioned, the only question arising was that involving the conditions of conversion. "Without questioning the possibility or impossibility of using neutral waters to effect conversion, it was considered that the question whether it was proper to limit the places where conversion might be effected to national or occupied ports should first be discussed. The arguments in favor of this proposition were supported especially by the British delegation, who gave the following reasons: conversion on the high seas would leave neutrals in ignorance of the character of a ship which had left its last port of departure as a merchant ship; the conversion would be an act of sovereignty which could be performed only in places where that sovereignty had jurisdiction." To this proposition, Germany, France, Russia, Austria-Hungary and Serbia were quite opposed, although they argued

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[104]The latter article reads as follows:

"ARTICLE VIII. A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that government is at peace, and also to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, this vessel having been adapted entirely or partly within the said jurisdiction for use in war."—Scott, *Reports*, pp. 833-845-6.

[105]*Ibid.*, pp. 590-699, *passim.*

against the possibility of reconversion. Substantial agreement was reached, however, on the following proposition:

> ARTICLE I. A merchant ship converted into a warship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control and respansibility of the state whose flag it flies.

In the opinion of the committee on the Seventh Convention, the object of the entire convention was to give a guarantee against any return to privateering, however disguised it might be. By Article VI of the convention, such conversion must be announced by the belligerent. The delegation from the United States had proposed conditions almost identic with those laid down by the British delegation in claiming that in time of war no merchant vessel should be transformed into a warship save in the territorial waters of the state owning the vessel or in those over which it exercised by its military forces an effective control.[106] These the United States again sustained at the London Naval Conference, and in 1913 the Naval War College concluded that the conversion of a private ship into a vessel of war should not take place except in the waters of its own state or of an ally or in the waters occupied by one of these.[107]

These considerations will suffice to show the respective attitudes of Great Britain and the United States on the subject of conversion. They endeavor to show the dangers to which neutral countries might expose themselves in treating certain converted merchantmen now as men of war and now as ordinary merchantmen. It was with these apprehensions in mind that Mr. Barclay wrote:

> It is probable that attempts will be made to equip and despatch merchantmen for conversion from the ports of the United States. Even if the final completion of the measures to fit out merchantmen to act as cruisers may have to be effected on 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

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[106]Scott, *Reports*, p. 614.

[107]U. S. Naval War College, *International Law Topics*, 1913, p. 148.

> leaving neutral waters must be more or less manifest before their departure. 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.

This was reviving the shadow of the *Shenandoah* and the *Alabama* with no little vigor. On August 9, Mr. Barclay wrote to the Secretary of State, making further explanations of the British stand as to armed merchantmen, in the following terms:

> As you are no doubt aware, a certain number of British merchant vessels are armed, but this is a precautionary measure adopted solely for the purpose of defense, which under existing rules of international law, is the right of all merchant vessels when attacked. According to the British rule, British merchant vessels cannot be converted into men-of-war in any foreign port, for the reason that Great Britain does not admit the right of any power to do this on the high seas. The duty of a neutral to intern or order the immediate departure of belligerent vessels is limited to actual and potential men of war, and, in the opinion of His Majesty's Government, there can therefore be no right on the part of neutral governments to intern British armed merchant vessels, which cannot be converted into men of war on the high seas, nor to require them to land their guns before proceeding to sea.
>
> On the other hand, the German Government have consistently claimed the right of conversion on the high seas, and His Majesty's Government therefore maintain their claim that vessels which are adapted for conversion and under German rules may be converted into men of war on the high seas, should be interned in the absence of binding assurances, the responsibility for which must be assumed by the neutral government concerned, that they shall not so be converted.[108]

This rather astounding endeavor to make the neutral governments bear the *onus probandi* for any misdeeds in regard to a matter so greatly disputed was not an isolated instance, for the British Government communicated the same memoranda to all neutral countries.[109]

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[108] *EW No. 2*, pp. 37-8. (9.VIII.14).

[109] *Ibid.*, p. 38. (12.VIII.14).

Before discussing the American reply to these notes, it will be necessary to cite several cases to elaborate the attitude of the United States towards privately armed merchantmen. In this connection, the endeavors of President Adams in 1797 to secure protection for American commerce by authorizing the arming of American merchantmen will be remembered. The mere fact of the arming of merchantmen as an incident in a policy of armed neutrality does not invalidate the fact that the United States, as a matter of policy, had recognized the propriety of this action. The penalties prescribed in the neutrality laws of the United States for the misuse of armed liners fall only on those who intend to use such vessels "to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace."[110] This law does not, therefore, apply in such cases. In 1877, the Department of State, being asked for its position on the question, stated that it was

> not aware of any international prohibition or of any treaty provision which would prevent a vessel . . . from carrying . . . guns and arms for the proper and necessary protection of the vessel against violence . . . provided always that the vessel carrying such guns and arms itself be on a lawful voyage and be engaged in none other than peaceful commerce and that such guns and arms be intended and be used only for the purpose of defence and self-protection.[111]

Inasmuch as the dangers from pirates and privateers seemed to have disappeared following the signing of the Declaration of Paris in 1856, the main motive that had led to the arming of merchantmen in the course of the Napoleonic wars no longer existed, and it was only at the beginning of the twentieth century that a disposition to resume the habit of arming merchantmen seems to have been resumed. In the Naval Code of 1900, the United States Navy specifically recognized the right of merchantmen to arm,

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[110]Chapter LXVII, *Revised Statutes of the United States*, Sec. 5289.
[111]Fish to Morrill (8.II.1877), Moore, *Digest*, II, 1080.

and give the members of the crews of such vessels the status of prisoners of war if captured.[112] In the case of Great Britain, Germany, and the United States arrangements were made with steamship lines in each country to turn over their vessels to the Government for its use on the outbreak of war, or else to be ready to accept armament. In Great Britain, the Cunard and White Star liners enrolled themselves with the Admiralty as being capable of conversion and thereby of inclusion in the auxiliary cruisers of the British fleet.

These may be regarded as instances of a practice which has the sanction of the majority of nations behind it, and also the consensus of opinion of leading authorities on international law. Commenting on this situation, Professor A. P. Higgins states:[113]

> The situation today bears a curious resemblance to that which existed a century ago with, however, certain modifications resulting from the Declaration of Paris and the Sixth Hague Convention of 1907 relative to the status of enemy merchant ships at the outbreak of hostilities, which may be considered as a supplementary and explanatory treaty. Private merchant ships are still constantly hired as transports, though they are not generally armed or commissioned, and, therefore, retain their character of merchant ships. Most states have arrangements whereby in time of war certain vessels armed by private owners, companies or individuals, are taken over by the state and equipped with arms and incorporated into the fighting forces of the state. These vessels take the place of the old letters of marque or private ship of war; but they are no longer fitted out by private owners for their own pecuniary benefit, but rank in all respects, when conforming to the Sixth Hague Convention, as public ships of war. Lastly there is a return to the armed and uncommissioned merchant ship, not armed compulsorily under an Order in Council, but armed at the expense of the state, by the willing cooperation of the owners.

The right of a merchant ship to arm in self-defense seems

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[112]U. S. Naval War College *Int. Law Topics*, 1903. Appendix I, Art. 10, p. 3.

[113]A. P. Higgins, 8 *AJIL*, 711-712 (1914). Also in Senate Document 332, 64th Congress, First Session, pp. 25-38.

to be supported on the ground that "whereas the visit of a belligerent warship to a neutral vessel, though justified by the fact of the existence of war, is not a hostile act," and is one to which the neutral must submit, if she is to prove her innocent character, "the visit to an enemy ship is, under the existing law, merely the first step to capture and is itself a hostile act. . . . A belligerent has a right to capture an enemy merchant ship, and the latter is under no duty to submit; it has a corresponding right to resist capture, which is an act of violence and hostility. By resisting, the belligerent violates no duty, he is held by force and may escape if he can."

This thesis sustained by Mr. Higgins has been severely criticized by Jonkheer W. J. M. von Eysinga, of Leyden University, on the ground that the arrest of a merchantman by a hostile belligerent cruiser does not in itself constitute a legal attack. This point of view, rather than that advanced by Dr. George Schramm, as Counselor of the German Imperial Navy Department, which denies to any merchantman the right to resist, seems to be the logical viewpoint to take if any critique is to be made of the *raison d'etre* of the practice of resistance to capture. The view of American authorities in this regard is perhaps best expressed by Professor C. C. Hyde of Northwestern University:[114]

> Under normal circumstances it is believed that a belligerent should refrain from arming its merchantmen as a means of defending them from lawful capture by legitimate processes, and against an enemy not failing to respect the equities of unarmed private ships. The merchantman when equipped with a gun of great destructive force and long range becomes itself a valuable weapon of offense. The master is encouraged to engage any public vessel of the enemy, of inferior defensive strength, and of whatsoever type, which comes within range, and that irrespective of whether the latter initiates hostilities. As the merchantman by reason of its armament may be deemed by the enemy to be

[114]Handbook on *Maritime War* issued by the Department of State, p. 80. Cf. also Hyde, C. C., *International Law*, II, 405.

> justly subjected to attack without warning, the master may fairly regard himself as on the defensive whenever his ship is pursued by an enemy warship, or even sighted by one. Thus the armed merchantman, although its chief mission be the transportation of passengers or freight, becomes necessarily a participant in the conflict. Lacking a formal commission from its government, it fails to satisfy the conditions imposed upon a ship converted into a naval auxiliary.

The reply of the United States, made by Mr. Bryan on August 19, 1914, noted that the assertion of the right of conversion claimed by Germany at the Second Hague Conference and at the London Naval Conference could not be construed by the Government of the United States as an intention of the German Government so to deal with its merchant ships which might be in American harbors, and that the United States would discuss the facts and circumstances of such cases only as they arose. As to the policy that the United States itself would follow, the Department declared it inexpedient at the time to declare what attitude the United States would assume in a contingency which had not yet arisen. Inasmuch as the United States accepted the interpretation of the clauses of Article VIII above mentioned, that a neutral was "bound to employ the means at its disposal," to prevent the violations of its neutrality, and at all times "to display the same vigilance," as the standard of its conduct, it seemed obvious that neither by the terms nor the interpretation of these provisions was the United States bound to assume the attitude of an insurer, consequently the British position could not be entertained by the United States. Mr. Bryan, therefore, requested the British Ambassador to inform his government that there was no reason to anticipate that the United States would be disregardful of its neutral duties.[115]

The reply of the United States to the second British note was made by Mr. Lansing on the following day, noting that the Department of State acknowledged without comment the statement of British policy, and the apprehensions entertained as to Germany's intentions and policy, but maintained Mr. Bryan's view as to the responsibility of the

United States as above stated.[116] On August 25 came another note from Sir Cecil Spring-Rice stating that in view of the fact that British armed merchantmen would be visiting American ports, he had been instructed by Sir Edward Grey to give the fullest assurances that British merchant vessels would never be used for purposes of attack, that they were merely peaceful traders armed only for defense, that they would never fire unless first fired upon, and that they would never under any circumstances attack any vessel.[117] This statement the Department promptly acknowledged without comment.

The Department first tested out its attitude towards armed merchantmen in the instance of the *Merrion*, a British merchant vessel entering an American port with six guns mounted aboard her. The Department called the attention of the British Ambassador to this instance, concerning which he inquired of Sir Edward Grey what attitude to take. On September 4, 1914, the views of the British Government were presented in a note stating that it was not in accordance with neutrality and international law to detain in neutral ports merchant vessels armed with purely defensive armaments. Due to the fact that the United States was detaining armed merchant vessels prepared for offensive warfare, and in order to avoid the difficult question of the character and degree of armament which would justify detention, the guns of the *Merrion* would be landed, if provision were made for taking these guns back as cargo on some other vessel. This action, it was pointed out, had been taken without prejudice to the general principle enunciated and still adhered to by the British Government.[118]

On September 9, 1914, the British Embassy submitted two memoranda with regard to the status of armed merchantmen, stating that the British Admiralty had been compelled to arm a certain number of merchant ships for self-defense, in view of the fact that the German Government

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[115] *EW No. 2*, pp. 38-40. (19.VIII.14).
[116] *Ibid.*, pp. 40-41. (20.VIII.14).
[117] *Ibid.*, p. 41; (25.VIII.14) reply, (29.VIII.14).
[118] *Ibid.*, pp. 41-2. (4.IX.14).

had openly entered upon a policy of arming merchant ships as commerce destroyers, and had claimed the right to carry out the process of arming and equipping such merchant vessels in neutral harbors or on the high seas. In undertaking this counter-measure, the Admiralty held that a merchant vessel armed purely for self-defense was entitled under international law to enjoy the status of a peaceful trading ship in neutral ports, without asking any better treatment than that accorded to ships of other powers. Only merchant vessels intended for use as cruisers should be treated as ships of war. The question as to whether the armament carried was defensive or offensive must be decided by the simple criterion as to whether the vessel concerned was engaged in ordinary commerce and embarking cargo and passengers in the ordinary way. If the latter were her purpose, there was no rule in international law that would justify such a vessel, even if armed, in being treater otherwise than as a peaceful trader.

The second memorandum pointed out that the continued presence of German raiders in the Atlantic was possible only because of the supplies and coal delivered to them by vessels setting out from American ports and by the escape of armed commerce raiders from American or South American ports. If, therefore, the United States were to deny British merchantmen the right of armament in self-defense, there would ensue deplorable and unavoidable injury alike to British and American trade.[119]

On September 19, 1914, Mr. Lansing sent to all the Allied missions and to the German Embassy in Washington a memorandum dealing with the status of armed merchant vessels. In brief, the memorandum stated that a merchant vessel of belligerent nationality might carry armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war. The presence of armament and ammunition created the presumption that it was to be used for offensive purposes, but evidence that it was

[119]*EW No. 2*, pp. 42-3. (9.IX.14).

for self-defense, wherever the armament might be located,[120] must be presented in each cause independently at an official investigation which must show that the caliber of guns carried did not exceed six inches; that guns and small arms carried were few in number; that no guns were mounted on the forward part of the vessel; that the quantity of ammunition was small, and that the vessel was manned by its usual crew, the officers remaining the same as those on board before war was declared. The vessel must clear for a port lying in its usual trade route, or a port indicating its purpose to continue in the same trade as in pre-war days. Its supplies and fuel must be its wonted quota or just sufficient to carry it to its port of destination; its cargo must consist of articles of commerce unsuited for the use of a ship of war in operations against an enemy; its passengers must be, as a whole, unfitted to enter the military or naval service of the belligerent whose flag the vessel carried, or of any of the allies of that belligerent, particularly if there were women and children aboard; the speed of the vessel must be slow. Whenever such armed vessels should arrive in an American port, the authorities must ascertain the foregoing and report to Washington the intended use of armament, clearance to be withheld until authorized from Washington. Conversion of vessels from a merchant status to that of a ship of war was to be a question of fact which was to be established by direct or circumstantial evidence of the intention to use the vessel as a ship of war.

Thus the Department of State handled the question of armed merchant ships during the beginning months of the war, but with the announcement of the submarine warfare against Allied commerce and the developments caused by it, the status of armed merchantmen was peculiarly affected, and, as American interests became more and more involved in the question of safeguarding American lives and commerce, new measures had to be re-

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[120] *i.e.*, "mounted or carried below."

sorted to for the protection of liners from submarine attack, and of submarines from the attacks of armed marchantmen. With this end in mind, Mr. Lansing submitted, on January 18, 1916,[121] an informal and confidential letter to the heads of the Allied missions in Washington, regarding warfare between submarines and armed merchant vessels. So far as the questions of the use, aims and objects of submarine warfare are concerned, we have, in this connection, little reason to inquire into their outcome, save to note the relation of armed liners to submarine craft. Thus Mr. Lansing wrote:

> Prior to the year 1915 belligerent operations against enemy commerce on the high seas had been conducted with cruisers carrying heavy armaments. Under these conditions international law appeared to permit a merchant vessel to carry an armament for defensive purposes without losing its character as a private commercial vessel. This right seems to have been predicated on the superior defensive strength of ships of war and the limitation of armament to have been dependent on the fact that it could not be used effectively in offensive against enemy naval vessels, while it could defend the merchantman against the generally inferior armament of piratical ships and privateers.
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> The use of the submarine, however, has changed these relations. Comparison of the defensive strength of the cruiser and a submarine shows that the latter, relying for protection on its power to submerge, is almost defenseless in point of construction. Even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. . . . The placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and search by them. Any armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.
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> If a submarine is required to stop and search a merchant vessel on the high seas, it would not seem just or reasonable that the submarine should be compelled . . . to expose itself to almost certain destruction by the guns on board the merchant vessel.

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[121] *EW No. 3*, pp. 162-164. (18.I.16). (Italics are writer's.)

> It would appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents 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 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.* . . .
>
> My Government is impressed with the reasonableness of the argument that *a merchant vessel carrying an armament of any sort,* in view of the character of submarine warfare and the defensive weakness of undersea 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 offiicials accordingly.

Whether the foregoing attitude towards armed merchantmen had any bearing on the measures contemplated by the Imperial German Government and the Austro-Hungraian Government to treat all vessels armed with cannon as vessels of war, it is impossible to state, and it is not in our province to inquire to what degree the Department of State was at this time susceptible to the claims and arguments advanced by the German Foreign Office, but because of the attitude subsequently shown to have been taken by the Allied Governments in their treatment of submarines by armed liners, as revealed in correspondence submitted to the United States by the Imperial German Government, it will be necessary to make a further inquiry along these lines to determine whether the professed English attitude was in keeping with its actual practice in the matter.

The German Government, in a note verbale of February 10, 1916,[122] submitted a memorandum on the treatment of armed merchantmen, reviewing the British practice before the war, and the legal position already discussed, pointing out in addition that the "the British Government set up the principle for armed vessels of other flags that they were to be treated as war vessels." Thus in Number 1 of

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[122] *EW No. 3*, pp. 166-183. (10.II.16).

Order 1 of the Prize Court Rules promulgated by the Order in Council of August 5, 1914, it was specifically stated that "ship of war" should include "armed ship."[123] As Germany had objected to the rules set forth in 1914 by the Department of State, pointing out that as far as she was concerned the distinction between defensively and offensively armed merchantmen was irrelevant, she reiterated this opinion in the note in question, and claimed, without submitting any specific instances or citing any cases, that certain neutral countries had "subjected armed merchantmen of belligerents to the neutrality rules applicable to ships of war."[124]

The conduct of English merchantmen during the war, the memorandum continued, was such as not only to offer resistance to German war-vessels but to attack them on their own initiative, cases of which, including the use of false flags, were specifically instanced, showing that other Allied countries were also adopting the same tactics.

> The explanation of the action of the armed English merchantmen is contained in . . . confidential instructions of the British Admiralty found by German naval forces on captured ships. These instructions regulate in detail artillery attack by English merchantmen on German submarines. They contain exact regulations touching the reception, treatment, activity, and control of the British gun-crews aboard merchantmen; for example, the *crew are not to wear uniform in neutral ports and thus plainly belong to the British navy.* Above all it is shown by the instructions that these armed vessels are not to await any action of maritime war on the part of the German submarines, but are to *attack them forthwith.* (a) Under "Action," it is stated in the regulations provided for guidance in the use, care and maintainance of armament in defensively armed merchant ships: "It is not advisable to open fire at a range greater than 880 yards unless the enemy has already opened fire." From this it is the duty of the merchantman in principle to open fire without regard to the attitude of the submarine. (b) The instructions regarding submarines applicable to vessels carrying a defensive armament prescribe: "If a submarine is obviously pursuing a ship by day and it is evi-

[123]Tiverton, *Prize Law,* Appendix, p. 2.

[124]Mexico and The Netherlands are referred to.

dent to the master that she has hostile intentions, the ship pursued should open fire in self-defense, notwithstanding the submarine may not have committed a definite hostile act such as firing a gun or torpedo." From this also the mere appearance of a submarine in the wake of a merchantman affords sufficient occasion for an armed attack.

In all these orders which . . . are unrestricted as regards their validity, the greatest emphasis is laid on secrecy, plainly in order that the action of merchantmen, in absolute contradiction of international law and the British assurances (to the United States Government) might remain concealed from the enemy as well as the neutrals.

It is thus made plain that the armed English merchantmen have official instructions to attack the German submarines treacherously wherever they come near them, that is to say, orders to conduct relentless warfare against them. Since England's rules of maritime war are adopted by her allies without question, the proof must be taken as demonstrated in respect of the armed merchantmen of the other enemy countries also.

In the exhibits appended to the German note further details are given which are of material interest. Statements such as the order that "in no circumstances should these papers be allowed to fall into the hands of the enemy"; that they should be kept in a place where they could "be destroyed at a moment's notice"; that "fire should not be opened under neutral colors"; that vessels carrying a defensive armament and proceeding to neutral ports must not be painted in neutral colors or wear a neutral flag"; that "in neutral ports the armament should be concealed as far as possible" for which canvas covers were provided, give some indications as to the sincerity with which the statements of Sir Cecil Spring-Rice were being carried out by the British Government.

A subsequent note verbale from the German Foreign Office brought to the attention of the Department of State further revelations concerning British orders as to armed merchantmen and submarines.[125]

Any submarine approaching a merchant vessel may be treated as hostile . . . If chased by a submarine armed with

[125] *EW No. 3*, pp. 193-194. (11.IV.16).

> a gun, first attempt to escape; if this proves impossible, turn and steer straight for the submarine before she gets close enough to use her guns effectively.

This confirmed the German attitude with regard to the offensive use of "defensively" armed merchantmen, in ramming submarines.

To return to the suggestion ventured by Mr. Lansing, a response from the Allied Governments was received in a series of identic notes from the various governments about March 22, 1916. These revealed an unwillingness on the part of the Allied Governments "to agree that upon a non-guaranteed German promise human life might be surrendered defenseless to the mercy of an enemy . . . both faithless and lawless." While maintaining their former attitude as to the legality of arming merchant ships, it was the opinion of the Allied Governments that the proposed treatment of armed ships by the United States Government as auxiliary cruisers cruisers "could not be given practical consideration by the American authorities." Such a modification of the policy of the United States, it was claimed, would be inconsistent with the general principles of neutrality as embodied in the fifth and sixth paragraphs of the preamble to Convention XIII of The Hague of 1907 concerning maritime neutrality. These stipulated that it was the duty of neutral powers to apply the rules concerning its neutrality impartially to all belligerents, and not to alter the rules of its neutrality in principle, except in a case where experience had shown the necessity for such change for the protection of the rights of that power. In that respect, it would appear, the contention of the Allied Governments as to the necessity or the non-necessity of such change was in fact immaterial, as the United States had carefully laid down the principle that hers alone was to be the duty of deciding the extent of her xigilance in defense of her neutrality. Moreover, the Allied notes continued, the result would be contrary to the Seventh Hague Convention of 1907, relative to the conversion of merchant ships, because they would not be under the direct authority of the Govern-

ment whose flag they flew and would not have their crews subject to military discipline. Thus, the note concluded, 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.[126]

The spirit of the Allied note being final, Mr. Lansing saw no way except to accept it at its face value, and did so in a note under date of April 7, 1916.[127]

> "It is believed," writes Professor Hyde, "that the Secretary of State sought to formulate no new principle of law, but rather to gain recognition of the inapplicability of an old rule to existing conditions of maritime warfare which were at variance with the theory on which the rule was based, and that he endeavored to encourage a practice both in harmony with that theory and responsive to the requirements of justice. Nor did his proposal indicate the abandonment of any neutral right."[128]

Into the Congressional furore that ensued upon the announcement by the Imperial German Government of the measures it would take against armed merchantmen, it is not our province to enter. The introduction of a resolution by Mr. Jefferson MacLemore of Texas into the House of Representatives on February 22, 1916, requesting the President

> to warn all American citizens within the borders of the United States or its possessions or elsewhere to refrain from traveling on any and all ships of any and all powers now or in future at war, which ship or ships shall mount guns, whether such ships be frankly avowed a part of the naval forces of the power whose flag it flies or shall be called a merchant ship or otherwise, and whether such gun or guns or other armament be called offensive or defensive; and in case American citizens do travel on such armed belligerent ships, they do so at their own risk

was one of the few sporadic and futile attempts on the part

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[126] *EW No. 3*, pp. 187-188. (23.III.16).

[127] *Ibid.*, pp. 194-195. (17.IV.16).

[128] C. C. Hyde, *Maritime War*, p. 76. Cf. also his *International Law*, II, 467.

of Congress to direct the foreign policy of the administration. In a letter to Representative Pou, President Wilson stated that any Congressional endeavor to formulate the policy of the administration would very seriously embarrass the negotiations then going on with the Allied and Central Powers in regard to armed merchant ships, hence he asked for an early and decisive vote on such questions. As a consequence, after four hours of very heated debate, the House tabled the warning resolution and the policy of the administration was sustained.[129]

In such confusion of issues many things were involved, and partisan considerations were not entirely in abeyance. But apart from that, "the legal problem confronting the United States was not one concerning the right of American citizens to take passage on British or other armed merchantmen, but rather one whether the presence of armament robbed vessels equipped therewith of the right to demand immunity from attack without warning, and hence justly exposed the occupants, of whatever nationality, to grave personal danger."[130]

Once that the congressional tempest had calmed down, the Department of State, by direction of the President, prepared a memorandum on the status of armed merchant vessels. This statement declared that the status of an armed merchantman was to be considered from two points of view: (1) from that of a neutral when a belligerent armed liner entered its ports, and (2) from that of an enemy when the vessel was on the high seas. Under the first heading, the Department of State reached the conclusion that if the vessel carried a commission of orders issued by a belligerent government and directing it under penalty to conduct aggressive operations, or if it were conclusively shown

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[129]*Congressional Record* LIII: 3689-3720 (7.III.16). Peculiarly the question of the status of armed merchantmen has been seriously confused alike in private and in Government publications with the question of Armed Neutrality, with which it has little, if anything, in common.

[130]Hyde, *op. cit.*, pp. 76-77. Cf. also his *International Law*, II, 568.

that such vessel had conducted such operations, it was to be regarded and treated as a warship. In default of such evidence, the neutral government, to preserve its neutrality, might presume from facts the status of such vessels, declaring a standard of evidence, modifiable according to general conditions of naval warfare or specific instances in default of any rule of international law. These changes and modifications might be made at any time during the progress of the war, since the determination of the status of the vessel would affect the liability of a neutral government.

Under the second heading, the Department held that it was necessary for a belligerent warship to determine the status of an armed merchant vessel of an enemy encountered on the high seas, since the rights of life and property of belligerents and neutrals might be impaired if the status of such a vessel were that of an enemy warship. In this case, the determination of warlike character must rest on absolutely conclusive evidence and not on presumption, hence the normal assumption would be that a vessel was a peaceful liner. The presence of armament was not warrant for attack.

> A neutral government has no opportunity to determine the purpose of armament unless there is evidence in the ship's papers or other proof as to its previous use, so that the government is justified in substituting an arbitrary rule of presumption in arriving at the status of the merchant vessel. On the other hand, a belligerent warship can on the high seas test by actual experience the purpose of an armament on an enemy merchant vessel, and so determine by direct evidence the status of the vessel.

The memorandum thereupon proceeded to consider the relations of neutrals and belligerents as affected by the status of armed merchant vessels in neutral ports. After citing the usual recognized rules for the treatment of war vessels, it was stated that merchantmen of belligerent nationality, armed only for purposes of protection against the enemy, were entitled to enter and leave neutral ports without hindrance in the course of legitimate trade.

Armed merchantmen under a commission, or which had, with or without such commission, used their armaments for aggressive purposes were not entitled to the same hospitality in neutral ports as peaceable armed merchantmen.

Finally the memorandum discussed the relations of belligerents and neutrals as affected by the status of armed merchant vessels on the high seas. Reciting the accepted principles that resistance to search, the carriage of contraband and the rendering of unneutral service were cause for confiscation or condemnation, the Department held that the only means of avoiding loss was by flight or successful resistance, and that enemy merchant ships therefore had the right to arm for purposes of self-protection. The right to capture and to prevent capture were recognized as equally justifiable, subject, however, "to certain accepted rules of conduct based on the principles of humanity" such as the giving of an opportunity to surrender. "If the merchantman finally surrenders, the belligerent warship may release it or take it into custody. In case of an enemy merchantman, it may be sunk, but only if it is impossible to take it into port, and provided *always* that the persons on board are put in a place of safety. *In the case of a neutral merchantman, the right to sink it in any circumstance is doubtful.*" The right to self-defense, and the right to cruise the seas could not, therefore, be regarded as identical. Where armed merchantmen were under commission to cruise, or could receive bounties for sinking enemy ships, they lost their status as peaceable merchant ships and were to be regarded as incorporated to a limited extent in the naval forces of their governments. Vessels engaging in such operations intermittently, even though acting as commercial carriers, possessed a tainted status entitling them only to the status of warships, with corresponding treatment by both enemies and neutrals. Private vessels seeking enemy craft without such commission were to be regarded as pirates.[131]

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[131] *FW No. 3*, pp. 188-193. (26.III.16).

The position taken by the United States in this memorandum, while not discussed or criticized in any published correspondence with the belligerent governments, except for a statement by the British Government that[132] no defensively armed British ship had received any money award from the British Government for firing upon an enemy vessel, has been subject to criticism from other sources.

Professor Hyde, in a critique of the memorandum points out that:

> It fails to heed the fact that the immunity of merchant vessels from attack at sight grew out of their impotency ot endanger the safety of public armed vessels of an enemy, and that maritime states have never acquiesced in a principle that a merchant vessel so armed as to be capable of destroying a ship of any kind should enjoy immunity from attack at sight, at least when encountering an enemy warship of inferior defensive strength.
>
> That an armed merchantman may retain its status as a private ship is not decisive of the treatment to which it may be subjected. The potentiality and special adaptability of the vessel to engage in hostile operations fraught with danger to the safety of an enemy warship, rather than the designs or purposes of those in control of the former, however indicative of its character, have been and should be deemed the test of the right of the opposing belligerent to attack it at sight. In view of the fact, the presence on board the armed merchantman of neutral persons or property cannot give rise to a duty towards the ship not otherwise apparent. Every occupant thereon must be held to assume that the enemy will use every lawful but no unlawful means to subject the vessel to control or destroy it.
>
> To test the propriety of an attack at sight by the existence of conclusive proof of the aggressive purpose of the merchantman places an unreasonable burden on a warship of an unprotected type, whether a surface or an undersea craft, for no evidence of the requisite purposes of the merchantman may be in fact obtainable until the warship encountering the former becomes itself the object of attack. The mere pursuit of the merchantman, prior to any signal made to it, may cause the vessel to attack the pursuer as soon as it gets within range.
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> What constitutes an act by way of defense must always

[132] *EW No. 4*, p. 66. (5.VI.16).

> remain a matter of uncertainty. The possession of substantial armament encourages the possessor to assert or claim that it acts defensively whenever it opens fire. Thus in practice the distinction between the offensive and defensive use of armament disappears, for the armed merchantman is disposed to exercise its power whenever it can safely do so. To presume that such a vessel has "a peaceable character" on the supposition that it will not when occasion offers open fire on vulnerable warships of the enemy is to ignore an inference fairly deducible from the conduct of vessels equipped with effective means of committing hostile acts.
>
> It is believed that the equipment of a belligerent merchant marine for hostile service, even though designed to be defensive rather than offensive, serves in principle to deprive the armed vessels of the right to claim immunity from attack without warning. It may be doubted whether the wise and humane effort to obtain hereafter general recognition by maritime states of the solid equities of unoffending belligerent vessels, and thus also to safeguard the lives and property of neutral occupants, will be strengthened by declarations assertive of immunities for armed ships. The proposal of Secretary Lansing of January 18, 1916, is believed to indicate the correct theory and therefore the true basis of the rule to which states should be generally invited to adhere.[133]

Regardless of the arguments advanced by Professor Hyde, it may be stated that the attitude assumed by the United States in an endeavor to maintain its neutrality was praiseworthy, even if in actual practice superior considerations of policy tended to render this attitude nugatory. We have thus traced the troubled question of the treatment of armed merchantmen in American ports to its last conclusion, for once the United States turned away from this extreme position toward a denial of its stand, the question of armed merchantmen became a nullity and the resort to Anglo-French policy was ventured just a year later under the caption of armed neutrality.[134]

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[133]C. C. Hyde, *Maritime War*, pp. 77-80. Cf. also his *International Law*, II, 468-472.

[134]For a critical discussion of the problem of armed merchantmen, *cf.* Garner *op. cit.*, I, 384-416, and Hyde, *International Law*, II, 402-405, 460-476, 739 742, *passim.*

The successful transit of the *S.S. Deutschland,* an unarmed submersible merchantman, from Bremen to Baltimore in the summer of 1916 with a very valuable cargo for sale in the United States, and its subsequent return voyage, intact, to Bremen, raised a lively discussion as to whether the rules of international law covering the rights and duties of surface craft could be applied to undersea craft of this nature without serious change.

The Allied Governments viewed this new departure in ocean-going craftsmanship with no little apprehension, and in a series of identic notes made their position known to the Government of the United States.[135] They deemed it necessary to exhort neutral governments to take efficacious measures to prevent belligerent submarines, regardless of their use, from availing themselves of neutral waters, roadsteads and harbors. This they did in order to protect their belligerent rights and the freedom of commercial navigation, as well as to remove the chances of conflict. The facility of such submersibles to navigate and sojourn in the seas while submerged prevented the exercise of supervision and surveillance applicable to surface craft, as it did the possibility of identifying their national character, whether neutral or belligerent, combatant or innocent, and of rendering them innocuous. It appeared, therefore, that when such a submersible had at its disposal a place where it might revictual, that place afforded sufficient advantages to it as to be regarded a base for naval operations. Consequently, the Allied Governments held that "submarine vessels must be excluded from the benefit of the rules theretofore accepted in international law regarding the admission and sojourn of war and merchant vessels in neutral waters, roadsteads and harbors, any submarine of the belligerents that once entered a neutral port must be held there." Lastly, the notes pointed out, neutral submarines navigating waters frequented or visited by belligerent submarines would be in great danger.

In reply, the Department of State expressed its surprise

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[135] *EW No. 4,* pp. 125-6, (21.VIII.16) and reply. (31.VIII.16).

at the endeavor of the Allied Powers to determine the rules of action governing the use of submarines and to enforce acceptance of these rules by neutral governments. In the opinion of the United States, nothing had been adduced by the Allied Governments to show that the existing rules of international law were inapplicable to the situation. In view of this fact and of the notice and warning of the Allied Governments, the United States Government notified the Allied Powers that, so far as the treatment of either war or merchant submarines in American waters was concerned, it reserved its full liberty of action in all respects, and would treat such vessels in its traditional spirit of neutrality and impartiality. To avoid misunderstanding, however, the United States announced to the Allied Powers that it held it to be the duty of belligerent powers to distinguish between submarines of neutral and belligerent nationality, and that responsibility for any conflict that might 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. This stated the case for the United States, and the Allied Governments promptly dropped the matter.

In discussing the legitimacy of the right of attack on such craft, Professor Hyde observes that, in the first instance, the submersible, if unarmed, cannot return the fire of a belligerent war-vessel; it has likewise extraordinary facilities for escape. "Refusal to obey a reasonable signal to lie to, should doubtless subject a submarine vessel to the same penalties as a non-submersible ship. . . . Hence it is believed that the undersea vessel when observed on the surface, if its harmless character is then ascertainable, is entitled to the same warning which it might justly claim if it could not submerge." Inability to distinguish such a submersible from an ordinary submarine might lead with greater readiness to an attack on it at sight of a belligerent cruiser, hence the need for an agreement as to the ensign to be displayed by such submersibles. Likewise, the

purpose of the submarine is to be inferred largely from its structure: "If the potentialities of an unarmed submersible merchantman are to suffice to justify its destruction at sight, there must be evidence not merely that the vessel is readily capable of transformation into a warship, but also that it is either constructed primarily for use as such, or is in fact at the time given over to a public service connected with the prosecution of the war."[136] Finally, he observes, "The principle that the right of an unarmed vessel of whatsoever type to demand immunity from attack at sight depends upon its own defenselessness, requires clear perception and general recognition. It must be obvious that the existence of this right does not imply that such a vessel is exempt from capture, but rather that the mode of subjecting it to control is not unregulated."[137]

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[136]Hyde, *op. cit.*, *pp.* 72-3. Cf. also his *International Law*, II, 463-464.

[137]For other discussions of the problem raised by the *Deutschland*, cf. Garner, *op. cit.*, II, 437-8; Atherley-Jones in 3 *Transactions of the Grotius Society*, 40, and Reeves, J. S., in 11 *AJIL*, 149.

## CHAPTER VI.

## THE CONTROVERSY OVER CONTRABAND AND THE RIGHT OF SEARCH

It was the endeavor of the representatives of maritime powers at the London Naval Conference of 1909 to draw up distinct lists of materials which in time of war were to be considered as absolute contraband, conditional contraband, or non-contraband, the latter comprising the articles which, either because they were inutile in war, or because the powers for some reason in particular declined to consider them as contraband, were left outside the purview of confiscable and condemnable articles. Likewise we have seen that it was the policy of the Allied Governments, from the inception of the war, to extend, as far as possible, the content of their contraband lists in order that commerce with the enemy might, in so far as possible, be intercepted.

In view of the confusion that sometimes exists as to the dividing line between what is regarded as an action in regard to contraband and what is a measure to enforce blockade, certain explanations may be in order, in an endeavor to bring out clearly the distinction between these two important means of intercepting the commerce of an enemy.

> The rule of international law which allows a belligerent state to capture contraband is based upon the theory that when two states are at war no neutrals are entitled to interfere. If a neutral state lends help to either of the combatants it exposes itself to attack from the other. If individual citizens do so by furnishing supplies by sea of a contraband character, they incur the risk of seizure and confiscation. Enemy capture is confined to enemy property. Blockade applies to property of all kinds if found in the prohibited zone and directly destined for the blockaded territory. But contraband is limited to property of a particular kind which is destined to the belligerent, and it may be captured anywhere at sea except in neutral waters . . . Some states sometimes say that it cannot be captured unless its destination is to the belligerent territory and for the belligerent government. The extreme view on the other side is that,

> no matter what its port of destination may be, it can be captured if it is intended ultimately to reach the belligerent territory . . . The law of contraband may be used so as almost to extinguish neutral trade, and to produce nearly the same effect as a blockade without the risk and effort of employing a sufficient naval force.

In this fashion Lord Loreburn[138] has laid down his concept of the underlying principles of contraband, and the effectiveness to which the doctrine of contraband may lead in the interception of the commerce of an enemy. On the other hand a noted German jurist, writing in the days before the war, leveled his sharpest criticisms of the entire system of contraband in the following terms:

> The acceptance of the right of contraband of war means: You are unrestricted in the definition of war contraband. Consequently, through a proper handling of the meaning of war contraband, you may evade the demands imposed upon blockade. By overstretching the right of contraband you may achieve approximately the results of an effective blockade that would otherwise be either impossible for you or else highly inconvenient. And by exercising as much as possible the right of contraband you may even surpass, under certain conditions, the imperfect, because locally restricted, effect of an efficient blockade.[139]

The above are cogently reasoned passages which show that because the ultimate effect of each is the same, the workings of contraband and blockade tend to be identified. In this connection the opinion of Hall is particularly helpful:

> The liability of a neutral merchant ship to be captured by a belligerent arises either because such a vessel is attempting to break a blockade, or because she is guilty of carrying contraband goods or is herself contraband—i.e., a vessel intended to be converted to a warlike use. The two causes of liability are to be carefully distinguished. There can only be a breach of blockade when one has been established, but it is illegal to carry contraband from the moment war has

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[138]Earl Loreburn, *Capture at Sea*, Chapter V, pp. 103-110, *passim*.
[139]Niemeyer, *Prinzipien des Seekriegsrechts*, 1909, p. 28.

> been declared. Sailing with any cargo or none to a blockaded place is illegal, but the liability for carriage of contraband depends entirely on the noxious nature of the cargo; for the object of blockade is to cut off all intercourse with a specific place, while the purpose of the latter is to cut off from the enemy everywhere articles of direct use to him in prosecuting the war. Again in blockade the ultimate destination of the ship is the test, but in the question of contraband it is that of the cargo. Finally the penalty for breach of blockade falls, as we have seen, on both ship and cargo, but for carrying contraband it falls primarily on the contraband goods and, except for loss of time and freight, only exceptionally on the vessel. Since, then, liability depends on the nature of the cargo, it is necessary to consider what is to be regarded as contraband and what as innocent.[140]

It is to the determination of what the policy pursued by the Allied Governments during the course of the Great War involved that we must now devote ourselves. We have already examined the status of contraband at the date of the acceptance, with reservations, of the Declaration of London by the Allied Governments, by the publication of an Order in Council under date of August 20, 1914.[141] On September 21,[142] by another Order in Council changes were made in the lists of contraband on the ground that it was "expedient to introduce certain modifications in the Declaration of London as adopted and put into force" and certain articles enumerated were placed on the list of conditional contraband "notwithstanding anything contained in Article 28 of the Declaration of London." Similarly the lists of contraband were materially altered and consolidated by Orders in Council of October 29, 1914,[143] which also modified the attitude of the British Government toward the Declaration of London. These stated that a neutral vessel with papers showing a neutral destination which proceeded to an enemy port notwithstanding the destination shown on

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[140]Hall, J. A., *The Law of Naval Warfare*, Chapter VII, p. 92.
[141]*EW No. 1*, p. 7. (20.VIII.14).
[142]*Ibid.*, p. 12. (21.IX.14).
[143]*Ibid.*, pp. 12-14. (29.X.14).

her papers should be subject to capture and condemnation if she were encountered before the end of her next voyage; that the hostile destination of goods was presumed to exist if the goods were consigned to or for an agent of the enemy state; that, notwithstanding the provisions of Article 35, conditional contraband would be liable to capture on board a vessel bound for a neutral port if the goods were consigned "to order," or if the ship's papers did not show who was the consignee of the goods, or if they showed a consignee of the goods in territory belonging to or occupied by the enemy, in which cases it should lie upon the owners of goods to prove that their destination was innocent. Where it was shown that an enemy government was drawing supplies for its armed forces from or through a neutral country, the provisions of Article 35 of the Declaration should not apply. So long as such directions were in force, a vessel carrying conditional contraband to that country should not be immune from capture. Another revised and very much extended list of contraband was issued December 23, 1914.[144] Lastly, a much more extended list was published by one of the Orders in Council of March 11, 1915.[145] Similar changes were made in the French contraband lists so that by the beginning of 1915 the lists corresponded absolutely,[146] as did the Russian contraband lists.[147]

This degree of uniformity having been reached, the process of extension did not cease, for by additional Orders in Council of May 27, 1915,[148] August 20, 1915 (placing cotton and cotton products on the list of absolute contraband),[149] October 14, 1915, [150] January 27, 1916,[151] April 12, 1916,[152] the list was continually extended until, on April

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[144]*EW No. 1*, pp. 14-16.
[145]*Ibid.*, pp. 17-18.
[146]*Ibid.*, pp. 16, 22.
[147]*Ibid.*, p. 23. (26.II.15).
[148]*EW No. 3*, pp. 89-90. (27.V.15).
[149]*Ibid.*, p. 90. (20.VIII.15).
[150]*Ibid.*, pp. 90-93. (14.X.15).
[151]*Ibid.*, pp. 107-108. (27.I.16).
[152]*Ibid.*, pp. 108-109. (12.IV.16).

13, 1916, the lists of conditional and absolute contraband were combined,[153] as, in the view of the British Government, the distinction between the two classes of contraband had ceased to have any value. No real distinction could be drawn between the armed forces and the civilian population of the enemy. So long as such conditions continued, the treatment of both kinds of contraband would be the same.[154] Into the changes themselves we cannot, save in particular instances, enter, except to say that the distinctions had ceased to have any real difference long before the date of formal abolition of the orders keeping the two in separate classes. The loophole in the lists of contraband that had been made in the first Order in Council had worked all too well and the labors of the London Naval Conference had been in vain.

Notwithstanding the early modification of contraband lists and the placing of severe restraints on American commerce, it was not until December 26, 1914, that the first correspondence with regard to restraints on commerce took place. On that date, Mr. Bryan sent a long note to the British Government presenting "a candid statement of the views of this Government in order that the British Government may be fully informed as to the attitude of the United States towards the policy which has been pursued by the British authorities during the present war."

The charges made against the conduct of the British authorities mentioned the seizure on the high seas of a large

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[153]This action of combining both contraband lists was taken only by the British Government, and was specifically avoided by the other Allied Governments, who clung to the traditional classification. It should be noted, however, that as the "free list" was practically extinguished, and as by the French decree which accompanied the Maritime Rights Order in Council, the doctrine of continuous voyage was made applicable both to contraband and blockade, the retention of the traditional classification was rendered virtually meaningless. The British Government alone seems to have had the temerity to acknowledge the logical consequences of the far-reaching extension of contraband lists.

[154]*Ibid.*, pp. 109-113. (13.IV.16).

number of vessels laden with American goods destined to neutral ports in Europe; the taking of these vessels into British ports and their protracted detention by the British authorities. Despite the announcement by the Foreign Office that it was satisfied with guarantees offered by the Norwegian, Swedish and Danish Governments as to non-exportation of contraband goods when consigned to named persons in those countries, and the consequent expectation of the United States Government that the seizures earlier occasioned by the sudden outbreak of war would cease, the greater freedom from detention and seizure resulting from shipments to definite consignees rather than "to order" was still awaited. While admitting the right of belligerents to interfere with commerce only to the extent that such interference was a manifest and imperative necessity, the Government of the United States was forced to the conclusion that the policy of the British Government exceeded manifest necessities and constituted unjustified restrictions upon the rights of American citizens on the high seas.

> The Government of the United States does not intend at this time to discuss the propriety of including certain articles in the lists of absolute and conditional contraband . . . Open to objection as some of these seem to this Government, the chief ground of present complaint is the treatment of cargoes of both classes when bound to neutral ports.

In this particular admission lay the reason for the failure of the position taken by the United States to bring about the slightest vestige of conformity to the principles of the Declaration of London. Even so, on the basis of the general principles of international law, to which the United States Government had ultimately resorted, there was no warrant for such an indiscriminate extension of the contraband lists as was being effected by the British Government, inasmuch as its own position in the Russo-Japanese War had been distinctly averse to the extension of the lists of contraband. Had an earlier endeavor to enforce conformity to a more equitable standard been made, it is possible that some response would have resulted; by delay and

indecision, by staving off the controversy, the case for the extension of contraband lists was materially strengthened, and the "free list" doomed to ultimate extinction.

As regards absolute contraband, complaint was made of the capricious treatment accorded such shipments to neutral countries, and the claim was made that a legitimate trade was being greatly impaired by the uncertainty as to the treatment that the British authorities might impose upon it. Conditional contraband had been subjected to similar treatment. The seizure of "foodstuffs and other articles which are admittedly *relative* contraband" in spite of the presumption of innocent use because of neutral destination, merely on suspicion, and not upon actual evidence, because of a belief or a mere fear that such was not their real destination, was a practice condemned by British practice during the South African War: "Foodstuffs, though having a hostile destination, can be considered contraband of war only if they are for the enemy's forces; it is not sufficient that they are capable of being so used, it must be shown that this was in fact their destination at the time of their seizure." On this historic doctrine laid down by the British Government the American citizen was entitled to rely.

As regards the 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 was sufficient evidence for so doing, when there was a belief that they carried a contraband cargo, the Government of the United States willingly conceded this right, but could not 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."*

*The distinction between the International Law of Prize, sanctioned by convention and custom, gathering force from precedent to precedent, and the municipal Prize Law of a given country is to be kept clearly in mind. The former represents the standard set in the

accepted or unquestioned law of nations; the latter, the particular standard set by a given country in its interpretation of its belligerent rights. The classical definition of "prize" has been given in the words of Lord Mersey[155] as "the term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port." The Law of Prize is found embodied in such conventions as the ninth, eleventh and thirteenth Conventions of the Second Hague Conference, and in such declarations as the Declaration of Paris. The Prize Law of any given country is to be found in the law which its prize courts interpret, and such, whether in America or abroad, is based on precedent and on domestic ordinances which may at any time, and usually do, take precedence over international practice, at the whim of the executive concerned.

> The practice of prize courts is regulated by rules of court made by the Privy Council, which must be kept exhibited in a conspicuous place in each court to which they relate. In all cases not provided for by the rules, the practice is to be governed either by the old Admiralty Court practice or by such practice as the President may direct.[156]

This is typical of the definitions of municipal prize law and its scope.

The difficulties in protecting neutrals and their rights lie in the fact that the stringent measures adopted by a belligerent may overstep the requirements established under general international practice and that there is no diplomatic redress for an aggrieved neutral who has once submitted his case to the decision of a prize court. This was one of the facts leading to the discretionary power given to the proposed international prize court to lessen the effects of such legislative regulations as Orders in Council or decrees and the very insistence of the United States Government on this point in the course of its protracted discussions with Great Britain on this point cannot be too strongly emphasized. It has been the aim of the United States to keep the Prize Court unfettered by such rigid legislation as would annihilate neutral rights in the long run. To seek redress of grievances in a court bound by the enactments of a belligerent power clearly overstepping the bounds of accepted international law is an impossibility for a neutral nation, despite the declarations of learned judges to the contrary.

> National Prize Courts are subject to the instructions of their own sovereign, whether or not these be consistent with

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[155]Earl of Halsbury, *The Laws of England,* Vol. XXIII, p. 276.

[156]Tiverton, *Prize Law,* pp. 1-2.

> the ordinary rules of international law. It is for this reason that neutral states do not consider themselves bound by the judgments of Prize Courts.[157]

In this particular respect the United States laid down its firm attitude in denying the British doctrine that Orders in Council, the "special municipal enactments" in question, could have the validity of international law. This attitude has been traditional on the part of the United States since the days of the Wars of the French Revolution, and the experience gained at that time has been a sufficient deterrent from the acceptance of any such decrees or Orders in Council as in any way binding upon the United States.

The last point raised in the note dealt with the grievance of American industries in being denied access to long established markets in Europe purely because those markets were in neutral countries contiguous to the enemies of Great Britain. On the ground of this undue interference in commerce with neutrals from the United States, the note requested that the British Government instruct its officials to refrain from all unnecessary interference with the freedom of trade between neutrals and to conform more clearly to the traditional British practice as regards the maritime relations between neutrals and belligerents.[158]

To this Sir Edward Grey replied on January 7, 1915, that the British Government concurred in the American view that belligerents should not interfere in the trade of neutrals so long as it was *bona fide,* or unless it interfered with the belligerent's national safety; and that the British Government were ready to make redress at any time that they exceeded this principle. The note then quoted at length figures to prove that American trade had by no means declined, inasmuch as exports to the smaller countries of Europe had greatly increased. Where it was shown that consignments such as aluminum had an ultimate enemy though an ostensible neutral destination it was not believed

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[157]Cohen, *Declaration of London,* p. 4.

[158]*EW No. 1,* pp. 39-41. (26.XII.14).

that the United States Government would question the propriety of taking such suspected cargoes to a Prize Court, or object to the use of legitimate means to prevent such articles from reaching the enemy. Regarding foodstuffs, the British Government gave no unlimited or unconditional undertaking to prevent their detention unless it were shown that they were destined for the use of the armed forces or government of the enemy. Cotton was to be maintained on the "free list," though investigation of cotton cargoes for concealed contraband would be continually necessary.

Such search, the note continued, would have to be made in port; in no other way could the right of search be exercised, and but for this practice it would have to be completely abandoned. This statement can not be too highly emphasized for its importance in determining the policy of the United States and Great Britain towards search. The mere statement of the absolute necessity for such action at a time when submarine warfare had not as yet begun is of the utmost importance. No complaint could be offered as to the action of neutral Governments adjoining the territory of Great Britain's enemies, although the danger that they would become a base of supplies for the armed forces of the enemies and for materials for the manufacture of armaments was increasingly pressing. The interception of goods really destined to the enemy without interference in *bona fide* neutral commerce was thus effected, as the United States had agreed, only in the interest of the national safety of Great Britain. While not contesting the principles of law on which the action of the United States was based, and desiring to restrict such interference solely to contraband destined for the enemy, any arrangement whereby delays would be avoided and the innocence of the cargoes easily proven, would be welcomed, as the British Government had no desire to interfere with normal commerce from the United States to neutral countries.[159]

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[159] *EW No. 1*, pp. 41-44. (7.I.15).

In a letter to Senator Stone on January 20, 1915, Mr. Bryan laid down the view that in the opinion of the United States Government the inclusion of petrol, petroleum products and rubber by the Allied Governments in their contraband lists was not improper, due to the absolute necessity of such products for the use of submarines, aeroplanes and motors. It was therefore difficult, as these were directly essential to the pursuit of military operations, to argue against their inclusion in the lists of contraband.[160]

On February 10, 1915, Sir Edward Grey sent a more detailed note covering the points raised in the first American note.[161] In it an endeavor was made to show that American trade had substantially increased and that a substantial part of this trade was intended for the enemy countries, going through neutral ports by routes to which it was previously unaccustomed. The shortages in means of ocean transportation were due to the general existence of war and not to British interference. It was open to American owners or shippers interested in detained ships to apply to the Prize Court for release of the ships on bail. Speedy discharge of detained cargoes was being pushed in order to relieve the acute shortage of shipping from which Great Britain was herself the worst sufferer; condemned ships likewise were being rapidly sold. German ships detained in British harbors by the outbreak of war were being requisitioned to relieve the shortage.

In reviewing the principles of international law on which British policy was based, the fundamental principle was that belligerents are entitled to capture contraband goods on their way to the enemy. The doctrine of continuous voyage, introduced and extended during the Civil War by the United States formed the second basis of belligerent right to capture contraband destined directly or indirectly for the enemy. What steps should be taken to detect the existence of such contraband trade, it was the main object

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[160]*EW No. 2*, p. 60. (20.I.15).

[161]*EW No. 1*, pp. 44-52. (10.II.15).

of British policy to determine, in view of persistent and systematic efforts at concealment, hence it was

> essential that His Majesty's Government should be entitled to make, and should make careful enquiry with regard to the particular destination of goods shipped, even at the risk of some slight delay to the parties interested. If such enquiries were not made, either the exercise of British belligerent rights would have to be abandoned, . . . or else it would be necessary to indulge in indiscriminate captures of neutral goods and their detention throughout all the period of the resulting prize court proceedings.

The results of such inquiry tended to permit the release of most vessels without unconscionable delay or loss, when the innocent nature or destination of their cargoes was established.

The practice of inquiry, then, may be said to have been the principal new departure in British practice, "but if it is correctly described as a new departure, it is a departure which is wholly to the advantage of neutrals, and which has been made for the purpose of relieving them so far as possible from loss or inconvenience."

The contention of the British note may be warranted to this extent: that the conditions under which contraband is shipped do necessarily entail an inquiry, but the point arises at once as to what that place of inquiry shall be. Shall it be on the high seas or in port? Shall it be effected within or without the territorial jurisdiction of a belligerent? Mr. Bryan had stated on January 20, 1915, that an American private vessel entering voluntarily the territorial waters of a belligerent became at once subject to the municipal law of that belligerent. What was to be said of a vessel taken into port by *force majeure*, or under any other form of duress?

The United States had already made known its opinion in this regard in a note addressed by the State Department to the British Ambassador on November 7, but which was not published by the State Department. In this the United States declared that in its opinion the belligerent right of visit and search required that the search should be made

on the high seas at the time of the visit, and that the conclusion of the search should rest upon the evidence found on the ship under investigation, and not upon circumstances ascertained from external sources.[161a]

To this the British Government was unable to accede, pointing out that both British and American prize court decisions had admitted the necessity for giving the belligerent captor full liberty to establish by all the evidence at his disposal the enemy destination of goods. Apart from the question of searching vessels in port, it was claimed that it was an absolute necessity to bring a vessel into quiet water in order that the visiting officer might go aboard, which right, if denied, would make the right of visit and search a mere nullity. "If the circumstances are such as to render it impossible to carry it out at the spot where the vessel is met with, the only practicable course is to take the ship to some more convenient locality for the purpose. To do so is not to be looked upon as a new belligerent right, but as an adaptation of the existing right to the modern conditions of commerce."

It was for this reason that neutral ships had been "encouraged" to visit British ports in order that the examination might take place conveniently. "The alternative would be to keep a vessel which the naval officers desired to board waiting . . . until the weather conditions enabled the visit to be carried out at sea." To harmonize belligerent action and neutral right, therefore, Great Britain had instituted means to facilitate alike compensation for costs, and damages incident to such delays pending investigation. The endeavors of neutrals engaged in surreptitious trade to secure diplomatic instead of legal redress could not be acceded to;

> when an effective mode of redress is open to them in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights which is contrary to the law of nations, the only course which is consistent with sound principle is that they should be referred

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[161a] *EW No. 1*, p. 48.

> to that mode of redress and that no diplomatic action should be taken until their legal remedies have been exhausted, and they are in a position to show *prima facie* denial of justice.

This the British Government maintained to have been its attitude in previous wars, and during the Spanish-American War.

Here again it must be particularly insisted upon that this attitude taken by the British Government was one of the most keenly disputed points at issue between the United States and Great Britain, inasmuch as to have countenanced the subjection to prize courts of the cases of all American citizens would have meant a complete surrender to the methods or orders in force in such prize courts as Great Britain might establish. These prize courts were bound by an Order in Council of August 6, 1914,[162] to hear and determine prize cases according to the course of admiralty (which was in effect an injunction to follow the political acts of the government) and the law of nations and the statutes, rules, and regulations for the time being in force in that behalf. The question at once arises as to whether a court of this nature is bound by the municipal enactments, rules, etc., of the country if they are contrary to the rules of international law. In this connection it will be advisable to quote the decision laid down by the Privy Council in the case of the *Zamora* in 1916 concerning the relation of Orders in Council to international law:

> The Prize Court Rules derive their force from Orders of His Majesty in Council . . . So far, therefore, as the Prize Court Rules relate to procedure and practice, they have statutory force and are, undoubtedly, binding. . . . The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our constitution. . . . A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its

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[162]Tiverton, *Prize Law*, p. 4.

orders from one of the parties to the proceedings . . . The law which the Prize Court is to administer is not the municipal law, but the law of nations . . . The Prize Court is a municipal court and its decrees and orders owe their validity to municipal law. The law which it enforces may, therefore, in one sense, be considered a branch of municipal law. Nevertheless, this distinction between municipal law and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign state which calls it into being. It need only inquire what that law is, but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular state, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international law but municipal law; for an exercise of the prerogative cannot impose legal obligations on anyone outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction. . . .

It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, 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 by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the court which administers it is constituted under the municipal law of the belligerent power or of the sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has 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 this remedy in the Prize Courts of the belligerent power . . . It is obvious, that the reason for this rule of diplomacy would en-

> tirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the directions of the executive of the belligerent power . . .
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> It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own sovereign state. . . . The fact, however, that the Prize Courts in this country would be bound by acts of the Imperial Legislature afford no ground for arguing that they are bound by the executive orders of the King in Council. . . . If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is, according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its functions as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.
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> It cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in course of time, be themselves evidence by which international law and usage may be established.[163]

Having thus explained the British position legally, we may return to examine the other circumstances laid down in the remainder of the British note. In order to avoid delays in regard to ships, interdepartmental committees had been established to care for detained ships. Concerning conditional contraband shipments, the note pointed out that the Order in Council of October 29 drew no distinction in the application of the doctrine of continuous voyage between absolute and conditional contraband, and placed upon the neutral power of the contraband somewhat drastic conditions as to the burden of proof of the guilt or innocence of the shipment. The criticisms of this as first embodied in the Order in Council of August 20, 1914, made by the

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[163]The *Zamora*, Law Reports, 1916, 2 A.C. 77 et seq. Cf. also Trehern, *British and Colonial Prize Cases*, II, 13.

United States in "prolonged discussions" which have never been made public[164] had caused the drafting of the Order in Council of October 29, 1914, as a partial concession to the views of the United States. It scarcely seems necessary to remark that the Order in Council really went far in imposing a very considerable burden on neutrals rather than lightening their burdens. In effect it tended to make the neutral assume the *onus probandi* which was properly to be shouldered by the belligerent.

Regarding foodstuffs, the note cited the views of Bismarck to show that the German Government had consistently held that the interception of foodstuffs was a perfectly legitimate measure. Furthermore, the distinction between civilian and military population in the Central Empires had ceased, in practice, to exist, due to Government control of foodstuffs. On this account there were grave fears that it would be impossible to permit the free passage of foodstuffs, particularly in view of German measures for the interception of commerce with Great Britain.

Evidence of further concessions to American commerce was shown in the establishment of a special committee to authorize the release of goods without insisting on full evidence of title being produced. Thus claimants were permitted to recover their goods with little delay. The British Government had, furthermore, dealt leniently with neutrals in regard to the transfer to a neutral flag of enemy ships belonging to companies incorporated in enemy territory but entirely composed of neutral shareholders. The note closed with the hope that it would be apparent to the United States that Great Britain was making every possible consideration for neutrals.

In a note of February 20, 1915, sent both to England and Germany, a *modus vivendi* to avoid the horrors of submarine warfare was proposed.[165] Great Britain was to agree that food and foodstuffs would not be placed upon the abso-

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[164]*EW No. 1*, p. 50. (10.II.15).

[165]*Ibid.*, pp. 59-60. (20.II.15).

lute contraband list and that shipments of such commodities would not be interfered with or detained by British authorities if consigned to agencies designated by the United States Government in Germany for the receipt and distribution of such cargoes to licensed retailers for distribution solely to the non-combatant population. This was proposed much in the same spirit as that which prompted the organization of the Commission for Relief in Belgium, and, while accepted by the German Government, was absolutely ignored by the Allied Governments.[166]

On March 1, 1915, a note from the British Embassy indicated that the Allied Governments were being driven by the actions of the German Government to frame retaliatory measures to prevent commodities of any kind from reaching Germany. These measures would be enforced without risk to neutral ships or to neutral or non-combatant lives. They held themselves free, therefore, to detain and take into port ships carrying goods of presumed enemy *destination, ownership or origin.* Such vessels or cargoes would not be confiscated unless otherwise liable to condemnation.[167] It is to be noted that the question of enemy destination is alone a question to be treated under the head of contraband, as the question of ownership or origin depends entirely upon other considerations than those dealt with under the head of contraband.

On March 5, 1915, the United States addressed identic notes to the French and British Governments stating that the action of the United States upon the Allied declarations of retaliation was rendered difficult by reason of the nature of the measures proposed, which were extremely indefinite, in so far as they affected neutrals. While a blockade was implied, it was not asserted, rights both incident to contraband and blockade were enunciated, and the United States was left in a quandary as to what should be done. In the case of enemy "ownership or origin," the implications attached thereto were that these tests were those

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[166] *Ibid.*, pp. 60-61. (28.II.15).
[167] *Ibid.*, pp. 61-62. (1.III.15).

to be applied to goods breaking blockade outwards. If a blockade was to be declared, some limit must be set upon the radius of activity, for the United States would be deeply concerned in the application of the principles of blockade to a zone far distant from the scene of actual naval operations.[168]

The French and British Governments replied separately, the French Government reserving to itself the right of bringing into a French or Allied port any ships carrying a cargo presumed to be of German origin, destination, or ownership, but stating that it would not go to the length of seizing any neutral ship except in case of contraband. Discharged cargoes would not be confiscated, but neutrals proving lawful ownership of goods destined to Germany would be *entirely free* to dispose of them *subject to certain conditions*. German-owned goods would be sequestrated. Merchandise of enemy origin, when possessed by an enemy, would also be sequestrated, but merchandise belonging to neutrals would be held at the owner's disposal to be returned to the port of departure. Prize Courts were to take cognizance of these situations and decide cases within eight days. Last of all, the announcement was made that the Allied French and British fleets had examined "what measures they could adopt to interrupt all maritime communication with the German Empire and thus keep it *blockaded* by the naval power of the two allies. Assurance was given that it was not and had never been the intention of the *French* Government to extend the action of its cruisers against enemy merchandise beyond European seas, the Mediterranean included.[169]

The British view was presented in two notes under dates of March 13 and 15, 1915, which stated that[170]

> Inasmuch as the stoppage of all foodstuffs is an admitted consequence of blockade, it is obvious that there can be no universal rule based on considerations of morality and hu-

[168]*EW No. 1*, pp. 62-63. (5.III.15).
[169]*EW No. 1*, pp. 63. (14.III.15).
[170]*Ibid.*, pp. 64-65. (13.III.15; 15.III.15).

manity which is contrary to this practice. The right to stop foodstuffs destined for the civil population must therefore in any case be admitted if an effective "cordon" controlling intercourse with the enemy is drawn, announced and maintained. Moreover, independently of rights arising from belligerent action in the nature of a blockade, some other nations, differing from the opinion of the Governments of the United States and Great Britain, have held that to stop the food of the civil population is a natural and legitimate method of bringing pressure to bear upon an enemy country . . .

The Government of Great Britain have frankly declared, in concert with the Government of France, their intention to meet the German attempt to stop all supplies of every kind from leaving or entering British or French ports by themselves stopping supplies going to or from Germany for this end. The British fleet has instituted a blockade effectively controlling by cruiser "cordon" all passage to and from Germany by sea.

. . . The degree of severity with which the measures of blockade authorized will be put into operation . . . will depend on the administrative orders issued by the Government and the decisions of the authorities specially charged with the duty of dealing with individual ships and cargoes according to the merits of each case . . . The instructions to be issued by His Majesty's Government to the fleet and to the customs authorities and executive committees concerned will impress upon them the duty of acting with the utmost dispatch and consideration for neutrals as may be compatible with the object in view, which is, succinctly stated, to establish a blockade to prevent vessels from carrying goods for or coming from Germany.

His Majesty's Government declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargoes which belligerents have always claimed in respect to breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory . . . It is not intended to interfere with neutral vessels carrying enemy cargo of non-contraband nature outside European waters, including the Mediterranian.

Thus was the long expected blockade announced. With its development and extension, its workings upon the enemy and upon neutrals we are not here concerned; it will form the topic of a later chapter. It is sufficient to remark that

from this time on the problem of the restraints on American commerce formed a topic in which these two lines—those of contraband and blockade—were doubly interwoven. In so far as possible, the endeavor will be made to determine the outcome of each line of policy independently.

In reply to these notes of the British Government, the Department of State, on March 30, 1915, made clear its position as regards the measures to be taken by the Allied Governments, holding that they amounted to a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace. The note then went on to point out what these rights were:[171]

> A nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain clearly determined rights which it is conceded may be exercised by nations which are at war.
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> A belligerent nation has been conceded the right of visit and search, and the right of capture and condemnation, if upon examination a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for the enemy government or armed forces. It has even been conceded the right to establish and maintain a blockade of an enemy's ports and coasts and to capture and condemn any vessel taken in trying to break the blockade. It is even conceded the right to detain and take to its own ports for judicial examination all vessels which it suspects for substantial reasons to be engaged in unneutral or contraband service and to condemn them if the suspicion is sustained. But such rights, long clearly defined both in doctrine and in practice, have hitherto been held to be the only permissible exceptions to the principle of universal equality of sovereignty on the high seas as between belligerents and nations not engaged in war.

The remainder of the note dealt with blockade.

At this point it will be well to deal with several cases of

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[171] *EW No. 1*, p. 69. (30.III.15).

detentions, pointing out what purpose they served in clearing up the British viewpoint as to restrictions on contraband. The first of such cases is that of the *Wilhelmina,* an American ship laden with foodstuffs from an American port to Hamburg, where the manager of the company owning the cargo, an American representative of an American firm, had instructions to sell the cargo solely to the civilian population of Hamburg. The vessel was seized by the British authorities and the cargo was sent to the prize court. At this point, on February 15, 1915, the State Department sent a note submitting that, according to sworn evidence and the ship's manifest, the cargo was destined for the civilian population of Hamburg and no one else. The British ground of justification of the cargo, that it was subject to the control of the German authorities, having proven unfounded according to the terms of a decree of the German Bundesrat, and special assurances having been directly given to the United States by the German Government that the cargo would not be used otherwise, the United States asked the British Government to release the vessel and allow her to proceed to her port of destination unless other evidence were found on which to detain her.[172]

Sir Edward Grey replied on February 19, 1915, to the effect that the exception of imported foodstuffs from Government control in Germany as alleged by the decree of the Bundesrat was a matter for prize court determination; the treatment by the German Government of cargoes of foodstuffs destined for undefended ports as though going to an "armed base" of the enemy led the British Government to accord a like status to Hamburg, which was fortified; furthermore, the owners of the *Wilhelmina* would be equitably indemnified if the cargo was found to be contraband. If, therefore, the British Government should, in view of enemy practices, declare foodstuffs absolute contraband, it was not to be expected that neutrals would challenge the validity of such reprisals.[173]

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[172]*EW No. 1,,* pp. 81-82. (15.II.15).

[173]*Ibid.,* pp. 82-83. (19.II.15).

In view of the developments as to blockade while the case was pending in the prize court the decision of the prize court could not possibly have changed the determination of the British Government to hold the cargo as absolute contraband. Therefore, after having held the cargo at Falmouth from February 11 till April 7, 1915, it was proposed that the British Government, acting by virtue of an Order in Council of March 23, 1915,[174] to purchase the cargo of the *Wilhelmina* and compensate the owners for the delay thus caused. This Order in Council was proclaimed with the intention of requisitioning ships, and detailed the procedure therefor. The owners of the *Wilhelmina* accepted the arrangement and the case was closed. It had been intended to use the case of the *Wilhelmina* as an instance of the carriage of a conditional contraband cargo permitted by earlier Orders in Council. The proclamation of the blockade made the carrying out of this project impossible.

The American steamship *Wico*, carrying a cargo of oil to Stockholm, was detained in Great Britain en route to Sweden pending assurances from the Swedish Government that such a cargo would not be captured by the German naval forces. On March 20, 1915, Mr. Bryan instructed Mr. Page to verify the attitude of the British Government in the matter, and, having done so, to demand the release of the vessel, as the United States could not admit the right of Great Britain to detain the vessel pending an answer made to a demand on a non-belligerent country, with which that country would be unable to comply, as no neutral could be expected to give assurances that the ship of another neutral would not be held up by the forces of another belligerent government. While the British Government released the vessel, reserving the right to reconsider its action in future cases, the United States notified Great Britain that such seizures by Germany would be subject of discussions between the United States and Germany, and could afford no basis for the recurrence of such action on

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[174] *EW No. 1*, pp. 72-75. (23.III.15).

the part of the British authorities. In reply, the British Government declared that such had not been their intention, but that they believed that the United States Government would not question the holding up of neutral ships where there was good reason to believe that the ostensible was not the real destination and that fraudulent arrangements had been concerted with enemy cruisers for delivering ships and cargo into their hands. Thereupon the United States dropped the case.[175]

Due to the Detention of the American ship *Seguranca*, bound from New York to Holland with a cargo entirely consigned to named consignees in Holland and accompanied by a certificate from the British Consul General in New York, the Department of State advised the British Government through Ambassador Page that the United States would support the claims of the owners of the vessel for damages for detention, as the United States did not admit the right of Great Britain to require reconsignment to the Netherlands Oversea Trust. In reply, the British Government stated that the ship had been allowed to proceed, as all the consignees had agreed to accept their goods through the Netherlands Oversea Trust; that while the British Government did not "require" it, consignments to the Netherlands Oversea Trust were accepted as evidence of *bona fide* destination, and materially expedited. The United States set forth its final position in a note of May 6, 1915, stating that while the United States had no objection to voluntary shipments to the Netherlands Oversea Trust, it maintained that other cargoes still had the same legal status; that there was no justification for the detention of non-contraband cargoes, and that the *onus probandi* was on the shoulders of the British Government to prove the contraband character of such consignments. This ended the case.[176]

On March 20, 1915, the American steamer *Joseph W.*

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[175]*EW No. 2*, pp. 121-2. (20.III-16.V.15).

[176]*Ibid.*, p. 117. (9.IV-6.V.15).

*Fordney* sailed from New York for Malmö, Sweden, with a cargo entirely composed of cattle fodder consigned to one E. Klingener. The bill of lading was certified by the British Consul General at New York and by the Swedish Consul, who asserted that the exportation of this kind of cargo from Sweden was prohibited. The vessel was loaded under the supervision of British consular officers, who sealed her hatches. On April 6, 1915, when about ten miles from the Norwegian coast she was sighted by *H.M.S. Teutonic,* which pursued her. The vessel thereupon endeavored to escape into Norwegian territorial waters to avoid interception. Being overtaken, she was brought to Kirkwall, April 8, 1915, while inquiry was made as to the identity of Klingener, who was found to be the agent of a Hamburg firm. On this account, the vessel was put into the Prize Court and compelled to discharge her cargo before being released.[177]

On April 14, 1915, Mr. Bryan sent a note to the British Government requesting the immediate release of the vessel if evidence had not revealed her to be carrying contraband. After considerable correspondence, the views of the Procurator General were set forth in a note from Sir Edward Grey on October 6, 1915, stating that it was originally proposed to deal with the cargo under the Order in Council of March 11, 1915, as in the case of the *Wilhelmina,* because the evidence showed that the cargo was intended for Germany, but as the British Government later had reason to believe that they were for the enemy Government or its armed forces, proceedings for condemnation were taken on that ground. This led to remonstrances from the State Department on the ground that it appeared that approximately one-half a year after the goods were seized the British authorities obtained possession of such evidence as alone would have justified the seizure. If due examination of the vessel at the time of its seizure did not disclose evidence warranting the seizure of the goods, of course the cargo

[177] *EW No. 3,* p. 119. (20.V.15).

could not be lawfully seized, and therefore subsequent proceedings in the Prize Court could not be lawful. To this the Foreign Office reply was categorically in the negative, on November 27, 1915.

Another half-year went by and Mr. Lansing addressed a note to the British Government stating that the United States considered itself entitled to knowledge concerning the principles on which the British Government had acted in the case of the *Fordney* and similar American shipping cases. Due to the retroactive effect of Orders in Council, in the opinion of the United States a plain denial of justice was being caused at least in the case of the *Fordney*. The previous stand of the Department in this matter was reiterated, but failed to evoke a satisfactory reply from the British Government. On May 9, 1916, the Foreign Office informed Mr. Page that the British Government must decline to enter into any discussion of points which were awaiting decision in a case pending in a Prize Court. Claimants could, however, submit to the Prize Court any evidence that they regarded as bearing on the subject, in an endeavor to secure redress.[178] This closed the case of the *Fordney* as a test case concerning the binding effect of British Prize Court regulations. Concerning the subsequent developments in the general controversy between the United States and Great Britain, it will be necessary to turn back to the approximate time when all these cases started. The developments in view of the Order in Council of March 11, 1915, will be dealt with under blockade; the remainder may be taken up in their chronological order.

The first statement of this kind may be found in a memorandum of the Foreign Office on May 20, 1915, dealing with detained ships and cargoes, and particularly with cargoes of cotton.[179]

This statement, while dealing principally with the question of blockade, held that

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[178] *EW No. 3*, pp. 127-8. (9.V.16).

[179] *Ibid.*, pp. 119-122. (20.V.15).

> as regards American cargoes or portions of cargoes which have been placed in the Prize Court, His Majesty's Government only resort to this measure in cases where either the goods concerned are contraband, or there is evidence that, although ostensibly consigned to a person in a neutral country, they are in reality destined for the enemy in contravention of the rules of blockade. The right to submit such cases to the public investigation of a judicial tribunal is one which His Majesty's Government cannot forego, and they feel convinced that enlightened opinion in the United States of America cannot adversely criticize their course of action in this respect.

This was, however, the peculiar point in question, and one concerning which the United States was then about to make very vigorous protest.

The resignation of Mr. Lansing as Secretary of State, in 1920, brought to light from extraneous sources reliable testimony as to the policy of the United States as assumed by Mr. Lansing on his induction into office as Secretary of State following Mr. Bryan's resignation:

> Mr. Lansing felt that this country should not only be neutral in thought, but that it should be just as much in earnest in calling England to account for her violations of international law during the war as in scoring the Germans for their sins. For instance, there was a note prepared before Mr. Bryan resigned, to be sent to Great Britain as soon as the first *Lusitania* note had gone to Germany, taking issue with England for various infractions of the laws of war, particularly as they affected neutrals. Mr. Cone Johnson, then solicitor of the State Department, was responsible for the statement that there was not a single canon of international law that England had not violated up to that hour; and it was beyond doubt true that England at that time had not only thrown all possible difficulties in the way of our dealing with Germany, but was holding up our ships destined for neutral ports. For instance, on May 20, 1915, there were twenty-four cotton ships all bound for Scandinavian and Dutch ports, held up in England in deliberate violation of British pledges that all cotton for which contracts of sale or freight engagements had been made before March 2, 1915, would be allowed free transit provided that the ships sailed not later than March 31. Mr. Lansing was one of those who thought that just as stiff a note should be sent to Eng-

land about these matters as had been sent to Germany about the *Lusitania*, and when the President reached New York on May 18, 1915, on the *Mayflower*, to review the fleet, such a note was placed in his hands by a special messenger from the State Department. With the drafting of that note Robert Lansing had a good deal to do.

Unfortunately for the country, that note was not sent to England until nearly five months later, (October 21, 1915),[180] during which time its effect was weakened for several reasons. In the first place, it came too late to have that effect on Germany which it was hoped it would have—namely, of relieving the German suspicion that America was playing the Allies' game. In the second place, it was very much toned down in its language and was not nearly so sharp an indictment of Great Britain as its projectors had intended. In the third place, much water had flowed under the bridge in the interim. But at least at that time Mr. Lansing was for dealing out an even-handed justice, was for vigorously upholding the rights of the American flag upon the high seas in accordance with American traditions, and was determined to stand by the tenets of international law which had been so hardly won by decades and centuries of slow juristic development.[181]

The next communication also came from Great Britain on June 22, 1915,[182] not as an answer to the arguments of the United States, but merely as an explanation of a few concrete cases. The note reiterated the previous assurances of the British Government, particularly in regard to the treatment of cotton cargoes, which were to be allowed free, or bought at contract price if stopped, if contract and freight arrangements had been made before March 2, provided the ships sailed by March 31, or if insured on March 2 and loaded before March 16. All such shipments were to be declared before sailing, and documents were to be produced to, and certificates obtained from, consular officers or other authority fixed by the Government. In trying to avoid unnecessary damage to the interests of neutrals in regard to the export of goods of German origin, special

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[180] *EW No. 3*, pp. 25-50. (21.X.15).

[181] 110 *Nation*, 258-259. (28.II.20).

[182] *EW No. 2*, pp. 173-5. (22.VI.15).

concessions had been made to American shippers, such as the arrangement for presentation of proof of payment at the British Embassy by American importers of German goods through neutral ports. The British Government further agreed to recognize the neutral ownership of goods of enemy origin even if not paid for on the date of the institution of the blockade, provided they were the subject of an f.o.b. contract of earlier date and had arrived at a neutral port within the time limit set for departures of vessels from blockaded ports. The fact that no time limit had been set in the Orders in Council proclaiming the existence of a blockade was no barrier to such limits on commerce being set, and special arrangements to settle cases outside the Prize Court had been made, as far as investigations were concerned, particularly in the case of meat shipments. However, in future, with these few exceptions, all cases would have to go to the Prize Court, as the British Government could not continue to deal through the diplomatic channel with individual cases.

On July 14, 1915, Mr. Lansing sent a note to the British Government stating that in so far as the interests of American citizens were concerned, the United States would insist upon their rights under the principles and rules of international law as theretofore established governing neutral trade in time of war, without limitation or impairment by Orders in Council or other municipal legislation by the British Government, and would not recognize the validity of Prize Court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law.[183]

The seizure of the American steamship *Neches,* carrying a general cargo from Rotterdam to the United States, by the British Government provoked a fresh note under date of July 15, 1915, from the United States, which regarded the seizure of the vessel, with American-owned goods passing from the neutral port of Rotterdam to a neu-

[183]*EW No. 2,* p. 177. (14.VII.15).

tral port of the United States, merely because the goods originally came from territory in the possession of an enemy of Great Britain, as "internationally invalid" under the Orders in Council of March 11, 1915. Although this was the first instance of a case where both enemy ownership and blockade were involved, it raised the protest on the part of the United States that it violated the rights of citizens of one neutral to trade with those of another, as well as with those of belligerents except in contraband; the rights of American owners of goods to bring them out of Holland was firmly insisted on, hence the British Government was requested to release the goods taken from the *Neches*. The British Embassy, in a note verbale of August 6, 1915, replied that the British Government admitted no illegality of procedure, inasmuch as the British Government could not presume the invalidity of its own legislation, nor admit the limitation by neutrals of its belligerent right of visit and search, capture and condemnation. Contraband, no less than blockade, was subject to the doctrine of continuous voyage, and the principles upheld by the United States could not be recognized.[184]

The two notes of March 30, 1915, and July 14, 1915, served to call forth from the British Government two notes in response, under the dates of July 23, and July 31, 1915, respectively. The first dealt almost exclusively with blockade, and the other with the contentions of the United States as to the validity of Orders in Council. American practice had held[185] that Prize Courts are subject to the instructions of their own sovereign, and in general the principles of American and British prize practice were identical. The note went on to quote the case of the *Fox*, in which Lord Stowell had declared that a Prize Court would not entertain *a priori* the question of a conflict between Acts of Parliament or Orders in Council and the principles of the law of nations . . . because it could not without extreme indecency presume that any such emergency would happen.

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[184]*EW No. 2*, pp. 177-8 (15.VII.15), p. 181 (31.VII.15).

[185]The *Amy Warwick*, 2 Sprague, 123.

Quoting from the opinion of the *Zamora,* which we have already mentioned, and which condemned this judgment of Lord Stowell in claiming legislative rights for the King in Council over Prize Courts as an erroneous dictum quite irreconcilable with the general doctrines otherwise enunciated by that learned judge, the note had the temerity to claim that Sir Samuel Evans had in an obiter dictum in the case of the *Zamora* approved the case of the *Fox* by saying that nations of the world need not be apprehensive that Orders in Council would emanate from the British Government in such violation of the acknowledged laws of nations that the Prize Courts would feel called upon to disregard and refuse obedience to the provisions of such orders. So long as the legality of the measures in question had not been passed upon by the Prize Courts of Great Britain, the note continued, there was no recourse for American citizens save to submit to the arbitrament of the Prize Court, as the presumption was that the Orders in Council were legal until declared otherwise.

The final stand taken by Great Britain in the matter was that if American citizens were denied justice in the Prize Courts and such decisions were upheld on appeal to the Judicial Committee of the Privy Council, and the United States still considered that there was serious ground for holding that the decisions were incorrect and infringed American rights, the matter could be subjected to review by an international tribunal. For this there was precedent in the seventh article of the Jay Treaty of 1794, the Treaty of Washington of 1871, and The Hague Convention of 1907 proposing the establishment of an International Prize Court. Under such circumstances, the British Government would be prepared to concert with the United States Government upon the best way of applying the principle of arbitration to the questions at issue between the two governments.[186]

On October 12, 1915, the British Embassy submitted a

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[186]*EW No. 2,* pp. 181-2. (31.VII.15).

memorandum concerning the grounds of Prize Court decisions in the cases of four ships, the *Kim,* the *Alfred Nobel,* the *Björnsternje Björnson,* and the *Fridland,*[187] laden with meat cargoes consigned by Chicago packers to Copenhagen and other Scandinavian ports. The cargoes had been seized before the blockade was instituted, on the ground of being conditional contraband destined for the use of enemy armies. The application of the doctrine of continuous voyage to these shipments was one which the United States, from its own practice, had sanctioned. Moreover, due to the fact that neutrals did not try to supply the enemy openly but by means of shipments to neutral ports, the British Government was enabled to apply the doctrine of continuous voyage, whereas, if the shipments had been made directly, it would have been for the British Government to establish that the consignees were actually supplying the German Government. Evidence of the subterfuges of purveyors to the enemy was seen in the fact that Dutch firms who guaranteed against reexportation would not accept such consignments. Other evidences of collusion presented showed that the British Government was perfectly justified in the seizures under the ordinary terms of international law.[188]

It was on October 21, 1915, however, that the classic note of the whole series, long-prepared and held back by superior orders, was finally sent to Great Britain, covering all the contentions in previous notes and the replies to them. With regrets that the interferences with American ships and cargoes had become increasingly vexatious, the United States submitted its case under the following specific complaints:

(1) Detentions of American vessels pursuant to the various Orders in Council had not been uniformly based on proofs obtained at the time of seizure, but were incident to a search made for evidence of the contraband character of their cargoes, or of their intent to evade the blockade. Such evidence was sought to support bare suspicion of enemy origin or destination.

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[187]9 *AJIL,* 975-1005, Oct. 1915.

[188]*EW No. 3,* pp. 22-25. (12.X.15).

(2) Search of vessels and their cargoes in port, instead of on the high seas, as sanctioned by long practice, was unwarranted by the British contention that "modern conditions" made such search difficult, as naval experts consulted by the United States were of opinion that

> the facilities for boarding and inspection of modern ships are in fact greater than in former times, and no difference except in time can be seen between the search of a ship of a thousand tons and one of twenty thousand tons, for the purpose of establishing fully the character of her cargo and the nature of her service and destination.

(3) Under revised British prize procedure, no "first hearing" was allowed; extrinsic evidence was at once admitted, enabling the detention of cargoes on suspicion, and causing unconscionable risk, loss and delay; the burden of proof of noncontraband character of goods was placed upon the claimant; the captor was allowed to establish enemy destination by all the evidence at his disposal, including mere presumption of reexportation, thus enabling belligerents to ignore entirely neutral rights on the high seas and prey with impunity upon neutral commerce.

(4) Increased British exports to neutral countries from which similar American products were kept out created a condition of such manifest injustice to American trade that the United States could not be expected to permit the rights of its citizens to be so seriously impaired to the profit and commercial advantage of Great Britain.

(5) The detention of goods clearly intended to become incorporated in the mass of merchandise for sale in neutral countries, on the presumption of ultimate enemy destination, was an unwarranted and inquisitorial preceeding, an illegal and unjustifiable attempt of belligerents to interfere with the rights of neutrals to trade with one another. Even if conditional contraband were destined to an enemy country through a neutral country, that fact was not in itself sufficient to justify seizure. For these reasons, it was anticipated that Great Britain would instruct its officers to refrain from such vexatious practices.

(6) American citizens were denied other means of redress than through the Prize Courts, subject to ultimate arbitration of the decisions involved. Such Prize Courts, being bound by the laws and regulations under which the seizures and detentions were made and which were held by the claimants to be in violation of the laws of nations, were therefore powerless to pass upon the real ground of complaint or to give redress for wrongs of that nature, whereas American courts were not and had never been bound by such restrictions. Furthermore, Great Britain, alike in the Civil and Boer wars,

had obtained or granted redress through diplomatic channels exclusively.

(7) The general menace of interference with trade, the unwarranted delays imposed, the imminent fear of illegal seizure by Allied authorities operated, together with the illegal measures for bringing ships under British territorial jurisdiction, to deter American merchants from trading with neutral countries, or to resort to British Prize Courts for redress, as release in these instances could be obtained only upon condition that costs and expenses such as pilotage, wharfage, demurrage, harbor dues, warehousage, unloading costs incurred in the course of such unwarranted procedure be paid by the claimants on condition, also, that they sign a waiver of right to bring subsequent claims against the British Government for these exactions. The United States denied that the charges incident to such detentions could be rightfully imposed upon innocent trade, or that any waiver of indemnity exacted from American citizens under such conditions of duress could preclude them from obtaining redress through diplomatic channels or any other means open to them.

In conclusion, the United States held that, while reserving the question of the discussion of the extension of contraband lists till a later day, it submitted as proven that the methods employed by Great Britain in obtaining and using evidence of enemy destination of cargoes bound to neutral ports to impose a contraband character upon them were without justification; that the judicial procedure for redress for an international injury was inherently defective, and violative of international law; that the United States could not with complacence suffer further subordination of its rights and interests to such oppressive and illegal practices; that our relations towards Great Britain must be governed not by expediency but by regularly established rules of international conduct, unhampered and unimpaired by belligerent action, so as to safeguard impartially the interests of neutrals, of whom the United States considered herself the champion.[189]

In substantiation of the charges laid down in the note, an appendix was submitted dealing with the specific cases of vessels whose detention for prolonged periods without the institution of Prize Court proceedings was unwarranted, in view of the fact that their papers were of such character as to require but a brief time for examination; of other vessels held until they reconsigned their cargoes to consignees in neutral countries designated by the British Government; of vessels detained without evidence amounting

[189] *Ibid.*, p. 38.

to probable cause, or because of the manner in which shipments had been consigned. Similar instances were furnished of the seizure by the British Government of goods on the ground that the country to which they were consigned had not prohibited their export, or in spite of such guarantees even though the goods themselves might be either conditional contraband or not contraband at all. Cases of detention pending assurances that embargoed goods would be allowed to pass through a neutral country to Allied countries and of seizure on the ground that consignees had been known to trade with the enemy or were suspected of so doing, were cited; likewise the instances where vessels proceeding from European neutral ports were detained or seized and brought into port and compelled to pay pilotage, harbor, unloading, warehouse, storage or other dues, costs and expenses in advance of a judicial determination of the validity of the seizure of the vessel or its cargo.[190]

This closed what may be regarded the most thoroughgoing and masterly effort of the United States to vindicate its neutral rights. From the British Government no response was received until April 24, 1916, when a reply embodying the views of the French and British Governments was received. Meanwhile Great Britain, by two Orders in Council of November 10, 1915,[191] had rendered liable to requisition for the carriage of foodstuffs and other articles of commerce any British ship registered in the United Kingdom upon the serving of such notice upon the owner of the ship by authority of the Board of Trade, and had prohibited, after December 1, 1915, the carrying of cargo from one foreign port to another by any British steamship registered in the United Kingdom exceeding 500 tons gross tonnage unless specifically exempted by licenses to be issued by the authority of the Board of Trade.

On January 19, 1916, the Department of State was of-

[190] *Ibid.*, pp. 40-50.

[191] *Ibid.*, pp. 51-53. (10.XI.15).

ficially apprised by Mr. Page of the terms of the "Trading with the Enemy (Extension of Powers) Act" of December, 1915, familiarly known as the act establishing the "Blacklist" of American and other neutral firms. In brief, the act provided for the extension of the restrictions relating to trading with the enemy to persons to whom it was expedient to extend such restrictions by reason of their enemy nationality or associations, whether resident and carrying on business in enemy territory or not. By proclamation, all persons or bodies of persons, incorporated or unincorporated, resident, carrying on business, or being in the United Kingdom, might be prohibited from trading with any persons or bodies of persons not resident or carrying on business in enemy territory or enemy-occupied territory (other than persons or bodies of persons incorporated or unincorporated, residing or carrying on business solely within British dominions) wherever it seemed expedient to the crown, by reason of the enemy nationality or association of such persons. Any list of such persons with whom such trading was prohibited by a proclamation might be varied or added to by Orders in Council, and all the provisions of trading-with-the-enemy acts should also apply to such persons. Within the scope of the act were embraced all persons trading with a person or body of persons to whom such royal proclamations might be applied, if they entered into any transaction or did 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.[192]

Such an announcement, as might readily be expected, drew fire from the United States, and Mr. Lansing, in a note of January 25, 1916, held that the act was pregnant with possibilities of undue interference with American trade, if such was not already being practiced. The United States Government believed that the act was framed without a proper regard for the right of persons domiciled in

[192] *EW No. 3*, pp. 54-55. (19.I.16).

the United States, whether Americans or enemy subjects, to trade with persons in belligerent countries, and held grave apprehensions as to its application, reserving the right to protest against its application in so far as it affected American trade, and to contest the legality or rightfulness of imposing restrictions on the freedom of American trade in such fashion.[193]

To this the British Foreign Office replied under date of February 16, 1916, stating that the act was an endeavor to bring British practice more in keeping with that of France, 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 had shown insufficient to deprive the enemy of all direct or indirect assistance from national resources. Care had been taken in framing the act, it was alleged, to avoid any definition which would impose enemy status upon all persons of enemy nationality and associations, but also to take powers of discrimination to withhold British resources from such persons. While abstaining from a strict interpretation of their belligerent rights, the British Government had acted by domestic legislation to restrict the activities of British subjects from a standpoint of national necessity. Without denying the right of all persons of any nationality resident in the United States to engage in trade legitimately, they could not admit thereby any limitation of the right of other governments to restrict in any appropriate manner the activities of their own nationals, which was a sovereign right inherent in national independence, from the exercise of which, under these self-imposed limitations, the United States should have little to fear.[194]

No reply was made to the British Government in regard to the Trading with the Enemy Act until July 26, 1916, by which time, it will be remembered, the Allied Governments had absolutely discarded their endeavor to pursue, even to

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[193]*EW No. 3*, p. 55. (25.I.16).

[194]*Ibid.*, pp. 56-57. (16.II.16).

a limited extent, the lines of policy laid down in the Declaration of London. On that date Mr. Polk addressed a formal note to the British Government, manifesting the surprise of the United States at the "blacklisting" of certain persons, firms, and corporations in the United States and the interdiction of all financial or commercial dealings between them and British subjects, and expressing the protest of the United States in the most decided terms against such a "policy of arbitrary interference with neutral trade." The extraordinary effect of the policy, and its wide scope operated to deter British steamship companies from accepting cargoes from such firms for transport to neutral ports, and neutral steamship lines were denied coal in British ports if accepting them, besides suffering other penalties; so neutral bankers refused loans to these firms, and neutral merchants would not contract from these firms, fearing a like proscription; Americans in foreign countries had been notified that their dealings with blacklisted American firms were to be regarded as subject to the veto of the British Government, so that Americans would thus be prevented from dealing with purely American firms. The limitless dangers to importers thus blacklisted for "enemy association" were "inevitably and essentially inconsistent with the rights of the citizens of all the nations not involved in war"; the United States could not consent to see the remedies and penalties for breaches of blockade, carriage of contraband or unneutral service altered or extended at the will of a single power or powers in derogation of American rights; the safeguards of prize courts against condemnation without fair adjudication were swept away by the blacklist which condemned without hearing, without notice and in advance. It was manifestly out of the question that the United States should acquiesce in methods or applications of punishment to its citizens. Apart from the question of the legality of the blacklist, the United States was constrained to regard it as inconsistent with true justice and impartiality in friendly international intercourse, and could not consent to see its citizens put on

an *ex parte* blacklist without protesting in the gravest terms against the serious consequences involved concerning neutral rights.[195]

Congress, apparently not content with the results of diplomatic protests, took occasion to provide, in the sections of the Revenue Act of 1916 dealing with "Unfair Competition" due legal authority whereby measures of a more stringent character might be employed. These provisions authorized and empowered the President whenever, during the existence of a war in which the United States was not engaged, he should be satisfied that there was reasonable ground to believe that under the laws, regulations or practices of any country, colony or dependency contrary to the law and practice of nations, the importation into their own *or any other country*, dependency or colony of any article . . . was prevented or restricted, to prohibit or restrict, during the period such prohibition or restriction was in force, the importation into the United States of similar or other articles, products of such country, dependency, or colony, as in his opinion the public interest might require, stating by proclamation the article or articles which were prohibited from importation into the United States. He was also authorized to change, modify, revoke, or renew such a proclamation in his discretion.

By a subsequent section, whenever, during the existence of a war in which the United States was not engaged, the President should be satisfied that there was reasonable ground to believe that any vessel, American or foreign, was, on account of the laws, regulations, or practices of a belligerent government, making or giving any undue or unreasonable preference or advantage in any respect whatsoever to any particular person, company, firm or corporation, or any particular description of traffic in the United States or its possessions or to any citizens of the United States residing in neutral countries abroad, or was subjecting any particular person, company, firm, or corporation or any particular description of traffic in the United States or its possessions, or any citizens of the United States residing in neutral countries abroad to any undue or unreasonable prejudice, disadvantage, injury, or discrimination in regard to accepting, receiving, transporting, or delivering or refusing to accept, receive, transfer, or deliver any cargo, freight or passengers, or in any other respect whatsoever, he was authorized and empowered to direct the detention of such vessels by withholding clearance or by formal notice forbidding departure, and to revoke, modify or renew any such direction.

Similarly it was provided that whenever there was reasonable ground to believe that under the laws, regulations or practices of

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[195]*EW No. 4*, pp. 85-87. (26.VII.16).

any belligerent country or government, American ships or American citizens were not accorded any of the facilities of commerce which the vessels or citizens of that belligerent country enjoy in the United States or its possessions, or are not accorded by such belligerent equal privileges or facilities of trade with vessels or citizens of any nationality other than that of such belligerent, the President was authorized and empowered to withhold clearance from one or more vessels of such belligerent country until such belligerent should restore to such American vessels and American citizens reciprocai liberty of commerce and equal privileges of trade; or the President might direct that similar privileges and facilities, if any, enjoyed by citizens of such belligerents in the United States or its possessions be refused to vessels or citizens or such belligerent; and in such case he should make proclamation of his direction, stating the facilities and privileges which should be refused, and the belligerent to whose vessels or citizens they were to be refused, and thereafter the furnishing of such prohibited privileges and facilities to any vessel or citizen of the belligerent named in the proclamation should be unlawful. He might change, modify or revoke or renew such proclamations at his discretion.

In case any vessel detained by virtue of this Act should depart or attempt to depart from the jurisdiction of the United States without clearance or other lawful authority, the owner or master or person or persons having charge or command of such vessel should be severally liable to a fine of not less than $2,000 nor more than $10,000 or to imprisonment not to exceed two years, or both, and in addition such vessel should be forfeited to the United States.

Lastly, the President of the United States was authorized and empowered to employ such part of the land and naval forces of the United States as should be necessary to carry out the purposes of the Act.[196]

The reply of Great Britain to this note concerning the "blacklist" was given to Ambassador Page on October 10, 1916, in a note in which Lord Grey stated that the Trading with the Enemy Act was to be regarded as purely municipal legislation, not purporting nor claiming to impose disabilities upon neutral commerce or individuals, but enjoining British subjects to cease relations with the enemy, directly or indirectly. The only disability imposed upon such neutral firms as had traded with the enemy was the disability suffered through the prohibition of trade with them

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[196]39 *Statutes at Large*, Part I, 799-800.

by British subjects. It was not Great Britain's desire to hamper neutral trade, particularly with America, with whom she desired the closest commercial relations; such steps were not being taken to further British trade by cutting off the trade of British subjects—manifestly this was impossible. It had, previous to the war, been Anglo-American practice to treat domicil as the test of enemy character, in contradistinction with the continental practice which regarded nationality as the test . . . In the face of enemy activities it was essential for Great Britain to take steps to deprive such hostile interests in neutral countries from the benefits of trade with British subjects. Such was Great Britain's belligerent right, as was also the right to refuse bunker coal to those trading with the enemy. While not unmindful of the trust which the possession of sea power gave her, Great Britain could not refrain from imposing certain restrictions on the unlimited use of her coal supply when the interests of the Empire were at stake. This ended the correspondence as to the blacklist.[197]

Between the sending of the main note of October 21, 1915, and the reply to it in April, 1916, the British Foreign Office adhered strictly to its policy of not heeding the diplomatic protests of the United States, but of referring all claimants to the Procurator General, where the ships would be released on the production of satisfactory proof, or else would be held until the sitting of the Prize Court to be judged. Small shippers complaining to the Embassy in London could thus obtain no redress, so Mr. Page, in a dispatch to Mr. Lansing, dated February 19, 1916, suggested that in view of the fact that the Consul General in London was in the practice of communicating directly with the Procurator General's office in regard to all claims of American citizens, he would suggest the State Department to advise such shippers to communicate with the Consul General directly, unless the Department made diplomatic representations. He himself would in future, when denied

[197] *Ibid.*, pp. 87-92. (10.X.16).

action by the Foreign Office, put the claimant in touch with the Consul General, advising him of the requisite documents for pushing his claims, viz.: the originals of bills of lading, invoices, previous correspondence with firms in the country to which goods were shipped, contracts, insurance policies and affidavits setting forth the facts in the case. Such, in Mr. Page's opinion, was the speediest way of settling cases which the British Government would not release from the Prize Court on diplomatic representations, or because such were not in order.[198]

On March 16, 1916, Mr. Polk notified Mr. Page that the Department had adopted a policy of notifying firms to take such action as the Embassy in London had recommended as the most expedient way of presenting American claims, while explicitly stating that such notice by the Department of State, or such action by the Consul General in London in attempting to secure the release of American cargoes by the British authorities was not to be construed as an admission on the part of the United States of the legality of the action taken by the British overnment under Orders in Council. While the Department could not undertake to assist private persons in the conduct of proceedings before British Prize Courts, the American Consul General at London would be glad to furnish the claimants with the names of reputable attorneys, for whose actions, however, the Department and the Consul General were not to be held responsible.[199]

Too much stress cannot be laid on this particular step taken by the Department of State, inasmuch as it conceded the practical efficacy of the British contentions as to the use of Prize Courts as the sole means of redress. However much the United States might protest diplomatically against the theoretical legality of the measures instituted by the British Government, it was forced to admit to its own tradesmen that the case of the United States as regards

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[198] *EW No. 3*, pp. 57-58. (19.II.16).

[199] *EW No. 3*, pp. 60-61. (16.III.16).

Great Britain was in effect futile, if not irretrievably lost. Whether it was the result of the five months of "watchful waiting" during the summer of 1915, when a more direct and spirited protest might have achieved some decisive end, or not, it is a matter that must seem in the colder reasoning of the morrow of the war to have been a surrender to the stern law of the sea as administered by Great Britain and the French Government. Possibly this intransigent attitude on the part of Great Britain was due to the more vigorous policy adopted by a war-time coalition Government, against which the United States nit not wish to hurl itself in impotence. Suffice it to say, that for all practical purposes, the middle of March, 1916—the very period when the Congressional battle over armed liners was settled against German claims to the dictatorship on the seas through her submarines—marks the end of British concessions to the United States, or of effective American resistance to British claims. Thereafter the battle became worthy and full of propaganda material, for once that the United States had pronounced her attitude towards armed liners, and towards submarine warfare as exemplified in the case of the *Sussex*, it was but a question of time until the United States should decide to enter the conflict herself. From this time on the mention of the "freedom of the seas"[200] became a topic on which Mr. Wilson might discourse volubly, but whatever meaning he might attach to those projects for a "radical reconsideration of many of the rules of international practice hitherto thought to be established" as regards maritime power, was forestalled by the active possession and tenacious grip of Great Britain upon the lines of commerce on the sea. For only one brief instant did the hope of effiicient action to guard maritime rights recur, and that was on the very eve of America's entrance into the Great War, when, under the guise of armed neutrality, possible means of restriction of the unlimited belligerent rights of the Allied Governments at sea might have been thought

[200]*EW No. 4*, pp. 381-386. (22.I.17). Address to the Senate of the United States.

within the bounds of practical attainment. But in the twinkling of an eye the opportunity for the assertion of American neutral rights in a truly impartial, militant form had passed, and a similar moment is hardly likely ever to recur.

The reply of the British Government to the American note of October 21, 1915, was delivered by Sir Cecil Spring-Rice on April 24, 1916, reviewing the statements of the United States and making reply to the charges of the United States point by point. In the view of the British Government, the complaints of the United States with regard to intercepted commercial shipments were made against the means chosen for such interception rather than due to any belief that the goods so treated had a *bona fide* neutral destination. The British Government, therefore, held that new devices for despatching goods to the enemy must be met by new methods of applying the fundamental and acknowledged principle of the right to intercept trade of that sort.

As regards search at sea instead of in port, the note held that the recurring attempts to conceal contraband intended for the enemy in innocent packages necessitated the examination of the ship and cargo in port. The problem of searching a ship at sea in troubled weather was demonstrably impracticable, as proved by the experience of the Allied fleets during the war. While hardships might be caused to neutral vessels in taking them out of their course into port for search, it would be impossible under the existing conditions to confine the rights of visit and search to an examination of vessels where encountered without surrendering a fundamental belligerent right. The opinion of Admiral Jellicoe that such searches were impossible due to the size of the vessels, the danger from submarines and the presence of enemy agents using forged American passports, was submitted as technical evidence, tending to establish the necessity of search in port. Likewise the French naval authorities held that a ship "in order to be searched, should be brought to port whenever the state of the sea,

the nature, weight, volume, and stowage of the suspect cargo as well as obscurity or lack of precision of the ship's papers, render search at sea practically impossible or dangerous for the ship searched" though when contrary circumstances existed the ship should be searched at sea. Bringing the ship into port was also necessary and justified when the recurrence of such searches in hostile waters[201] until the innocence of a vessel were clearly proven would subject her to unwarranted dangers.

The question of locality of search, the Allied Governments held, was of secondary importance. In view of the fundamental and incontestable belligerent right to intercept contraband, restrictions due to insufficient proof to condemn the cargo should not be allowed to limit this right. The Allied Governments were therefore compelled to take the most effectual steps to exercise that right.

Regarding Prize Court procedure, British jurists had prepared the revised prize procedure adopted by Great Britain at the beginning of the war, so as to avoid a first and second hearing, and permit the concurrent examination and condemnation of cargoes without awaiting further proof. Prize procedure was regulated by municipal and not international law. The previous traditions of Great Britain were no basis for keeping Great Britain from conforming with French or continental prize practice, or introducing such changes as modern circumstances required. Prize Courts were only bound to give a fair hearing to the claimants presenting their case. Thus, first and second hearings being merely forms of procedure, the Allied Governments were not bound to maintain them when they had become obsolete, and changes would expedite cases, eliminate technicalities and fully enable the parties to prove their cases with all true and material facts before the court. Modern means of communication had made subterfuge and deception so easy that belligerent governments would not readily forego the use of all the means at their disposal

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[201]Literally, "dans la zone ou le voisinage des hostilites."

to secure the condemnation of a cargo with ultimate enemy destination. Mere evidence that goods were ostensibly designed to become a part of the common stock of neutral countries could not be regarded as sufficient to prove their innocence, or hinder further inquiry as to their ultimate destination. The Allied Governments could not believe that the United States countenanced the existence of such illicit traffic through neutral ports, as actually existed.

In the presence of overwhelming evidence that consignments of goods to neutral ports had been made to people who could under no possible circumstances have use for the products imported, the British Government submitted that no belligerent could in modern times be bound by the rule that no goods could be seized unless they were accompanied by papers establishing their enemy destination, and that all detentions of ships and goods must uniformly be based upon proofs obtained at the time of seizure. To press such a theory, it was held, was tantamount to asking that all trade between neutral ports should be free, and would render nugatory the exercise of sea-power and destroy the pressure which the command of the sea enabled the Allies to impose upon Germany. The United States could not be expected to "urge the technical theory that there should be no interference at all with goods passing between neutral ports," thus frustrating the Allied measures for the interception of commerce, because of its previous stand taken during the Civil War. . . . It was essential to the Allied Powers to see that the measures so taken were not rendered illusory by the use of adjacent neutral ports. Every effort was being made to distinguish *bona fide* from suspicious commercial transactions, even though neutrals should be dissatisfied with the action of the Allies in determining to allow no more than the normal inflow of goods to neutral countries, as shown by previous experience to be actually needed. The mere fact of adjacency to neutral countries constituted in itself an element of proof of ulterior destination which no Prize Court could afford to ignore.

As to the means of redress open to American citizens for

any injury or loss suffered as a consequence of belligerent action, and the claim of the United States that neutrals could not appeal to Prize Courts bound and fettered by municipal enactments which could not be questioned by the courts themselves, Sir Edward Grey held that the Prize Courts had jurisdiction to pronounce a decision as to whether an order or instruction to the naval forces issued by the British Admiralty was inconsistent with the principles of international law, and could decline to enforce such orders, thus affording every facility for redress and compensation to American citizens. While municipal law governed the establishment and procedure of Prize Courts, the substantive law applied therein between captor and claimant consisted of the rules and principles of international law, and not the municipal legislation of the country, and the British Government laid particular stress on the fact that its competence and jurisdiction, vital to the performance of its duties, should not be encroached on.

It only need be pointed out that the above reasoning in regard to the scope of the authority of the Prize Court is valid so long as the Prize Court exercises such rights in annulling obnoxious Orders in Council. Due, however, to the traditional practice in Anglo-American jurisprudence not to question the decision of the political authorities in the Government, it is extremely unlikely that any Court of Prize in Great Britain would have questioned the action of the British Government in establishing a blockade of German ports. As a consequence, it is altogether likely that, as actually proved the case, all such Orders in Council would be held valid—just as German Prize Courts did not for a moment question the propriety of the measures of the Imperial Government—and no redress against the noxious effect of such Orders in Council could possibly have been obtained.

Concerning losses to neutrals from the exercise of rights *jure belli* Prize Courts had ample jurisdiction to deal with them, and they were at the disposal of all aggrieved neutrals. Where such means of redress existed, recourse must

be had to such courts before there was any scope for diplomatic action. The very cases submitted by the United States, concerning the *Magicienne, Labuan, Don Jose* and *Saxon,* bore out the British contention that where the Prize Court was empowered to grant relief, no recourse through diplomatic channels could be permitted.

As to the claim of exactions of wharfage, pilotage, port dues, etc., had been charged to detained American vessels under duress, it was stated that where detained vessels had not discharged cargo, no dues had been exacted; where cargoes were discharged, the terms of the discharge were arranged by the Prize Court. The British Government held that the statement that waivers of the right to put forward claims of compensation had been exacted as a condition of release was not accurate, and that such waivers would be a hardship to the owners of released goods. Under the circumstances, no further exactions would be made, nor those made be enforced. This is particularly important as being a veiled admission that the charges of the United States were substantially correct, even if "scarcely accurate."

Provided that measures against enemy commerce were not impaired thereby, the British Government was willing to concert with the shippers of neutral countries as to means for reducing the probabilities of delay and risks of seizure; it was to such mitigation of the rigors of belligerent measures rather than to abrupt changes either in the theory or the application of policies based on admitted principles of international law carefully adjusted to modern war-time conditions that neutrals could best look for relief. Otherwise the principles contended for by the United States would tend to deprive the Allied Governments of their belligerent rights.

In closing, the Allied Governments stated that they had nothing to fear from any combination of neutral nations under the lead of the United States which would exert an effective influence to prevent the violation of neutral rights, if impartially undertaken in the true spirit of the rules of international law and humanity. This was, as may readily

be seen, the most vigorous instance of the use of propaganda in purely legal controversy that had as yet come up in America's correspondence with the Allied Governments. Moreover, it bears out the view that once the crisis of the MacLemore resolution had been passed, the great aim of Anglo-French diplomacy became the enlisting of the aid of the United States in the Great War. While numerous "concessions" were made, and *actes de grace* allowed, substantially no concession of the belligerent rights of the Allies was admitted, no acknowledgement of the rights of neutrals avowed, nor was any endeavor for the promotion of a concert of neutral powers really favored by Great Britain. At the very moment that she and France made these broadminded suggestions, the Paris Economic Conference, with its deep-laid schemes of an economic *revanche* were being laid out, regardless of the wishes of neutrals or its possible effect on them. The championship of neutral rights had become but a phantom idea to be raised at will by the Allied Governments as an enticement to neutrals to concert in measures directed against the economic structure of the Central Empires, no less cogently or forcefully than the Central Empires with their dreams of world dominion and Weltzollvereins were plotting. From now on, the conquest of neutral opinion was to become increasingly easy, and the subjection of neutrals to the maritime rights of the Franco-English naval alliance swift and sure. The United States had made its last move for the maintenance of its rights and had failed.

This, in substance, had been the controversy between the Allied Governments and the United States. It remains for us to sum up briefly the criticisms made by others on the particular topics covered under the caption of contraband.

As regards the questions of visit and search, in port or on the high seas, Professor Hyde holds that

> in resorting to a procedure regardless of precedent, Great Britain assumed the burden of showing that changed conditions freed it from restrictions previously acknowledged, and that its conduct was in any event but a reasonable if

fresh application of a fundamental belligerent right. The attempts of warships to visit and search neutral merchantmen of great tonnage and in rough waters have not been confined to wars of even the present century. The British task was rendered difficult and dangerous by the submarine operations of the enemy rather than by any absence of calm seas. Such operations often made it impracticable to conduct an extensive yet reasonably necessary search at the place where a suspected merchantman was encountered. In view of such circumstances, unlike those prevailing in any previous war, it may be admitted that searches in port were oftentimes the only effective searches by means of which the exercise of that right could become effective.

The right of search is not to be deemed an unrestricted means of interfering with the carriage of contraband to the enemy. It has never been more than a concession to a belligerent itself capable of exercising it on the high seas. . . . Doubtless latitude should be accorded a belligerent in attempting to check traffic in contraband, and to ascertain its existence on the high seas. The procedure, however, whereby innocent ships are forced to deviate from their courses, put into belligerent ports, and there submit to protracted searches as a means of indicating whether they or other vessels are participating in the war or are about to do so, appears to be at variance with the demands of justice. The British argument and the facts which supported it indicate why the right of search as exercised in previous wars is inapplicable to modern conditions. There is solid reason for the attempt to place within the reach of a belligerent by some other process less injurious to innocent shipping, information concerning the nature of neutral cargoes and the voyages of neutral vessels. It is believed that neutral governmental certification of ships' papers would offer as reliable assurance as to facts ascertainable by search as could be furnished by a neutral convoy. Moreover, the burden of making such certification might be fully compensated by benefits derived from the freedom from annoyances under the system now prevailing. General approval of a procedure establishing reasonable neutral guarantees effected through increasing governmental control over neutral commerce may cause the exercise of the belligerent right of visit and search to sink into a much desired desuetude.[202]

Similar arrangements, in his opinion, would tend to establish, by some form of neutral governmental certification,

[202]Hyde, *Maritime War*, pp. 49-51. Cf. his *Int. Law*, II, 443-444.

the inviolability of postal correspondence at sea, whereas the United States, by its stand, had essentially admitted the right of censorship in numerous cases,[203] though the essence of American complaints had been that by virtue of the sheer naval force they possessed, the Allied Governments compelled neutral steamship lines to put into allied ports and thus subject themselves to the municipal laws of the country.

As regards contraband in general, "it may be fairly contended that existing conditions of war place the burden squarely upon those who claim to be unmolested (i.e. upon neutrals). Neutral as well as belligerent governmental assurance ought to be given the state called upon to forego the right of capture and confiscation. . . . It is in the nature and scope of assurance of innocent use that lies the hope of retaining for neutral states the enjoyment of a trade which, as war is now waged, must otherwise be regarded as a traffic in contraband."[204]

It is interesting to point out the vast possibilities inherent in a concert of neutrals for the safeguarding of their rights, not only by means of convoy or armed merchantmen—the externals of a system or league of modern armed neutrality—but by "the conclusion of a general arrangement contemplating a system of regulated trade under neutral governmental auspices and embracing a mode of giving requisite assurance that such articles would be employed for hostile purpose. Possibly the readiness of some states to acquiesce in such an arrangement might be accelerated in case simultaneously general agreement were made that neutral maritime powers should undertake, either to forbid the exportation from their territories of munitions of war and ingredients in their manufacture, or to facilitate the task of a belligerent in ascertaining both the character and destination of cargoes comprising such articles."[205]

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[203]*Ibid.*, p. 56 and note.

[204]Hyde, *Int. Law*, II, 597.

[205]Hyde, *op. cit.*, pp. 165-169, *passim*. Cf. also his *Int. Law*, II, 601.

While such may seem rather radical steps to take in view of the policy finally adopted by the United States on her entry into the war in acknowledging no distinctions between conditional and absolute contraband, and extending her contraband lists so as to preclude the possibility of her ever making "a further communication" to the Allied Governments in regard to the question of contraband, the possibilities of such a course may be said to be fruitful in protecting in future the rights of neutrals by making their Governments responsible for the good faith of the shippers. Once that belligerents may find a definite locus for responsibility in the neutral government, the right of search is superfluous.[206]

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[206]For other critical reviews of the whole subject of contraband, right of search and continuous voyage, cf. Garner, *op. cit.*, II, 285-316, *passim*, and Baty, T., "Continuous Voyage: The Present Position." 9 *Transactions of the Grotius Society*, 101-117.

## CHAPTER VII

## TRANSFER OF REGISTRY AND ENEMY CHARACTER

With the outbreak of the Great War there at once arose a very acute shortage of shipping in the ports of the United States. The ships of the British mercantile marine at once were taken over by the British Admiralty by virtue of its previous agreements with the various steamship lines, as noted in our discussion of armed merchant ships. As concerns the German liners, after the abortive effort of the *Kronprinzessin Cecilie* to steal her way across the Atlantic with a cargo of gold, and her final entry into the port of Bar Harbor, Maine, no effort was made by them to sail out of the various American ports into what was almost certain capture by British cruisers. As a consequence, the existence of a large unusable belligerent mercantile marine in our ports and the withdrawal from the trade routes of American commerce of the British bottoms in which American goods were wont to be carried led to earnest inquiries by American merchants as to the possibility of the purchase, in all good faith, of these various liners, for permanent American use.

This at once raised a serious question: Would the belligerent governments, particularly those of Great Britain and France, raise any objection to the transfer to American registry of such ships, or question the validity or good faith of such transactions? This was a peculiarly pressing problem, and the State Department, alive to the necessities of the hour, at once issued a memorandum on the transfer of merchant ships of a belligerent to a neutral after the outbreak of war, holding the American position to be that merchant ships of a belligerent might so be transferred if the transfer was absolute, made in good faith, without colorable or collusive action, under the municipal regulations of the country of the neutral purchaser. Such transfer could not,

of course, be made while the ship was in *transitu*, or in a blockaded port. As far as the provisions of the Declaration of London were concerned, there was no binding force to them, since the Declaration had remained unratified and the American ratification had not been deposited at The Hague.[207]

In pursuance of this policy, the Administration introduced into Congress, and succeeded in passing at an early date, a bill designed to facilitate the transfer to American registry of foreign-built and owned vessels, whether of belligerent or neutral powers.[208] Under the stress of the emergency, it was provided that not all the watch officers need be Americans—an arrangement which, as we have already seen in the case of the *Metapan*, enabled an almost entirely British crew to be kept on board an American vessel and to be officered almost without exception by British officers. Furthermore, survey, inspection and measurement by American officers was dispensed with. Once that this measure had been adopted, the transfer of ships from Danish, Swedish, Norwegian and Dutch lines was greatly facilitated, and the available ships were readily registered under the American flag. There remained, however, the German ships, and bids for these were now readily offered. As a result, a very few of such vessels were sold, notably the Hamburg American liner *Dacia*, whose case is of peculiar interest in view of the fact that it tested the Allied standpoint towards the validity of such transfers. According to the evidence of purchase, the purchaser, Mr. E. N. Breitung, was not engaged in a collusive bargain with the Hamburg American line, but actually wanted the ship for his own permanent possession in the conduct of commercial operations.[209]

The *Dacia* was sold to Mr. Breitung in December, 1914,

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[207]See statement of State Department in Appendix, *infra*, pp. 169-177, (7.VIII.14).

[208] 38 *Statutes at Large*, 698-699; Chap. 256, 63rd Congress, 3rd Session.

[209]Senate Document 979, 63rd Congress, 3rd Session.

received her certificate of American registry at Port Arthur, Texas, on January 4, 1915, and was chartered to take a cargo of cotton to Bremen from Galveston, Texas. The ship loaded 11,000 bales of cotton and sailed from Galveston to coal at Norfolk and receive final instructions before leaving for Rotterdam, in lieu of going to Bremen. On February 27, 1915, the French auxiliary cruiser *Europe* met the *Dacia* on the high seas near the entrance to the English channel, and, on examination of the ship's papers, which showed her to have been of Hamburg-American ownership at the beginning of the war, captured the vessel, "because it could not in time of war avail itself of the right of transfer to a neutral flag."

The case was brought before the French Prize Council on August 3-4, 1915, the government asking the council to declare right and lawful the capture of the *Dacia* and all its accessories, including the supplies and provisions of every kind without exception found on board, even those claimed as personal property by the captain, an American, except the ship's papers, and the owner asking that the vessel be immediately released on bail, and her rightful transfer to American registry under American law and Article 56 of the Declaration of London as put in force by the French Government by a decree of November 6, 1914, be acknowledged; that her capture be declared void, as being neutral property; that she be released and her provisions, etc., restored; and that compensation of 300,000 francs be given, under the provisions of Article 64 of the Declaration of London, for the injury caused by the unjustifiable capture of the ship, plus freight and demurrage charges.

The council, being concerned solely with the validity of the capture of the ship, and not concerning the cargo, held that Article 56 of the Declaration of London, which provided that the transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, was void unless it were proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such,

was exposed, was the only law applicable to the particular case, with only the force of a national act and not of an international one.

On this point the report of the Drafting Committee had settled the question of *bona fide* transfer by declaring that a belligerent cruiser encountering a merchant vessel laying claim to neutral nationality must inquire whether such nationality had been acquired legitimately or merely to shield the vessel from the risks to which she would have been exposed had she retained her former nationality.[210] According to the report, from the determination of the neutral or enemy character of merchant vessels followed the question of the validity of their capture and the fate of the goods they had on board. So would be determined the neutral or enemy character of the goods. It is of the utmost importance to bear this in mind, as the Prize Court in France held that it was not empowered to decide the fate of the goods according to the decree that embodied the provisions of the Declaration of London. As the German Prize Ordinance of 1909 had embodied these principles,[211] it was held that the viewpoint of the French Government in thus interpreting the Declaration of London could not be considered extreme.

Furthermore, as had been decided by the Supreme Court in the case of the *Benito Estenger*,[212] the continuance of a vessel in the same trade as before transfer led to a presumption that the transfer had been effected in order to avoid the consequences of enemy character. Hence the council held that such a transfer to a neutral flag with the object of carrying on enemy trade and of protecting the ship from capture could not be valid against belligerents, hence the capture of the *Dacia* together with its rigging, apparatus, equipment, and supplies of every kind was declared good and valid as a prize to be assigned to the claimants according to the laws and regulations in force. Articles and effects, the personal property of the captain and

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[210]Cohen, *op cit.*, pp. 133-134.

[211]Huberich and King, *Prize Code of the German Empire*, p. 11.

[212]176 U. S. Reports, 568.

the crew, if not contraband, were to be restored to the claimants.[213] This decision seemed to settle, in the minds of the Allied governments, that the capture of vessels of former German registry, even if bound from neutral port to neutral port with a cargo of non-contraband, was quite legal, and that American registry, no matter whether legally made or not, could not be considered binding.

It subsequently developed that the *Dacia* had been captured by a French cruiser purely because the British Admiralty did not wish to reverse its own policy,[214] hence the British Government was not fully committed to this policy. Later, however, in reply to a written question in the House of Commons on January 21, 1916, Lord Robert Cecil, speaking for Sir Edward Grey, stated that the British Government adhered in full to the provisions of the Declaration of London and the report on these matters. This in substance would mean the acquiescence of the British Government in the views held by the French Prize Council.[215] As no instance of this kind occurred after the abandonment by the Allied governments of the Declaration of London or under the Maritime Rights Order in Council of 1916,[216] it may be presumed that the attitude of the Allied governments remained the same throughout the war.[217]

In the cases of the American Transatlantic Company's steamers, *Genesee* and *Hocking,* seized by the British authorities while plying between neutral ports, and giving rise to several exchanges of correspondence between the British Government and the United States, there was raised

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[213]9 *AJIL,* 1015-1027 (1915).

[214]The idea of letting a French cruiser make the capture appears to have been suggested to Sir Edward Grey by Ambassador Page, in order to relieve the British Government of the responsibility in the case of the *Dacia.* Cf. Hendrick, Burton, J. *The Life and Letters of Walter Hines Page,* I, 392-397.

[215]*Parliamentary Debates,* 1916, Vol. LXVIII, Col. 859 (21.I.16).

[216]*EW No. 4,* pp. 69-72. (7.VII.16).

[217]For comment on the cas eof the *Dacia,* Cf. Garner, *op. cit.,* I, 184-198, *passim.*

the rather important question of so-called "beneficial ownership," under which category Great Britain held it possible to seize the vessels in question. The British Government had from the first protested against the transfer of neutral vessels from their registry to American registry under the American Transatlantic Company, and had taken occasion to seize the *Genesee* and the *Hocking*, even though under thoroughly authenticated neutral registry and flag, and while plying between two neutral ports and not carrying, therefore, contraband cargo if anything could be considered contraband in coastal traffic from one American port to another, or to a South American port. The history of these cases was not published by the Department of State, inasmuch as the effort of the United States, in this instance at least, was not overwhelmingly successful, and only the final note in the series, on May 10, 1916,[218] was made public. Elsewhere the story may be found—hidden in the pages of the *Congressional Record* and told with all the pro-German bias of the facile pen of the late William Bayard Hale, who may be regarded with suspicion for his motives, although in the main accurate as to the facts.[219]

This much, however, is revealed from the fragmentary correspondence available: that in December, 1915, the Department of State had obtained from the British Government assurances that they would not detain any vessels belonging to the American Transatlantic Company unless they should carry contraband, pending the decision of the British Prize Court in the cases of the *Genesee* and *Hocking*. Meanwhile the State Department had made an exhaustive investigation into the organization of the American Transatlantic Company to determine the character of its stockholders. On April 22, 1916, however, the British Embassy informed the Department of State that such vessels could no longer enjoy the immunities accorded them

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[218]*EW No. 3*, pp. 84-96. (10.V.16).

[219]*Congressional Record*, 64th Congress, 1st Session, Vol. LIII: 14. pp. 139-141.

unless the company could give further assurances that its vessels would not trade with Scandinavia or Holland.

To this Mr. Lansing replied that the American Transatlantic Company, being an American corporation, was regarded as a citizen of the United States and must be so treated in accordance with the custom of nations. According to British Prize Court decisions, British corporations were British in character, regardless of what the political nationality of its shareholders might be, yet in recent cases they had condemned a vessel flying the German flag and refused neutral claimants an opportunity to establish that they were the beneficial owners of the vessel, owning the capital stock of the nominal owners, a subsidiary German concern, ruling that such facts would not benefit the claimants. Similarly, the British Government had requisitioned British registered vessels in which the entire beneficial interest was owned by Americans, holding that ownership by British corporations made them British, not American vessels. Thus British courts did not in any way recognize beneficial ownership in their own cases, yet the British Government sought to condemn the ships of an American corporation on the ground that they were entirely or largely enemy owned, stressing beneficial, rather than actual, ownership as the criterion of national character.

The American Transatlantic Company's stock was, to the best of the Government's information, entirely American owned, hence the United States could only regard these seizures as entirely arbitrary and unwarranted. This had been the original attitude of the United States, but the Government had "decided to let the matter rest" after receiving assurances that the remaining vessels would not be captured, pending prize court proceedings, unless these were unduly protracted, or the remaining vessels carried contraband. The company had agreed to refrain from so doing. In view of this, the United States could not allow matters to stand if the British Government were to repudiate the promise it had given. The argument of the United States was continued in the notes discussing the

so-called "blacklist," in dealing with ships denied privileges at British ports. Evidence to substantiate these claims was furnished by the company itself,[220] yet, as has already been noted, the net result of the standpoint taken by the United States was nugatory, and utterly preclusive of future claim upon the British Government, because of the adoption of similar lists of "trading-with-the-enemy" firms during the war.

The Declaration of London on this point had held that as regards ships, the neutral or enemy character of a vessel was determined by the flag she was *entitled to fly,* [221] not by the flag she might choose to fly. This is one of the reasons that gave little opportunity for the United States to make more than a formal protest at the beginning of the submarine warfare in 1915 against the illegal use of the American flag. At that time [222] the United States "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," but pointed out the serious consequences apt to result from such general use, as it "jeopardized the vessels of the neutral in a peculiar degree by raising the presumption that they were of belligerent nationality, regardless of the flag they carried." Such action the United States viewed with "anxious solicitude" and "grave concern," as it would seem to "impose upon the government of Great Britain a measure of responsibility for the loss of American lives and vessels in case of an attack by a German naval force." To this the British Government replied that by the British Merchant Shipping Act, the use of the British flag by foreign merchant vessels was permitted for the purpose of escaping capture, and that in their opinion it would be unreasonable to expect Great Britain to pass legislation forbidding the use of neutral flags as a ruse de guerre. Such use was justifiable to escape

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[220] *Congressional Record,* 64th Congress, 1st Session, LIII: 9525. (12.VI.16).

[221] Cohen, *op. cit.,* p. 140.

[222] *EW No. 1,* p. 55. (10.II.15).

capture, but a general use of neutral flags was not contemplated. It was, however, incumbent upon a belligerent warship to ascertain the identity of a suspected vessel before attacking it.[223]

The Declaration of London being in force at this particular time, it was legitimate to expect the British Government to conform to its wonted policy of test of nationality rather than beneficial ownership as the real criterion of enemy or neutral character. This was actually recognized in the case of the *Proton*.[224] But when, on October 20, 1915, an Order in Council repealed and made inoperative Article 57 of the Declaration of London, the British Courts, though enjoined to apply the rules formerly in force in such courts, were entirely free to do as they chose in the matter with the result that in 1917 it was held in the case of the *Hamborn*[225] that a vessel registered in Holland and flying the Dutch flag was in reality a German ship because the vessel belonged to German owners, though it did not appear that registration in Holland had been illegal. Still more close to the cases of the *Genesee* and the *Hocking* was the case of the *Polzeath*,[226] where a vessel *owned* by a British corporation whose chief office was in Hamburg and which was controlled in Germany was condemned and forfeited to the Crown. While this was the case of recognition of beneficial ownership, it does not appear that a similar test could have been applied with success to the *Genesee* or *Hocking*. Nevertheless the British Prize Court, on March 5, 1917, condemned the *Genesee* and the *Hocking* as good prize on account of their being beneficially owned by enemy subjects.[227]

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[223]*Ibid.*, p. 59. (19.II.15).

[224]34 *Times' Law Reports*, 309; also Trehern, *op. cit.*, III, 125.

[225]*Ibid.*, 145, also Trehern, *op. cit.*, III, 80.

[226]32 *Times' Law Reports*, 399, 647; also Law Reports, P. D., 117 (1916).

[227]Cf. London *Times*, March 6, 1917, for the decision of the Prize Court. For critical commentary on the cases of the *Genesee* and the *Hocking*, cf. Garner, *op. cit.*, I, 198-199.

## CHAPTER VIII

## THE CONTROVERSY OVER BLOCKADE

It will be remembered that the controversy between the United States and the Allied Governments over restraints on commerce was traced in Chapter VI from the beginning of the war until the issuance of the famous Order in Council of March 11, 1915, which proclaimed the beginning of a blockade of Germany by the joint Anglo-French naval forces. The blockade, as it was proclaimed, was declared to be an act of retaliation, according to which no merchant vessel which sailed from her port of departure after the first of March, 1915, was to be allowed to proceed on her voyage to any German port. Unless the vessel received a pass entitling her to proceed to some neutral or allied port named therein, her goods must be discharged in a British port and placed in custody of the marshal of the Prize Court. Goods so discharged, if not contraband, and not requisitioned for the use of the British Government, would be restored to persons entitled to them upon such terms as the court might deem just. Vessels sailing from German ports after the same date were not to be allowed to proceed with any goods laden in a German port; such goods must be discharged in British or Allied ports, and put under similar custody, where they might be detained, requisitioned or sold, the proceeds in the latter instance being paid into the court as the court might deem fit to direct. No proceeds from the sale of such goods were to be paid out until the conclusion of peace, except upon application of the proper officer of the Crown, unless it were shown that the goods had become neutral property before March 11. Nothing in the Order in Council was to prevent the release of neutral property laden in a German port on application of the proper officer of the Crown, so as to comply with the provisions of the Declaration of Paris.

Merchant vessels sailing from their port of departure

after March 1, 1915, en route to non-German ports, carrying goods with an enemy destination, or which were enemy property, might be required to discharge the goods in a British or Allied port, on the same conditions as goods bound directly for German ports. Likewise, with merchant vessels from non-German ports, carrying on board goods of enemy origin or which were enemy property, the British or French naval forces might compel the discharge of such goods in British ports subject to the conditions laid down for vessels breaking blockade outward from enemy ports.

Interested parties claiming such discharged goods might issue a writ in the Prize Court against the proper officer of the crown and apply for an order that the goods be restored to him, or their proceeds paid to him, subject to the forms of Prize Court procedure.

The most important provision laid down in the Order in Council was that merchant vessels clearing for neutral ports from British or Allied ports and proceeding to an enemy port would, if captured on *any* subsequent voyage, be liable to condemnation. This is peculiarly important, inasmuch as it was distinctly violative of the provisions laid down in the Declaration of London, even as accepted by the Allied Governments. The terms on which the Allied Governments had accepted the Declaration, it will be remembered, were that such vessels proceeding to enemy ports under false papers were liable to capture on the *return* voyage only, and not on *any* subsequent voyage. The terms of the Declaration itself were that a vessel breaking blockade outwards, or attempting to break blockade inwards, was liable to capture as long as pursued by ships of the blockading force, so that if pursuit were abandoned she could not be captured, the report holding that indefinite or unlimited liability to capture would be too extreme a position to take.[228] It introduced a considerable modification of English law and practice, according to Bentwich, since the rule of English Prize Law had been that a vessel was subject

[228]Cohen, *op. cit.*, p. 90, Article 20.

to capture for breach of blockade at any time after leaving port during a continuous voyage to the blockaded place—the very rule that the Allied Governments had reestablished as a condition of their "acceptance" of the Declaration of London. It will be argued in this respect that no blockade had at that time been declared, which is technically but not actually true. All except the notification to neutrals and the delimitation of the blockaded area had been laid down in the Order in Council of August 20, 1914,[229] and when the sham of this action was made clear by the retaliatory, though plainly illegal, measures taken by the German Government in instituting a submarine "blockade," there was no longer any *modus vivendi* of keeping up a half effective and totally undeclared blockade by mere restrictions on the carriage of contraband and by the mining of the North Sea[230] in retaliation for the mining operations of the German Government. The blockade was now openly acknowledged, although its limits were not clearly defined.[231]

The Order in Council in question concluded by stating that none of its provisions should be deemed to affect the liability of a vessel or goods to capture or condemnation independently of the order, nor to prevent the relaxation of its provisions in respect of the merchant vessels of any country which declared that no commerce intended for or coming from Germany or belonging to German subjects should enjoy the protection of its flag. This, of course, was a plain bid to all neutrals to depart from their neutrality in favor of Great Britain, and cannot be considered as a legally justifiable practice, as it would mean, in essence, the guaranteeing of neutral rights when they were surrendered to belligerents, or relaxed in their behalf.

A decree of the French Republic, dated March 13, 1915, laid down in the main the same provisions as the British Order in Council, but as the correspondence and controversy over the blockade are almost entirely with Great

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[229] *EW No. 1*, p. 7.
[230] *EW No. 4*, p. 231.
[231] *EW No. 1*, p. 66. (11.III.15).

Britain, it is scarcely necessary to detail the provisions of the French decree, save to say that Article 5 stated that in exceptional cases, at the suggestion of the foreign, war, and navy ministers, authorization for the passage through the blockade lines of specified cargoes or certain categories of merchandise destined to or coming from a specified neutral country might be granted, but that goods coming from Germany should only be allowed to pass when they were loaded in neutral ports after having paid the custom duties of the neutral country.[232]

At this point it may be well, before entering the correspondence in regard to the blockade, to point out that, according to the rules on blockade laid down in the Declaration of London, which should, in this instance, be regarded as the criterion of Allied action, a blockade must not extend beyond the ports or coasts belonging to or occupied by the enemy;[233] it must be effectively maintained by a force sufficient really to prevent access to the enemy coastline; it must be applied impartially to the ships of all nations; it must be declared, specifying the date of its inception, the geographical limits of the coastline under blockade and the period within which neutral vessels might come out, and notified to neutral powers by the blockading power by means of a communication addressed to the governments direct, or to their representatives accredited to it, and to the local authorities by the officer commanding the blockading force, else the declaration would be regarded as void. These rules were to apply to cases where the limits of the blockade were extended or where a blockade was reestablished after having been raised. Raising of a blockade must also be notified. Neutral vessels were liable to capture for breach of blockade contingent upon their knowledge, actual or presumptive, of the blockade. Such presumption was dependent upon the ship's having left a neutral port subsequent to a notification of blockade; otherwise it was

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[232]*EW No. 1*, pp. 67-68. (13.III.15).

[233]Cohen, *op. cit.*, pp. 70-91.

incumbent upon the officer of the blockading force to personally notify the existence of such a blockade to the vessel concerned by writing the fact on her log-book. Failing such notification, a neutral vessel must pass free. Neutral vessels might not be captured for breach of blockade except within the *area of operations* of the warship detailed to render the blockade effective.

Concerning the meaning of such a *rayon d'action* or *area of operations,* considerable conflict had arisen in the Naval Conference, but the consensus of opinion of the reporting committee held that all the zones of action along a blockaded coast, taken together, and so organized as to make the blockade effective, would be regarded as forming the area of operations of the blockading naval force. It did not seem possible to fix the limits of the area of operations in definite figures, which must be determined according to the circumstances in each particular case of blockade, as the coast might not be defended by fortifications. Though the area might be rather wide, the whole idea of blockade was inseparable from the effectiveness of operations, and must never reach distant seas and there affect merchant ships, which could not be proven to be making for a blockaded coast. The specific assurance given by both France and Great Britain that the blockade would not extend further than the European area did not, as will be seen, cover the question of *hovering,* which has not inaptly been compared to a blockade.

According to Article 18 of the Declaration, the blockading forces must not bar access to neutral ports or coasts. This rule, in the opinion of the drafting committee, was necessary to better protect the interests of neutral countries. Concerning this, Bentwich points out that[234]

> a blockade, being exclusively a warlike act, cannot be made to extend to any part of the coast which belongs to a neutral power, even though there may be ready means of access from that neutral country to the enemy country . . . It was laid down by Lord Stowell in the case of the *Stert*[235] that ships carrying goods from a blockaded port by means of a canal, or interior means of navigation, to a neutral

> port which was open could not be seized for breach of blockade. *Thus if England were blockading the German coast, our cruisers could not seize neutral vessels bringing innocent merchandise to or from German ports through the Scheldt.*

Article 19 further established the provision that whatever might be the ultimate destination of a vessel or her cargo, she could not be captured for breach of blockade if, at the moment, she was on her way to a non-blockaded port. It was the true destination of the vessel, the Drafting Committee held, that was in question, and not the ulterior destination of the cargo. This, of course, bears out the distinctions so neatly drawn by Lord Loreburn between the objects of contraband interception and the aims of a blockade.[236]

Lord Loreburn, looking at the evils of a purely commercial blockade, sees, in any attempt to legalize it, the killing of its efficiency by the permission granted in Article 19 for neutrals to trade with other neutrals adjacent to the enemy, under the supposition that there would be no questioning, in the case of blockade, as to the ultimate destination of the cargo. Similarly, the noble lord holds that a blockade of the Baltic Sea by the British navy would be legitimate only if Great Britain were at war with all the powers on its littoral, hence in any maritime war in which one country bordering on the Baltic were engaged, the British fleet could not "blockade" the Baltic legally.[237]

Far different is the view of Sir Francis Piggott in holding that

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[234]Bentwich, *op. cit.*, pp. 44-45.

[235]4 Rob. Adm., 65.

[236]Sir Francis Piggott, in one of his vehement philippics against the protests of the United States, has brought out the fact that if a neutral must sacrifice his rights in the carrying of cargoes to belligerent rights, in so far as those cargoes are contraband, the belligerent has one last resort and may take the last right of a neutral to trade with the enemy away from him by the declaration of a blockade, which not only stops all shipping, but puts even non-contraband under the ban. *The Neutral Merchant and Contraband of War and Blockade*, p. 77.

[237]*Capture at Sea*, pp. 71-102, *passim.*

> "contraband" and "blockade" are identical in principle; that they are merely convenient names given to varying exhibitions of sea-power against the enemy, and the consequences, to enemy and neutral merchant alike, do in fact depend on and vary with the force exhibited, that is, with the number and position of the ships employed upon the service, which, if effectively performed, results in both cases in seizure and condemnation. Blockade in principle is, threfore, nothing more than an indefinite extension of the list of contraband of war, subject only to the requirement that a sufficient number of ships should be placed in such a position as to make this extended threat of seizure effective. This, then, is practically what the Order in Council does.[237a]

The writer of this passage then goes on to proclaim that the disappearance of a definite limit to the blockading line, the granting of the broad *rayon d'action* to a blockading fleet by the Declaration of London is in itself full warrant for the denial of any such strictures upon belligerent right as the waiver of the doctrine of continuous voyage relative to blockade in the Declaration of London would seem to imply. It is the bold assertion in the realm of maritime law that "might is right."

Having thus found the legal situation in the allied countries by virtue of the existence of their decrees of Orders in Council—fashioned admittedly on the Orders in Council of 1807—to be in direct contrast with the Allied professions in regard to the Declaration of London, having shown that the unveiling of the sham of an undeclared blockade by the action of the German naval authorities forced the Allied Governments to conform to the form, as well as the substance, of a blockade which had all but been declared before, it remains to be seen how the United States, confronted with such an aggressive exercise of belligerent power, accommodated herself to the situation thus created.

This found its first expression in the American note to Great Britain on March 30, 1915,[238] wherein the United

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[237a] Piggott, *op. cit.*, p. 79.

[238] *EW No. 1*, pp. 69-72. (30.III.15).

States contended that innocent shipments might be freely transported to and from the United States through neutral countries to belligerent territory without being subject to the penalties of contraband traffic or blockade. It was also assumed that the British Government would not dispute the provisions laid down as to blockade and the covering of enemy goods by the neutral flag as laid down in the Declaration of Paris. Calling attention to the case of the *Peterhof,* under which decision it was held that the mere fact of ulterior enemy destination was not cause for breach of blockade proceedings, the United States held that no claim on the part of Great Britain of justification for interfering with these clear rights of the United States to trade with the enemies of Great Britain through neutral ports in goods that were not contraband, could be admitted. To admit it would be to assume an attitude of unneutrality towards the enemies of Great Britain which would be obviously inconsistent with the solemn obligations of the United States. For Great Britain to make such claims was to abandon and set at naught her traditional principles.

The blockade thus notified, the note continued, would, if defined by the terms of the Order in Council, include all the coasts and ports of Germany and every port of possible access to enemy territory. The novel feature of the blockade was that it *embraced many neutral ports and coasts, barred access to them, and subjected all neutral ships seeking to approach them to the same suspicion that would attach to them if they were bound for the ports of the enemies of Great Britain, and to unusual risks and penalties.* These constituted distinct invasions of the sovereign rights of the United States.

Though the United States recognized that a "close" blockade might not be possible under modern conditions, the spirit and principles of the established rules of war must be conformed to, whatever form of effective blockade was employed.

> If the necessities of the case should seem to render it imperative that the cordon of blockading vessels be extended across the approaches to any neighboring neutral port or

> country, it would seem clear that it would still be easily practicable to comply with the well recognized and reasonable prohibition of international law against the blockading of neutral ports by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon. This traffic would of course include all outward-bound traffic from the neutral country and all inward-bound traffic to the neutral country except contraband in transit to the enemy. Such procedure need not conflict in any respect with the rights of the belligerent maintaining the blockade since the right would remain with the blockading vessels to visit and search all ships either entering or leaving the neutral territory which they were in fact, but not of right, investing.

The United States could not admit that the mere fact of establishing the blockade as an act of retaliation could become an excuse for, or a prelude to, any unlawful action on the part of the British naval forces. It was thus confidently expected that the orders actually given would modify in practical application those provisions of the Order in Council which, if strictly enforced, would violate neutral rights and intercept legitimate trade. The United States took it for granted that the approach of American merchantmen to neutral ports situated upon the long line of coast affected by the Order in Council would not be interfered with so long as they were not carrying contraband or proceeding to enemy ports. With such a wide area of operations to cover, it was assumed by the United States that neutral vessels would have the right to pass through the blockading line in order to reach important neutral ports such as those of Holland and Denmark and Scandinavia, which were, of course, open for American trade. As Great Britain had no legal right to blockade these ports, it was presumed that she would not do so. From the terms of the Order in Council, the United States also inferred that Scandinavian countries would be allowed to trade with German Baltic ports, although it was essential in any blockade that it bear with equal severity upon all neutrals.

The British Government, in its note of July 23, 1915, replied to the American contentions, noting that the United States admitted the right of a belligerent to establish a

blockade of enemy ports, but holding this to be obviously of no value if the belligerent were not permitted to cut off all the sea-borne trade of his adversary. The British Government, therefore, found itself unable to accept the contention of the United States that if a belligerent was so circumstanced that his commerce could pass through adjacent neutral ports, his opponent had no right to interfere and must restrict his measures of blockade in such a manner as to leave such avenues of commerce still open. This was held unsustainable from either a standpoint of law or the principles of international equity. The British Government was unable to admit that a belligerent violated any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances rendered such an application of the principles of blockade the only means of making it effective. It will readily be seen that this plea, reduced to its lowest terms, is none other than that which the German Chancellor advanced as his reason for his *"chiffon de papier"*—that necessity knows no law.

Testing the means sought to be employed by the British Government as to whether they conformed to the spirit and principles of the essence of the rules of war, the doctrine which the United States had been most zealous to advance during the Civil War—the doctrine of continuous voyage—was seen to have applied in American experience equally well to blockade and to contraband. Applying this to the situation confronting Great Britain, it was held that if the blockade could only become effective by extending it to enemy commerce passing through neutral ports, such an extension was defensible and in accordance with principles which had met with general acceptance—the very principles on which the United States had decided to rely when the various belligerents could not come to an agreement as to the unqualified adoption of the Declaration of London. Citing the case of the *Springbok*, the British Government held that what was really important was that adapta-

tions of old rules should not be made unless they were consistent with the general principles upon which admitted belligerent rights were based. That was the spirit of the measures taken to intercept commerce with Germany, and the penalty hitherto imposed, that of condemnation and confiscation of the vessel and goods, had been changed so as to avoid confiscation of either for breach of blockade.

As regards the charge of the United States that the blockade was embracing neutral ports and coasts and barring access to them, the note held that the measures "could not be properly so described." This circumlocution was an endeavor to avoid admitting what, throughout the entire discussion of blockade, loomed up as the most obvious fact in the whole controversy. In the successful operation of the British blockade, little difficulty would be encountered by neutrals not trading in contraband *except* in so far as bordering countries constituted ports of access to and exit from enemy territory. As this was the entire matter in question, it is evident that the note here made a most fundamental acknowledgment. There were many ports, the note alleged, that could not be regarded as offering facilities for neutral commerce only, and the only endeavor of the British Government was to interfere with trade with an ultimate enemy destination through such ports.

In closing, the note pointed out that many questions regarding the exact method of carrying out a blockade were unsettled. The one fundamental principle obtaining universal recognition was that entitling a belligerent to cut off, by effective means, the sea-borne commerce of his enemy. This was true of blockade; it was the same with contraband. This was the most bald and unequivocal statement of the view of Sir Francis Piggott and his correligionists of the school of worshipers of sea power.[239]

The classic reply of the United States to the position taken by Sir Edward Grey is to be found in the note of October 21, 1915,[240] in which the United States held that

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[239] *EW No. 2*, pp. 179-181. (23.VII.15).

[240] *EW No. 3*, pp. 30-34. (21.X.15).

Great Britain's main defense of the successful working of her blockade of Germany had not borne fruit in the ability of the Allied naval forces to distinguish between enemy and neutral trade. The arrangements made in neutral countries to create special consignees or consignment corporations (like the Netherlands Oversea Trust ) with power to refuse shipments and to determine the amount of imports actually needed had only hampered neutral trade by the intricacy of such arrangements, thereby much reducing American trade with neutral countries. The shifting of the burden of proof by the belligerents to the neutral shippers to prove neutral destination was an endeavor to make the neutral exercise responsibility that rightfully belonged to belligerents.

As regards the blockade itself, the United States was compelled to admit that it had misconceived the intentions of the British Government. The United States had, therefore, reserved for this occasion the discussion of the validity of the blockade, whose legality is now challenged. The charges made by the United States may be enumerated: (1) That the blockade was *ineffective,* as instanced by the freedom with which German naval forces cruised in certain portions of the North Sea and in the Baltic, seizing and bringing into German ports goods intended for neutral countries. The placing of cotton on the list of absolute contraband by the British Government was adduced as proof of the ineffectiveness of the blockade and of its doubtful legality. (2) That the blockade was *not impartial* in its application to the ships of all nations. German ports were open to Scandinavian trade, and Great Britain herself shipped great quantities of goods to Scandinavian ports while denying to American vessels access to the Scandinavian coast. It had been held in British Prize Courts that if belligerents themselves traded with blockaded ports they could not be regarded as blockaded. (3) That it *blockaded neutral ports,* in violation of the Declaration of London, which the British Government had adopted without modification in that respect, as well as in violation of Sir

Edward Grey's instructions to the delegates to the Naval Conference. It was also noted that no limitation on the blockade area nor any penalty for breach of blockade had been prescribed. On all of these grounds the United States was bound to consider the blockade illegal. The British view in the case of the *Springbok,* as expressed by Sir Edward Grey himself, had been that it was exceedingly doubtful if the doctrine of continuous voyage could be applied to a vessel carrying non-contraband material, which was the only instance where condemnation for breach of blockade alone was warranted.

It was not until April 24, 1916, that the British Government made reply, in concert with the French Government, pointing out, as regards the blockade, that the Allied Governments had loyally complied with the spirit of the rules as laid down in the Declaration of London, having given due notice of the blockade and having treated liberally all neutral ships finding themselves in German ports at the time. The effectiveness of the blockade, it was pointed out, could be seen in the small number of vessels that escaped the Allied patrols. The most astonishing portion of the note is the one which states that

> the measures taken by the Allies are aimed at preventing commodities of any kind from reaching or leaving Germany, and not merely at preventing ships from reaching or leaving erman ports. His Majesty's Government do not feel, therefore, that the rules set out in the United States' note need be discussed in detail . . . It need only be added that the rules applicable to a blockade of enemy ports are strictly followed by the allies in cases where they apply—as, for instance, in the blockades which have been declared of the Turkish coast of Asia Minor or of the coast line of German East Africa.

This attempts to ignore the position laid down by the United States. In a subsequent section of the note, however, the question of the blockade of neutral ports is thus dealt with:

> It is no doubt true that commerce from Sweden and Norway reaches German ports in the Baltic in the same way that commerce still passes to and from Germany across the

> land frontiers of adjacent states, but this fact does not render the measures which France and Great Britain are taking against German commerce the less justifiable. Even if these measures were judged *with strict reference to the rules applicable to blockades, a standard by which, in their view, the measures of the Allies ought not to be judged,* it must be remembered that the passage of commerce to a blockaded area across a land frontier or across an inland sea has never been held to interfere with the effectiveness of a blockade. If the right to intercept commerce on its way to or from a belligerent country, *even though it may enter that country through a neutral port,* be granted, it is difficult to see why the interposition of a few miles of sea as well should make any difference. If the doctrine of continuous voyage may rightly be applied to goods going to Germany through Rotterdam, on what ground can it be contended that it is not equally applicable to goods with similar destination passing through some Swedish port and across the Baltic or even through neutral waters only? In any case, it must be remembered that the number of ships reaching a blockaded area is not the only test as to whether it is maintained effectively. The best proof of the thoroughness of a blockade is to be found in its results. (Italics are writers).

To argue thus in the face of premises that were themselves the subject of dispute was but a bold endeavor to hide the fact that the blockade was notoriously ineffective in the Baltic because of the failure of Allied naval forces to control those waters.

In regard to the placing of cotton on the list of contraband, it was alleged in the note that the necessity for such action was the very effort of the Order in Council to spare blockade-breaking goods from condemnation. The immense demands in Germany for cotton for military as well as other purposes had, in the opinion of the Allied Governments entirely justified the placing of cotton on the list of absolute contraband by an Order in Council of August 20, 1915.

As regards the retaliatory character of the Allied measures, it was held that the principle of retaliation was one firmly established in international law; that the measures taken by the Allies were not in conflict with any general principle of international law, of humanity or civili-

zation; that they were enforced with consideration against neutral countries and were, therefore, juridically sound and valid. Concerning the more abstract question of the legitimacy of measures of retaliation, the Allied Governments thought that the subject was one *the consideration of which might well be deferred.*[241] By this curt refusal, the Allied Governments put an end to a discussion futile from its inception and extremely embarrassing to the United States, whose view that any concurrence in such measures of retaliation by her would make her own conduct unneutral was thus reduced, from an abstract, though not perhaps from a sentimental standpoint, to reality. This extreme view of the Allied Governments was one based on the inexorable force of superior sea-power, and the United States had no choice but to submit to it.

Before giving a final consideration to the means taken by the Allied Governments to enforce their blockade still further, once that even the sham of the Declaration of London had been thrown overboard by the Maritime Rights Order in Council of July 7, 1916,[242], we may advert for a moment to the discussion of the question of *hovering* by Allied warships off American ports. This action in particular cases had led the United States to protest to the British Government and the Japanese Government in 1914 in regard to the acts of their war vessels off New York and Honolulu, respectively.[243] In both cases, the warships were withdrawn. Mr. Bryan, early in 1915, called attention to the fact that the United States had regarded such conduct throughout the course of the Franco-Prussian war as "unfriendly and offensive" (see Appendix, *infra*), but it was not until the Danish steamer *Vinland* was chased down the Atlantic seaboard of the United States and forced to seek shelter from British war vessels in American territorial waters, whither, it was alleged, the cruiser followed, that further representations were made. In these, reference

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[241]*EW No. 3*, p. 77. (24.IV.16). (Italics are writer's).
[242]*EW No. 4*, pp. 69-71.
[243]*EW No. 2*, p. 29, (24.IX.14) and p. 61. (20.I.15).

was made to the unpublished correspondence, which comprised three notes of October 5, 1914, December 22, 1914, and April 16, 1915, and a request made that the British Admiralty instruct its ships to desist from a practice which had been maintained for long periods at a time, and which was peculiarly disagreeable alike to the Government and to American tradesmen.[244]

In reply, the British Government maintained that this was a purely extra-legal question, and one in which the United States could claim no right or precedent, as the action of American vessels during the Civil War amply warranted the actions now being pursued by the British cruisers. To this the United States rejoined by saying that much earlier practice, during the Napoleonic wars, had justified the United States in protesting against hovering, and that Great Britain herself had protested during the Civil War, not as to the illegality of such action on the part of cruisers, but on account of the irritation that they caused to tradesmen. Fear that German raiders would escape from American ports showed a distinct mistrust of the ability of the United States to maintain her neutrality. Just as the mobilization of an army on a frontier in time of peace might be the cause of peculiar affront, upon the same principle the constant and menacing presence of cruisers on the high seas near the ports of a neutral country might be regarded as a just cause for offense, although it might be strictly legal. To this the British Government did not even deign to reply.

In the chapter dealing with the Declaration of London, brief mention was made of the final withdrawal of acceptance of the declaration by an Order in Council of July 7, 1916, on the grounds that the successive Orders in Council had given rise to doubts as to whether the Allied Governments were acting within the strict bounds of international law. In the place of the Declaration certain principles were enunciated and rules laid down for the guidance of the Allied fleets. The provisions as to hostile desti-

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[244] *EW No. 3*, pp. 131-141. (20.XI.16).

nation were kept with the addition of the case where goods were shipped to or for a person who during hostilities had forwarded contraband goods to an enemy authority . . . or if the ship's papers did not show who was the real consignee of the goods. The principle of continuous voyage was to be applicable both in cases of contraband and blockade. This, of course, obviated any further controversy with the United States unless the latter should seek to push the legal determination of these controversies to actual arbitration. The United States took occasion to back down gracefully from its position by declaring, in a note of September 18, 1916,[245] that it deemed the rules established by the Order in Council of July 7, 1916, at variance with the law and practice of nations, and that the United States reserved all of its rights in the premises, including the right not only to question the validity of the rules, but to present demands and claims in relation to any American interests which might be unlawfully affected thereby. Sir Maurice de Bunsen having replied that the United States could challenge their validity in British Prize Courts,[246] Mr. Lansing replied that without admitting that even individual rights, when clearly violated by Orders in Council, must be maintained by resort to Prize Courts, the United States must announce that it, of course, had no intention to resort to British courts for the maintenance of such of its national rights as might be infringed by Great Britain's Orders in Council.

On January 10, 1917, the British Government issued another Order in Council defining the status of goods of "enemy origin" or "enemy destination" as applying to goods destined for or originating in *any* enemy country, "enemy property" being deemed to be goods belonging to any person domiciled in an enemy country. This was to have a retroactive effect on all goods which, having been discharged at a British port or an Allied port, were goods

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[245] *EW No. 4*, pp. 75-6.

[246] *Ibid.*, pp. 76-7. (10.X.16) and reply (24.XI.16).

of enemy, though not German, destination, origin, or ownership. Similarly, by an Order in Council of February 22, 1917, also modifying the Blockade Order in Council of March 11, 1915, it was held that vessels encountered at sea on their way to or from ports in neutral countries affording access to the enemy without calling at a port in British or Allied territory would, until the contrary was established, be deemed to be carrying goods with an enemy destination or of enemy origin and should be brought into port for examination, and, if necessary, for adjudication by a Prize Court. Any vessel carrying goods with an enemy destination or of enemy origin should be liable to capture and condemnation in respect of the carriage of such goods, provided that vessels complying with the foregoing requirements would be condemned only for actual carriage of enemy goods, the presumption being that her touching at an Allied port made her actions just. Such goods, if of enemy origin, when found aboard such vessels, would be liable to condemnation.[247]

This supplied the missing link in the "effective blockade" argument that Mr. Lansing had adduced and closed the iron ring of maritime right and supremacy still further. The United States, in these two instances, gave its tacit consent to the steps already undertaken.

There remains the necessity of pointing out the particular conclusions to be reached from our study of the controversy over the belligerent exercise of the right of blockade. Concerning this, Professor Hyde points out quite significantly[248] that the British argument appeared to rest primarily on the theory that the right to institute a blockade embraced the right also to render it effective. As has already been pointed out, the practice of the United States in the Civil War offers no justification for the British practice, because the particular cases involved, such as the case of the *Springbok* or the *Peterhof*, all involved additionally

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[247]*EW No. 4*, pp. 92-4. (22.II.17).

[248]C. C. Hyde, *Blockade* (State Department Documents) pp. 14-24. Cf. also his *International Law*, II, 668.

the carriage of contraband. No evidence was offered to invalidate the position taken by the United States that the blockading of neutral coasts was not to be permitted, however seriously that might impair the value of the blockade of the enemy's coast. Such a contention that the right to make the blockade involved the right to bar access to neutral coasts has had no general sanction; the tendency has been hitherto distinctly the opposite. Instead of resembling the old-style blockade, or conforming in any way to it, the effort of the British and French Governments was rather towards an expansion of the right to capture, the only restriction being placed on the action of the belligerents being the ultimate destination or point of departure, or ownership of the goods in question, regardless of whether they were contraband or not. If carried to its logical conclusion, this extended right of capture means the destruction of the principle that free ships make free goods, a point which the British Government was not anxious to discuss.

Professor Hyde draws a very clear distinction in this connection between the right to intercept contraband and that to institute a blockade of hostile territory:[249]

> The former is due to the fact that articles deemed to possess military or other special value to the belligerent into whose territory they come are objects which for that reason the enemy may reasonably endeavor to intercept when so destined. The application of the doctrine of continuous voyage to contraband merely signifies that the ultimate hostile use was inferred from an ultimate hostile destination and justifies seizure when the article is in transit to a neutral port while actually en route for belligerent territory. The right to establish a blockade is based on the claim that as a consequence of the power which a belligerent is able to exert against a particular place controlled by the enemy, all access by sea thereto may be lawfully barred. The act of maintenance constitutes a hostile operation undertaken by a naval force and directed against the place blockaded as

[249]Hyde, *Blockade, loc. cit.* Cf. also his *International Law*, II, 657-669, *passim*, especially 668-9.

truly as if it were subjected to bombardment. Such a measure should not be directly or indirectly undertaken with respect to territory possessed by states not engaging in the war.[250]

The placing of a screen or barrier before all commerce bound for neutral territory in proximity to that under blockade, and the interference with non-contraband and innocent traffic destined to the former justify such opposition as emanated from the United States in 1915. It also suffices to account for the lack of general approval on th epart of maritime states . . . In order to protect legitimate neutral trade in non-contraband articles with neutral territory contiguous or in close proximity to that controlled by a belligerent and under blockade, there is needed a definite prohibition of measures either capable of operating as a blockade of neutral territory, or serving to enlarge the right of capture.

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[250]For a defense of the blockade and an attempted refutation of the American contentions, Cf. Garner, *op. cit.*, II, 326-334. It is only fair to add that Professor Garner cites copiously from the writings of proponents and opponents of the Anglo-French blockade.

## CHAPTER IX. CONCLUSION

A summary of the controversy between the United States and the Allied Governments respecting neutral rights and commerce reveals the very wide extension of the rules of maritime war as existing on the outbreak of the World War. The evolution of those rules, as disclosed in the course of the controversy, has been such as to enlarge to a remarkable degree the rights of belligerents at the expense of the rights of neutrals. This may be seen in the matter of censorship, and of mail seizures; in the wide extension of the categories of unneutral service; in the wholesale arming of the merchant fleets of belligerents to pursue limited but discriminate warfare against armed public vessels of the enemy. It is further instanced in the extension of the measures taken against ships and goods of enemy ownership, actual or beneficial, as well as those of enemy origin or destination. Lastly, it is evidenced in the wide extension of the belligerent rights of visit, search, capture, condemnation and requisition as well as in the greater extension of contraband lists so as to destroy not only the hypothetical difference between absolute and conditional contraband, but virtually to subject all non-contraband goods to the same fate. In the contest between the defenders of neutral rights and the possessors of sea-power, the victory has in no wise been for the neutral.

Undoubtedly, the conditions of modern warfare have either caused, or resulted in, changes in the rules previously obtaining. Under the pressure of naval necessity, contraband and blockade have in reality become dual aspects of a single process—the interception of enemy commerce. The power of belligerents to police the seas has resulted in the exaction of compliance by neutrals in belligerent action against neutral nationals and property in ways hardly known before the World War. It is seriously to be questioned whether in the future the rights of neutrals, if such there be, will receive any greater acknowledgment at the hands of belligerents. It would appear that

the cumulative tendency of the measures taken by the Allied Governments during the World War was to outlaw completely the group of states which, having broken their covenanted word in one instance, did not scruple to trample under foot other portions of the law of nations. Viewed in this light, the tendency of Allied measures closely approaches what is legally possible under the provisions of the League of Nations Covenant—the boycotting and banning of a covenant-breaker. In a reorganized society seeking to curb the violence of outlaws, the rights and interests of the bystander are altogether likely to be swept away. No position of impartiality, of disinterestedness, of aloofness on the part of the neutral will guarantee him security; rather will his abstention from the enforcement of the common law of nations against branded madefactors mark him out as a tacit accomplice of the lawless and the passive abettor of criminal acts of war against the society of which he forms, albeit unwillingly, a part. Under the Covenant of the League, there can scarcely be immunity for neutrals any more than there will be impunity for outlaws.

Thus it is not inappropriate to question whether the consistent diminution of neutral rights evidenced in the controversies of the United States with the Allied governments is not an evidence of a tendency in consonance with the political integration of the world into a closer international society. Under such circumstances, the freedom of the seas, involving of old a balance of power between neutrals and belligerents, will simply cease to exist, and legal authority of an unchallengable character will be vested in such naval powers as command and police the seas, to keep open the channels of commerce for law-abiding nations, while utterly closing the world's highway to the commerce of lawbreakers. It is along such lines that the problems which vexed non-participants in the World War are most likely to be solved.

# APPENDICES

## THE TRANSFER OF MERCHANT SHIPS OF A BELLIGERENT TO A NEUTRAL AFTER THE OUTBREAK OF WAR

### Conclusions From the Memorandum Attached

1. Merchant ships of a belligerent may be transferred to a neutral after the outbreak of hostilities.

2. If the sale of the ship is made in good faith, without defeasance or reservation of title or interest in the vendor, without any understanding, expressed or tacit, that the vessel is to be retransferred after hostilities, and without the indicia or badges of a collusive or colorable transaction.

3. But the transfer cannot be made of such vessels in a blockaded port or while in transitu.

4. The transfer must be allowable under and in conformity to the municipal regulations of the country of the neutral purchaser.

5. The declaration of the London convention that transfers of an enemy vessel to a neutral during war will not be valid unless it be shown that the same was not made to evade the consequences to which an enemy vessel, as such, is exposed, if it were controlling of the question, relates only to the good faith of the transfer and not to the ulterior motives of the parties to reap the natural advantages to flow from the operation of the vessel under the flag of a country not at war, while it inverts the burden of proof of the good faith of the transaction.

## THE RIGHT OF NEUTRALS TO PURCHASE MERCHANT SHIPS FROM BELLIGERENTS IN TIME OF WAR

### Introductory

The right of neutrals to purchase merchant ships from belligerents in time of war is based upon, and is indeed part of, the right of neutrals to continue in time of war to trade with belligerents, which right is undoubted, subject to certain exceptions, relating principally to contraband and blockade. This right to trade with belligerents is of universal recognition, although on occasions it has been denied in practice. During the Napoleonic wars the French and British Governments assumed to dictate the trade in which neutrals should be permitted to engage with the belligerents and to prohibit them from trading with belligerents altogether. But these decrees met with the firmest resistance on the part of the American Government at the time, and after the occasions which produced them had passed, the English Government was compelled to reprobate and

abandon them. The commerce of neutrals should not be interrupted by the exigencies of war. The right of the citizens of a neutral country to trade in merchant vessels belonging to the citizens of a belligerent, with certain well-defined exceptions, may be said to be of well-nigh universal admission.

The position of the United States on this question is historical, and, so far as my investigation has extended, has been uniform. This position may be stated as follows:

A neutral has a perfect right to purchase the merchant vessels of a belligerent during a state of war, when such purchase is bona fide, without defeasance, reservation of title or interest, and intended to convey perfect and permanent title to the purchaser. This rule is subject to certain exceptions herein noted.

### Precedents

I shall now recite some of the precedents illustrating the position uniformly maintained by the United States.

1. February 19, 1856, Secretary of State Marcy to Mr. Mason:

"The principle, therefore, that a neutral has a perfect right to purchase the merchant vessels of a belligerent has been maintained by England, by Russia, and by the United States; and it is inconsistent with these historical facts to say that the contrary doctrine avowed by France has had the sanction of the chief maritime nations or that it forms part of the whole doctrine of maritime law." (Msc. Inst. France, Vol. XV, 321; see 11th Waits State Papers, 203.)

(The position thus stated by Secretary Marcy is undoubtedly in harmony with the general English rule, but has been contested by France, where, under governmental regulations, enemy-built vessels cannot be made neutral by a sale to a neutral after hostilities begin. It is also claimed that the position of Russia is in line with the French contention. But it appears that the position of Russia is correctly stated by Secretary Marcy, supra.)

Secretary of State Cass to United States Consuls, Circular No. 10, June 1, 1859:

"Inquiries having been addressed to the Department as to the right of a citizen of the United States to purchase the vessel of a belligerent during the present war in Europe, I have to inform you that a similar question arose during the late Crimean War and was deliberately and carefully investigated by the administration for the time being and resulted in the conviction that a vessel so purchased in good faith becomes the property of the purchaser and is entitled to the protection of the flag of the United States, though a special act of Congress would be necessary to enable her to obtain a register from the proper department. These views are entirely concurred in by the existing executive Government of the United States, and will be maintained whenever there may be occasion therefor."

To the same effect, Secretary Cass to Mr. Mason, June 20, 1859, (30 MS Dom. Let., 414), and Secretary Cass to Mr. Gittings, June 24, 1859, (30 MS Dom. Let., 429).

The regulations referred to, supra, pointed out that the purchase, in order to be valid, must be in good faith and not a simulated purchase of vessels to be employed in hostile operations against countries with which the United States are at peace. In this connection it is safe to say that where there has been merely an outward transfer of title, as when the original owner is left in command and direction of the vessel, and the same is continued in identically the same service of trade, especially where the original owner retains, though secretly, an interest in the vessel or its operation, the sale would be treated as a mere subterfuge to screen the vessel from capture by one of the belligerents, and in such case the ostensible owner would not be entitled to the protection accorded to a vessel flying the flag of the neutral country. (Under this, see Mr. Fish, Secretary of State, to Mr. Marsh, January 29, 1877, MS Inst., to Chile, Vol. 2, p. 11).

Boutwell, Secretary of the Treasury, to Mr. Washburne, Minister to France, May 23, 1871, and sent to the Secretary of State at the same time (see MS. Misc. Let.):

2. "Can a foreign vessel be purchased by a citizen of the United States?"

"In reply, I have to observe that the natural right to acquire property by purchase has been held by high authority to be unaffected, so far as neutrals are concerned, by the mere fact that a state of war exists between two or more powers, from the citizens or subjects of one of which the purchase is made. Such right is subject, however, to the restrictions imposed by international law, by treaty, or by belligerent powers, respectively, as to the property of their own citizens or subjects during the existence of such war. This principle is stated by one of the former Attorneys General of the United States, as follows: 'A state of war interrupts no contract of purchase and sale, or of transportation, as between neutral and belligerent, except in articles contraband of war.'"

3. The opinion of the Attorney General referred to was that of Mr. Cushing in 1854 (6 Op. Atty. Gen., p. 638) and 1855 (7 Op. Atty. Gen., p. 538), wherein the Attorney General said:

"A citizen of the United States may purchase a ship of a belligerent power, at home or abroad, in a belligerent port, or on the high seas, provided the purchase be made bona fide and the property passed absolutely and without reserve, and the ship so purchased becomes entitled to bear the flag and receive the protection of the United States."

4. On June 20, 1879 (Foreign Relations, 1879, p. 884), Secretary of State Evarts to Mr. Christiancy, minister to Peru, affirmed the

general doctrine as above stated, but pointed out the temptations to the abuse of the right and the great danger from inconsiderate action on the part of United States consuls in facilitating such transfers, but stated that "although the validity of the transfer may in the end be judicially inquired into, much harm might result from a simulated sale before a final decision on the subject could be reached; still the possible abuse of power by a sale is not a sufficient reason for abrogating the power, especially if Congress should abstain from forbidding the purchase and use abroad of foreign-built ships by American citizens."

In a letter to Minister Christiancy, December 26, 1879 (Foreign Relations, 1879, p. 894), and in a similar instruction to the minister to Chile, Secretary Evarts again stated, among other things, that:

"The right of Americans to buy foreign-built vessels and to carry on commerce with them is clear and undoubted. . . . As a consequence, an adjunct of this right, that of flying the American flag, cannot be prohibited. If circumstances justify on the part of the consular officers, an opinion that the sale is honest and that the vessel has really become the property of a citizen of the United States, she may properly fly the flag of the owner's country as an indication of such ownership and as an emblem of the owner's nationality."

(In this connection he said that a ship so transferred but not registered as an American vessel was not entitled to the immunities and thorough protection accorded to registered American vessels plying between ports of the United States and those of foreign countries; that American owners domiciled abroad and engaged in business of that sort take upon themselves the risks to such traffic, and that, if seized by one of the belligerents, they have no right of diplomatic protection other than that they should be accorded fair treatment in prize courts.)

5. In reply to request for sanction of a proposed transfer of an enemy vessel to a neutral in a blockaded Cuban port in 1898, the Department said, through Assistant Secretary Moore, that it would not give such desired permission or any privilege to the transfer from a belligerent to a neutral of a vessel in a blockaded port. (Mr. Moore to Messrs. Butler et al., May 10, 1898, 226 Dom. Let., 378.) (The refusal of this request was evidently based upon the fact that the vessel intended to be transferred was at the time in a blockaded port of the Cuban Government. It will be seen that this forms an exception to the general rule as hereinbefore stated.)

6. In this same connection, the case of the *Benito Estenger* (176 U. S., 568) is valuable as illustrating the general principle stated. In that case Chief Justice Fuller said:

"Transfer of vessels flagrante bello were originally held invalid, but the rule has been modified and is thus given by Mr. Hall, who, stating that in France their sale is forbidden and 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 war.' "

He cites Justice Story on *Principles and Practice of Prize Courts*, who states: "In respect to the transfer of enemy's ships during war, it is certain that purchases of them by neutrals are not in general illegal, but are liable to great suspicions, and if good proof be not given of their validity by bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; and if after such transfer the ship be employed habitually in the enemy's trade or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive."

(The Chief Justice cites several English cases, which are valuable on the question of fraudulent and colorable transfers.)

7. The Russian Prize Regulations of March 27,1895, section 7 (*Foreign Relations*, 1904, p. 736), prescribe that merchant vessels acquired from the hostile power, or its subjects, by persons of neutral nationality are acknowledged to be hostile vessels, unless it be proven that the acquisition must be considered according to the laws of the nation to whom the purchaser belongs as having actually taken place before the purchaser received news of the declaration of war, or that the vessels acquired in the manner mentioned, although after the receipt of such news, were acquired conscientiously and not for the purpose of covering hostile property.

8. I find no citation of any American precedent or authority which denounces the general doctrine of the right of a neutral to purchase the vessel of a belligerent in time of war, where such purchase is made in good faith and is not subject to the charge that it was colorable or collusive only.

## AUTHORITIES ON INTERNATIONAL LAW

1. Oppenheim's *International Law* (p. 206), discussing this question, says:

"Since many vessels are liable to capture, the question must be taken into consideration whether the fact that an enemy vessel has been sold during war to a subject of a neutral or to a subject of the belligerent state whose forces seized her has the effect of excluding her appropriation. It is obvious that if the question is answered

in the affirmative, the owners of enemy vessels can evade the danger of having their property captured by selling their vessels. There is no general rule of international law which answered this question. The rule ought to be that, since commerce between belligerent subjects and neutral subjects is not at all prohibited through the outbreak of war, a bona fide sale of enemy property should have the effect of freeing such vessels from appropriation, as they are in fact no longer enemy property. But the practice among the states varies. Thus France does not recognize any such sale after the outbreak of war. On the other hand, the practice of Great Britain and the United States of America recognizes such sales, provided they are made bona fide and the new owner has actually taken possession of the sold vessel. If the sale was contracted in transitu, the vessel having started her voyage as an enemy vessel, the sale is not recognized when the vessel is detained on her voyage before the new owner has taken actual possession of her."

(The attempted sale of a vessel in transitu seems to form another exception to the rule permitting the sale of enemy vessels to neutrals. This and the other exception of an attempted sale of an enemy vessel in a blockaded port appear to constitute the two principal exceptions.)

2. Halleck's *International Law* (Vol. 2, p. 93), discussing the subject, says:

"The transfer, in time of war, of the vessel of an enemy to a neutral is a transaction, from its very nature, liable to strong suspicion and consequently is examined with a jealous vigilance and subjected to rules of peculiar strictness in the prize court of an opposite belligerent. Nevertheless, neutrals have a right to make such purchases of merchant vessels, when they act with good faith, and the belligerent powers are not justified, by the law of nations, in attempting to prohibit such transfer by a sweeping interdiction, as was done in former years by the French and English governments. Ordinances of this character form no part of the law of nations, and consequently are not binding upon the prize court, even of the country by which they are issued. Nevertheless, when the sale is claimed to have been made by an enemy to a neutral in time of war, it is not unreasonable that these motives and terms should be an object of searching inquiry. Hence courts of admiralty have established severe rules respecting these transfers."

(He states these rules to be in substance: the sale must be absolute and unconditional; the title and interest of the vendor must be completely and absolutely divested; if there is a covenant, agreement or tacit understanding by which he retains any proof of his interest, the contract is vitiated and in international law is regarded as void. He points out various instances in which a sale would be considered as colorable only.)

3. Phillimore's *International Law*, Volume 3, page 735, says:

"In respect to the transfers of enemy ships during war, it is certain that purchases of them by neutrals are not in general illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by bill of sale and payment of a reasonable consideration, it will materially impair the validity of the neutral claim; and if the purchase be made by an agent, his letters of procuration must be produced and proved; and if, after such transfer, the ship be employed habitually in the enemy's trade or under the management of a hostile proprietor, the sale will be deemed merely colorable."

He quotes the Privy Council in 1857 as follows:

"The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from each belligerent, and the purchase is valid whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer sufficient to transfer the property between the vendor and vendee is good; also against a captor if war afterwards unexpectedly breaks out. But in case of war, either actual or imminent, this rule is subject to qualifications and it is stated that in such case a mere transfer by documents, which would be sufficient to bind the parties, is not sufficient to change the property as against captors as long as the ship or goods remain in transitu."

## LONDON CONVENTION OF 1909

The London convention (which was not ratified by the signatory powers and becomes valuable only as indicative of the disposition of the several governments) confirms rather than denies the position herein maintained.

Article 56 of the convention is as follows:

"The transfer of an enemy vessel to a neutral flag affected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"Provided that there is an absolute presumption that a transfer is void—

"(1) If the transfer has been made during a voyage or in a blockaded port.

"(2) If a right to repurchase or recover the vessel is reserved to the vendor.

"(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."

The effect of this article would be merely to change the burden of proof by reversing the presumption of the bona fides of the sale

and specifying certain conditions under which the sale would be conclusively presumed to be void. But this article does not change the general rule which I have asserted, to-wit, that the sale of a belligerent vessel to a neutral in time of war is valid where such sale is made in good faith and divests all title and interest of the vendor. In this connection the report of the drafting committee of the convention is instructive. Of this article it is said:

"The rule respecting transfer made after the outbreak of hostilities is more simple. Such a transfer is only valid if it is proved that its object was not to evade the consequences to which the enemy vessel is exposed. The rule accepted in respect to transfers made before the outbreak of hostilities is inverted. In that case there is a presumption that the transfer is valid; in the present that it is void, provided always that proof to the contrary may be given. For instance, it might be proved that the transfer had taken place by inheritance."

In this same connection, attention is directed to the report to their government by the British delegates to the convention respecting the work of the convention. Referring to this article, they said: "The provisions respecting transfers made during war are less complicated. The general rule is that such transfers are considered void unless it be proved that they were not made with a view to evade the consequences which the retention of enemy nationality would entail. This is only another way of stating the principle already explained that transfers effected after the outbreak of hostilities are good if made bona fide, but that it is for the owners of the vessels transferred to prove such bona fides. The provisions under this head are practically in accord with the rules hitherto enforced by British prize courts."

From all of which it will appear that 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 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 retransferred 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.

This memorandum . . . it is believed, correctly presents the status of the question involved.

CONE JOHNSON.

*Solicitor's Office, State Department,*
August 7, 1914.

*Congressional Record,* LI: 13572. Cf. also Sen. Doc. 563, 63d Congress, 2d Session, pp. 83-89.

ON BOARD UNITED FRUIT COMPANY'S STEAMSHIP "METAPAN"

October 8, 1914.

SENATORS THOMAS AND SHAFROTH,
Washington, D. C.:

This is an American vessel, flying the American flag. On Sunday, the 4th instant, between Cartagena and Puerto Colombia, at 10:30 a. m., this ship was boarded by two French officers and two armed soldiers from the French war vessel, the *Conde,* who, through the captain, after having examined the ship's papers, ordered all the passengers into the dining-room. After some ten minutes all were permitted to leave the dining-room except five young Germans, who were held imprisoned and compelled to each sign a parole in order to gain their liberty, binding them not to engage with Germany in this war against France, etc.

After these young Germans had each signed in triplicate this parole, the French officers and armed soldiers departed from the *Metapan* to the *Conde,* which had stood by during the search and seizure. The *Metapan* was held for two and a half hours or more.

This vessel had been recently transferred from a British ship to an American ship with other vessels of the United Fruit Company. This is her first voyage as an American ship. The captain and all the officers, save the physician and the third officer, are British subjects. The captain did not protest, so far as I oculd see or hear. He admitted to the American consul at Barranquilla, Mr. Isaac Manning, that he did not protest. I witnessed the entire proceedings as herein recited.

I called the captain to account afterwards, and he claimed he did not know whether the *Conde* had the right to imprison and take off his ship these five Germans, said he could not find out until he arrived in New York. He said he would know his rights and duties if this were a British ship. . . .

This American ship was sailing between two Colombian ports, neutral ports. Its entire voyage is between neutral ports, unless it should halt at Jamaica. Four of these Germans were sailing from New York to Puerto Colombia, Colombia, and one went on board at

Cartagena, for Puerto Colombia. They were all going into the interior of Colombia, away from Germany. Two were born in Germany. One other was physically incapacitated to serve in the German army and exhibited papers from the German Government to that effect.

Here was an outrage committed on American soil, under the American flag, by the *Conde*—the passengers were all practically imprisoned on an American ship by French officers of war. I urged Mr. Manning to protest and to report upon this act of the *Conde*. He has made a report of this affair to the United States Government. I have this report in a sealed envelope in my possession, with instructions to mail it when I reach the United States. These are the facts as I know them. Yours,

ROBERT W. PATTERSON.

*Congressional Record*, LI: 16765-6. (17.X.14).

## NEUTRALITY AND TRADE IN CONTRABAND

The Department of State has received numerous inquiries from American merchants and other persons as to whether they could sell to governments or nations at war contraband articles without violating the neutrality of the United States, and the Department has also received complaints that sales of contraband were being made on the apparent supposition that they were unneutral acts which this Government should prevent.

In view of the number of communications of this sort which have been received, it is evident that there is a widespread misapprehension among the people of this country as to the obligations of the United States as a neutral nation in relation to trade in contraband and as to the powers of the executive branch of the Government over persons who engage in it. For this reason, it seems advisable to make an explanatory statement on the subject for the information of the public.

In the first place, it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law or by any treaty provisions, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, etc., or are foodstuffs, clothing, horses, etc., for the use of the army or navy of the belligerent.

Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

It is true that such articles as those mentioned are considered con-

traband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy's duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this, that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale.

Neither the President nor any executive department of the Government possesses the legal authority to interfere in any way with trade between the people of this country and the territory of a belligerent. There is no act of Congress conferring such authority or prohibiting traffic of this sort with European nations, although in the case of neighboring American republics, Congress has given the President power to proclaim an embargo on arms and ammunition when in his judgment it would tend to prevent civil strife.

For the Government of the United States itself to sell to a belligerent nation would be an unneutral act, but for a private individual to sell to a belligerent any product of the United States is neither unlawful nor unneutral nor within the power of the executive to prevent or control.

The foregoing remarks, however, do not apply to the outfitting or furnishing of vessels in American ports or of military expeditions on American soil in aid of a belligerent. These acts are prohibited by the neutrality laws of the United States.

*Department of State,*
October 15, 1914.

*Congressional Record,* LI: 16814. Cf. also Sen. Doc. 604, 63d Congress, 2d Session, pp. 3-4.

## ATTITUDE OF THE UNITED STATES GOVERNMENT TOWARDS HOVERING

Secretary of State Hamilton Fish to E. B. Washburne, Minister to France:

*Department of State,*
WASHINGTON, October 4, 1870.

This Government desires and intends to maintain a perfect and strict neutrality between the two powers which are now unfortunately engaged in war. It desires also to extend to both the manifestation of its friendly feeling in every possible way and will allow to the vessels of war of each power equally the hospitality of its ports and harbors for all proper and friendly purposes.

But this hospitality is liable to abuse, and circumstances have arisen to give rise in the minds of some persons to the apprehension that attempts at such abuse have taken place.

I am not in possession of facts to justify me in saying that such has been the case, but I have deemed myself justified in calling the attention of M. Berthemy, the French representative at this Capital, to the current rumors, sustained, as they are, by the presence of a number of French vessels upon the coast of the United States. These vessels have appeared at or near the entrance of the harbor of New York, off Sandy Hook; at the entrance of the Long Island Sound; at or near the entrance of the Chesapeake Bay. One or more is represented to have been anchored not far from Sandy Hook, the main entrance to New York harbor, and there is a difference of statement as to the precise distance at which she lay from the shore, some claiming that she was within a marine league. But of this there is no positive evidence. She has entered the port of New York—as claimed by some—for the purpose of watching a German steamer about to sail thence. Three of them have put into the harbor of New London (which looks out upon Long Island Sound, the eastern entrance to the New York Harbor), avowedly for some small repairs; one recently asked permission, which was granted, to make some repairs at the Norfolk Navy Yard, near the entrance of Chesapeake Bay.

All this may be consistent with the intention of perfect observance of the neutral character of our waters and jurisdiction, and with an entire absence of undertaking any hostile movement against the vessels of North Germany from those waters or that jurisdiction.

A large trade has been carried on from the ports of the United States approached by the waters in which these vessels have thus appeared by vessels belonging to North Germany.

The appearance of French vessels in these immediate neighborhoods in such numbers and force does not fail to excite the alarm of these vessels and must have the effect to a greater or less degree to diminish that trade.

The United States are not prepared at present to say that any actual violation of international law has been committed or that the hospitality of these waters has been positively abused. *But the hovering of the vessels of war of a belligerent on the coasts near the entrance of the principal ports of a friendly power does interfere with the trade of the friendly power.*

The interruption of the regular communication with you, by reason of the investment of Paris, has led me to represent to M. Berthemy our views on this subject and to say that, although the vessels of either belligerent may not actually shelter within the jurisdiction of the United States and proceed thence against the vessels of its enemy, *this Government would regard as an unfriendly act the hovering of such vessels upon the coast of the United States, near to its shores, in the neighborhood of its ports, and in the track of the ordinary com-*

*merce of these ports with intent to intercept the vessels of trade of its enemy.*

I have requested M. Berthemy to make known these views to the French Government and to express the confident hope of the President that there may be no cause of complaint on the part of this Government by reason of any such hovering by the vessels of the French Government.

You will be pleased to take an early opportunity to present the same view to the minister for foreign affairs, which you may do by reading to him this dispatch.

HAMILTON FISH.

*Congressional Record*, LII:1782 (18.I.15). (Italics are writer's.)

## STATEMENT AS TO USE OF CABLES AND WIRELESS

*Department of State,*
WASHINGTON, D. C.,
January 20, 1915.

Communication 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 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.

WILLIAM JENNINGS BRYAN.

*EW No. 2*, p. 58.

*Department of State,*
WASHINGTON,
March 3, 1915.

HON. OSCAR W. UNDERWOOD,
*House of Representatives.*
My Dear Mr. Underwood:

The Secretary has . . . requested me to address you on a subject of vital importance to the Government in the present war situation. I refer to the necessity for additional legislation to enable the Government to enforce its neutral duties during the present war. It is known in some quarters that the Government has been hindered by lack of sufficient legislation to prevent vessels from leaving American ports with coal and supplies for warships at sea in contravention of the neutrality of the United States. The United States is bound by treaties in force to prevent the use of its ports as bases of naval operations, but there is no legislation by Congress to enable the Government to carry out these obligations.

The Department of Justice, therefore, has drafted a proposed resolution which, in its opinion, will give the President such power as will be necessary to carry out the neutral obligations of the Government in these respects. The Department of State heartily supports the proposed resolution, and I desire to emphasize the great urgency and need of the immediate passage of a resolution in some such form as the one enclosed, in order that, in the present critical situation brought about by the stupendous conflict in Europe, the Government may not be bound internationally and yet have its hands tied so as to be unable to act in the discharge of its international duties.

Very sincerely yours,
ROBERT LANSING.

*Congressional Record,* LII:5454 (3.III.15).

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The accompanying bibliography has been prepared with a view to giving in a brief compass an accurate guide to the primary sources from which the foregoing study has been drawn. Attention is here directed to the fact that for purposes of convenience to the reader, citations have been made almost exclusively from the American sources, which are more easily verifiable. The dates follow invariably those given in the European War Whitebooks issued by the Department of State. Magazine and periodical literature, largely because of its inaccessibility, has been excluded from the bibliography, although, in selected instances, references to important articles have been given in the footnotes.

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