

ships by his Majesty's Government with a view to the capture of contraband trade on its way to the enemy has not contributed nearly so much to the shortage of shipping as has the destruction of neutral vessels by submarine mines indiscriminately laid by the enemy on the high seas, many miles from the coast, in the track of merchant vessels."

As evidence of the liberal treatment of neutral commerce by Great Britain, the note mentions a rule of the Prize Court which allows the release of cargoes without the necessity of entering a claim in the court by simply producing the documents of title to the officer representing the Crown, who, later, in order to avoid the delays of interdepartmental communication, was succeeded by a special committee which sits daily, receives full reports by telegraph as soon as a ship reaches port, and decides whether it may be allowed to proceed and whether her cargo or any part of it must be discharged and put into the Prize Court. Whenever proceedings are instituted against portions of the cargo of neutral ships, every effort is made to secure the speedy discharge of the cargo and the release of the ship, and where the ship is held for the action of the prize courts it may, pending adjudication, be released on bail.

Finally, special attention is directed to the jurisdiction of the British Prize Court to deal with any claim for compensation by a neutral arising from the interference with ship or goods by the British naval forces.

MINES, SUBMARINES AND WAR ZONES—THE ABSENCE OF BLOCKADE

Another striking feature of the present war is the absence of blockade formally declared and applied in the way in which that doctrine has been previously recognized, namely, by the actual patrol of the enemy's coasts and waters with a sufficient number of cruisers to prevent ingress and egress. In its place "military areas" or "war zones," depending for their effectiveness upon submarine mines and torpedo boats, have been established not only within the enemy's waters, but upon the high seas. The penalty meted out to neutrals for entering these zones is not the penalty which may be legitimately invoked for breach of blockade, namely, confiscation of vessel or cargo after condemnation by a prize court, but, in case a neutral ship comes in contact with a mine or is encountered by a submarine, it must almost inevitably be sunk with its cargo regardless of whether either be guilty or innocent, and the passengers and crew, whether combatants or non-

combatants, left to the precarious fate of saving their own lives in the ship's boats or of being rescued by vessels which may happen along at that time.

The use of mines in the sea is not a novelty of naval warfare introduced in the present war. They were successfully used in the American Civil War for the defense of harbors and the destruction of blockading ships, but the area affected was limited to territorial waters, within which nations have the right to protect themselves by all means at their disposal. It is when such deadly engines of destruction are placed beyond the territorial jurisdiction or are allowed to drift there that the right of neutral nations to the freedom of the seas is impinged upon. In protesting against the reported use by Peru in its war with Chile in 1880 of "boats containing explosive materials" which were set adrift on the chance of their coming in contact with some of the blockading squadron, Mr. Evarts, Secretary of State, said that such means of warfare, so dangerous to neutrals, should "be at once checked, not only for the benefit of Peru, but in the interest of a wise and chivalrous warfare, which should constantly afford to neutral Powers the highest possible consideration."¹ And the Chinese Government bitterly complained of the losses sustained by its subjects in both life and property owing to the destruction of Chinese vessels by floating mines, not only during but after the Russo-Japanese War, which may or may not have been placed within territorial waters. It remained for the leading maritime nations of the world in the present conflict, claiming to represent its highest civilization, openly to place mines in certain strategic parts of the high seas and formally to warn neutral vessels to keep out of them.

According to a statement made in the House of Commons by Prime Minister Asquith on November 17, 1914, Great Britain "deliberately abstained, and abstained entirely, from the use of mines during the first two months of the war outside British territorial waters, but eventually found it necessary to adopt counter-measures in order to cope with the German policy of mine-laying combined with their submarine activity. A mine field was therefore laid across the southern portion of the North Sea in such a way as to guard the approaches to the English Channel and due public warning was given in accordance with the Hague convention."²

¹ Moore's International Law Digest, Vol. VII, p. 366.

² London *Times*, November 18, 1914.

Shortly thereafter the French Ministry of Marine announced that France had been forced to take similar measures in the Adriatic as a precaution against the activity of the Austro-Hungarian submarines. A danger zone was delimited, comprising the territorial waters of Austria-Hungary and the channels between the islands on the Dalmatian coast, and neutral ships were warned of the dangers of navigating those waters.³

On October 17, 1914, Russia announced that, in view of the presence of German submarines at the entrance to the Gulf of Finland, and the placing by the enemy of bombs and torpedoes near the Russian coast, the Russian naval authorities were compelled to have recourse to similar steps, and gave warning that navigation would be dangerous in a zone bounded by the Russian coast, by Par. 15° 50' N. Lat., and by the M. 21° E. Long., and likewise the entrance to the Gulf of Riga and the coast waters of the Aland Archipelago.⁴

On November 3, 1914, the British Admiralty announced that beginning with November 5, 1914, the whole of the North Sea would be considered a military area, within which merchant shipping of all kinds, traders of all countries, fishing craft and all other vessels would be exposed to the gravest dangers from mines which have been laid and from war ships searching vigilantly by night and day for suspicious craft. All ships passing a line drawn from the northern point of the Hebrides through the Faroe Islands to Iceland would do so at their peril. The ships of all countries wishing to trade to and from Norway, the Baltic, Denmark and Holland were advised to proceed by way of the English Channel and the Straits of Dover, where sailing directions would be given them. They were warned of the dangers they would encounter by entering this area except in strict accordance with the Admiralty's directions, but, "by strict adherence to these routes, the commerce of all countries will be able to reach its destination in safety, so far as Great Britain is concerned, but any straying, even for a few miles, from the course thus indicated may be followed by fatal consequences."

In justification of this unprecedented action in closing to neutral navigation a stretch of the open sea approximately 500 miles in length, as well as a large sea upon which neutral nations depend for their waterborne foreign commerce, the Admiralty announcement stated that "during the last week the Germans have scattered mines indiscrimi-

³ London *Times*, October 8, 1914.

⁴ *Ibid.*, October 19, 1914.

nately in the open sea on the main trade route from America to Liverpool via the north of Ireland, with consequent loss to peaceful merchant ships and lives." The statement continues:

These mines cannot have been laid by any German ship of war. They have been laid by some merchant vessel flying a neutral flag which has come along the trade route as if for the purposes of peaceful commerce, and while profiting to the full by the immunity enjoyed by neutral merchant ships, has wantonly and recklessly endangered the lives of all who travel on the sea, regardless of whether they are friend or foe, civilian or military in character. * * * In these circumstances, having regard to the great interests entrusted to the British navy, to the safety of peaceful commerce on the high seas, and to the maintenance within the limits of international law of trade between [with] neutral countries, the Admiralty feel it necessary to adopt exceptional measures appropriate to the novel conditions under which this war is being waged.⁵

In making a further explanation in the House of Commons on November 17, 1914, Premier Asquith charged that the German naval authorities resorted from the commencement of the war to the indiscriminate laying of mines in large numbers in the North Sea outside territorial limits, and he repeated the Admiralty's charge that neutral flags had been used for that purpose. Germany had, he said, not only violated the principle of the freedom of the seas for peaceful trading, but had failed to observe the provisions of the Hague convention relative to the laying of submarine mines. "The menace to peaceful shipping presented by these wholly illegal methods of waging war is so great," said Mr. Asquith, "that his Majesty's Government have been compelled to adopt the only possible means of protection, namely, to declare the whole North Sea to be a military area and to restrict all shipping crossing it to a narrow passage, along which the strictest supervision can be exercised." Referring to the effect of this action upon neutrals, the Prime Minister said:

His Majesty's Government are fully aware of the anxiety prevailing in the United States and other neutral countries on these subjects, and they trust that their policy will be fully understood. They are confident that public opinion in neutral countries will appreciate their earnest desire that there should be no interference with neutral trade provided the vital interests of Great Britain, which are at stake in the present conflict, are adequately maintained. Any interference by the British navy is directed not to increase British trade or to diminish the trade of any neutral foreign country, but solely to prevent goods from reaching the enemy which would increase his power in the war against the British and allied forces.⁶

⁵ London *Times*, November 3, 1914.

⁶ *Ibid.*, November 18, 1914.

It was Germany's turn next, and on February 4, 1915, she issued the following decree:

The waters around Great Britain, including the whole of the English Channel, are declared hereby to be included within the zone of war, and after the 18th instant all enemy merchant vessels encountered in these waters will be destroyed, even if it may not be possible always to save their crews and passengers.

Within this war zone neutral vessels are exposed to danger since, in view of the misuse of neutral flags ordered by the Government of Great Britain on the 31st ultimo and of the hazards of naval warfare, a neutral vessel cannot always be prevented from suffering from the attacks intended for enemy ships.

The routes of navigation around the north of the Shetland Islands in the eastern part of the North Sea and in a stretch 30 miles wide along the Dutch coast are not open to the danger zone.⁷

In explanation of this action, which added to the dangers from mines the announced intention of deliberately sinking commercial vessels on sight regardless of the safety of passengers and crews, the German Government published an official memorandum "concerning retaliation against the measures taken by England in violation of international law, to stop all neutral sea commerce with Germany."⁸ The memorandum charged that, although Great Britain had announced that the Declaration of London would be binding on its naval forces during the war, she had renounced it in its most important parts; that she had placed on the contraband list articles which, according to the Declaration and the universally recognized rules of international law, may not be designated as contraband, and had practically abolished the distinction between absolute and conditional contraband; that she had violated the Declaration of Paris and her own decrees by seizing non-combatant German property on neutral ships and had taken from such ships German subjects liable to military service. Finally, the memorandum charges that by declaring the entire North Sea to be an area of war, Great Britain has, to a certain extent, effected a blockade of neutral coasts and ports in violation of international law. These measures, Germany states, are aimed not only at her military strength but to starve her entire population. Neutral Powers, the memorandum continues, have generally acquiesced, especially have they failed to effect the restoration of the German subjects and property seized upon their ships, and have aided the British measures by adopting export and transit embargoes which prevent the passage of goods for peaceful

New York *Times*, February 7, 1915.

⁸ *Ibid.*, February 7, 1915.

purposes to Germany. Great Britain, having appealed to her vital interests as a justification for her methods of warfare, Germany also appeals to the same vital interests, and just as England has designated the area between Scotland and Norway as an area of war so Germany declares the waters indicated in the decree to be an area of war.

The Department of State at Washington on February 10, 1915, lodged a protest with Germany against the enforcement of the decree in the manner indicated as regards American vessels. The American note declared that:

The sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized.

With reference to the charge in the German memorandum that neutral governments had acquiesced in and aided the British measures, Secretary Bryan reminded Germany that:

The Government of the United States is open to none of the criticisms for neutral action to which the German Government believe the governments of certain of other neutral nations have laid themselves open; that the Government of the United States has not consented to or acquiesced in any measures which may have been taken by the other belligerent nations in the present war which operate to restrain neutral trade, but has, on the contrary, taken in all such matters a position which warrants it in holding those governments responsible in the proper way for any untoward effects upon American shipping which the accepted principles of international law do not justify; and that it, therefore, regards itself as free in the present instance to take with a clear conscience and upon accepted principles the position indicated in this note.

To this protest Germany replied on February 16, 1915, that her action is an act of self-defense, which her vital interests force her to take against England's method of conducting maritime war and which neutral protests have failed to bring into accordance with the principles of international law generally recognized before the outbreak of hos-

tilities. Germany claims that she has scrupulously observed the existing provisions of international law relative to maritime war, especially the Declaration of London, and has permitted food supplies to reach England which it was within the power of her naval forces to prevent. England, on the contrary, "has not shrunk from grave violations of international law wherever she could thereby cripple Germany's peaceable trade with neutral countries, with the stated intention to cut off Germany from all supplies and starve her peaceful civilian population." Although neutrals have protested against this illegal interception of trade with Germany, they have not succeeded in dissuading England from the course originally adopted. The situation is summarized by Germany as follows:

Germany is to all intents and purposes cut off from oversea supplies with the toleration, tacit or protesting, of the neutrals regardless of whether it is a question of goods which are absolute contraband or only conditional contraband or not contraband at all, following the law generally recognized before the outbreak of the war. On the other hand England with the indulgence of neutral governments is not only being provided with such goods as are not contraband or merely conditional contraband, namely, foodstuffs, raw material, et cetera, although these are treated by England when Germany is in question as absolute contraband, but also with goods which have been regularly and unquestionably acknowledged to be absolute contraband. The German Government believe that they are obliged to point out very particularly and with the greatest emphasis, that a trade in arms exists between American manufacturers and Germany's enemies which is estimated at many hundred million marks.

Continuing, the reply, without charging a formal breach of neutrality, emphasizes the fact that Germany is "placed at a great disadvantage through the fact that the neutral Powers have hitherto achieved no success or only an unmeaning success in their assertion of the right to trade with Germany, acknowledged to be legitimate by international law, whereas they make unlimited use of their right to tolerate trade in contraband with England and our other enemies." In view of this situation, Germany states that she is compelled to invoke the same powers of famine as a drastic counter-measure against England, and relies upon neutrals to display no less tolerance toward Germany, even if the German measures constitute new forms of maritime warfare, as has hitherto been the case with the English measures. In addition, Germany is determined to suppress with all the means at her disposal the supply of war material to England and her allies and as-

sumes that neutrals which have not prevented this trade will not oppose its forcible suppression by Germany.

The German Government disclaims any intention to destroy neutral rights and property, but can not shut its eyes to the dangers arising from mines which menace without discrimination all trade within the area of maritime war. Germany will not accept responsibility for accidents which may happen to neutral ships entering the closed waters. Such ships will not be destroyed or interfered with except to search for contraband and to take the necessary action if the presence of such un-neutral cargoes is established.

The reply further calls attention to the misuse of neutral flags by English merchant vessels and the arming of such vessels to resist German submarines. These practices make it "difficult for the German submarines to recognize neutral merchant vessels as such, for even a search will not be possible in the majority of cases, since the attacks to be anticipated in the case of a disguised English ship would expose the commanders conducting a search and the boat itself to the danger of destruction." The continued misuse of neutral flags would render the German measure illusory and Germany must make her measures effective at all events. In the expectation that the American Government will require England to respect the American flag in the future, Germany states that she has instructed the commanders of her submarines to abstain from violence to American merchant vessels when they are recognized as such. Germany suggests, however, that it would be much safer if the United States convoyed their ships carrying peaceable cargoes and traversing the English seat of maritime war, provided that only such ships should be convoyed as carry no merchandise which would be considered as contraband according to the interpretation applied by England against Germany. The reply concludes:

The German Government repeat that in the scrupulous consideration for neutrals hitherto practiced by them they have determined upon the measures planned only under the strongest compulsion of national self-preservation. Should the American Government at the eleventh hour succeed in removing, by virtue of the weight which they have the right and ability to throw into the scales of the fate of peoples, the reasons which have made it the imperative duty of the German Government to take the action indicated, should the American Government in particular find a way to bring about the observation of the Declaration of London on the part of the Powers at war with Germany and thereby to render possible for Germany the legitimate supply of foodstuffs and industrial raw materials, the German Government would recognize this as a service which could not be too highly estimated in favor of more

humane conduct of war and would gladly draw the necessary conclusions from the new situation thus created.

In connection with the foregoing correspondence it may be interesting to recall the provisions of the Hague convention of 1907 relative to the laying of automatic submarine contact mines. This convention was signed and ratified by the following belligerents engaged in the present naval war: Austria-Hungary, France, Germany, Great Britain and Japan. It was entered into for a period of seven years dating from the sixtieth day after the date of the first deposit of ratifications, which took place on November 27, 1909. It contains the usual stipulation that it shall not apply except when all the belligerents are parties to the convention.

The convention forbids the laying of unanchored automatic contact mines except when they are so constructed as to become harmless one hour after control over them has ceased; the laying of anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; the use of torpedoes which do not become harmless when they have missed their mark. It is also forbidden to lay automatic contact mines off the coast and ports of the enemy with the sole object of intercepting commercial shipping, but this provision was not accepted by France and Germany. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping and the belligerents undertake to do their utmost to render them harmless within a limited time, and, when they have ceased to be under surveillance, to notify the danger zones, as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the governments through the diplomatic channel.

At the time of its signature, dissatisfaction was expressed with the convention, not so much because of what it contained, but because of what it did not contain in the way of added prohibitions. Particularly interesting at this time are the remarks at the Conference made by Sir Ernest Satow on behalf of the British delegation:

Having voted for the Mines Convention which the Conference has just accepted, the British delegation desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the convention of the rights of neutrals to protection, or of humanitarian sentiments which cannot be neglected. The British delegation has done its best to

bring the Conference to share its views, but its efforts in this direction have remained without result. The high seas, gentlemen, form a great international highway. If in the present state of international laws and customs belligerents are permitted to fight out their quarrels upon the high seas, it is none the less incumbent upon them to do nothing which might, long after their departure from a particular place, render this highway dangerous for neutrals who are equally entitled to use it. We declare without hesitation that the right of the neutral to security of navigation on the high seas ought to come before the transitory right of the belligerent to employ these seas as the scene of the operation of war.

Nevertheless, the convention as adopted imposes upon the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defense, in the waters of the enemy as a means of attack, or finally on the high seas, so that neutral navigation will inevitably run great risk in time of naval war and may be exposed to many a disaster. We have already on several occasions insisted upon the danger of a situation of this kind. We have endeavored to show what would be the effect produced by the loss of a great liner belonging to a neutral power. We did not fail to bring forward every argument in favor of limiting the field of action for these mines, while we call very special attention to the advantages which the civilized world would gain from this restriction, since it would be equivalent to diminishing to a certain extent the causes of warlike conflicts. It appeared to us that by acceptance of the proposal made by us at the beginning of the discussion, dangers would have been obviated which in every maritime war of the future will threaten to disturb friendly relations between neutrals and belligerents. But, since the Conference has not shared our views, it remains for us to declare in the most formal manner that these dangers exist, and that the certainty that they will make themselves felt in the future is due to the incomplete character of the present convention.

As this convention, in our opinion, constitutes only a partial and inadequate solution of the problem, it cannot, as has already been pointed out, be regarded as a complete exposition of international law on this subject. Accordingly, it will not be permissible to presume the legitimacy of an action for the mere reason that this convention has not prohibited it. This is a principle which we desired to affirm, and which it will be impossible for any state to ignore, whatever its power.⁹

Equally interesting is the reply of Baron Marschall von Bieberstein on behalf of Germany:

That a belligerent who lays mines assumes a very heavy responsibility towards neutrals and towards peaceful shipping is a point on which we are all agreed. No one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character. But military acts are not solely governed by stipulations of international law. There are other facts. Conscience, good sense, and the sense of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it (*je le dis à haute voix*), will always

⁹ Scott, *The Hague Peace Conference of 1899 and 1907*, Vol. I, pp. 585-586.

fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognize the importance of the codification of rules to be followed in war. But it would be a great mistake to issue rules the strict observation of which might be rendered impossible by the law of facts. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view—is possible even in exceptional circumstances. Otherwise the respect for law would be lessened and its authority undermined. It would also seem to us to be preferable to maintain at present a certain reserve, in the expectation that seven years hence it will be easier to find a solution which will be acceptable to the whole world. As to the humanitarian sentiments of which the British delegate has spoken, I cannot admit that there is any country in the world which is superior to my country or my Government in the sentiment of humanity.¹⁰

THE USE OF NEUTRAL FLAGS ON MERCHANT VESSELS OF BELLIGERENTS

The United States took official notice of the declaration of the German Admiralty on February 4, 1915, that the British Government had on January 31, 1915, explicitly authorized the use of neutral flags on British merchant vessels for the purpose of avoiding recognition by the German naval forces, and on February 11, the American Ambassador at London, acting under instructions of the Department of State, addressed a communication to Great Britain, which, reserving 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, pointed out the serious consequences which may result to American vessels if the practise be continued. The action of the captain of the *Lusitania*, who had recently raised the American flag as his vessel approached the British coast in order to escape anticipated attacks by German submarines, was called to the attention of the Foreign Office, and, in requesting Great Britain to restrain British vessels from the deceptive use of the flag of the United States in the sea area defined in the German declaration, Secretary Bryan said:

The occasional use of the flag of a neutral or an enemy under the stress of immediate pursuit and to deceive an approaching enemy, which appears by the press reports to be represented as the precedent and justification used to support this action, seems to this government a very different thing from an explicit sanction by a belligerent government for its merchant ships generally to fly the flag of a neutral Power within certain portions of the high seas which are presumed to be frequented with hostile warships. The formal declaration of such a policy of general misuse of a neutral's flag jeopardizes the vessels of the neutral visiting those waters in a peculiar

¹⁰ Scott, *The Hague Peace Conference of 1899 and 1907*, Vol. 1, pp. 586–587.