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# DEFENSIVELY - ARMED MERCHANT SHIPS AND SUBMARINE WARFARE

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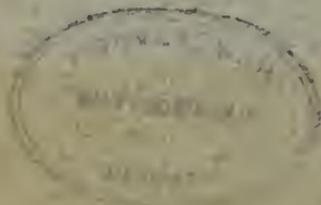
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MERCHANT SHIPS  
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SUBMARINE WARFARE

BY

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## DEFENSIVELY ARMED MERCHANT SHIPS AND SUBMARINE WARFARE.

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### *Introductory.*

IN the month of July, 1914, I prepared a paper on Armed Merchant Ships which I had undertaken to read at the Meeting of the International Law Association which was to be held at the Hague in the following September. I sent the transcript to the Honorary Secretary, and a copy to Professor James Brown Scott, the Editor of the American Journal of International Law, and then went abroad for a holiday. On my return to England at the end of August, I found that the paper was already in type. As the meeting of the International Law Association had necessarily been abandoned owing to the outbreak of war, and as the paper dealt with a question which had already become one of immediate importance, I arranged for its publication as it stood as a pamphlet.<sup>1</sup> It also appeared in the October number of the American Journal of International Law.<sup>2</sup> Early in 1916 it was published, together with other articles, and extracts from works on International Law on the same subject by the United States Government as a Senate document.<sup>3</sup>

Much has happened since August, 1914. Old problems in new forms have arisen, and a further examination of them, in view of new developments, seems called for.

I propose in the following pages shortly to recapitulate the evidence and the conclusions reached in the former paper, written, it will be noticed before the outbreak of the war, conclusions to which I fully adhere; to add further evidence which has been acquired since that paper was written; and to discuss the unprecedented situation which has arisen in view of the German use of submarines as commerce destroyers.

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<sup>1</sup> Published by Messrs. Stevens & Sons, Chancery Lane, London.

<sup>2</sup> Vol. viii., pp. 705-722.

<sup>3</sup> International Relations of the United States, 64th Congress, 1st Session Document No. 332.

*Evidence of the arming of merchant ships in the past.*

The historical evidence in this country as to the arming of merchant ships in self-defence from the time of Charles I. onwards is conclusive. A Proclamation of 1625, Acts of Parliament of 1662 (13 & 14 Car. II., c. 11), 1664 (16 Car. II. c. 6), 1670 (22 & 23 Car. II. c. 11), an Order in Council of 1672 ordering vessels before clearing from port to give security that they would provide themselves with firearms and swords for defence, and a Statute of 1694 (5 & 6 Will. & Mary, c. 24), all were passed with a view of encouraging and enforcing the peaceful trading vessel to provide herself with the necessary means of defence. The practice was common, but sometimes dangerous, and an Act was passed in 1732 (5 Geo. II. c. 20) forbidding armed merchant ships lying in the Thames above Blackwall to keep their guns shotted or to fire them between sunset and sunrise. In order, however, that small ships should not take advantage of the practice of carrying guns to resist or evade revenue cutters Statutes were passed limiting their armament, and later forbidding it altogether, except in the case of foreign-going traders (24 Geo. III. c. 47; 34 Geo. IV. c. 50), but the restriction imposed by the Statute of 1784 were removed on the outbreak of war in 1793 by an Order in Council. During the Napoleonic wars, it is evident that trading vessels frequently went armed, both those of subjects of belligerent as well as those of neutral States, and the right and duty of all belligerent merchant ships to defend themselves was recognised by the Prize Courts of England, France and the United States.<sup>1</sup> Not only did the ships of belligerent States carry guns for self-defence in war time, but vessels carried arms in times of peace, and the continuity of the practice, after the close of the Napoleonic wars, is to be seen in the fact that the ships of the East India Company went armed certainly down to 1834, and probably till a

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<sup>1</sup> *Several Dutch Schuyts*, 6 C. Rob, 48; *The Catherina Elizabeth*, 5 C. Rob. 232; *The Two Friends*, 1 C. Rob. 271; *The Nereide*, 9 Cranch, 388; *U.S. v. Quincy*, 6 Peters, 445; *Cushing v. U.S.* 22 Ct. Cl. 1; *Hooper v. U.S.* 22 Ct. Cl. 408; *Le Pignon* 2 Pistoye et Duverdy, Prises Maritimes 51, C. de Boeck, *Propriété privée* sec. 212, E. Nys, *Le droit international* (1906) iii. 181. *Talbot v. Seeman* (The Amelia) 1 Cranch, 1.

much later date. Many were the fights in self-defence which these gallant East Indiamen made during the period of the French wars.<sup>1</sup> The ships of the Dutch East India Company also carried defensive armament.

*Continuance of the practice in the 19th century.*

If the practice of arming merchant ships in self-defence became less common during the latter part of the 19th century, it did not wholly die out, and American Secretaries of State in 1877 and 1894 gave the opinion that there was no international prohibition against an American ship carrying guns and arms for self-defence in the South Sea Islands, and the laws of the United States did not forbid the carrying of guns and ammunition on a schooner which entered Haytian waters, so long as no hostilities were committed against the persons or property of foreign powers with whom the United States were at peace.<sup>2</sup> The question of the position of defensively armed merchant ships was incidentally discussed in the case of the *Panama*,<sup>3</sup> which came before the United States Supreme Court in 1899. She was a Spanish vessel which left port before the outbreak of the Spanish-American War in 1898, carrying two 9-centimetre bore guns and a Maxim, together with arms and ammunition, and, being captured in ignorance of the outbreak of war, claimed exemption from condemnation as a mail ship under the terms of the President's Proclamation of the 20th April, 1898. She was, however, under contract with the Spanish Government to be taken over for war purposes, and the Court, in these circumstances, decided that she was not entitled to the exemption granted by the President's Proclamation. (The *Panama* would, since the Sixth Hague Convention, 1907, have come under the designation of a ship "whose construction indicates that she is intended to be converted into a warship.") But in the course of his judgment, Mr. Justice Gray said: "It

<sup>1</sup> Low's History of the Indian Navy, Vol. i., p. 12; Hannay, The Sea Trader, his Friends and Enemies, 347-358. See also "The Times," 2nd February, 1916, "Armed Traders."

<sup>2</sup> J. B. Moore's Digest of International Law, ii., p. 1070.

<sup>3</sup> 176 U.S. Rep. 535; J. B. Moore's Digest of International Law, VII., p. 456.

must be admitted that arms and ammunition are not contraband of war when taken and kept on board a merchant vessel as part of her equipment and solely for her defence against 'enemies, pirates and assailing thieves,' according to the ancient phrase still retained in policies of marine insurance." He also quoted Pratt (Contraband of War, xxii., xxv., xl.), who, after speaking of the class of articles of direct use in war, said: "But even in the case of articles of direct use in war, an exception is always made in favour of such a quantity of these as may be supposed to be necessary for the use or defence of the ship." Again speaking of "warlike stores," he adds: "These are, from their very nature, evidently contraband; but every vessel is, of course, allowed to carry such a quantity as may be necessary for purposes of defence: this provision is expressly introduced in many treaties." In the same judgment the French case of *Le Pégou* or *Pigou* is also cited with the following opinion of Portalis: "I do not think it is enough to have or to carry arms to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce and not for war. The arms found on this ship were evidently intended not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war, therefore, appears to me to be unfounded." This ship, it will be observed, was a neutral captured as being an uncommissioned ship of war, but released on the evidence showing that she was armed solely for defence. The reasoning of Portalis, quoted by the Supreme Court of the United States without disapproval, and as a high autho-

rity applies generally to the legitimacy of arming in self-defence as well as to the nature of the armament, which may be evidence that the ship is a warship and not a defensively-armed merchant ship.

*The views of an American International Lawyer.*

The practice of nations and decisions of Prize Courts appear without exception to have recognised the legitimacy of arming merchant ships for self-defence, and except for some *ballons d'essai* put forth by certain German lawyers in 1913, the position on the outbreak of war is correctly summarised by Dr. Ellery C. Stowell in a remarkable article in "The New York American," of 7th March, 1916, in the following words: "The important consideration is that upon the outbreak of this war we find merchantmen possessing the right to arm for defence. Before the war I had never heard that this right had been questioned, yet it was well understood that piracy and privateering were no longer a menace to peaceful commerce."

*A German International Lawyer on the same subject since the War.*

This is also the view of Dr. Hans Wehberg, a German international lawyer who, in a work on the law of naval warfare, published since the outbreak of the present war, says: "The resistance of enemy merchant ships to capture would then only be unlawful if a rule against this had found common recognition. But, in truth, no single example can be produced from international precedents in which the States have held resistance as not being lawful." He then cites Lord Stowell's decision in the *Catharina Elizabeth* and the provisions of the United States Naval War Code, 1900, and the 12th Article of the Rules proposed by the Institute of International Law in 1913, and he adds, "If it was a question of making a new rule, ships ought to be allowed to defend themselves. Should great merchant ships worth millions allow themselves to be taken by smaller vessels simply because the

latter comply with the requirement of a warship? ”<sup>1</sup> The conclusion to be stated as a result of the examination of the practice of States, the legislation of the war codes and opinions of text writers and bodies of international lawyers is that at the outbreak of the present war it was a recognised rule of international law that merchant vessels were entitled to defend themselves against enemy attack, and for such purpose they were entitled to carry arms and ammunition.<sup>2</sup>

*German attack on the arming of merchant ships in 1913.*

One note of dissent only had been raised, and that shortly before the outbreak of the War and on the part of Germany. In 1913 Dr. Schramm published a work entitled *Prisenrecht in seiner neuesten Gestalt*,<sup>3</sup> and Dr. Triepel, in the summer of the same year, put forward at the Oxford Meeting of the Institute of International Law the view that self-defence on the part of merchant ships was not allowable. The official connection of these two authorities with the German Admiralty makes their attitude significant, in the light of recent occurrences. Dr. Schramm is described in the title-page of his book as “Geheimer Admiralitätsrat und vortragender Rat im Rechts-Marine-Amt” (Legal Adviser to the German Admiralty), while Dr. Triepel, in the biographical notice in the “Annuaire de l’Institut de Droit International” (1913), is described as having been appointed “Professeur ordinaire à l’Université de Kiel et à l’Académie de la Marine militaire (Marine-Akademie) en 1909”; in 1913 he was appointed to a chair in the University of Berlin.

The point of view taken up by these German lawyers is a reflex of the German attitude towards resistance by

<sup>1</sup> *Das Seekriegsrecht* (1915), p. 284.

<sup>2</sup> Italian Code for the Mercantile Marine, 1877, Art. 209; Russian Prize Regulations, 1895, Art. 15; U.S. Naval War Code, 1900, Art. 10; Hall, *International Law*, 456; Oppenheim II., 85; Phillimore III., sec. 339; Twiss II., sec. 97; Snow, pp. 83, 84; Wheaton, sec. 528; Stockton, 179; De Boeck, *De la propriété privée ennemie*, sec. 212; Dupuis, *Le droit de la guerre maritime* (1899), 121; Fiore, secs. 1627, 1698; Nys III., 181; J. H. Fergusson, sec. 225; *Annales de l’Institut* (1913), 644; Perels, *Internationale Seerecht* (1903), 191

<sup>3</sup> Pp. 308-10, 357.

unauthorised forces in land warfare. It arises from a complete confusion between the position of neutral and enemy merchant ships in regard to resisting visit and search by a belligerent warship.

*Rules of land and sea warfare are different.*

Dr. Schramm showed how completely he was dominated by the analogy of land warfare by the treatment which he alleged was due to officers and crews who resisted, for he lays it down that such persons are to be dealt with according to the criminal law of the captor's State, except such of them as are enrolled in the enemy's forces who could claim to become prisoners of war. Such a distinction is unknown, and was unheard of before it appeared in the pages of Dr. Schramm, and is wholly illogical. Dr. Schramm's position was carefully examined and controverted by Professor Oppenheim in a German review.<sup>1</sup> The suggestion of Dr. Schramm that the uncommissioned vessel's crew must be dealt with as *franc-tireurs* or unlawful combatants, is denied by Dr. Wehberg, who says: "It is unfounded to say that because in war on land armed resistance may not be carried out by civilians, therefore that is also the case in war at sea. It might equally well be said that on land private property is inviolable, therefore the same must apply to war at sea. But such a position is untenable. . . The doctrine that 'armed resistance' is only allowed to organised troops is, in the general view, as false as the assertion that war is only a legal relation between States and excludes the peaceful population" (p. 283). "The act of resistance has no influence on the fate of the crew of an enemy merchantman" (p. 286).

It may be worth while looking a little more closely at this point of the alleged similarity between the rules applicable to land and sea warfare since one of the "Wishes" (*Vœux*) of the Hague Conference, 1907, was to the effect that the Powers should, as far as possible, apply to war by sea the principles of the Convention relative to the law and

<sup>1</sup> Zeitschrift für Völkerrecht, VIII., 154.

customs of war on land. This *Vœu* was passed as the result of a long and unsuccessful attempt by one of the Hague Committees to prepare a code for naval warfare on the same lines as those on which the Hague Regulations for land warfare had been drawn. The Committee found this task impossible, as there were so many points of difference between land and sea warfare as to render fundamental modifications necessary. Wehberg truly remarks, "One can in no way draw conclusions for sea warfare from principles which have found common recognition in land warfare" (p. 284). The main reason why on land it has been found necessary to draw a marked distinction between belligerent acts committed by civilians and those done by members of the armed forces has been the protection of the army of occupation, and, in order to ensure that the apparently peaceful artisan or labourer shall not change his character from day to day, being one day a soldier and another day a civilian. But even in unoccupied territories the Hague Regulations recognise as lawful the resistance of the inhabitants who spontaneously take up arms at the approach of the invader without having time to organise themselves in accordance with the general rules (Art. 2).

Private property on land is not to be confiscated, but at sea, enemy merchant ships, though private property, have always been liable to capture and confiscation. The crews have always been liable to be treated as prisoners of war; they are therefore justified, if they can, in rescuing their ship from the captor if it has been captured, for their action is no more than a continuation of that resistance to the enemy's force which it is their duty to offer whenever there is a chance of success.<sup>1</sup>

*Professor von Eysinga's doubts.*

One other writer, in addition to the two German professors, has adversely criticised the policy of the British Admiralty in arming merchant ships. Jonkheer W. J. M. von Eysinga, a Professor at Leyden University, had also

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See *The Two Friends*, 1 C. Rob., 271.

prepared a paper on Armed Merchantmen for the Meeting of the International Law Association at the Hague in 1914, in which he approached the topic from a point of view quite different from that taken in the paper I had written.<sup>1</sup> He doubts whether defensively-armed ships will keep strictly to their defensive rôle. He fails to distinguish between the positions of neutral and enemy merchant ships when approached by belligerent warships. He considers that merchant ships have been encouraged by the British Government to defend themselves in a "heretofore unheard-of" manner, and that such self-defence is calculated to produce sorry consequences. He raises the question of the difficulty of neutral Powers admitting armed merchant ships of belligerent nationality into their ports, and proposes the "regularisation" of such ships by giving them commissions as auxiliary men-of-war, and suggests that the arming of merchant ships, since privateers have been abolished, is a retrogressive step.

It is unnecessary in detail at this point to controvert these propositions, many of which have already been shown to have no real foundation in the practice of States. It is sufficient to say that, in my opinion, the paper is based on misconceptions and imperfect knowledge of the naval wars of the past, and the allegation made on the authority of M. Surie, a captain in the Dutch Navy, that merchant vessels armed at the expense of the State have the essential character of warships, is equally wanting in force. Merchant vessels may be converted into warships, but this conversion must be in conformity with the Seventh Hague Convention, 1907. Until this has been complied with they remain merchant ships, even though they may be armed. However, as we are accumulating evidence as to the practice of States and opinions of publicists, it is not right to omit a reference to this short article, which is, in effect, inconclusive, and appears to be dictated by ideas of policy rather than by the accepted doctrines of the Law of Nations.

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<sup>1</sup> International Law Association Reports, 1913-15, with Hague Papers, 171.

*Armed merchant ships in the present War.*

We leave Dr. Schramm, Dr. Triepel and the Dutch Professor, and pass on to a consideration of the occurrences since the outbreak of the present War in regard to the legitimacy of the arming of merchant ships and the meaning of the right of defence against attack. But, as a conclusion to this part of the subject, it may be well to notice that in the past there has been no question of confusing the defensively-armed merchant ship with the commissioned ship of war, whether belonging to the State Navy or merely commissioned as a privateer by Letters of Marque. The distinction was well known and universally recognised; the former could lawfully resist attack and visit by an enemy warship, but was not entitled to exercise the function of a warship in visiting, searching and capturing neutral or enemy vessels—such an act as against neutrals would have been piratical.

*The German Naval Prize Regulations on armed merchant ships.*

In the first place, it is necessary to ascertain the view taken by the German Admiralty in their Naval Prize Regulations. These Regulations, dated the 30th September, 1909, together with an Appendix dated the 22nd June, 1914, relating to the procedure to be adopted in regard to armed merchant ships in war, were published in Berlin on the 3rd August, 1914. The Regulations in the main are unexceptionable. They are based on the Hague Conventions and the Declaration of London, but they are incomplete on many points, and have received alterations since the outbreak of the present War. The Appendix contains two Articles, which are as follows:—

“(1) The exercise of the right of visit, search and capture, as well as every attack on the part of an armed merchant ship upon a German or neutral merchant ship is considered an act of piracy. The crew is to be proceeded against in accordance with the Regulations as to extraordinary martial law procedure.

“(2) If an armed merchant vessel offers armed resistance against measures taken under the law of prize, this

is to be broken down by all means possible. The enemy Government is responsible for any damage thereby caused to the ship, cargo and passengers. The crew are to be treated as prisoners of war. The passengers are to be liberated unless it is proved that they have taken part in the resistance. In the latter case they are to be proceeded against in accordance with the extraordinary martial law procedure."

On these two Articles there is little to be said. In the main they admit the validity of the argument in favour of enemy merchant ships arming themselves in self-defence and resisting by armed force the exercise of the right of visit, search and capture on the part of enemy warships, and place the burden of compensating such merchant ships for any damage done as a result on the enemy Government.

The first Article of the German Appendix is in accord with the generally accepted rules of International Law. A defensively-armed merchant ship must not exercise the right of visit, search and capture, and must not make an attack on an enemy ship. A good deal will turn on the meaning of the word "attack."

The 2nd Article of the German Appendix does not speak of defence and resistance to visit and search by an *unarmed* enemy vessel, and it was apparently because the *Brussels* was unarmed and attempted to ram a German submarine that Captain Fryatt was shot as a *franc-tireur*.<sup>1</sup> But, the rule in the past was that any merchant vessel, armed or unarmed, might resist. Obviously, in practice it would rarely happen that an unarmed ship would venture to resist, but there is not the slightest doubt of the legality of resistance. Recapture of a vessel was,

<sup>1</sup> Dr. James Brown Scott discussing the execution of Captain Fryatt in the *American Journal of International Law*, Vol X (1916), at p. 877 speaking of Article 2 of the Appendix to the German Naval Prize Regulations, says: "It left untouched the right of belligerent merchant vessels to defend themselves against attack, whether armed or unarmed, by means of guns or by ramming the enemy vessel, if the master of the merchantman is skilful enough so to do. The Article does not state the manner in which the vessel is to be armed, and it is no strained construction to consider the merchantman in its entirety as an arm so far as the submarine is concerned." The conclusion which Dr. Scott reaches as to the execution of Captain Fryatt is that if the views he has expressed are correct, "the execution of Captain Fryatt appears to have been without warrant in international law and illegal, whatever it may have been according to the municipal ordinances of Germany."

also not uncommon, and the members of the crew that failed in its attempt were not treated as unlawful combatants, pirates or robbers, any more than are prisoners of war who unsuccessfully attempt to escape from confinement; clearly they ran grave risks of being killed in the proceeding.<sup>1</sup>

The Austro-Hungarian Prize Regulations contain no specific reference to armed merchant ships. These Regulations are merely extracts from Hague Conventions and the Declaration of London, but under the heading of "Crews of captured enemy merchant ships," Article 8 of the Eleventh Hague Convention is included, which states that the provisions relating to the release on parole of the crews of enemy merchant ships who become prisoners of war do not apply to ships taking part in hostilities.

*Recognition by Neutral States of the right to arm merchant ships since August, 1914.*

Neutral States almost unanimously have recognised the legality of the arming of merchant ships, by admitting them to their ports on the usual terms of ordinary merchant vessels. Some States, in order the more surely to enforce respect for their neutrality, have made special rules on the subject of the evidence necessary to be produced in order to convince the port authorities that the merchant ships would not undertake offensive operations.

*United States.*

The first set of rules issued by the United States on 19th September, 1914, placed an undue burden on defensively-armed ships. They commenced by giving full recognition to the arming of merchant ships in self-defence, in these words: "A merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defence without acquiring the character of a ship of war," but the Regulations then proceeded on the basis that the presence of armament and ammunition on board a merchant vessel created a presumption that the armament was for offensive purposes, which presumption the owners

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<sup>1</sup> As to rescue by neutrals, see Dana's note in Wheaton, p. 475.

had to overcome by evidence. Amongst the various indications that the armament would not be used offensively was the fact that the calibre of the guns did not exceed 6 inches ; that they were few in number and not carried on the forward part of the ship ; that the vessel was manned by its usual crew, the officers being the same as those on board before the war ; that the vessel carried passengers, particularly women and children, and that the speed of the ship was slow.<sup>1</sup>

Many of these indications appear to be oppressive and unnecessary. The old defensively-armed ships were not limited as to the number of guns carried, their position, or their calibre. If they were not commissioned ships of war they were merchant ships, and enjoyed all the privileges of hospitality accorded to merchant ships. However, the Regulations just referred to are now replaced by others issued on the 25th March, 1916, which are an admirable statement of the position of armed merchant ships from the two points of view—(1) of a neutral when the vessel enters its ports, (2) of an enemy when the vessel is on the high seas ; this is followed by a consideration of the rights and duties of neutrals and belligerents as affected by the status of armed merchant vessels in neutral ports and on the high seas.<sup>2</sup> One important paragraph dealing with the position of an armed merchant ship on the high seas may be quoted : “(7) When a belligerent warship meets a merchantman on the high seas which is known to be enemy-owned, and attempts to capture the vessel, the latter may exercise its right of self-protection either by flight or by resistance. The right to capture and the right to prevent capture are recognised as equally justifiable.”

No other States are known to have issued so full a statement on the subject as the United States. Some few others have issued regulations for the admission of armed merchantmen to their ports.

### *Uruguay.*

Uruguay, on the 8th September, 1914, issued Regulations,

<sup>1</sup> These Regulations are printed in Appendix A.

<sup>2</sup> This Memorandum is printed in Appendix B.

in the first of which it was provided that ships which arrive at Uruguayan ports, although carrying arms, but carrying passengers and cargoes in the ordinary operations of navigation, will be considered as devoted to commerce, while if armed merchant ships carried neither passengers nor cargo they would likewise be considered as merchant ships if the Legation of the country to which they belonged made a declaration in writing to the Foreign Minister that they were in fact solely intended for commerce.<sup>1</sup>

### *Chile.*

Chile also admits armed merchant ships to her ports, if previous notification is made; if one arrives without such notification it is considered as suspect.<sup>2</sup>

### *Spain.*

Spain requires the captain, owner or agent of a defensively-armed merchant vessel, on visiting a Spanish port, to make a written declaration within twenty-four hours after arrival (through the intervention of the British consul, if there is one at the port), that the vessel is destined exclusively for commerce; that it will not be transformed into a ship of war or auxiliary cruiser before returning to its own country; that the armament on board will only be used for the defence of the vessel in case of attack.

### *The Netherlands.*

Only one State has refused to admit defensively-armed merchant ships into its ports on the footing of ordinary merchant ships. The Dutch Government considers that as such ships are in case of necessity to commit acts of war they are assimilated to warships, and by Article 4 of the Declaration of Neutrality issued by it the presence of no belligerent ship of war or ship assimilated thereto is allowed within the jurisdiction of the State, except on account of distress or of weather. The Dutch Government

<sup>1</sup> Rev. Gén. de Droit international public, xxii., Doc. 193.

<sup>2</sup> A. Alvarez, *La grande guerre européenne et la neutralité du Chili*, 259. In a communication of Sir Edward Grey to the Chilean Foreign Minister on 18th June, 1915, he stated that defensively-armed merchant ships regularly visited the ports of the Argentine, Brazil, Uruguay, the United States and Spain. (A. Alvarez, *op. cit.*, 258.)

admitted, in correspondence with the British Government, that the Law of Nations authorised ships to defend themselves, but contended that it did not follow that neutrals were bound to admit ships armed for the purpose into their ports; the right of self-defence was a matter falling within the laws of war, but the admission of defensively-armed ships into neutral ports was a question falling within the law of neutrality. The Dutch Government contends that the view it adopts is supported by the great majority of writers on International law.<sup>1</sup>

In view of the uniform practice of all other States as to the admission of such defensively-armed merchant vessels into their ports, the attitude of the Dutch Government appears to be wholly unjustifiable. The general rules of neutrality afford every protection to a State whose hospitality may be abused by a defensively-armed belligerent merchant vessel. Every vessel armed or unarmed is entitled to defend itself, and so in case of necessity to commit acts of war, and the *Brussels* after having successfully driven off a German submarine, continued for many months afterwards to enter Dutch ports. The explanation, if any, of the Dutch attitude in thus refusing admission of armed merchant ships into its ports and waters must, it would seem, be found in policy and expediency, and not in law.

#### *Other States*

It is probable that other neutral States have made regulations for the admission of armed merchant ships to their ports which have not, so far, come under my notice. It is also understood that many such States freely admit armed merchant ships without having issued any formal regulations, relying on the general principles of the law of nations that if it should prove that they have misused the hospitality of such ports their States will be liable to make reparation for the violation of the neutrality of such State. No such occurrence is known to have taken place.

#### *What armament may defensively-armed ships carry?*

It may be advisable to say a few words on the subject of

<sup>1</sup> Dutch Orange Book (French translation), Sept., 1916, p. 163.

the nature of the armament of defensively-armed ships. Several of the Statutes already referred to provide for merchant ships carrying from 16 to 30 guns, and many of the East Indiamen carried as many as 38 guns; none of the latter armed ships appear to have carried less than 10.<sup>1</sup> There was not, nor is there to-day, any ground for suggesting that while one or two guns placed in the stern of a ship determine her character as a merchant ship, the possession of more guns placed in other parts of the vessel would convert her into a warship. The possession of armament no more converts a merchant ship into a warship than the cowl makes the monk. There are, however, very practical considerations which must limit the number of guns placed on merchant ships. They are chiefly these: the capacity of the vessel to carry the guns and their mountings and the number of guns and mountings that are available. International law places no restriction on the armament of merchant vessels. It is, however, certain that occurrences during the progress of a war may lend support to a belligerent's determination to increase the defensive armament of his merchant ships beyond that which was deemed necessary in its earlier stages. For the present, British and Allied merchant ships carry only a small number of guns, one or two, but that is because the enemy's surface warships have been driven from the seas and compelled to remain in their own ports. Only sufficient armament is carried to enable the merchant ships to resist submarine attacks. If enemy cruisers were afloat and operating against the mercantile marine of the Allies, there would be every reason in law and fact for entitling them to carry a greatly increased armament; the increased size of submarines may also require that defensively-armed merchant ships should be provided with heavier armament than was originally intended. Neutral Powers have no cause for alarm on this head, their rights are safeguarded by the law of neutrality.

*What is "Defensive armament"?*

There is sometimes apparent a confusion of thought in respect of the term "defensive" armament. There is, in

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<sup>1</sup> See a list given in Steel's Navy List for 1815.

fact, no difference between offensive and defensive armament; a six-inch gun can be used for either purpose; but a six-inch gun is placed on a merchant ship in order to enable it to defend itself from capture "It is not the nature of the armament, but the use which is made of it, that makes it offensive."<sup>1</sup> A warship is entitled to act on the offensive, to visit, search and capture enemy or neutral ships; the armed merchantman must do none of these things, except when capture follows on a successful resistance to attack by an enemy warship.

*Resistance by unarmed merchant ship.*

There is perhaps need to say a few words regarding the defensive-offensive which a ship may take when unprovided with guns. The unarmed merchant ship, by heading for a submarine is as much defending herself as the armed merchant ship is by firing her gun. This action has not infrequently proved effective, as it causes the submarine to submerge, its power of vision is lost, and the merchant ship also presents the smallest possible target for attack. The merchant ship thus obtains an opportunity of escape. The turning to face an assailant is often the best means of putting a bully to flight. It is unnecessary to labour this point; it would have been unnecessary even to refer to it but for the judicial murder by the Germans of Captain Fryatt for having taken this action to defend his ship. When it is remembered that if the unarmed merchant ship resists by attempting to force down the submarine the captain has been shot, and if he surrenders, his ship is sunk without an opportunity for escape being afforded to passengers and crew, there is every reason in policy and law for the captain doing all he can to defend his vessel.

*Should defensively-armed merchant ships be commissioned?*

It has been more than once suggested, in letters to the public press in England, that, in order to avoid the possibility of a recurrence of such an episode as the execution of

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<sup>1</sup> Dr. Ellery Stowell in "The New York American," 7th March, 1916.

Captain Fryatt, all armed merchant vessels should be commissioned as warships and their officers given commissions in the Royal Naval Reserve. There are three main reasons for not granting commissions to defensively-armed merchant ships. First, to adopt the suggestion would be a complete surrender to the Germans of the position for which Great Britain has been contending, namely, that merchant vessels, as such, have, and always have had, a right to defend themselves and to carry armament for the purpose. Secondly, the conditions on which neutral States permit belligerent warships to make use of their ports are such as would effectually prevent a commissioned merchant ship from loading or unloading cargoes and from carrying on commercial intercourse with them. A third reason is, that if armed ships were commissioned as ships of war, the enemy would at once have the undoubted right of attacking and sinking without warning. Further, the suggestion that the possession by a captain of a commission in the Royal Naval Reserve would in any way increase his legal powers of self-defence is equally inadmissible, and betrays the German confusion of thought which fails to distinguish between the rules of land and sea warfare.

*Some general principles of the laws of naval warfare.*

So far the subject of the rights of merchant ships to defend themselves from enemy attack, and to arm in self-defence, has been considered apart from any relation to submarine warfare against merchant shipping. Before dealing with that point, a few elementary principles of the laws of naval warfare, which were of universal acceptance before the outbreak of the present war, and some of which even find recognition in the German Naval Prize Rules, may be stated.

All merchant ships are liable to be visited and searched by commissioned warships of a belligerent State. Visit and search are necessary to ascertain the nationality and status of the merchant ship and are an essential preliminary to capture. Visit and search are rights conferred on belligerents *jure belli* as against neutrals, while as

against enemies they are ancillary to the right of capture, and it has become a duty imposed by the customary law of nations to visit enemy ships in order to avoid bloodshed of non-combatants and to give effect to the recognised exemption from capture of certain classes of enemy ships. This operation may be effected on the high seas or within the territorial waters of one of the belligerent States. All enemy merchant ships are liable to capture and condemnation, with a few exceptions, such as hospital ships, inshore fishing boats, small boats engaged in local trade, cartel ships, etc.

Neutral vessels must not resist the exercise of the right of visit and search by belligerent warships; if they do so they are liable to capture and condemnation.

Merchant vessels of belligerents have the right to resist visit and search; if they do so they may be compelled by force to surrender. When resistance has ceased, or the vessel has hauled down her flag, it is the duty of the captor to make every reasonable effort to save all on board. The crew, on surrendering, become prisoners of war, and as such must be treated with humanity. When captured, merchant vessels should be taken into a port of the captor and proceedings in prize taken for their due condemnation. One of the chief reasons for this is because almost invariably neutral property or rights are involved.

Captured enemy vessels may be destroyed under special circumstances, but before the vessel is destroyed all persons on board must be placed in safety and the papers on board must be preserved.<sup>1</sup> This was clearly recognised by the German Naval Prize Regulations, which state: "Before the destruction of a vessel, all persons on board are to be placed in safety, with their goods and chattels, if possible." (Art. 116.)

A merchant vessel, though armed, must not act as a warship. It therefore must not attempt to visit, or search, or in any way interfere with or obstruct the operations of other merchant vessels or fishing boats of any nationality.<sup>2</sup>

<sup>1</sup> See Hague Convention, VI., 1907, Art. 3.

<sup>2</sup> W. E. Hall, *Int. Law*, 525; Taylor, 497; *The Curlew* (1812, Stew. Adm., 326); Wehberg, *op. cit.*, 285.

A belligerent merchant ship, if attacked, may not only defend itself, but may, if strong enough, overpower its assailant and sink or capture it.<sup>1</sup>

Great Britain does not admit that a merchant ship can change its status into a warship on the high seas. All States do not recognise this rule, and it was primarily with a view of meeting the possibility of the conversion on the high seas of merchant ships into warships, which several important Powers contended was lawful, that the British Admiralty reverted to the old policy of seeing that the mercantile marine carried armament for self-defence.<sup>2</sup>

*The general law of resistance by merchant ships.*

The old law was developed in relation to warfare which was conducted by non-submersible vessels. The master of a belligerent merchant ship, seeing on the horizon a suspicious vessel, either determined to attempt to escape by flight, or realising the impossibility of this procedure, he had two courses open to him—either to continue his voyage and wait till summoned to surrender by the enemy cruiser, and then to haul down his flag; or he might decide to resist. This decision would largely depend on the type of ship whose approach he was awaiting. If he she were a heavily-armed warship, he would then generally decide to avoid useless waste of life, but if she were a privateer or a small and lightly-armed cruiser, he would, and in practice often did, defend his ship.

Assuming that he decided to adopt the latter course, the cruiser overhauled the merchant ship, and when within gunshot hailed her, but the latter was under no obligation to wait till summoned to surrender before opening fire. The evidence of offensive action on the part of the enemy was and is sufficient.

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<sup>1</sup> Hall, *loc. cit.*; De Boeck, *Propriété privée*, sec. 212; Kent, *Int. Law* (Abdy's ed.), p. 246; Nys, *Le Droit International* (1906), III., 181; Wehberg, *op. cit.*, 285.

<sup>2</sup> See the statement in the House of Commons of the First Lord of the Admiralty (the Rt. Hon. Winston S. Churchill) on 26th March, 1913.

*The right of a belligerent merchant ship to resist visit.*

The right to resist capture includes the right to resist visit and search, and the latter includes the right to resist approach. As soon as the belligerent merchant ship is aware that an enemy warship shows an intention to effect its capture, that is the moment for the defensive-offensive to commence. Dr. Wehberg, our German authority, is clear on this point: "The enemy merchant ship has then the right of defence against an enemy attack, *and this right he can exercise against visitation, for this is indeed the first act of capture.*"<sup>1</sup> The possibility that a merchant ship might carry guns and resist visit and capture was always present to the minds of the captains of warships and privateers, but it was never suggested that they were entitled, without warning, to open fire with heavy guns or torpedoes on enemy merchant ships at a distance merely because of the possibility that if they went closer it might be found that the merchant vessel carried guns and would defend herself. "The presumption was conclusive that the war vessel would be sufficiently strong to overcome and render useless any defence. If not, so much the worse for the attacking party. He was not permitted to make the merchantman's possible strength the excuse for a surprise attack."<sup>2</sup> Dr. Ellery Stowell expresses the same view when he says: "If a belligerent wishes to prey upon his enemy's commerce he must be in sufficient strength to overcome the armament which will be opposed against him by the merchantman."<sup>3</sup>

*Has the abolition of Privateering destroyed the right of merchant ships to arm in self-defence?*

It has been urged by Mr. Lansing, in his Note of the 18th January, 1916, that the arming of merchant vessels was introduced to enable them to resist the unlawful actions of privateers, or to resist pirates, and that, as privateering

<sup>1</sup> *Das Seekriegsrecht*, 285.

<sup>2</sup> Prof. Raleigh C. Minor in *Proceedings of the American Society of International Law*, April, 1916, 53.

<sup>3</sup> "The New York American," 7th March, 1916.

has been abolished by the Declaration of Paris, and piracy is no longer a danger to navigation, the reason for arming has ceased. Dr. Schramm and Professor von Eysinga also use the same argument. This assertion cannot be sustained by evidence. Privateers were duly commissioned warships, as much as those of the regular State Navy, and the danger apprehended from the modern converted cruisers, which have in a sense taken the place of the old privateers, was the prime reason for the Admiralty's policy in 1913 of approaching British shipowners, in order to encourage them to make provision against the possibilities of the conversion on a large scale on the high seas of merchant ships into cruisers. The British and Allied Fleets have so far successfully dealt with the cruisers of the enemy, but the case of the *Moewe* was sufficient to show that, quite apart from submarine attacks, the step was a wise one. Those, however, who contend for the theory of the origin of defensive armament suggested by Dr. Lansing overlook the fact that the methods of the modern enemy submarine are far more barbarous and inhuman than those of the privateers of old, and Professor Ellery Stowell adduces two cogent reasons, with which I entirely agree, for the continuance of the practice of arming merchant ships.

They are: "First, because the wholesale sinking of vessels has been brought about by new conditions. There is now more reason that belligerents should be allowed to arm their merchantmen, so as to interpose a reasonable obstacle to an excessive recourse to this terrible practice.

"Secondly, belligerent merchantmen now carry large numbers of non-combatant passengers, many of whom are neutrals. Until there is some guarantee that the lives of these passengers will be adequately protected before the vessel is sunk, and that they will not be placed in boats too far from land or in rough weather, it would be contrary to the fundamental principles of law and common-sense to interfere with the right of the merchantman to provide whatever protection it can muster. With the advent of the submarine and other new inventions which make it possible to conduct successful raids on belligerent and neutral commerce, even where the belligerent is not in control of the

seas, it would be more logical to do away with the exorbitant right of sinking vessels."

A third reason may be added, namely, that the effectiveness of submarines would be greatly increased if they were freed from the possibility of any resistance by armed merchant ships, while there would be no guarantee of their complying with the laws of war.

Examples of the barbarous methods of the submarines of the Central Powers have been omitted from these pages, they have been frequently reported and have been described in a graphic manner by Mr. Noyes in a series of articles on "Open Boats," contributed to the Press. One recent case, publicly notified by the Secretary of the Admiralty on the 30th December, 1916, may, however, be cited; it is an example of the savagery with which the submarine policy is being carried out. On 14th December the British SS. *Westminster*, proceeding in ballast from Torre Annunciata to Port Said, was attacked by a German submarine, without warning, when 180 miles from the nearest land, and struck by two torpedoes in quick succession, which killed four men. She sank in four minutes. This ruthless disregard of the rules of international law was followed by a deliberate attempt to murder the survivors. The officers and crew, while effecting their escape from the sinking ship in boats, were shelled by the submarine at a range of 3,000 yards. The master and chief engineer were killed outright and their boat sunk. The second and third engineers and three of the crew were not picked up, and are presumed to have been drowned.<sup>1</sup> The commander of the submarine could have had no means of ascertaining whether the ship was armed or unarmed, as he attacked her at a distance of nearly two miles.

*Can submarines observe the rules of International Law when attacking commerce?*

It now remains to apply the rules of naval warfare previously set forth to the case of submarines, and at the same time to consider the position of the submarine in naval warfare.

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<sup>1</sup> *The Times*, 30th December, 1916.

A submarine engaged in attacks on commerce cannot comply with the hitherto accepted rules of International Law. The commander has not enough men to place a prize crew on board a captured ship, and if he sinks the prize he cannot place the crew and passengers in a place of safety. The sinking of prizes when the ships are *enemy* has, in the past, only been resorted to in exceptional cases, and the Law of Nations and humanity has demanded, and the German Prize Regulations recognise the validity of the rule, that all persons on board should be placed in safety and not committed in small boats, miles from the nearest land, to face the perils of the sea.

*Neutral* merchant ships, and those whose nationality is doubtful, must not be sunk, they must be brought in for adjudication by a Prize Court. If this is found to be impossible, owing to the commander being unable to spare a prize crew, the vessel must be released, for her detention cannot be justified as between the neutral owner and the captor by any necessity on the part of the belligerent.<sup>1</sup> This was the rule of the British Prize Courts which was embodied in the British Manual of Naval Prize Law, edited by Professor Holland (Art. 302). It is not of universal acceptance, though it is universally recognised that, in principle, a neutral prize must be taken into port for adjudication. Some Governments, such as those of Great Britain, Japan and Holland, considered the rule against destroying neutral prizes as admitting of no exception, or, if the destruction had been effected, decreed compensation; others allowed destruction only as an exceptional measure and under specially determined cases. The unratified Declaration of London adopted a compromise by first prohibiting the destruction of neutral ships, and then, by way of exception, allowing a belligerent warship to destroy a neutral vessel if two conditions were satisfied, namely, (i.) that she would be liable to condemnation, and (ii.) that the taking in of the vessel would involve danger to the safety of the warship or the success

<sup>1</sup> *The Acton*, 2 Dods, 48; *The Felicity*, 2 Dods, 381; *The Leucade*, Spinks, 231.

of the operation in which she was engaged at the time. Before, however, the vessel is destroyed it is provided that all persons on board must be *placed in safety*, and all the ship's papers and other documents which the parties interested considered relevant for the purpose of deciding on the validity of the capture *must be taken on board the warship* (Articles 48-50).<sup>1</sup> Liability to condemnation is an essential preliminary to the right to destroy conferred by these Articles; unless this condition is fulfilled the right to destroy does not exist. Though those Articles fail to reach the British standard they sufficiently denote that the destruction of neutral vessels was recognised as being a very exceptional proceeding, whereas with the Germans it has become the rule. Neutral and enemy ships have alike been sunk by German submarines, frequently without any attempt being made to discriminate between them. The submarine was certainly on its introduction not intended for use as a commerce destroyer, for the reason that it was and remains physically incapable of complying with the accepted rules of International Law. It cannot take prizes in for condemnation by a Prize Court, and so give neutral owners of goods on board an opportunity to put forward their claims for restitution of their goods, protected by the Declaration of Paris and the older rule of the *Consolato del Mare*.

The United States Government, in their Note to the German Government of the 13th May, 1915, after the sinking of the "Lusitania," pointed out that experience had demonstrated that submarines, from their very nature, could not be used in the destruction of commerce "without disregarding those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative." Nearly a year later, on the 19th April, 1916, the President of the United States, in explaining to Congress the situation in the controversy with Germany, after pointing out that the torpedoing of the *Sussex* was merely one of the latest and most shocking instances of the German method of warfare, and not an exceptional or isolated case, added: "It has therefore become painfully evident that the position

<sup>1</sup> The destruction of neutral vessels is dealt with by Prof. J. W. Garner in "The American Journal of International Law," Vol. x. (1916), pp. 12-41.

which this Government took at the very outset is inevitable, namely, that the use of submarines for the destruction of an enemy's commerce is of a necessity, because of the very character of the vessels employed and the very methods of attack which their employment of course involves, incompatible with the principles of humanity, the long established and incontrovertible rights of neutrals, and the sacred immunities of non-combatants."

*Can Germany make new laws for her submarine warfare?*

The submarine being a new instrument of war, and the existing rules of the law being found to be detrimental to its use as a commerce destroyer, it is urged that by reason of its fragile character as an offensive weapon the rule of self-defence by enemy merchant ships must be abandoned, and other rules introduced for the protection of the submarine, so that it may, without incurring danger, effect the capture and destruction of enemy merchant vessels. But this is entirely contrary to all the principles of war. If a belligerent is allowed to use force against his adversary, it is not for him to complain if the weapon employed is of insufficient strength. It is for him to assure himself that the weapon he uses will be strong enough to overcome all possible resistance. The attempt to change existing rules to the advantage of the party that is not in command of the surface of the sea, is an attempt to avoid the consequence of naval weakness. War is not to be conducted on the analogy of handicapping rules of a race meeting.

It would follow from these proposals that it would be inadmissible for an enemy merchant ship to resist visit and capture; that she should be placed in the same position as a neutral ship, and bound to stop and submit to capture when called upon to do so by any warship of the enemy, whether armed or unarmed. Such a solution of the question would certainly simplify the question of commerce destroyers for Germany. If this rule were adopted, all that a State would require in the future would

be a fleet of fast vessels armed with signalling guns, and the only practical objection to this would be the possibility of their encountering ships of the other belligerent's Navy.

The answer to the question, therefore, whether the introduction of the submarine as a commerce destroyer has made or necessitates any change in the Law of Nations is an emphatic negative. Submarine warfare on commerce is carried on by the Central Powers in defiance of the Law of Nations and humanity.

But recently the German Government has changed its front, and urges through Herr Zimmerman that "Our cruiser warfare with submarines is being conducted in strict compliance with the German Prize Regulations, which correspond to the international rules laid down and agreed to in the Declaration of London, and this despite the fact that England has refused to be bound by the London Declaration. Germany, accordingly, will continue to exercise her perfect good right to take these defensive measures."<sup>1</sup> The Declaration of London contains no word on the subject of the destruction of enemy merchant ships, but, as already stated, it does allow the sinking of neutral vessels under exceptional circumstances, when they are liable to condemnation, and if all relevant papers are taken off the vessels and the passengers and crew are placed in safety. Cruisers have not acted as submarines have done: even German cruisers, when they were able to keep the seas, did not act in this way. Frequent cases have occurred of the sinking of neutral ships without warning, and when armed enemy merchant ships have been thus sunk, the possession of the defensive armament could in many cases not have been known to the submarine's commander, for no attempt was made to ascertain even their enemy character by visit. The disastrous result of the abandonment of visit and search received its most striking illustration in the sinking of the *Lusitania*.

This question of the right of Germany to make new laws for the conduct of her submarine warfare has another aspect which must not be overlooked. The high seas are the high-

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<sup>1</sup> *New York Times*, 17th November, 1916.

way of the ships of all nations, neutrals and belligerents, and neutrals are entitled to travel freely on the merchant ships of the belligerents without danger of running greater risk than the inconvenience which is the necessary consequence of the capture of the vessel. The attacks without warning on merchant ships have shown that, even on the most favourable assumption, the imperfect and limited vision of the submarine has led to the sinking of neutral vessels. In the case of the American vessel the *Gulflight* Herr von Jagow admitted that "the American flag was first observed at the moment of firing the shot," and in the case of the *Nebraskan*, another American ship, the German Memorandum of the 15th July, 1915, stated that "in the twilight, which had already set in, the name of the steamer was not visible from the submarine" ; while in the case of the attack on the Cunard steamer, the *Orduna*, the excuse made by the German Memorandum of the 9th September, 1915, was the "difficulty of observation, caused by the unfavourable weather."<sup>1</sup> The Entente Allies take their stand on the long-established rules of International Law which have been evolved in the interests of humanity and as safeguards of neutral rights. These are both negated by the proceedings of the Central Powers. It is, therefore, not only in their own interests, but also in those of neutrals that they protest against the view that Germany can, by reason of the defensive weakness of submarines, make new rules and advance claims which would put not only belligerent but neutral shipping at their mercy. Submarine warfare against commerce is, from the nature of the instrument, bound to inflict injury on neutrals, both in their person as well as in their property, by the indiscriminate sinking of prizes, whereby the protection given by the Declaration of Paris is rendered wholly illusory. Even in the case of a belligerent whose faith was irreproachable, mistakes would certainly be made and neutral ships would be sunk. "This certainty makes it imperative to prohibit absolutely the use of submarines in commercial warfare."<sup>2</sup>

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<sup>1</sup> "The Round Table," June, 1916, p. 504.

<sup>2</sup> "The Round Table," p. 528.

*Should the use of submarines as commerce destroyers  
be allowed?*

It has been impossible, in view of the German submarine attacks on commerce, both Allied and Neutral, to avoid this discussion in relation to the position of the defensively-armed merchant ships. On the one hand gatherings of expert international lawyers are already examining the question whether changes in existing rules may properly be made which would relieve the submarine of the disabilities under which it now labours. On the other Professor Minor, who opened such a discussion at the Annual Meeting of the American Society of International Law, in April, 1916, came to the conclusion that the only possible answer to the question what rules should govern the conduct of submarines in warfare upon commerce would seem to be: "There must be **no** submarine warfare on commerce," and that "it would follow that a submarine ought to be prohibited to approach or pursue a merchant vessel, whether enemy or neutral, on the high seas, unless itself in distress or to relieve distress, in either of which cases its mission would protect it from attack. Under other circumstances its approach would lay its motives open to such suspicion as would justify an attack upon it by the merchantman in self-defence—an attack which it would have brought upon itself and to which it would not be justified in replying." This is the policy pursued in the Instructions issued by the British and Allied Navies. The commanders of armed merchant ships are instructed that "British and Allied submarines and aircraft have orders not to approach merchant vessels. Consequently, it may be presumed that any submarine or aircraft which deliberately approaches or pursues a merchant vessel does so with hostile intention. In such cases fire may be opened in self-defence, in order to prevent the hostile craft closing to a range at which resistance to a sudden attack with bomb or torpedo would be impossible."<sup>1</sup>

This instruction makes clear the position of the captains of

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<sup>1</sup> These Instructions were printed in full in "The Times," 3rd March, 1916; they will also be found in Appendix C.

armed merchant ships as to the meaning of attack on the part of enemy submarines. Any offensive movement, any indication that a submarine is approaching or pursuing a British merchant ship gives the master at once the right to open fire or take such other steps as he may think most suitable to ward off the impending attack. The fact that a merchantman is unarmed in no way diminishes the master's right of self-defence.

The captain of the *Brussels* attempted to ram a submarine in self-defence, and was executed as an unauthorised combatant, in defiance of every rule of International Law, for this law follows the common-sense principle of the English Common Law and, it is believed, of the laws of all civilised States, that any circumstance denoting at the time an intention, coupled with a present ability to use actual violence against a person is sufficient to justify the latter in striking in self-defence; he need not wait till the other has actually struck his blow; if he did, he probably would not have a chance of reply. This is the real defensive-offensive action—"visit is the first act of capture," just as (using the words in their technical sense in English law) assault is incipient battery and at once justifies a blow in self-defence.

*German methods of submarine warfare are illegal.*

The methods of warfare pursued by the enemy submarines of the Central Powers during the present War raise questions not alone for their enemies, but for neutral Powers. British and Allied shipmasters may defend and resist attack on their vessels, but meantime hundreds of neutral vessels are being sunk in defiance of the rules of international law. The United States has engaged in lengthy correspondence with the German Government in regard to the injury inflicted on her passengers who have been victims of the submarine warfare. It obtained certain promises, such as that enemy ships carrying passengers shall not be attacked within the war zone round the United Kingdom and France without having received a summons to stop, and if the vessels are sunk, crews and passengers shall not be placed in small

boats, except when the state of the sea or the nearness of the coast enables them to reach a neighbouring port; outside the war zone such rules as to attack without warning are to apply to all merchant ships, but there is no provision as to the safety of passengers and crew. Within the war zone there is also no protection for non-passenger vessels, and these so-called concessions are made by Germany only; Austria is not a party. Notwithstanding these promises since May, 1916, 33 ships have been sunk without warning, and with a loss of 140 lives.<sup>1</sup> Compromise is impossible on this subject; the choice is a clean-cut one between the barbarity of submarine warfare as conducted by the Germans and the respect for law and humanity of the rules developed by the custom of nations. Attempts at compromise are rendered nugatory owing to another illegal practice engaged in by the German Alliance in sowing the high seas with mines in the track of neutral commerce. If the torpedo is not seen, a mine is pleaded—though such a plea ought to have no hearing. One proceeding is as lawless as the other.<sup>2</sup>

### *Are German Submarines Pirates?*

German submarine warfare is as much a violation of the law of nations as was the action of the ships of the Barbary Powers, which ultimately was stopped by the joint action of Europe and America when the squadron commanded by Lord Exmouth destroyed the Pirates' stronghold. It may not be technically correct to speak of German submarines as "Pirates," for they are ships of war commissioned by a sovereign Power, whose commanders

<sup>1</sup> These figures are taken from an Article in the *New York Times*, 17th November, 1916. On the 1st March, 1916, there appeared in *The Times* a list issued by the Secretary of the Admiralty of 40 British and 14 neutral vessels which were torpedoed and sunk by submarines of the Central Powers during 1915 without warning. In addition to these it was stated that "there are several cases in which there is no reasonable doubt that the vessel was sunk by torpedo fired without warning from a submarine, but in the absence of actual proof, due to the lack of survivors or from other causes, these cases are omitted from the list." The "German-American Submarine Controversy" is dealt with at length in an admirable article in "The Round Table" for June, 1916, by a writer who is apparently an American, as it is dated from New York.

<sup>2</sup> J. Perrinjaquet, *La guerre commerciale sous-marine*, Rev. gen. de Droit International xxxiii, 421. See also "The German-American Submarine Controversy" in "The Round Table" for June, 1916, pp. 493-534.

are obeying the orders of the Higher Command, but pirates within the meaning of the old definition of "hostes humani generis" they are showing themselves to be, and neutral writers do not hesitate to call them such. A distinguished American lawyer, Mr. Everett P. Wheeler, speaking of the action of the German submarines, says: "It is clear that up to the time of the war now raging such warfare as that which the submarines are carrying on was unlawful. It would have been, I think, generally considered piratical. That was the phrase which Mr. Jefferson applied to similar attacks by the Barbary cruisers. They had commissions from the Barbary Powers, but such attacks as they made were without warning, destroying without bringing into port, making captives, perhaps, but solely for the purpose of ransom. Their attacks, which were precisely similar to those of the submarines at the present time, were designated as piratical, and we felt called upon in the beginning of the last century to send cruisers to the Mediterranean and suppress them, which we succeeded in doing."<sup>1</sup>

Mr. Wheeler is not alone among neutrals in this opinion. In an article in the important Dutch monthly, *De Gids*, of December, 1915, on "The unfreedom of the open Sea," the Dutch writer, after referring to the method of blockade pursued by Great Britain and her Allies, and pointing out that that manner of blockading "will in the future certainly not be considered against the principles of international rights," passes on to consider the German submarine policy. On this he says: "Totally different stands the case of the manner in which Germany tries to rule over any portion of the open sea. It is certain that the civilised nations will never justify such a destruction of human lives and goods, which, from a military point of view, is also ineffective. For that method goes completely against the principles of international law, which, in so far as warfare at sea is concerned, are based on humanity and military purpose, next to mutual interest of all parties. That law can, therefore, never adapt itself to the German method of warfare. To

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<sup>1</sup> Proceedings of the American Society of International Law, April 27-29, 1916, p. 66.

excuse such action, which totally runs against the customs of international law and against every notion of humanity, the German Government said that it is usually for a submarine too dangerous to investigate beforehand the ship's papers, and that self-preservation compelled the submarines to act as they did. That may be so, but then the German Government ought to have concluded from that the simple fact that such warships are completely unfit for the task imposed on them. What, indeed, would any sane man say of a policeman who, without any investigation, shoots down an apparently suspicious person because he is afraid to talk to him? It is, therefore, not at all surprising that the action of German submarines against the merchant ships of all nations has caused in all civilised countries indignation and anger, and that they are looked upon as pirates."<sup>1</sup>

Piracy is not too strong a term to use in connection with a method of warfare whose crowning act was the destruction of the *Lusitania*, and which has, since the opening of the submarine campaign, destroyed no less than 570 neutral ships, and has caused the deaths in British vessels alone of over 3,800 non-combatants, men, women and children many of whom were neutral subjects lawfully travelling on such vessels. The loss of life occasioned by the destruction of neutral ships is not known, but it has been serious.

*The position of the Allies as against German submarines.*

When troops in the field persistently, and by command of their superior officers, after due warning, continue to violate the laws of war, those laws allow of the enemy refusing quarter till observance with the recognised laws and usages of war is enforced.<sup>2</sup> Submarine warfare against warships of the

<sup>1</sup> Cited by Mr. J. C. Van der Veer in the *Spectator*, 4th March, 1916.

<sup>2</sup> Hall, *International Law* (6th Ed.), 392. Oppenheim II., 147: "The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilised nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrages." (Art. 27 of the Instructions for the Government of Armies of the United States in the Field.)

enemy is lawful, though it is to be regretted on the ground of humanity that it has been so recognised ; but the systematic abandonment of the duty of visit and search and bringing in of prizes by submarines, which are from their character incapable of complying with the usages of civilised warfare, is another matter. The Allies have broken down the submarine attack in its earlier phase ; they will do so yet in its later, and for neutrals more dangerous manifestation. The results of the present war will not be affected by the submarine attacks on the commerce of the world, belligerent and neutral, for it is evident that the present attacks are directed as much towards securing a predominant position for the German mercantile marine, as against Great Britain and neutral Powers alike, as to cutting off supplies from her and the Allies. Whatever may be the stern action which the Allied Governments may deem necessary to take during the war to put down the submarine attacks, it is certain that their demands will, at the termination of the war, be of the severest character when they recall to the memory of the German Government that it was on its proposal that in the Hague Convention on the laws and customs of war on land in 1907 there was inserted an Article which provides that a belligerent party violating the provisions of the Regulations for land warfare should, if the case demanded, be liable to make compensation, and that it should be responsible for all acts committed by persons forming part of its armed forces (Article 3).

*What is the position of neutrals?*

The situation of neutrals is equally grave. Neutral Governments have had frequent occasion to protest vigorously against the conduct of war by Germany and her Allies. Neutrals, too, are probably considering whether it is not time for them to take the step of arming their merchant ships in self-defence and ordering them to resist visit and search by submarines of all belligerents. British and Allied merchant vessels may lawfully do this, both as regards submarines and other warships, but the existing rules provide that a neutral may not. "It is a wild conceit," said Lord Stowell, "that wherever force is

used it may be forcibly resisted; a lawful force cannot lawfully be resisted." The only case where it can be so is in the state of war and conflict between two countries, where one party has a perfect right to attack by force and the other an equal right to repel by force; but in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist. "The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search."<sup>1</sup> But Lord Stowell was considering a case where "the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause." In such cases he held that a neutral merchant vessel has no right to say for itself, "I will submit to no such inquiry, but I will take the law into my own hands by force." Far otherwise is the condition of the neutral merchant ship to-day. Her captain often has no opportunity of submitting to visit and search, and if he does so, he has to submit to the rough-and-ready decision of the young German commander of the submarine who, in the great majority of cases, has held that his vessel was carrying contraband of sufficient quantity to render the vessel liable to condemnation, and that military necessities prevented his taking her into port and, therefore, she was forthwith destroyed, crew and passengers, at the best, being allowed to take to the boats. A passing neutral merchant ship or a destroyer of a belligerent or a neutral Power summoned by wireless may or may not have rescued them from death by drowning.

In the past, when neutral States considered that a belligerent was acting in a way injurious to their subjects, they have either individually or collectively taken steps to protect them. It is not necessary to refer in detail to the Armed Neutrality Leagues of 1780 and 1800, though it is not unimportant to remember that both were formed against Great Britain for the enforcement of rules which the latter Power declined to recognise as part of the Law of Nations. The Northern Powers banded themselves

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<sup>1</sup> *The Maria*, 1 C. Rob, 363.

together to resist visit and search of their vessels under the convoy of their warships.<sup>1</sup>

In the *Maria*, from which the preceding quotations on resistance by neutrals are taken, Lord Stowell made a decree of condemnation. Resistance, however, continued for a while, and the Second Armed Neutrality added to the principles of the First the further one that belligerents should not have the right to visit and search in case the commanding officer of the convoying vessel should declare that no contraband was on board the convoyed vessels. A temporary compromise was reached, but the question remained unsettled.

The action of the United States in this connection was more striking and forms a more important precedent for neutral States in the present juncture of affairs. France was in close relationship with the United States, treaties of amity, commerce and alliance having been entered into between these Powers in 1778. But France was bitterly chagrined that the United States had granted rights to Great Britain similar to those which she enjoyed under the Treaty of Commerce of 1778, and acts of aggression commenced on American commerce in 1796 of a similar character to those complained of by the Northern Powers. The proceedings of the French privateers and Prize Courts, particularly of those sitting in the West Indies, at length caused the President to withdraw the *exequaturs* of the French Consuls, but not until Congress had passed an Act on 25th June, 1798, which permitted the arming of American merchant vessels for the purpose of defence against capture as well as to "subdue and capture" any armed French vessel. There was, however, a reservation that the President might thereafter instruct the armed merchantmen to submit to search, when French armed vessels should observe the Law of Nations. A subsequent Act of 7th July, 1798, abrogated treaties between France and the United States, and another of 9th July, 1798, gave the President power to instruct commanders of public armed vessels to capture any French armed vessel, and to issue Letters of Marque to

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<sup>1</sup> See T. A. Walker, *International Law*, 311.

privateers. The nature of the relationship brought about between the United States and France by these proceedings is a matter on which American lawyers and politicians do not agree. The position was considered by the Supreme Court of the United States in *Bas v. Tingy*.<sup>1</sup> Several of the judges considered the position of the two Powers was one of war. Chase, J., called it "limited, partial war," but it was also "a public war." Patterson, J., said the two countries were "in a qualified state of hostility." It was war *quoad hoc*. It was "a public war between the two nations," qualified in the manner prescribed by Congress. Marshall, C. J., cast doubts on the existence of war in the phrase, "Even if an actual and general war had existed between this country and France."<sup>2</sup> But Webster, in his speech on French spoliations, considered that the situation did not amount, at any rate, to open and public war. There was no public declaration of war: general reprisals were never authorised on French commerce; French citizens continued to sue in American Courts. The Act of Congress authorised the use of force under certain circumstances and for certain objects against French vessels. "Cases of this kind may occur under that practice of retorsion which is justified, when adopted for just cause by the laws and usages of nations, and which all the writers distinguish from general war."<sup>3</sup> Lord Stowell was not very definite in some of his references to the situation, and in the *Santa Cruz* in 1798<sup>4</sup> spoke of "the present state of hostility (if so it may be called) between America and France," and in *The Two Friends*:<sup>5</sup> "It is not for me to say whether America is at war with France or not," but he decreed salvage on recapture by the crew of an American vessel from the French. Whatever the position, whether war, partial war or war *sub modo*, as Professor Holland termed the so-called Pacific Blockade of Venezuela in 1902, the Government of the United States,

<sup>1</sup> (1800) 4 Dall, 37.

<sup>2</sup> *Hallet & Browne v. Jenks* (1805), 3 Cranch 210. See also *Talbot v. Seeman* (1801) 1 Cranch 1.

<sup>3</sup> J. B. Moore's Digest of Int. Law VII § 1102 where the subject is discussed; see also an Article by H. N. Stull on "Our partial war with France" in "Harper's Magazine," December, 1915.

<sup>4</sup> 1 C. Rob. at p. 64.

<sup>5</sup> *Ibid.* at p. 276.

by way of retaliation for the illegal treatment of American ships, cargoes and crews, authorised the latter to defend themselves, and the former to carry guns for the purpose of resisting visit and search. After nearly two years of "partial" war France and the United States agreed to a settlement of their differences.

It would appear that some 20 years ago fears were entertained that the Torpedo Boat would act as the German Submarines are acting and sink enemy ships at sight. The especial features which belong to Submarines, their secret methods of attack and their vulnerability were attributed to Torpedo Boats, and it was suggested that these afforded reasons why the prevailing rules of law should not apply to them. The answer given by the distinguished French Admiral, Admiral Bourgois, to such arguments is as true to-day as it was then. "The advent of the torpedo, whatever its influence on naval *matériel* has in no way changed international treaties, the law of nations, or the moral laws which govern the world. It has not given the belligerent the right of life and death over the peaceful citizens of the enemy State or of neutral States."<sup>1</sup> Professor Dupuis, in discussing the question of sinking vessels without visit and search, points out that the indiscriminate destruction of enemy ships must necessarily, on occasion, involve the destruction of neutrals also. Visit and search are necessary to ascertain the nationality of a vessel, flags are no necessary criteria of nationality, the usages of the sea admit of enemy merchant ships flying neutral flags. The build of the ship is, again, no necessary criterion of its nationality, and even if a vessel should clearly appear to be of enemy build, hundreds of merchant ships are built in countries other than those whose nationality they possess. Then follows this passage in which is discussed the right of self-defence of all vessels, enemy or neutral, against a proceeding in all respects similar to that with which the whole shipping of the world is now faced.<sup>2</sup> "Certainly if the aggressors contented themselves with data so doubtful (*i.e.*, the flag or the build of the ships) every neutral ship would be

<sup>1</sup> *Les torpilles et le droit des gens. Nouvelle revue*, 1886, ii., 499.

<sup>2</sup> *Le droit de la guerre maritime* (1899) 350.

justified in treating as pirates the torpedo boats which should dare to send a ship to the bottom on such feeble evidence; not only would it be justified in law, but the interest of its security would oblige it, provided it had a gun on board in aiming it (*à le braquer*) without any hesitation at every torpedo-boat heading for it. Enemy or neutral, cruiser or merchant vessel, every ship will have the right and the duty of treating as enemies the frail barks which have become a peril for all." For "torpedo boat" in this passage read "submarine" and the doctrine is equally good to-day.

It is for the United States and other neutral Powers to decide whether they should arm their merchant vessels, and, so long as the submarine warfare is continued against commerce, authorise them to resist visit and search. Neutral Powers are the sole judges of the policy which they consider best calculated to protect the interests of their citizens: they have other methods open to them; but in examining anew the question of defensively-armed merchant ships in the light of current events it has not seemed irrelevant to envisage the subject not only from the standpoint of belligerents, but also from that of neutrals. The latter, doubtless, have claims to advance against Great Britain and the Allies for acts done *jure belli*. They can and do appeal with confidence to the Prize Courts of these countries. Little redress have they so far been able to obtain from the Prize Courts of Germany, whose decisions are based upon their Naval Prize Regulations, and only on the Law of Nations so far as it does not conflict with them.<sup>1</sup>

The Allies have found themselves able to conduct the war without any further extension of the application of the Law of Nations than was legitimately effected by the Prize Courts of the United States during the Civil War. They have stood, and are standing, for the maintenance of International Law, and those rights of humanity, due alike to belligerents and neutrals which have characterised the laws of naval warfare of the past, and in the evolution of which Great Britain and the United States, both as belli-

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<sup>1</sup> See the Judgment of the Berlin Prize Court in the *Elida*, 18th May, 1915.

gerents and neutrals, have played so important a part. What steps neutral nations may deem it politic to take to maintain the right of their subjects to travel freely on the high seas in their own and belligerent merchant vessels is a matter for them to decide. The Allies, at any rate, are innocent of the deaths of any neutral passengers on enemy or neutral ships. They have used mines and submarines, which, as Dr. Ellery Stowell points out, are "proper instruments in their sphere," but their operations have not jeopardised "the lives of peaceful Americans travelling on merchantmen, be they neutral or belligerent, armed or unarmed." There is, therefore, no need for the United States as against them "to sustain," as Dr. Stowell calls on the President to sustain, "those natural rights which his predecessors did so much to create."

APPENDICES.  

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A—The United States First Memorandum on the Status of Armed Merchant Vessels of 19th September, 1914.

B—The United States Second Memorandum of 25th March, 1916.

C—The British Admiralty Instructions to Captains of Defensively-armed Ships which were published in *The Times* on 2nd March, 1916.

## APPENDIX A.

### The United States Government's First Memorandum on the Status of Armed Merchant Vessels.

*A.*—A merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defence without acquiring the character of a ship-of-war.

*B.*—The presence of an armament and ammunition on board a merchant vessel creates a presumption that the armament is for offensive purposes, but the owners or agents may overcome this presumption by evidence showing that the vessel carries armament solely for defence.

*C.*—Evidence necessary to establish the fact that the armament is solely for defence and will not be used offensively, whether the armament be mounted or stowed below, must be presented in each case independently at an official investigation. The result of the investigation must show conclusively that the armament is not intended for, and will not be used in, offensive operations.

Indications that the armament will not be used offensively are:—

1. That the calibre of the guns carried does not exceed six inches.
2. That the guns and small arms carried are few in number.
3. That no guns are mounted on the forward part of the vessel.
4. That the quantity of ammunition carried is small.
5. That the vessel is manned by its usual crew, and the officers are the same as those on board before war was declared.
6. That the vessel intends to, and actually does, clear for a port lying in its usual trade route, or a port indicating its purpose to continue in the same trade in which it was engaged before war was declared.
7. That the vessel takes on board fuel and supplies sufficient only to carry it to its port of destination, or the same quantity substantially which it has been

accustomed to take for a voyage before war was declared.

8. That the cargo of the vessel consists of articles of commerce unsuited for the use of a ship-of-war in operations against an enemy.

9. That the vessel carries passengers who are, as a whole, unfitted to enter the military or naval service of the belligerent whose flag the vessel flies, or of any of its allies, and particularly if the passenger list includes women and children.

10. That the speed of the ship is slow.

*D.*—Port authorities, on the arrival in a port of the United States of an armed vessel of belligerent nationality, claiming to be a merchant vessel, should immediately investigate and report to Washington on the foregoing indications as to the intended use of the armament, in order that it may be determined whether the evidence is sufficient to remove the presumption that the vessel is, and should be, treated as a ship-of-war. Clearance will not be granted until authorised from Washington, and the master will be so informed upon arrival.

*E.*—The conversion of a merchant vessel into a ship of war is a question of fact which is to be established by direct or circumstantial evidence of intention to use the vessel as a ship of war.

DEPARTMENT OF STATE.

*September 19th, 1914.*

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## APPENDIX B.

### United States Government's Second Memorandum on the Status of Armed Merchant Vessels.

#### I.

Department of State,  
Washington,  
*March 25th, 1916.*

The status of an armed merchant vessel of a belligerent is to be considered from two points of view: First, from that of

a neutral when the vessel enters its ports ; and, second, from that of an enemy when the vessel is on the high seas.

First.—An Armed Merchant Vessel in Neutral Ports.

(1) It is necessary for a neutral Government to determine the status of an armed merchant vessel of belligerent nationality which enters its jurisdiction, in order that the Government may protect itself from responsibility for the destruction of life and property by permitting its ports to be used as bases of hostile operations by belligerent warships.

(2) If the vessel carries a commission or orders issued by a belligerent Government and directing it under penalty to conduct aggressive operations, or if it is conclusively shown to have conducted such operations, it should be regarded and treated as a warship.

(3) If sufficient evidence is wanting, a neutral Government, in order to safeguard itself from liability for failure to preserve its neutrality, may reasonably presume from the facts the status of an armed merchant vessel which frequents its waters. There is no settled rule of international law as to the sufficiency of evidence to establish such a presumption. As a result, a neutral Government must decide for itself the sufficiency of the evidence which it requires to determine the character of the vessel. For the guidance of its port officers and other officials a neutral Government may, therefore, declare a standard of evidence, but such standard may be changed on account of the general conditions of naval warfare or modified on account of the circumstances of a particular case. These changes and modifications may be made at any time during the progress of the war, since the determination of the status of an armed merchant vessel in neutral waters may affect the liability of a neutral Government.

Second.—An Armed Merchant Vessel on the High Seas.

(1) It is 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 on board the vessel may be impaired if its status is that of an enemy warship.

(2) The determination of warlike character must rest in no case upon presumption but upon conclusive evidence, because the responsibility for the destruction of life and property depends on the actual facts of the case and cannot be avoided or lessened by a standard of evidence which a belligerent may announce as creating a presumption of hostile character. On the other hand, to safeguard himself from possible liability for unwarranted destruction of life and property the belligerent should, in the absence of conclusive evidence, act on the presumption that an armed merchantman is of peaceful character.

(3) A presumption based solely on the presence of an armament on a merchant vessel of an enemy is not a sufficient reason for a belligerent to declare it to be a warship and proceed to attack it without regard to the rights of the persons on board. Conclusive evidence of a purpose to use the armament for aggression is essential. Consequently, an armament which a neutral Government, seeking to perform its neutral duties, may presume to be intended for aggression might, in fact, on the high seas be used solely for protection. A neutral Government has no opportunity to determine the purpose of an armament on a merchant vessel, 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.

#### Summary.

The status of an armed merchant vessel as a warship in neutral waters may be determined, in the absence of documentary proof or conclusive evidence of previous aggressive conduct, by presumption derived from all the circumstances of the case.

The status of such vessel as a warship on the high seas must be determined only upon conclusive evidence of aggressive purpose, in the absence of which it is to be presumed that the vessel has a private and peaceable character, and it should be so treated by an enemy warship.

In brief, a neutral Government may proceed upon the presumption that an armed merchant vessel of belligerent nationality is armed for aggression, while a belligerent should proceed on the presumption that the vessel is armed for protection. Both of these presumptions may be overcome by evidence—the first by secondary or collateral evidence, since the fact to be established is negative in character; the second by primary and direct evidence, since the fact to be established is positive in character.

## II.

The character of the evidence upon which the status of an armed merchant vessel of belligerent nationality is to be determined when visiting neutral waters and when traversing the high seas having been stated, it is important to consider the rights and duties of neutrals and belligerents as affected by the status of armed merchant vessels in neutral ports and on the high seas.

First.—The Relations of Belligerents and Neutrals as Affected by the Status of Armed Merchant Vessels in Neutral Ports.

(1) It appears to be the established rule of international law that warships of a belligerent may enter neutral ports and accept limited hospitality there upon condition that they leave, as a rule, within 24 hours after their arrival.

(2) Belligerent warships are also entitled to take on fuel once in three months in ports of a neutral country.

(3) As a mode of enforcing these rules a neutral has the right to cause belligerent warships failing to comply with them, together with their officers and crews, to be interned during the remainder of the war.

(4) Merchantmen of belligerent nationality, armed only

for purposes of protection against the enemy, are entitled to enter and leave neutral ports without hindrance in the course of legitimate trade.

(5) Armed merchantmen of belligerent nationality under a commission or orders of their Government to use, under penalty, their armament for aggressive purposes, or merchantmen which, without such commission or orders, have used their armaments for aggressive purposes, are not entitled to the same hospitality in neutral ports as peaceable armed merchantmen.

## Second.—The Relations of Belligerents and Neutrals as Affected by the Status of Armed Merchant Vessels on the High Seas.

(1) Innocent neutral property on the high seas cannot legally be confiscated, but is subject to inspection by a belligerent. Resistance to inspection removes this immunity and subjects the property to condemnation by a prize court, which is charged with the preservation of the legal rights of the owners of neutral property.

(2) Neutral property engaged in contraband trade, breach of blockade, or unneutral service obtains the character of enemy property and is subject to seizure by a belligerent and condemnation by a prize court.

(3) When hostile and innocent property is mixed, as in the case of a neutral ship carrying a cargo which is entirely or partly contraband, this fact can only be determined by inspection. Such innocent property may be of uncertain character, as it has been frequently held that it is more or less contaminated by association with hostile property. For example, under the Declaration of London (which, so far as the provisions covering this subject are concerned, has been adopted by all the belligerents) the presence of a cargo which in bulk or value consists of 50 per cent. contraband articles impresses the ship with enemy character and subjects it to seizure and condemnation by a prize court.

(4) Enemy property, including ships and cargoes, is always subject to seizure and condemnation. Any enemy property taken by a belligerent on the high seas is a total

loss to the owners. There is no redress in a prize court. The only means of avoiding loss is by flight or successful resistance. Enemy merchant ships have, therefore, the right to arm for the purpose of self protection.

(5) A belligerent warship is any vessel which, under commission or orders of its Government imposing penalties or entitling it to prize money, is armed for the purpose of seeking and capturing or destroying enemy property or hostile neutral property on the seas. The size of the vessel, strength of armament, and its defensive or offensive force are immaterial.

(6) A belligerent warship has, incidental to the right of seizure, the right to visit and search all vessels on the high seas for the purpose of determining the hostile or innocent character of the vessels and their cargoes. If the hostile character of the property is known, however, the belligerent warship may seize the property without exercising the right of visit and search, which is solely for the purpose of obtaining knowledge as to the character of the property. The attacking vessel must display its colours before exercising belligerent rights.

(7) When a belligerent warship meets a merchantman on the high seas which is known to be enemy owned and attempts to capture the vessel, the latter may exercise its right of self-protection either by flight or by resistance. The right to capture and the right to prevent capture are recognised as equally justifiable.

(8) The exercise of the right of capture is limited, nevertheless, by certain accepted rules of conduct based on the principles of humanity and regard for innocent property, even if there is definite knowledge that some of the property, cargo as well as the vessel, is of enemy character. As a consequence of these limitations, it has become the established practice for warships to give merchant vessels an opportunity to surrender or submit to visit and search before attempting to seize them by force. The observance of this rule of naval warfare tends to prevent the loss of life of non-combatants and the destruction of innocent neutral property which would result from sudden attack.

(9) If, however, before a summons to surrender is given, a

merchantman of belligerent nationality, aware of the approach of an enemy warship, uses its armament to keep the enemy at a distance, or after it has been summoned to surrender it resists or flees, the warship may properly exercise force to compel surrender.

(10) If the merchantman finally surrenders, the belligerent warship may release it or take it into custody. In the 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 circumstances is doubtful.

(11) A merchantman entitled to exercise the right of self-protection may do so when certain of attack by an enemy warship, otherwise the exercise of the right would be so restricted as to render it ineffectual. There is a distinct difference, however, between the exercise of the right of self-protection and the act of cruising the seas in an armed vessel for the purpose of attacking enemy naval vessels.

(12) In the event that merchant ships of belligerent nationality are armed and under commission or orders to attack in all circumstances certain classes of enemy naval vessels for the purpose of destroying them, and are entitled to receive prize money for such service from their Government, or are liable to a penalty for failure to obey the orders given, such merchant ships lose their status as peaceable merchant ships and are to a limited extent incorporated in the naval forces of their Government, even though it is not their sole occupation to conduct hostile operations.

(13) A vessel engaged intermittently in commerce and under a commission or orders of its Government imposing a penalty, in pursuing and attacking enemy naval craft, possesses a status tainted with a hostile purpose which it cannot throw aside or assume at will. It should, therefore, be considered as an armed public vessel and receive the treatment of a warship by an enemy or by neutrals. Any person taking passage on such a vessel cannot expect immunity other than that accorded persons who are on board a warship. A private vessel engaged in seeking enemy naval craft without such a commission or orders from its Govern-

ment stands in a relation to the enemy similar to that of a civilian who fires upon the organised military forces of a belligerent, and is entitled to no more considerate treatment.

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## APPENDIX C.

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### **British Instructions for Defensively-Armed Merchant Ships.**

#### A.—THE STATUS OF ARMED MERCHANT SHIPS.

(1) The right of the crew of a merchant vessel forcibly to resist visit and search, and to fight in self-defence, is well recognised in international law, and is expressly admitted by the German prize regulations in an addendum issued in June, 1914, at a time when it was known that numerous merchant vessels were being armed in self-defence.

(2) The armament is supplied solely for the purpose of resisting attack by an armed vessel of the enemy. It must not be used for any other purpose whatsoever.

(3) An armed merchant vessel, therefore, must not in any circumstances interfere with or obstruct the free passage of other merchant vessels or fishing craft, whether these are friendly, neutral, or hostile.

(4) The status of a British armed merchant vessel cannot be changed upon the high seas.

#### B.—RULES TO BE OBSERVED IN THE EXERCISE OF THE RIGHT OF SELF-DEFENCE.

(1) The master or officer in command is responsible for opening and ceasing fire.

(2) Participation in armed resistance must be confined to persons acting under the orders of the master or officer in command.

(3) Before opening fire the British colours must be hoisted.

(4) Fire must not be opened or continued from a vessel which has stopped, hauled down her flag, or otherwise indicated her intention to surrender.

(5) The expression "armament" in these instructions includes not only cannon, but also rifles and machine guns in cases where those are supplied.

(6) The ammunition used in rifles and machine guns must conform to Article 23, Hague Convention IV., 1907; that is to say, the bullets must be cased in nickel or other hard substance and must not be split or cut in such a way as to cause them to expand or set up on striking a man. The use of explosive bullets is forbidden.

#### C.—CIRCUMSTANCES UNDER WHICH THE ARMAMENT SHOULD BE EMPLOYED.

(1) The armament is supplied for the purpose of defence only, and the object of the master should be to avoid action whenever possible.

(2) Experience has shown that hostile submarines and aircraft have frequently attacked merchant vessels without warning. It is important, therefore, that craft of this description should not be allowed to approach to a short range at which a torpedo or bomb launched without notice would almost certainly take effect.

British and Allied submarines and aircraft have orders not to approach merchant vessels. Consequently, it may be presumed that any submarine or aircraft which deliberately approaches or pursues a merchant vessel does so with hostile intention. In such cases fire may be opened in self-defence in order to prevent the hostile craft closing to a range at which resistance to a sudden attack with bomb or torpedo would be impossible.

(3) An armed merchant vessel proceeding to render assistance to the crew of a vessel in distress must not seek action with any hostile craft, though, if she is herself attacked while so doing, fire may be opened in self-defence.

(4) It should be remembered that the flag is no guide to nationality. German submarines and armed merchant

vessels have frequently employed British, Allied, or neutral colours in order to approach undetected. Though, however, the use of disguise and false colours in order to escape capture is a legitimate *ruse de guerre*, its adoption by defensively armed merchant ships may easily lead to misconception. Such vessels, therefore, are forbidden to adopt any form of disguise which might cause them to be mistaken for neutral ships.

Admiralty War Staff, Trade Division,  
October 20, 1915.



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