

EDITORIAL COMMENT

THE LAW OF NEUTRALITY AND THE POLICY OF KEEPING OUT OF WAR

There is always a danger of confusing law and policy. Often earnest and sincere advocates of a policy, in itself worthy, are able to bring it about that their policy is adopted as national law. National law may and sometimes does, as in the case of the Act of Congress of June 8, 1794, following the proclamation by President Washington of April 22, 1792, appeal to the mentality of mankind and then become generally approved. This proclamation of Washington and the Act of 1794 led Canning to refer to it as "a guide in a system of neutrality." The British Foreign Enlistment Act of 1819 was a tribute by a great maritime Power to the merit of the legislation embodying this American "system of neutrality." The fundamental concept of neutrality clearly implies that the neutral be "of neither party," eliminating policy in real neutrality legislation.

On the other hand, legislation having as its object to keep a state out of war must tend to be opportunist and to vary with the fortunes of war or with the effectiveness of the threats and the propaganda put forth by the respective belligerents.

The right of any state to change its laws from time to time is, of course, admitted, but such a change of domestic law does not imply any change in international law. The change in domestic law may or may not relate to matters within the field of international law, and the international responsibility of the state legislating may be involved only when domestic law conflicts with international law. The domestic law of a neutral state might, for instance, prohibit the sailing of its vessels to a named area outside the limits of a blockade proclaimed by a belligerent. This law would be, however, an expression of domestic policy only and would have no effect upon the limits of a blockade established by a belligerent in accordance with international law.

GEORGE GRAFTON WILSON

THE CITY OF FLINT

On or about October 9, 1939, the American steamship *City of Flint* was captured by a German cruiser at an estimated distance of some 1,250 miles from New York, with a mixed cargo destined for British ports. The vessel was taken into the harbor of Tromsø, Norway, on October 21, with a German crew and flying the German flag.¹ After there remaining for a few hours to

¹ Concerning the stay of the vessel at Tromsø, see statement by the Norwegian Government, Nov. 5, 1939, as set forth in Associated Press despatch of that date, published in New York Times, Nov. 6, 1939.

In the course of a statement broadcast by Captain Joseph A. Gainard, as printed in New York Times, Nov. 7, 1939, it was said: "When it was evident that we could take aboard

take water, the ship was ordered by the Norwegian Government to depart and did so. The vessel was taken into the harbor of Murmansk, Union of Soviet Socialist Republics, on October 23.

On October 25 the American Chargé at Berlin reported that the Foreign Office had said at a press conference that the *City of Flint* had been captured by a German vessel and contraband found on board, the captured ship being destined for England; and that it had been added that the ship was unseaworthy in that it did not have navigation charts adequate for bringing the ship into a German port. When the vessel entered the harbor of Murmansk, according to an announcement said to have been presumably from the Soviet Government through the Tass news agency, the naval forces at the port of Murmansk temporarily held the vessel and interned the German prize crew. On October 25 the American Chargé at Berlin reported that the German Foreign Office said, in reference to the seizure of the *City of Flint*, that "the German authorities were communicating with the Soviet authorities in the matter." On the same day the Tass agency reported that the German crew had been released from internment by the maritime authorities at Murmansk in view of the fact, as had been established, that the vessel had been brought into port for repairs of machinery, and also that the vessel was meanwhile remaining in Murmansk for verification of exact composition of its cargo. On October 26 the American Chargé at Berlin, referring to a memorandum received that day from the Foreign Office, reported that it stated that a prize crew placed on board the *City of Flint* had brought the vessel to the harbor of Murmansk because of "sea damage."² For some reason then unexplained the German crew was interned at Murmansk in spite of the fact that, according to the German authorities, they were without charts and had put into Murmansk because they could not proceed to a German port without charts. Later, the members of the crew were released, seemingly under a plea that their entry into Murmansk was required for necessary repairs to defective machinery.³

thirty-eight male passengers, the crew of a British ship were placed on board. A total of three officers and eighteen Germans were placed on board as a prize crew. They brought with them sixty hand grenades, twenty revolvers, twenty bayonets, twelve dynamite bombs and one machine gun. They used none of these, however, during the whole voyage, but eventually delivered them to the Norwegian authorities.

"The lieutenant in charge of the prize crew addressed our crew in good English as follows: 'I must tell you we proceed as a prize to Germany, where the Prize Court decides what becomes of your cargo. You are, as usual, to obey your own captain and his officers.'"

² It was added that an official of the German Foreign Office, when transmitting the memorandum, stated to the Chargé that the Foreign Office had no details as to the damage which necessitated taking the ship to Murmansk, but that he had maintained, in response to an inquiry, that the term "damage" would cover the case of a ship lacking charts with which to navigate the waters through which it had to proceed.

³ The statement of facts in the text reproduces a statement released by the Department of State Oct. 28, 1939, published in Dept. of State Bulletin of that date, p. 431.

On October 28 the Russian authorities ordered the *City of Flint* to leave the port of Murmansk in the control of the German prize crew; and the vessel thereupon departed from Russian territorial waters.⁴ The ship thereupon proceeded around the North Cape under German control and continued southward in Norwegian territorial waters where it was accompanied by a Norwegian naval ship. When outside of Sogn (a fiord north of Bergen), the German prize commander, reporting a sick man aboard, requested permission to stop at Haugesund in order to obtain desired medical treatment for that individual. A doctor sent aboard from the Norwegian naval ship, after examining the sick man, reported him to be suffering from an insignificant wound in the leg, a fact which caused the Norwegian authorities to inform the commander of the *City of Flint* that it could not be permitted to anchor at Haugesund. Nevertheless, the ship did there

⁴ Mr. Steinhardt, the American Ambassador at Moscow, reported under date of Oct. 27, a statement by Assistant Commissar of Foreign Affairs Potemkin in the following words: "The *City of Flint* had come into the port of Murmansk in charge of a German prize crew without any previous knowledge on the part of the Soviet Government and through no act on its part. The reason ascribed by the prize crew for the entry was damaged machinery making the ship unseaworthy. When the Soviet authorities at Murmansk judged that the vessel was again fit to put to sea, and being desirous of preserving its neutrality, the Soviet Government had ordered the vessel to leave the port of Murmansk immediately under the same conditions as those of her entry, namely, with both the German and American crews on board and her cargo intact. He added that the order would be enforced immediately and that the Soviet Government felt that its decision was not only in accordance with the well-recognized principles of international law and consonant with the obligations of a neutral but it was also the correct position to take as between the conflicting claims of the United States and Germany to possession of the vessel and her cargo and that by this he meant 'to send her out in the same status as she had entered one of the ports.'

"He said that his government did not consider that it had the right to turn the vessel and her cargo over to the American crew unless the German prize crew refused to take her out, as in the opinion of his government to do so would be an unneutral act. In reply to a question he stated that the decision of the Soviet Government to permit the German prize crew to take the vessel to sea was final.

"I then asked him who had verified the alleged damage to the machinery, to which he replied that he had no information on this subject, but assumed this had been done by the authorities at Murmansk.

"I again inquired concerning the welfare of the American crew and he said that it was his understanding that they had been on board the ship all of the time and were well.

"I then referred to my difficulties in making contact with the captain or members of the crew, reciting my repeated attempts to get into communication with them by telegram and telephone, as well as my inability to obtain a plane today. He disclaimed any responsibility for these difficulties, passing over the subject lightly by pointing out that the crew being on board the ship in the roadstead, in conjunction with the average delays in long distance telephone communication had probably brought about this 'unfortunate result.'

"I am again endeavoring to complete a telephone connection with the captain of the *City of Flint* at midnight." (Dept. of State Bulletin, Oct. 28, 1939, p. 430.) In the same report the Ambassador stated that he had vigorously reiterated his indignation at the lack of coöperation by the Soviet Government in withholding information from him while issuing communiqués with respect to the *City of Flint* through the medium of the Tass agency.

anchor on November 3, in consequence of orders said to have come from the German Government. In accordance with what were conceived to be the requirements of the Hague Convention of 1907 Concerning the Rights and Duties of Neutral States in Naval War, the ship was removed from the control of the German prize crew, which was temporarily interned, and the vessel surrendered to its own American crew.⁵ The ship proceeded to Bergen on November 4.

The law of nations does not at the present time permit the captor of a neutral prize to take the vessel into the port of another neutral state and there sequester it pending the decision of a prize court.⁶ On the other hand, as has been recently observed, "if the neutral permits sequestration, it is undoubtedly giving assistance to a belligerent and enabling it to use neutral territory as a base for one form of belligerent activity."⁷ This fact suffices in itself to cause one greatly to doubt whether maritime states generally acknowledged in 1907, when the Hague Conference assembled, that a neutral state possessed the right to permit sequestration, and to demand convincing evidence in support of any assertion that it did. There is, however, a paucity of such evidence. No instance has been seen where a local statute or regulation assertive of the rights of a neutral with respect to prizes, and enacted during the century immediately prior to the consummation of the Hague Convention, made specific provision for sequestration.⁸ It is reasonable to conclude that when the United States declined to adhere to Article XXIII of the Hague Convention, which permitted as between the contracting parties the sequestration of prizes under conditions that were specified, and by such means sought to protect itself against any relaxation of the normal requirements in relation to prizes, it was endeavoring to safeguard itself against the operation of a fresh privilege yielded by treaty to a

⁵ See statement by Norwegian Government of Nov. 5, 1939, contained in Associated Press despatch of that date, as printed in *New York Times* of Nov. 6, 1939.

On Nov. 3, 1939, it was announced that the American Chargé in Berlin had reported the receipt of information from the German Foreign Office that appropriate German naval authorities had been requested to comply with the desire of the United States that all precautions be taken to avoid exposing the members of the American crew of the *City of Flint* to unnecessary danger. (Dept. of State Bulletin, Nov. 4, 1939, p. 458.)

On Nov. 27, 1939, the *City of Flint* left Bergen for Haugesund. See *New York Times*, Nov. 28, 1939, p. 3.

⁶ Declared the Department of State on Oct. 28, 1939: "A prize crew may take a captured ship into a neutral port without internment only in case of stress of weather, want of fuel and provisions, or necessity of repairs. In all other cases, the neutral is obligated to intern the prize crew and restore the vessel to her former crew." (Dept. of State Bulletin, Oct. 28, 1939, p. 432.)

⁷ Comment by the Reporter on Art. 29 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, this *JOURNAL*, Supp., Vol. 33 (1939), p. 458.

⁸ The statutory regulations enacted since that event and prior to the European war initiated in 1939, as revealed in the texts published in Deák and Jessup, *Neutrality Laws*, have been obviously designed to make appropriate provision to harmonize with the Hague Convention, a fact which in some instances has been acknowledged in terms.

neutral state.⁹ That endeavor was successful. Thereafter, if either Germany or Russia felt that, as in the war initiated in 1939, the Hague Convention was applicable to American ships, they were obliged either to accept the terms on which the United States adhered thereto by acknowledging that the provisions of Article XXIII were not to be utilized against such vessels, or to forego the right to invoke any portions of the treaty as against the United States. They could not cause the United States to burden itself with the convention on terms other than those set forth in its adherence.¹⁰

It may be observed that Great Britain did not accept (and is not understood as yet to have accepted) the convention. Inasmuch as Article XXVIII thereof declared that "the provisions of the present convention do not apply except as to the contracting parties, and then only if all the belligerents are parties to the convention,"¹¹ it may fairly be contended that the agreement was not applicable in the instant case. Whether or not, therefore, it was to be regarded as applicable, it is not apparent how either Russia or Germany could properly invoke the privilege of sequestration against the United States. Without the benefit of the treaty they were impotent to do so; by means of the treaty minus Article XXIII they were no better off.

It may be noted that in reported discussions concerning the *City of Flint* there appears to have been no reference to the matter of sequestration of the vessel. It was rather suggested that the ship proceeded to the distant port of Murmansk for other reasons, such as on account of defective machinery

⁹ It may be noted that the United States did not sign the convention, but deposited its adherence subsequently, with the reservation and exclusion of Art. XXIII.

¹⁰ It is perhaps, therefore, unnecessary to seek to appraise the significance of acts on the part of Germany or Russia in connection with the negotiation of the convention or thereafter, which may point to acceptance of the terms of the adherence by the United States. Nevertheless, certain statements that have been made in relation to the matter are of interest: "With reference to the action taken by the Government of the United States, in its declaration of adherence to the Convention, in reserving and excluding Article XXIII, I have to inform you that it does not appear from the official records of this Government that any formal acknowledgment or acceptance of this reservation was made on the part of any of the contracting parties." (Mr. Charles M. Barnes, Chief, Treaty Division, Dept. of State, to the writer, Dec. 18, 1939.)

Declares Mr. Hunter Miller: "It thus appears to have been within the contemplation of the Powers, particularly in view of the very numerous reservations made at signature to the different conventions of 1907, that a non-signatory Power might make its reservations upon adhesion, at least in the case when such Power has made what may be called a general reservation, such as was made by China, and, as to Convention XIII, by the United States." (David Hunter Miller, *Reservations to Treaties*, Washington, 1919, pp. 152 and 154.) Mr. Miller also adverts to the fact that the delegation of the United States made an express general reservation in regard to the convention itself at the eighth plenary session of the Conference on October 9, 1907, *id.*, 153.

It may be noted that in the *Reichs-Gesetzblatt*, 1910 (No. 3715), p. 382, is printed the text of the reservation by the United States, from which may be fairly drawn the conclusion that Germany formally accepted the terms of the American adherence.

¹¹ Malloy's *Treaties*, II, 2362.

or unseaworthiness. In view, however, of the position of the vessel when captured and when it later approached the coast of Europe, where Scandinavian ports were nearer at hand and better available to satisfy the legitimate needs of the ship and its occupants, it is not unreasonable to conclude that sequestration was the real end in view when Murmansk was sought and became the destination of the vessel.¹² Such a conclusion finds support, moreover, in data released by the Department of State, on October 28, 1939.¹³

It is not sought to be intimated that the *City of Flint* could not have been in need of such succor as Russia might lawfully have yielded when the vessel approached or entered the harbor at Murmansk. The Soviet authorities did not, however, offer to the United States evidence of such a state of facts, or proof that the relatively protracted sojourn of the ship in Russian waters was necessary.¹⁴ Thus, when the vessel was permitted to leave Murmansk

¹² It may have been realized at Berlin as well as Moscow that sequestration was a dangerous matter to inject into any diplomatic controversy concerning the treatment of the ship. It must have been perceived that the Government of the United States was shrewd enough and likely to be persistent enough to expose the weakness of an acknowledgment that sequestration had been sought by the captor or yielded however briefly by the neutral sovereign at Murmansk. In the circumstances of the case it was more convenient to allege the need of legitimate succor, even though the allegation lacked a solid foundation and was merely to be utilized as a face-saving device.

¹³ Declared the Department of State in its statement of Oct. 28, 1939: "The conclusion from the foregoing facts and circumstances indicates that when the *City of Flint* entered the harbor at Murmansk, any plea relating to the chart requirements if advanced must have been ignored since the German crew was interned. A second and entirely different reason for entering at Murmansk, namely, defective machinery which called for immediate repairs, was not advanced until later. A subsequent cable from the American Chargé d'Affaires at Berlin, also dated October 26, quoted a statement of the Foreign Office at its noon press conference to the effect that the fact that the Russians have freed the German crew indicates that the Soviet authorities have confirmed the view of the prize crew that the *City of Flint* was unseaworthy and it was therefore permissible to take the ship into a neutral harbor. . . . It seems manifest that even if it is assumed that the German crew was proceeding legally prior to the entry of the *City of Flint* into the harbor of Murmansk, the known facts and circumstances support the contention of the American Government that the German crew did not at the time of entry offer any reasonable or justifiable grounds such as are prescribed by international law for taking the vessel into this port, and that therefore it was the clear duty of the Soviet Government to turn the *City of Flint* over to the American crew. This has been the major contention of the American Government.

"In view of the foregoing facts and circumstances, each person can judge for himself the question as to how much light is shed on this entire transaction by the action of the Soviet Government in withholding adequate coöperation with the American Government with respect to assembling and disclosing to the American Embassy in Moscow the essential facts pertaining to the landing, the whereabouts, and welfare of the American crew; by the fact that it was first alleged by the German authorities that the need for charts was the ground for bringing the vessel into port; and by the fact that later this ground seems to have been abandoned and a new ground or theory relating to defective machinery was set up." (Dept. of State Bulletin, Oct. 28, 1939, p. 432.)

¹⁴ On Oct. 30, 1939, the Department of State announced a Tass agency report, communicated by the American Ambassador at Moscow, stating that "on October 28 in the evening

in the custody of the German prize crew, those authorities neither evinced the disposition, nor undertook in fact to make full and reasonable explanation of the privileges yielded to the German captor. Accordingly, there was much ground for the American contention that Russia had failed to indicate the existence of a situation that sufficed to excuse the giving of the succor that was yielded, and that in allowing the vessel to depart in the custody of the prize crew, there was unconcern for an obligation due to the United States, and which assumed the form of the bestowal of an improper benefit upon the captor of an American ship. It was the absence of a showing that the extended sojourn at Murmansk was in fact occasioned or demanded by needs of the *City of Flint* which the neutral territorial sovereign under the customary or conventional law (as exemplified by the provisions of Article XXI of the Hague Convention) could lawfully satisfy, which emphasized the impropriety of the benefit.

The Norwegian Government, in the light of information which it possessed when the *City of Flint* anchored at Haugesund on November 3, against the will of the territorial sovereign, is believed to have been warranted in releasing the prize from the captor, and in giving it over to its American crew. By such means, moreover, Norway respected the obligation which it owed to the United States with respect to the ship.¹⁵

Notwithstanding the obscurity surrounding the factual situation which for a time produced confusion of thought and perhaps also subtlety of statement, the case of the *City of Flint* revealed the zeal of the captor, regardless of the applicable law, to seek places of sequestration or succor for its prize, and the readiness of a European neutral state to smooth the way of the captor without much concern for the rights of that other neutral state to which the ship belonged.

CHARLES CHENEY HYDE

THE "NEUTRALITY ACT OF 1939"

In 1935, the United States adopted the view that its neutrality—in the sense of non-involvement in war—could best be preserved in future wars by the relinquishment of certain neutral rights which we had traditionally and vigorously maintained. A major part of this decision was the adoption of the embargo on arms, ammunition and implements of war. This decision was reached after thorough public discussion and amid much publicity, although Congressional debates were limited and rather inconclusive. The decision was under attack and was reargued in 1936, 1937 and the winter and spring of 1939. In each case it was sustained. After the outbreak of war in Europe in September, 1939, it was again debated and the conclusion reached in time

the steamship *City of Flint*, after the machinery had been repaired, left the port of Murmansk." (Dept. of State Bulletin, Nov. 4, 1939, p. 457.)

¹⁵ See report from the American Minister to Norway, released Nov. 3, 1939, Dept. of State Bulletin, Nov. 4, 1939, p. 458.