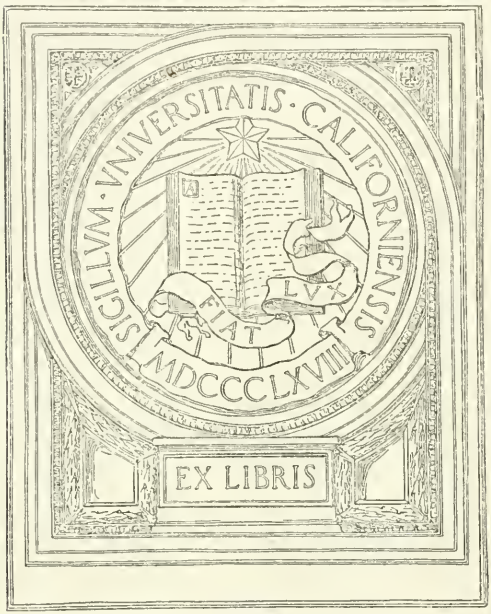
THE DESTRUCTION OF MERCHANT SHIPS UNDER INTERNATIONAL LAW

SIR FREDERICK SMITH, K.C., M.P.



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BY
THE RIGHT HON.
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PREFACE

My learned friend, Dr. Coleman Phillipson, whose authority upon such matters is generally recognised, has given me the greatest possible assistance in the preparation of this little book. His acquaintance with the relevant authorities, which is exhaustive, has been placed unreservedly at my disposal.

It may be thought that to compile a treatise at this moment on the legality of sinking merchantmen is much as if one were to read the Larceny Acts in a Thieves' Kitchen. It is certainly true that the matter has, for the moment, passed far from the hands of lawyers and awaits decision before a sterner tribunal.

But it would nevertheless appear that a useful purpose may be served by collecting in a small volume the authorities—and amongst them German authorities—which define the law as it was understood by every civilised country in the world until the developments of the present war.

Such an examination may within a convenient

compass enable those who suffer from the present Reign of Terror to understand and formulate their legal grievance, and it will not be without its uses when the revindication of International Law ushers in the day of retribution. And if (*per incredibile*) the result of the struggle should be to consecrate the breach of laws universally recognised, if the precedents of ages should be extinguished in a welter of savagery, this treatise will serve as a melancholy reminder, to those who live (or die) under the changed conditions, of the humaner methods in which their ancestors, almost from the twilight of the world, had waged their maritime wars. In such an age, should it ever come—

forsan haec meminisse juvabit.

FREDERICK SMITH.

Attorney-General's Chambers,
Law Courts,
March 9, 1917.

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THE DESTRUCTION OF MERCHANT SHIPS

Of the many questions raised in the present war the destruction of merchantmen is one of the most important. The practice of destroying them has been carried to an extent far greater than in any previous war; and unparalleled losses have been inflicted on the subjects of neutral as well as of the belligerent states. We propose, therefore, to examine the legal position of merchant ships. First, we shall consider enemy merchantmen. After investigating the questions whether belligerent warships may dispense with visit in regard to such vessels, whether enemy merchantmen may evade search or defend themselves in case of attack, and whether the arming of such ships for defensive purposes is legitimate, we discuss the relation of seizure to ownership, and then examine more fully the question of destruction. The views of jurists, the pronouncements of judicial courts, the express regulations of states, and the actual practice in previous wars are set forth. Then the duties with regard to passengers, crews, and

ship's papers, the position of neutral goods on board destroyed enemy merchantmen, and the classes of vessels that have been specially exempted from capture and destruction are dealt with. Next, we consider neutral merchantmen: the practice of visit and adjudication; when an attack on them is excusable or justifiable; the general rule of non-destruction, and the alleged exceptions thereto; whether military necessity or readiness to pay compensation is a valid ground for destruction; the practice in the Russo-Japanese War, and whether it furnishes precedents in modification of the customary law; the discussions at the Second Hague Conference and at the London Naval Conference; the rules of the Declaration of London, and how far they are binding; and, lastly, the rules and practice in the present war.

PART I. ENEMY MERCHANTMEN

1. Visit and Search, and Resistance Thereto

(a) *Whether belligerent warships may dispense with the practice of visit and search in regard to enemy merchantmen*

Differentiation of vessels

From the point of view of legitimate belligerent operations, it is necessary to draw a distinction

between vessels belonging to the enemy state and those belonging to the subjects of the enemy state, and between enemy vessels commissioned for and engaged in the service of war and vessels engaged in peaceful commerce and other pacific activities. Vessels belonging to the enemy state, and notably warships, may be attacked, captured, or destroyed by a belligerent man-of-war anywhere on the high seas or in the territorial waters of the contending belligerents, at any time and without notice. But enemy merchantmen are not to be subjected to such summary and drastic treatment.

Reasons for such differentiation

There are several reasons for such differentiation. In the first place enemy merchantmen are not combatants. International law and practice have long recognised a line of demarcation between combatants and non-combatants, both in war on land and in war on sea. In the case of the former we have now the Hague Regulations [1]; and in the case of the latter we have, on the one hand, the Declaration of Paris, 1856, which abolished privateering; and, on the other, the more detailed provisions of the seventh Hague Convention.[2]

[1] *Hague Convention* (1907), No. IV. (*Regulations respecting the laws and customs of war on land*), Arts. 1, 2.

[2] *Hague Convention* (1907), No. VII. (*Relative to the conversion of merchant ships into warships*), which is—and especially Art. 1—

Secondly, an enemy merchant ship may actually belong to a class of vessels exempted from capture and destruction by special conventions and usage. (These are to be dealt with later.)

Thirdly, enemy merchantmen may have neutral persons and neutral cargoes on board; for neutral passengers are not debarred from sailing in the merchant ships of a belligerent, neutral crews are not prohibited from taking service therein, and neutral merchants are not forbidden to continue their commercial intercourse with the belligerents and to ship their goods in the merchant ships belonging to any of the belligerents.

Declaration of Paris

Indeed, the Declaration of Paris expressly provides that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy flag.[1]

Visit necessary

From these considerations it follows that the commander of a belligerent warship may not dispense with the practice of visit and search in regard to suspected or enemy merchantmen. It is his duty, before resorting to forcible measures,

a corollary of the above-mentioned provision of the Declaration of Paris, and constitutes an additional guarantee against recourse to privateering. See A. Pearce Higgins, *The Hague Peace Conferences* (Cambridge, 1909), p. 312.

[1] Art. 3.

to ascertain the true character of the vessel, the nationality of the passengers and crew on board, and the nature and destination of the cargo. The duty to preserve the ship's papers, and the treatment of the persons on board, in case of capture or destruction of the vessel—whenever the latter alternative may excusably or justifiably be adopted—will be considered later. For the present it is sufficient to emphasise that the belligerent is obliged to visit an enemy merchantman, and that he has no right to destroy her in any case without examining her or making a reasonable attempt to examine her.

(*b*) *Whether enemy merchantmen have the right to evade search or defend themselves against attack*

Merchantmen may not take the offensive

On the other hand, a merchantman not being entitled to engage in belligerent offensive activities may not exercise the right of visit which is reserved exclusively for warships. But the legal incapacity to assume the offensive by no means implies necessarily a legal incapacity to act on the defensive. A belligerent merchantman being called upon by a hostile vessel to heave to may disregard the summons and do her utmost to escape. If brought to a standstill, she may use

May resist visit and search

all the resources at her command to resist visit and search or capture.[1] In that case she will, of course, become liable to attack and to the consequences thereof. Her crew, then, really become combatants, and if captured are to be treated as prisoners of war. Were they to act purely on the offensive on their own initiative, they might be regarded by the captor as " war criminals " and tried by court-martial. Finally, if they act neither on the offensive nor on the defensive and are captured, they are to be dealt with in accordance with the provisions of the eleventh Hague Convention (1907).[2]

Defensive-offensive measures

It is on neutral merchantmen that international law imposes the duty to submit to visit and search; but in the case of a merchantman belonging to a belligerent, no juristic doctrine, no judicial pronouncement, and no example of international practice[3] can be found that con-

[1] Cf. *The Nereide* (1815), 9 Cranch, 388—Marshall, C. J., delivering the opinion of the Supreme Court of the United States; see also *U.S.* v. *Quincy* (1832), 6 Peters, 445; 10 Curtis, 189; *Cushing* v. *U.S.* (1886), 22 Court of Claims, 1; *Hooper* v. *U.S.* (1886), 22 Court of Claims, 408; in the English Prize Court, *The Two Friends* (1799), 1 C. Rob., 271; *The Catherina Elizabeth* (1804), 5 C. Rob., 232; *Several Dutch Schuyts* (1805), 6 C. Rob., 48; in the French Prize Court, *Le Pégou* (or *Pigou*) (9 prairial an VIII.) (1800), 2 Pistoye et Duverdy, 51.

[2] *Hague Convention* (1907), No. XI. Arts. 5–7.

[3] The right of resistance is recognised expressly or impliedly in the regulations of various states, *e.g.* the United States Naval

demn resistance as an illegitimate act. To offer resistance to a warship may, in the case of an enemy merchantman, perhaps be contrary to prudence; it is not contrary to law. Neither jurisprudence nor commonsense could lay down a rule whereby, for example, the greatest and most valuable liner would be bound to submit to the summons and be at the mercy of the smallest and most insignificant enemy vessel that happened to fulfil the broad requirements conferring the status of a combatant. Thus it is legitimate for a merchantman that finds it impossible to escape from the pursuit of a hostile submarine to defend herself by heading for it, compelling it to submerge, and then making off. If, perchance, the merchantman should thus ram the submarine, the act will be justified, and doubly so when the merchantman has reasonable ground for fearing that the submarine, in pursuance of the policy of the state to which it belongs, will adopt a proceeding contrary to the established law. Whether such inference is *prima facie* deducible, and whether the submarine is entitled to fire a torpedo without warning through fear that the merchantman possesses

War Code (1900), Art. 10, Par. 3; the Russian Prize Regulations (1895), Art. 15; the Italian Code for the mercantile marine (1877), Art. 209.

effective means of self-defence, will be considered presently.

(c) *The legal position of armed merchantmen*

Just as an unarmed merchantman may offer resistance to visit and search and may retaliate in case of attack by bringing the whole force of her momentum to bear on the attacking vessel, so a merchantman that happens to have arms on board may use them for purposes of self-defence.

Use of arms by merchantmen

Moreover, a merchant ship may deliberately introduce arms on board, with the avowed intention of protecting herself, her passengers and crew, and her cargo. The introduction of armament intended to be used exclusively for defensive purposes is not contrary to international law and practice. It is sanctioned by the long-established custom of many maritime powers; in this country the practice has definitely been established for at least three centuries. It has frequently received express recognition in courts of law,[1] and in the naval codes and ordinances of several states [2]; and during the present war, despite the objections urged by this or that

Recognition of armed merchantmen

[1] Cf. *The Panama* (1899), 176 U.S., 535.

[2] Cf. the Regulations of the United States of March 25, 1916: *American Journal of International Law, Supplement*, October, 1916, pp. 367–372.

belligerent, various neutral powers, including the United States, have in their Regulations recognised its legality. In short, the legal status of a defensively-armed merchantman in no way differs from that of an unarmed merchantman in regard to the enemy; so that all that has been said above relative to the latter applies equally to the former.[1]

2. The Relation of Seizure to Ownership

When a belligerent warship captures an unresisting merchantman or overcomes the resistance of a resisting vessel, the question of the proprietary relationship of the captor to his prize at once arises. Here a distinction may be made according as the prize is an enemy commissioned vessel, or an enemy merchantman, or a neutral merchantman. In the case of an enemy commissioned vessel it is universally admitted that capture immediately and definitively transfers the ownership thereof to the captor, who may therefore either take the vessel into port or destroy her, as he thinks fit. All persons on board become prisoners of war. All goods found on

Property in captured public vessel

[1] This part of the subject need not be pursued further here; for full argument and citation of authorities, see A. Pearce Higgins, *Defensively Armed Merchantmen and Submarine Warfare* (London, 1917).

board similarly become the property of the captor.

Property in captured merchantman —earlier view

In the case of an enemy merchantman, opinion is not at all unanimous and practice is not entirely uniform. Under the earlier law the title passed as soon as the capture became effective, and the test as to when it became effective varied with different states and at different times. According to one view, supported by the *Consolato del mare*, the criterion was whether the prize had been carried *infra praesidia* or to such a secure place that the owner could have no immediate prospect of recapturing it, as, for example, the captor's or his ally's harbour, or near a protecting fortress or squadron. Another view held that the test was twenty-four hours' possession.[1] The tendency, however, of modern

Modern view

doctrine is to regard the seizure of a private enemy vessel as a somewhat analogous case to that of the military occupation of enemy territory in war on land [2]; that is, that the captor's right consists in a right of possession only, and that the true owners are not divested of their property in the vessel unless and until a sentence of condemnation has been duly passed thereon by a properly constituted prize court.

[1] Cf. *The Santa Cruz* (1798), 1 C. Rob., 49, at pp. 58 *seq.*

[2] Cf. Oppenheim, *International Law*, vol. ii. p. 231.

DESTRUCTION OF MERCHANTMEN

In 1799, during the war between Great Britain and France, a British vessel, the *Flad Oyen*, was seized by a French privateer and carried into a Norwegian port. She was condemned by the French Consul in "a sort of process," then sold, and subsequently captured by the British. The original British owner thereupon applied for restitution, on the ground that the vessel had not been validly condemned, and therefore that the property therein had not been affected. Lord Stowell (then Sir W. Scott) decreeing restitution observed that the requirement of due condemnation for transferring the ownership in prize was a doctrine not peculiar to English courts, but was in accordance with the general practice of nations; and that the adjudication must be carried out in a proper judicial form conformably to the law and usage of nations.[1] In another case, Lord Stowell, after referring to the rule of bringing the prize *infra praesidia*, emphasised the necessity for adjudication for the purpose of transferring the ownership: "In later times, an additional formality has been required, that of a sentence of condemnation, in a competent court, decreeing the capture to have been rightly made, *jure belli*; it not being thought fit, in civilised society, that property of

The Flad Oyen

[1] *The Flad Oyen* (1799), 1 C. Rob., 135.

this sort should be converted without the sentence of a competent court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require, that such exercises of war should be placed under public inspection and therefore the mere *deductio infra praesidia* has not been deemed sufficient. No man buys under that title; he requires a sentence of condemnation, as the foundation of the title of the seller; and when the transfer is accepted, he is liable to have that document called for, as the foundation of his own. From the moment that a sentence of condemnation becomes necessary, it imposes an additional obligation, for bringing the property, on which it is to pass, into the country of the captor; for a legal sentence must be the result of legal proceedings, *in a legitimate court*, armed with competent authority upon the subject matter, and upon the parties concerned—a court which has the means of pursuing the proper enquiry and enforcing its decisions. These are principles of universal jurisprudence applicable to all courts. . . ." [1]

[1] *The Henrick and Maria* (1799), 4 C. Rob., 43, at p. 55. Cf. *The Kierlighett* (1800), 3 C. Rob., 96; *The Cosmopolite* (1801), 3 C. Rob., 333; *Goss* v. *Withers* (1758), 2 Burr., 683, at p. 694; *Stevens* v. *Bagwell* (1808), 15 Ves., 139. For American views, see

Examples of recent treaties

We may recall, as a point of some significance, that in certain recent treaties of peace stipulations were made for the restoration of such captured vessels as remained uncondemned on the conclusion of peace; for example, the Treaty of Zurich, 1859, between France and Austria (Art. III.); the Treaty of Vienna, 1864, between Denmark on the one side and Austria and Prussia on the other (Art. XIII.); the Treaty of Frankfort, 1871, between France and Germany (Art. XIII.)—thirteen out of ninety captured German vessels were restored by France conformably to this provision. It is conceivable that in the minds of the respective negotiating parties, the idea existed that in the absence of condemnation the former owners were not completely divested of their proprietary rights in the vessels, and that the captor states had not yet, on that account, validly disposed of them.

In the absence, however, of express stipula-

Miller v. *The Resolution* (1781), 2 Dallas, 1; *Commodore Stewart's Case* (1864), 1 Court of Claims, 113; Scott, *Cases on International Law* (Boston, 1902), at pp. 915, 916; *Opinions of U.S. Attorneys-General*, vol. iii. p. 379. For a Russian judicial view, see *The Knight Commander* (1905), 1 Hurst and Bray, 75, where the Supreme Court said: ". . . When once a prize court has decided in favour of condemnation, the right to the captured property must necessarily be considered as having passed to the state from the moment of capture, and not from the date of the order of the court respecting its condemnation."

tions in the treaty of peace, providing for the disposition of uncondemned prizes after the restoration of peace, a judicial investigation cannot be dispensed with; it is necessary in order to determine the legitimacy of the capture in each case, and consequently whether the former owners have lawfully been deprived of their property.[1]

Neutral prize

As to a captured neutral vessel it is everywhere admittedly the rule that a decree of condemnation pronounced by a prize court is essential in order that the ownership may be transferred to the captor.[2]

Hague Convention

The established rule that the validity of the capture of a merchant ship or her cargo, whether neutral or enemy property be involved, is to be decided by the prize court was recognised at the Second Hague Conference.[3]

Judicial condemnation essential

It would follow, therefore, that in default of judicial condemnation the prize does not belong to the captor, so that he is not entitled to dispose of her or destroy her as though she were his

[1] Cf. C. Phillipson, *Termination of War and Treaties of Peace* (London, 1916), pp. 218, 219.

[2] Cf. *Andersen* v. *Marten* (1908), A.C., 334.

[3] *Hague Convention Relative to the Establishment of an International Prize Court* (1907), No. XII. Art. 1. This Convention has not been ratified, but this fact does not impair the applicability of the customary rule.

own; though a valid decree of condemnation may perhaps operate retrospectively to the date of capture.

It may be, however, that the captor claims to destroy his prize on the ground that it is impossible for him at the time of capture to proceed to take her in for adjudication. Is he then justified in such circumstances in destroying her? And if so, within what limits is the claim of justification tenable? To answer this question is now our main task, to which the foregoing observations were necessary for supplying preparatory data.

3. The Destruction of Enemy Merchantmen

(*a*) *Juristic opinion*

Economic argument

Some writers have urged against the practice of destruction that it is contrary to civilisation and to humanitarian interests and to the economic system of the society of states.[1] But objections of this kind apply equally to the whole of the operations of warfare, whereby men are killed, territories devastated, and property destroyed. We are not concerned here, however, with considerations of humanitarianism and international

[1] Cf. C. de Boeck, *De la Propriété Privée Ennemie sous Pavillon Ennemi* (Paris, 1882), pp. 301, 302.

policy, supremely important as they are; we are concerned only with the determination of those rules and principles of a juridical character which are applicable to the question.

Moral argument

There are one or two publicists who hold, similarly, that the destruction of merchantmen, including those belonging to the enemy, is a barbarous practice; and there they leave the matter.[1]

Juristic views

Others usually assert what they maintain to be the general rule and then mention certain exceptions thereto. It will be useful to refer to a few representative views in order to see to what extent they are in substantial agreement, and then to determine how far they coincide with the claims and practices of states.

Gessner

GESSNER: As a general rule the captor may not scuttle or otherwise destroy the prize he has taken in the open sea. He may do so, however, and on his own responsibility, in circumstances of *force majeure;* for example, when he is threatened with pursuit by the enemy, when he is unable to put a prize crew on board, when he is engaged on an urgent mission, and when it is necessary for him to conceal his position and course from his adversary's cruisers.[2]

[1] For example, T. Woolsey, *Introduction to the Study of International Law* (5th ed. 1879), Sec. 148.

[2] L. Gessner, *Le Droit des Neutres sur Mer* (2e ed. Berlin, Paris, 1876), p. 348.

HEFFTER: The destruction of an enemy prize is not justifiable except in case of extreme necessity.[1] Heffter

FONSECA: The general rule is that destruction is prohibited, but in certain exceptional and clearly defined cases it is permissible; for example, when the vessel disregards the warship's *coup de semonce* (affirming gun) or offers resistance, when to take her into port is a dangerous proceeding for the captor, when he has no means available for taking the prize to a place of safety, and when he has good reason to fear recapture. These rules, adds the writer, are generally admitted and are well known to all maritime nations.[2] Fonseca

BLUNTSCHLI: As a rule enemy prizes must be taken into the captor's port for adjudication. Destruction is permissible only in case of absolute necessity. The blockade of the captor's port does not in itself constitute a case of absolute necessity.[3] Bluntschli

BULMERINCQ: Speaking of the Russian Regulations of 1869, he admits that destruction is Bulmerincq

[1] A. W. Heffter, *Le Droit International de l'Europe* (4e ed. par F. H. Geffcken, Berlin, Paris, 1883), p. 317.

[2] Wollheim da Fonseca, *Der deutsche Seehandel und die französichen Prisen-Gerichte* (Berlin, 1873), pp. 112, 113.

[3] J. C. Bluntschli, *Das Moderne Völkerrecht* (Nördlingen, 1872), Sec. 672.

justified in the circumstances specified therein; but he emphasises that it is necessary to define them exactly and exclude other cases, so as to prohibit the captor from resorting to this extreme measure merely on his own judgment.[1]

F. de Martens

F. DE MARTENS: Like several other writers, he speaks simply of "prizes," and so, seemingly, does not differentiate between enemy and neutral. He appears to regard destruction as justifiable for various reasons of convenience, though he admits that the maritime laws of all states permit it only in case of extreme necessity. He observes that what is, therefore, an exceptional practice will become for his country (Russia) the general rule owing to the distance of its ports from the scenes of naval operations; and he foresaw that the application of such rule would certainly arouse against Russia "un mécontentement universel."[2]

De Boeck

DE BOECK: Adjudication is necessary to separate neutral property from enemy property; hence the general rule is that the captured vessel must not be sunk but must be taken into port. Most of the alleged reasons

[1] A. Bulmerincq, "Le Droit des Prises Maritimes," in *Revue de Droit International* (1879), p. 632. As to the Russian Regulations of 1869, see *infra*.

[2] F. de Martens, *Traité de Droit International*. Trad. du russe par A. Léo (Paris, 1883–1887), vol. ii. p. 126.

given in justification of destruction are untenable. Thus, if the prize is in such a condition that it is difficult to keep her afloat, it is not necessary to give her the *coup de grâce ;* for the captor can take possession of the whole or part of the cargo and leave the vessel to her fate. Further, if destruction is permissible on the ground that a captured vessel moves so slowly that she is liable to be recaptured, then the commander of a cruiser would always deem it justifiable to destroy a sailing vessel. When the prize is of too small value to have a prize crew put on board, then she is of too small value to be destroyed. The fact that the prize is taken at a considerable distance from the captor's ports cannot form the ground for a valid rule, inasmuch as it would open the door to arbitrary conduct and indiscriminate destruction. Nor can a captor claim to sink his prize because he is engaged on a pressing mission and has no time to visit the captured vessel ; for if he has time to stop and sink her he has time to put a prize crew on board. Again, that the captor wishes to conceal his movements from the enemy, would make too elastic a rule, as such a reason might be urged in almost any circumstances. Finally, if the captor is informed of the approach of superior enemy forces, he is not on that account

obliged to destroy his prize; he can make off with the prisoners and with what he can seize of the cargo on board. The writer holds that in none of these cases is destruction justifiable, and that, as in land warfare, destruction for the sake of destruction is illegitimate. He admits, however, that it is permissible in circumstances of imperative military necessity, as, for example, in the case of the sinking of a vessel for the purpose of blocking a port or a river to prevent the enemy's approach.[1]

Kent KENT: When captured property cannot be taken into port the captor may proceed to destroy or ransom it.[2]

Bernard BERNARD: "Debarred from carrying their prizes into their own ports which were under blockade, or into those of neutral Powers, the Confederates early adopted and continued to the last the practice of burning them at sea. This is certainly a destructive way of making war; it aggravates the waste and havoc which are inseparable from hostilities directed against private property, and of which the avowed purpose is

[1] C. de Boeck, *De la Propriété Privée Ennemie sous Pavillon Ennemi* (Paris, 1882), pp. 302–306. Cf. F. Despagnet, *Cours de Droit International Public* (4e ed. par C. de Boeck, Paris, 1910), p. 1141.

[2] J. Kent, *Commentary on International Law*, ed. by J. T. Abdy (Cambridge, London, 1878), p. 251.

the temporary ruin of the enemy's commerce. But it is not prohibited by any international law or usage, and it has not rarely been resorted to by captors who, from fear of weakening themselves by sending home prize crews, or for any other reason, have found themselves at a loss how to dispose of their prey. . . . A formal sentence of condemnation, of which the effect is to establish the fact of hostile or constructively hostile ownership, and the chief use to convey a secure title to a neutral purchaser, is superfluous where there is no neutral purchaser and the original owner is confessedly an enemy. Cases might, indeed, arise in which the whole or part of the cargo was either owned by neutrals or documented at least as neutral property; in such cases—and they were numerous—it was the custom of the Confederate commanders, if they were satisfied that the neutral claim was genuine, to release the ship on a bond being given for payment of a ransom; if they thought it fraudulent, to destroy both ship and cargo." [1]

Twiss

Twiss: As enemy subjects have no *locus standi* in our courts it is not obligatory to bring enemy prizes in for adjudication; therefore,

[1] Mountague Bernard, *Historical Account of the Neutrality of Great Britain during the American Civil War* (London, 1870), pp. 419, 420.

should any cause render it impossible to carry them in, they may be destroyed.[1] (It may be added that the fact that a municipal provision imposes a disability on enemy aliens does not necessarily confer the right to dispense with an international obligation, viz. to proceed to adjudication.)

Westlake

WESTLAKE: "The capture of enemy's property at sea ousts the enemy owner." Adjudication is necessary in order to secure the discipline of the capturing country's fleet, and to ensure that neutrals are not unjustly despoiled; but as against the enemy this procedure is not necessary. Consequently, it is not illegal to destroy his property at sea.[2] (In reply to this statement, however, we may point out that not infrequently it is only by judicial investigation that enemy property can be properly separated from neutral property. Moreover, the discipline of the capturing country's fleet is also to be secured in its proceedings against the enemy, and a prize court would, for example, have to take cognizance of a capture effected in a privateering expedition.)

Holland

PROFESSOR HOLLAND: "For the protection

[1] Sir Travers Twiss, *Law of Nations: Time of War* (Oxford, 1875), Sec. 167.

[2] J. Westlake, *International Law: War* (Cambridge, 1913), p. 309.

of what may prove to be innocent neutral property the captor is bound, in ordinary cases, to place a prize crew on board the captured vessel, and to send her in for adjudication by a prize court. He may, however, find difficulties in the way of doing this. He may, for instance, be in immediate danger of attack by a superior force of the enemy, may be unable to spare the men needed to navigate the prize (especially now that the work on a warship is so much more highly specialised than was formerly the case), or may be unable to spare coal for a prize which has possibly exhausted her own supplies of fuel. Under these circumstances what steps may be taken by him?

"If ship and cargo belong, beyond question, to the enemy, he may, after taking off the crew, sink the ship, the property in which is now vested in his own government." [1]

Destruction and ownership

It will be noted that Professor Holland, like Professor Westlake, holds that capture *ipso facto* transfers property in the enemy vessel and enemy cargo to the captor's government. There is, no doubt, a difference of opinion on this point; but, as has been shown above,[2] the

[1] T. E. Holland, "Neutral Duties in Maritime War," in *Proceedings of the British Academy*, vol. ii. pp. 12, 13.

[2] See *supra*, pp. 21 *seq.*

better—perhaps the only legally justifiable—view is that the proprietary rights in captured enemy merchantmen are not so transferred, though they are admittedly transferred in the case of captured public vessels of the enemy. The principle of the non-transference of ownership save by due condemnation of a properly constituted prize court, certainly conflicts with even a conditional right of destruction; but the view that destruction may in certain circumstances be resorted to does not necessarily imply that the ownership immediately passes to the captor. Destruction may be legitimate on the ground of overwhelming military necessity and self-preservation, without the property in the thing destroyed first passing to the destroyer. In the operations of war private property is constantly destroyed; it does not become vested in the attacking belligerent simply because it has fallen into his hands or has served as a target for his guns, even though the owner is thereby deprived of it.

Oppenheim

PROFESSOR OPPENHEIM: The general rule is that captured enemy merchantmen are not to be destroyed. There are exceptions, but opinion and practice in regard to them are not unanimous.[1]

[1] L. Oppenheim, *International Law*, 2 vols. (London, 1912), vol. ii. p. 242.

Institut de Droit International

We may conclude this statement of juristic opinion by referring to the conclusions arrived at by the Institut de Droit International, a body including some of the leading jurists and publicists of the present time. The " Règlement International des Prises Maritimes," adopted at Turin in September 1882, says that a captor is permitted to burn or sink his prize in the following cases :—

(1) When it is not possible to keep the vessel afloat owing to her bad condition and the rough state of the weather.

(2) When the vessel cannot keep up with the warship and might easily be recaptured by the enemy.

(3) When the approach of a superior enemy force creates fear of recapture.

(4) When the captor cannot put on board an adequate prize crew without reducing his own beyond what is essential for his own safety.

(5) When the port to which it would be possible to take the captured vessel is too distant.[1]

[1] *Annuaire de l'Institut de Droit International* (1882–1883), vol. vi. p. 221.

(*b*) *State regulations*

British regulations

GREAT BRITAIN: The *Manual of Naval Prize Law* of 1888 lays down that a commander who captures a vessel, which he cannot possibly take into port, need not release her if "there be clear proof that the vessel belongs to the enemy."[1] Such an impossibility would arise, for example, through the unseaworthy condition of the prize or through the commander's inability to spare a prize crew.[2]

French regulations

FRANCE: The Marine Ordinances of 1681 and 1693 permitted the captor to burn or sink his prize. Valin commenting on these Ordinances, points out that this exceptional course could be resorted to where the captor found it impossible to conduct his prize into port owing to her bad condition, her slowness, her small value, the approach of the enemy, or inability to place a prize crew on board.[3] The provisions in these Ordinances were reproduced in the decree of 2 prairial an XI. (May 22, 1803) (Art. 64). The Instructions of July 25, 1870, allowed a

[1] T. E. Holland, *Manual of Naval Prize Law*, Art. 304 (London, 1888).

[2] *Ibid.* Art. 303.

[3] R. J. Valin, *Commentaire sur l'Ordonnance de la Marine de* 1681 (1766), vol. ii. pp. 281–288; Valin, *Traité des Prises* (1763), vol. i. pp. 132, 133.

cruiser to destroy a prize if her preservation might endanger the captor's safety or the success of his operations. The right was, however, to be exercised with the greatest reserve, and only if the commander were compelled by an overmastering circumstance — "une circonstance majeure." [1] The Instructions issued during the present war (January 30, 1916) lay down (Art. XXVIII., Sec. 153) that in general enemy prizes are not to be destroyed; a prize crew is to be placed on board and the captured vessel is to be taken into a national or into an allied port. Exceptionally, however, the captor is permitted to destroy his prize, if her preservation should endanger his security or the success of his operations, and especially if it should necessitate an undue depletion of his crew.[2]

Russian regulations

RUSSIA: The Regulations of 1787 instructed Russian commanders to destroy, if necessary, the merchantmen captured from the enemy.

[1] *Instructions Complémentaires*, Art. 20. H. Barboux, *Jurisprudence du Conseil des Prises Pendant la Guerre de* 1870–1871 (Paris, 1872), p. 155.

[2] "*Destruction des prises ennemies:* Les prises doivent être amarinées, conduites dans un port national ou allié, et non pas détruites.

"Par exception, vous êtes autorisé à détruire toute prise dont la conservation compromettrait votre sécurité ou le succès de vos opérations, notamment si vous ne pouvez conserver la prise sans affaiblir votre équipage."

By a decree of February 5, 1854, prize money was to be paid to warships for all enemy vessels that were burnt, sunk, or otherwise destroyed; but privateers were forbidden to destroy vessels.[1] The Rules of 1869, Sec. 108,[2] permitted destruction in circumstances substantially similar to those specified in the "Règlement of the Institut de Droit International."[3] The Prize Regulations of March 27, 1895, Sec. 21, were to this effect: "In exceptional cases, when the preservation of a detained vessel appears to be impossible in consequence of her bad condition or entire worthlessness, the danger of her recapture by the enemy, or the considerable distance or blockade of the ports, or else on account of the danger threatening the ship which has made the capture, or the success of her operations, it is permissible for the commander, on his own responsibility, to burn or sink the captured vessel. . . ."[4] The Special Instructions of September 20, 1900, Sec. 40, not only enumerate the same cases but extend the latitude allowed to commanders by adding the words

[1] Bulmerincq, "Le Droit des Prises Maritimes" in *Revue de Droit Int.* (1878), vol. x. p. 621.

[2] Bulmerincq, *Rev. de Droit Int.* (1879), p. 632.

[3] See *supra*, p. 37.

[4] For the full text, see C. J. B. Hurst and F. E. Bray, *Russian and Japanese Prize Cases* (London, 1912), vol. i. pp. 311 *seq.*

" and other similar exceptional cases." A note is appended stating that the captor does not incur any responsibility when the detained vessel is actually subject to condemnation and her destruction is imperatively demanded by the exceptional circumstances in which the imperial vessel is placed.[1]

Spanish regulations

SPAIN: The Regulations of April 24, 1898, make no mention of destruction.[2]

American regulations

UNITED STATES: The Instructions to blockading vessels and cruisers issued June 20, 1898, provide as follows: " If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize." [3] This provision was embodied in the Naval War Code, published June 27, 1900, by the Secretary of the Navy; but the whole code was revoked February 4, 1904.

Japanese regulations

JAPAN: The Prize Rules of 1894 directed commanders to destroy captured vessels be-

[1] *British and Foreign State Papers* (1900–1901), vol. 94, p. 891.

[2] *U.S. Diplomatic Correspondence* (1898), p. 775.

[3] General Orders, No. 492, Sec. 28: *U.S. Dip. Corr.* (1898), p. 782.

longing to the enemy if it was impracticable to send them to a port. And Article 91 of the Regulations of March 7, 1904, prescribed thus: "In the following cases, and when it is unavoidable, the captain of the man-of-war may destroy a captured vessel or dispose of her according to the exigency of the occasion. . . . 1. When the captured vessel is in very bad condition and cannot be navigated on account of the heavy sea. 2. When there is apprehension that the vessel may be recaptured by the enemy. 3. When the man-of-war cannot man the prize without so reducing her own complement as to endanger her safety." [1]

(c) *Judicial pronouncements*

View of British courts

GREAT BRITAIN: In the case of the *Felicity*,[2] Lord Stowell pronounced the destruction of an enemy merchantman to be permissible if "a grave call of public service required it." The military operations in which the *Endymion*, the capturing vessel, was engaged did not permit her to part with any of her crew. "Under this

[1] S. Takahashi, *International Law applied to the Russo-Japanese War* (London, 1908), p. 788; Hurst and Bray, *op. cit.* vol. ii. p. 438.

[2] (1819), 2 Dodson, 381, at pp. 385, 386.

collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property."

View of French courts

FRANCE: In the case of the *Ludwig* and the *Vorwärts*, German merchantmen destroyed by a French warship, the Conseil des Prises, sitting at Bordeaux, February 27, 1871, held that the vessels were of German nationality, that they were good and valid prizes, and had been destroyed through *force majeure* in order to assure the safety of the captor's operations; that acting as he did the captor had exercised a right, rigorous no doubt, but permitted by the laws of war and prescribed by the instructions of his state. On appeal the decision of the Court was upheld by a Commission Provisoire, sitting instead of the Conseil d'Etat, and the action of the captor was declared justifiable because the existence of a large number of prisoners on board rendered it impossible to withdraw a part of the crew for taking the vessels to a French port.[1]

[1] C. Calvo, *Le Droit International* (Paris, 1887–1896), vol. v. Sec. 3033, p. 280.

(*d*) *Practice in wars*

The war of 1812–1814

In the war of 1812–1814, the United States naval forces frequently destroyed British merchantmen. The American instructions were not issued in a general form, but were given from time to time to individual officers. Thus one commander was ordered, June 5, 1813, to attack the enemy's commerce and destroy captured vessels "in all cases," unless the "value and qualities" should "render it morally certain that they may reach a safe and not distant port." Other commanders were directed to proceed in the same manner, and to save only valuable and compact articles that might easily be transhipped.[1] In this war seventy-four merchantmen were thus destroyed.

Crimean War

In the Crimean War two Russian coasters were sunk by the French, on the ground that they were of too small value to have a prize crew placed on them.[2]

American Civil War

In the American Civil War, Semmes, the

[1] Cf. the Instructions of December 8 and 22, 1813, January 6, 1814, February 26, 1814, March 3, 1814, November 30, 1814: *American State Papers—Naval Affairs*, I. 373–376; J. B. Moore, *Digest of International Law* (Washington, 1906), vol. vii. p. 516.

[2] Report of Admiral Hamelin to the Minister of Marine, May 2, 1854: *Moniteur*, May 21, 1854; A. de Pistoye and C. Duverdy, *Traité des Prises Maritimes* (Paris, 1855), vol. i. p. 272.

commander of the Confederate States cruiser *Alabama*, destroyed a large number of enemy prizes.[1]

In the Franco-German War the French war- Franco-German War
ship *Desaix* sank, October 14, 1870, the *Charlotte;* and on October 21 set fire to the *Ludwig* and the *Vorwärts*. The decision of the French Prize Court has already been referred to.[2]

In the Spanish-American War, 1898, three Spanish-American War
Spanish merchantmen were destroyed by an American cruiser; but here the ground alleged was that they were being used at the time as transports, so that they were destroyed not as merchantmen but as public enemy vessels.

In the Russo-Japanese War Russian cruisers Russo-Japanese War
destroyed twenty-one captured Japanese merchantmen.[3]

(e) *Passengers, crews, and ship's papers—Destruction without warning*

We have seen that the destruction of enemy prizes has frequently been resorted to in wars, and that the practice is defended by jurists and judicial tribunals and sanctioned by the ordi-

[1] See *infra*, p. 49.
[2] See *supra*, p. 43.
[3] Takahashi, *op. cit.* pp. 284–310.

nances, regulations, and instructions of states when, owing to various circumstances of *force majeure*, it should be found impossible or dangerously difficult to conduct the captured vessels into port for adjudication. Whatever difference of opinion there may be with regard to these circumstances, there is and there has been always and everywhere complete unanimity as to one obligation at least that is imposed on captors—namely, that if they find it imperatively necessary to destroy their prizes they must make due provision for the safety of passengers and crew on board and for the preservation of the ship's papers. This is clearly and indubitably an established rule of the law and usage of nations. It is explicitly enforced in the naval regulations of maritime states, and until the present war it has invariably been respected in actual practice. A few examples of such regulations and practice may be briefly noted.

Safety of passengers and crew

British rule

GREAT BRITAIN: If the destruction of a captured vessel becomes unavoidably necessary, the captor must first remove the crew and passengers, if any, together with the ship's papers and, if possible, the cargo.[1]

French rule

FRANCE: The Marine Ordinances of 1681 and 1693, the decree of 2 prairial an XI., and the

[1] *Manual of Naval Prize Law*, Art. 304.

Supplementary Instructions of 1870 require the removal of the "prisoners" on board and the preservation of the papers and other things necessary for the rendering of a judgment by the prize court.[1] Similarly the French Instructions of January 30, 1916 (Sec. 154) require the commander, before he proceeds to destruction, to place in safety the persons found on board, as well as the papers and documents useful for the purpose of adjudication.[2]

Italian rule

ITALY: The Naval Prize Regulations, approved by a decree of July 15, 1915, say that if the observance of the requirements as to conducting a prize into port may endanger the safety of the captor's ship or interfere with the success of the operations of war in which he is engaged, the prize may be destroyed after providing for the safety of the persons on board and the ship's papers, manifests, etc., necessary for determining the legitimacy of the capture.[3]

Russian rule

RUSSIA: The Prize Regulations of 1895,

[1] Valin, *Traité des Prises* (1763), I. p. 133; *Commentaire sur l'Ordonnance de* 1681 (1766), II. pp. 281–288; H. Barboux, *Jurisp. du Conseil des Prises Pendant la Guerre de* 1870–1871, p. 155.

[2] "Avant la destruction, vous mettrez en sûreté les personnes quelles qu'elles soient qui se trouvent à bord, ainsi que tous les papiers et documents utiles pour le jugement de la prise."

[3] *American Journal of International Law, Supplement,* April 1916, p. 120.

Sec. 21, and the Special Instructions of 1900, Sec. 40,[1] lay down that in any extraordinary case of destruction, the crew and as much as possible of the cargo must previously be transhipped, as well as all documents and objects essential for throwing light on the case at the judicial investigation.

German rule

GERMANY: The Naval Prize Regulations of 1914 (Art. 116) provided that the captor must, before destroying his prize, ensure the safety of the persons on board and, as far as possible, their effects, together with the ship's papers, etc.[2]

American rule

UNITED STATES: The Instructions to blockading vessels and cruisers, June 20, 1898, require all the papers and other evidence to be sent to the prize court in order that a decree may be duly entered.[3]

Japanese rule

JAPAN: The Prize Regulations of 1894, Art. 22, and those of 1904, Art. 91, provide for the transhipment of crew, ship's papers, and, if possible, cargo.[4]

Juristic opinion

So far as juristic opinion is concerned it will suffice to refer to the conclusion formulated by the Institut de Droit International, which is in

[1] *British and Foreign State Papers* (1900–1901), vol. 94, p. 891.

[2] Huberich and King, *The Prize Code of the German Empire* (1915), p. 68.

[3] Moore, *Digest*, vol. vii. p. 518.

[4] Takahashi, p. 788; Hurst and Bray, vol. ii. p. 426.

effect the same as the rule contained in the above state regulations.

The practice of wars has conformed to this rule. During the American Revolution, Paul Jones removed the persons on board before destroying a captured vessel; and, when he could do so, he released his prize.[1] Similarly in the war of 1812 this rule was observed. In the case of the *Felicity*—to give but one example—"the officers and crew together with their clothes and other property had been removed on board the *Endymion*," and the *Felicity* was destroyed.[2] In the American Civil War, Captain Semmes, the notorious commander of the *Alabama*, did not hesitate to destroy his prizes, but invariably removed first the persons on board. When it was found impossible to do so, he released the ship. Thus he released the *Ariel*, a valuable prize, "and sent her and her large number of passengers on their way rejoicing," because he could not find any accommodation for them.[3] Before destroying the *Hatteras*, which was, moreover, a warship, "every living being in it was safely conveyed to the *Alabama*."[4]

American Revolution

War of 1812

American Civil War

[1] Allen, *Naval History of the American Revolution*, vol. i. pp. 121, 124.

[2] 2 Dods., 383, at pp. 391, 392.

[3] R. Semmes, *Service Afloat during the War between the States* (Baltimore, 1887), p. 535.

[4] *Ibid.*

"We were making war," he observed, "upon the enemy's commerce, not upon his unarmed seamen. It gave me as much pleasure to treat these with humanity as it did to destroy his ships."[1] Mr. J. A. Bolles, the Solicitor to the United States Navy during this war, admits the truth of this statement. He examined all the charges of cruelty brought against Semmes, and in no case did he find the least evidence that the commander had inflicted any unavoidable hardships on those he captured.[2] Again, in the Russo-Japanese War the crews of captured vessels were removed before destruction was effected.[3] And in the present war British commanders scrupulously observed the rule; and on several occasions German cruisers, *e.g.* the *Emden*, the *Karlsruhe*, the *Eitel Friedrich*, did the same.

Hague Convention

It may be added that in the eleventh Hague Convention relative to certain restrictions on the exercise of the right of capture in maritime war, it is expressly laid down that the enemy crews

[1] R. Semmes, *Service Afloat during the War between the States* (Baltimore, 1887), p. 131.

[2] See the article by J. A. Bolles in the *Atlantic Monthly* (1872), vol. 30, p. 150: "Why Semmes of the *Alabama* was not tried." Cf. Marvin, *History of the American Merchant Marine*, p. 327. These are referred to by J. W. Garner in *American Journal of International Law* (1915), p. 620.

[3] Takahashi, *op. cit.* pp. 284–310.

of captured enemy merchantmen are not even to be made prisoners of war, if they undertake not to engage, while hostilities last, in any service connected with the operations of war.[1]

Position of non-combatants

It is clear, then, that doctrine, practice, and international conventions unanimously recognise that the claim to weaken the adversary by attacking his financial and commercial resources—to whatever extent it may be justified—does not and cannot carry with it the right to take the lives of non-combatants. That every effort must be made to save the persons and papers on board before proceeding in circumstances of exceptional urgency to destroy a prize, and that the prize should be released if such safety cannot be ensured, is a rule of maritime warfare against which no dissentient voice has ever been raised. It follows inevitably that enemy vessels may not be sunk or otherwise destroyed without warning,[2] and that, though warning be given, such means of attack should not be resorted to as would render it impossible for the assailant to observe

Warning necessary

[1] *Hague Convention* (1907), No. XI. Art. 6.

[2] With regard to attacking without warning, Lord Stowell observed, in a case in which he referred to the illegal practice of firing under false colours, that " it may be attended by very unjust consequences ; it may occasion the loss of the lives of persons who, if they were apprized of the real character of the cruiser, might, instead of resisting, implore protection." (*The Peacock* (1802), 4 C. Rob., 185, at p. 187.)

Use of submarine against merchantmen

the rule. It necessarily follows, again, that a submarine attack on an enemy merchantman[1] is unlawful, if proper provision be not first made for the safety of crew, passengers, and ship's papers. Accordingly the contention of the British Government in the Note of March 1, 1915, to the United States Government is well

British contention

founded in established law and usage: "A German submarine . . . fulfils none of these obligations [viz. visit, verification of the status and character of vessel and cargo, arrangements for the security of crew, etc.]; she enjoys no local command of the waters in which she operates; she does not take her captures within the jurisdiction of a prize court; she carries no prize crew which she can put on board a prize; she uses no effective means of discriminating between a neutral and an enemy vessel; she does not receive on board for safety the crew and passengers of the vessel she sinks; therefore her methods of warfare are entirely outside the scope of any of the international instruments regulating operations against commerce in time of war."

American view

Similarly, the President of the United States in his statement to Congress, April 19, 1916,

[1] See A. Pearce Higgins, *Defensively Armed Merchantmen and Submarine Warfare* (London, 1917).

relative to the controversy with the German Government, affirmed emphatically that the use of submarines against enemy merchantmen is "incompatible with the principles of humanity, the long-established and incontrovertible rights of neutrals, and the sacred immunities of non-combatants."

Submarine attack on merchantmen unlawful

The excuse usually offered by the Germans that submarines dare not approach the object of their attack for fear the enemy merchantman is armed, and that they have no facilities whatever for carrying out the admitted requirements as to the safety of crew and passengers, is entirely invalid. A combatant must refrain from doing such acts as entail indefeasible obligations if he cannot properly and adequately fulfil those obligations. The plea of military necessity cannot justify a line of conduct which involves proceedings and consequences forbidden by existing law. Indeed this very law has been deliberately established in order to obviate arbitrary and factitious pleas of necessity.[1] The use of submarines against commerce must necessarily remain illegal until international law has made express provision for their employment. The

New weapons and international law

[1] For an examination of the doctrine of military necessity in relation to international law, see C. Phillipson, *International Law and the Great War* (London, 1915), pp. 27 *seq.*

introduction of new engines of destruction must conform to the law as it is; it is contrary to all reason and all conceptions of jurisprudence for any nation to claim that the existing law becomes obsolete on the invention of new appliances of warfare. No single nation, as an American court said, may change the law of the sea, which is of universal obligation.[1]

General condemnation of submarine attacks

It is not our object here to enumerate the instances of the flagrant violations of law committed in the present war; the whole world is fully aware of the numerous cases of destruction of merchantmen by German submarines without notice and without making provision for the safety of passengers and crew. States have officially and publicly condemned this illegal procedure. The sinking of the *Lusitania*, for example, brought forth a strong protest, May 13, 1915, from the United States Government, which described the act as being "absolutely contrary to the rules, practice, and spirit of modern warfare . . . a violation of many sacred principles of justice and humanity."

(*f*) *Neutral goods on board enemy merchantmen*

Earlier variation of practice

Down to the middle of the nineteenth century there was no universally accepted rule of inter-

[1] *The Scotia* (1871), 14 Wallace, 170.

national law regulating the legal position of neutral goods under enemy flag and enemy goods under neutral flag. Practice varied at different times with different states, and also at different times in the case of any particular state. There is no need here to set forth the historical development of doctrine and the varying applications of policy and expediency. It is sufficient to say that the Declaration of Paris, 1856, adopted the compromise arrived at by Great Britain and France in the case of the Crimean War—a compromise embodying the principle "free ships free goods" (without the supposed corollary "enemy ships enemy goods"). The Declaration of Paris, which is now part and parcel of international law, lays down the following rules of exemption from capture at sea :—

Declaration of Paris

"The neutral flag covers enemy's goods, with the exception of contraband of war.

"Neutral goods, with the exception of contraband of war, are not subject to capture under enemy's flag."

Before the Declaration of Paris, the British practice followed the principle of exempting from condemnation neutral goods, other than contraband, found on an enemy vessel; and if in such a case the captor forwarded the goods to their destination, he was entitled to freight, but

British practice

remained answerable to the owners for loss or damage due to his misconduct.[1] The captor's right to freight in such circumstances and his responsibility for loss are not affected, of course, by the Declaration of Paris.

View of French court in Franco-German War

During the Franco-German War, the Declaration of Paris was appealed to by the neutral owners of cargoes which were destroyed, along with the German merchantmen *Ludwig* and *Vorwärts*, by the French cruiser *Desaix* (October 21, 1870). No offence of trading in contraband or of breach of blockade was alleged. The Conseil des Prises, however, decided—and its decision was on appeal affirmed by the Commission Provisoire (March 16, 1872)—that as the destruction of the vessels was a legitimate act of war, the neutral cargo-owners were not entitled to compensation. The ground of the decision was that though the Declaration of Paris prohibited the confiscation of such goods, it did not imply that compensation was payable for loss or injury caused by a lawful capture of the vessel or by legitimate acts of war accompanying or following the capture. It seems, therefore, that, in the view of the court, a neutral who deliberately places his goods in an enemy vessel identifies himself *pro tanto* with the enemy, and therefore

[1] *The Fortuna* (1802), 4 C. Rob., 278.

renders himself liable to the consequences of warlike operations.

View of German Court

Similarly, during the present war the German Prize Court held in the cases of *The Glitra* (July 30, 1915) and *The Indian Prince* (April 14, 1916),[1] that if destruction of the prize be permissible on the ground of military necessity, the neutral owner of cargo destroyed along with the vessel is not entitled to indemnity under the Declaration of Paris.

Its questionable validity

The construction adopted by the French Court appears to involve an encroachment on the Declaration of Paris, and has been questioned by some writers. If the destruction of an enemy vessel be imperatively demanded by the necessity of military operations, and it is impossible to remove the neutral cargo on board, the destruction of the latter is justifiable; for a belligerent cannot be expected to release an enemy prize simply because neutral goods are found on board. But, on the other hand, a neutral is not forbidden by international law to embark his goods in the merchantmen of any of the belligerents; it is a perfectly legitimate proceeding on his part to do so. Therefore, unless he has been found guilty by a prize court of contraband trading, blockade running, or un-

[1] *Amer. Journ. of Int. Law*, Oct. 1916, pp. 921, 930.

neutral service, he is entitled to full compensation for the destruction of his innocent property.[1] The decision, then, of the French Court in 1870, and that of the German Court in the present war, are not consonant with the existing principles of international law; for to proceed on that view is to make a dead letter of the Declaration of Paris. But this declaration is recognised, even by states that were not signatory thereto, as a constituent element of the law of nations; it cannot be distorted or repudiated to meet the convenience of this or that state.

Neutral goods on defensively armed merchantmen

Is the position of neutral goods on board defensively armed merchantmen the same? We have seen that merchantmen are entitled to escape from, and—if they can and care to risk it—resist capture by, enemy warships. It follows, therefore, that if the resistance is overcome and the vessel captured, neutral goods on board will not be legally affected by the fact that resistance had been offered. "No duty," observed Lord Stowell, "is violated by such an act on his [the enemy master's] part—*lupum auribus teneo*, and if he can withdraw himself

[1] Under the British rules compensation is in general payable for innocent neutral cargo destroyed along with an enemy prize: Cf. the British Memorandum, *Parliamentary Papers* (1909), *Miscellaneous*, No. 4, p. 9.

he has a right so to do." [1] Now as the arming of merchantmen for purely defensive purposes is legitimate, it follows, again, that neutral goods carried by them are, in general, similarly immune from seizure and destruction. A neutral is not debarred from placing his goods on merchant ships that provide themselves with means of self-defence of admitted legality but more effective than those possessed by an unarmed merchantman. If he places his property in a vessel that arms herself expressly with a view of engaging in offensive operations, then he has no right to indemnity for the loss of or injury to his property occasioned by a conflict of the vessel with an enemy cruiser. But it is permissible for him to embark his merchandise in a vessel possessing armament that is to be used only in self-defence in the event of an attack or attempted capture. Accordingly he is entitled to full compensation for innocent property either seized or destroyed by an assailant.

The Fanny

In a case, however, that was decided in the British Prize Court,[2] it was held that goods shipped on board an enemy armed vessel were confiscable, on the ground that deliberately to embark neutral cargo on a ship of this kind is

[1] *The Catherina Elizabeth* (1804), 5 C. Rob., 232, at p. 233.
[2] *The Fanny* (1814), 1 Dods., 443.

evidence of hostile association and intention to resist visit and search. But this view was not accepted by the United States courts,[1] which decided that armament or resistance of an enemy merchantman does not deprive neutral goods on board of their neutral character (and so of their inviolability), so long as the neutral himself does not directly participate in the resistance. If the neutral plays no part in the arming of the vessel or in the opposition offered to visit, and has no control over the vessel or her navigation, it is difficult to conceive how on any rational principle he is to be penalised.

The Nereide Chief Justice Marshall, in *The Nereide*, delivering the judgment of the Supreme Court, observed that to evade visit and search is lawful on the part of the neutral owner if lawful means are used; he may not, indeed, resort to fraud or force; but he cannot be held responsible or punishable for the legitimate resistance offered by the captain and crew of the merchantman, with whose acts he has no concern and over which he has no control. It is submitted that this is the better opinion, and it follows from the principles already set forth above.

[1] *The Nereide* (1815), 9 Cranch, 388, Story, J., dissenting; but this view was confirmed in *The Atalanta* (1818), 3 Wheat., 409.

It is important to note, however, in reference to the divergence of opinion between the English and the American Courts, that Lord Stowell's decision was based on the fact that the *Fanny* was an armed merchantman furnished with letters of marque, of which the neutral cargo-owner had knowledge; so that she was in the legal position of an ordinary warship. On the other hand, the *Nereide* appears to have been an uncommissioned armed merchantman that offered resistance to capture, after being under enemy convoy. But the cases are different

(g) *Enemy vessels exempt from capture or destruction*

Whatever liabilities enemy merchantmen in general incur at the hands of belligerents, there are certain classes of vessels that are ordinarily immune not only from destruction but also from attack. As the law relating to them is clearly established and in nearly every case universally recognised, there is no need to enter into elaborate exposition or argument; the briefest statement of the law and usage will suffice for our purpose. The protected vessels in question are the following :—

(1) Merchantmen at the outbreak of the war. As to the merchantmen of a belligerent that are Merchantmen at outbreak of war

in the enemy's ports at the outbreak of war, it has been the regular practice from about the middle of the nineteenth century (the Crimean War) to allow them a certain time in which to load and depart. Those on their way to and from a belligerent's port have similarly been permitted to discharge their cargoes and then depart unmolested to any port not blockaded.[1] The sixth Convention of the Hague (1907) now provides as follows :—

Hague Regulations thereon

1. When a merchant ship[2] belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port,[3] it is desirable that she should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to her port of destination or any other port indicated to her. The same rule

[1] Cf. *The Buena Ventura* (1899), 175 U.S., 384; *The Panama* (1899), 175 U.S., 535; *The Pedro* (1899), 175 U.S., 354; *The Nadajda* (1905), Takahashi, 604. See also the Report of the American Delegation to the Hague Conference of 1907: J. B. Scott, *The Hague Peace Conferences of* 1899 *and* 1907 (Baltimore, 1909), vol. ii. p. 219; A. Pearce Higgins, *Hague Peace Conferences*, pp. 295–307.

[2] This does not include a yacht: *The Germania* (1915), 1 Prize Cases, 573; it applies only to a vessel entering a port in pursuance of a commercial adventure: *The Prinz Adalbert* (1916), 2 Prize Cases, 70.

[3] As to the meaning of "port," see *The Belgia* (1915), 1 Prize Cases, 303; affirmed on appeal, 2 Prize Cases, 32.

applies in the case of a ship which has left her last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities had broken out.

2. A merchant ship which, owing to circumstances beyond her control, may have been unable to leave the enemy port [1] within the period contemplated in the preceding article, or which was not allowed to leave, may be confiscated. The belligerent may merely detain her under an obligation to restore her after the war without payment of compensation, or he may requisition her on condition of paying compensation.

3. Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities may not be confiscated.[2] They are merely liable to be detained under an obligation to restore them after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the

[1] Cf. *The Möwe* (1914), 1 Prize Cases, 60.

[2] If the vessel is fitted with wireless installation and is within a reasonable distance of communications, her knowledge is presumed: *The Gutenfels* (No. 2) (1915), 2 Prize Cases, 136.

preservation of the ship's papers. After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war.[1]

4. Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship. The same rule applies in the case of cargo on board the vessels referred to in Article 3.

5. The present Convention does not refer to merchant ships which show by their build that they are intended for conversion into war ships.

6. The provisions of the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties thereto.[2]

One or two important points are to be carefully noted in regard to the protection of vessels of this kind. In the first place, the convention does not make the exemption obligatory, but only optional; so that the granting of the immunity would naturally be conditioned on the adoption of

[1] This article does not apply to Germany, since she excluded it on ratifying the Convention.

[2] *Hague Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities* (1907), No. VI. Arts. 1–6.

reciprocal practice.[1] Secondly, a special restriction is imposed by Article 6. Thirdly, failing the application of the convention it is doubtful whether the exemption conceded in the various wars beginning with the Crimean War can be regarded as sufficiently long established to have materialised itself into an obligatory usage.

Licensed vessels

(2) Licensed vessels. A license to trade protects vessels if they duly comply with the terms thereof.[2]

Coast fisheries

(3) Coast fisheries, including the crews, boats, equipment, and cargoes of fresh fish.[3] The coast need not be that of their own country. The exemption is forfeited through violation of blockade, or engagement or intention to engage in any kind of warlike service, including scouting,[4] signalling, carrying arms, etc. The exemption is not extended to vessels engaged in the deep-sea fishery,[5] or to those fitted for the curing of fish.

[1] Cf. *The Chile* (1914), 1 Prize Cases, 1; *The Perkeo* (1914), *ibid.*, 136; *The Erymanthos* (1914), *ibid.*, 339; *The Bellas* (1914), *ibid.*, 95; *The Barenfels* (1915), *ibid.*, 122; *The Marquis Bacquehem* (1915), *ibid.*, 130; 2 Prize Cases, 58.

[2] *Usparicha* v. *Noble* (1811), 13 East, 332; *Flindt* v. *Scott* (1814), 5 Taunt., 674; *The Acteon* (1815), 2 Dods., 48; *The Felicity* (1819), 2 Dods., 381.

[3] *The Paquete Habana and the Lola* (1899), 175 U.S. 677.

[4] Cf. *The Kotik* (1905), Takahashi, p. 593; Hurst and Bray, vol. ii. p. 95: a fishing-vessel condemned by the Japanese Prize Court for having been employed in police duty.

[5] *The Lesnik* (1904), Takahashi, 595; Hurst and Bray, vol. ii. p. 92; *The Berlin* (1914), 1 Prize Cases, 29.

Under the earlier usage, the immunity was often expressly accorded by means of edicts, ordinances, and treaties.[1] It was sometimes withdrawn in exceptional circumstances of military necessity. Thus in the Crimean War the British interfered with the coast fisheries in the Sea of Azof owing to the exigency of military operations.[2] Similarly, the French Instructions in the same war [3] and in that of 1870 prohibited the molestation of coast fisheries, unless demanded by naval or warlike operations. The traditional rule was, indeed, regarded by some states as only a relaxation of strict right in the interests of humanity, or as a rule of comity.[4] Now, however, the eleventh Hague Convention (1907) confirms the old usage, and grants immunity not only to vessels engaged in coastal fishing but also to small boats engaged in local trade [5] (excluding coasting steamers), so long as they do not participate in the hostilities.[6]

[1] As to the " trêves pêcheresses " in the case of France, see J. M. Pardessus, *Collection des Lois Maritimes* (Paris, 1837), vol. iv. p. 319.

[2] See *United Service Journal* (1855), part iii. pp. 108–112.

[3] T. Ortolan, *Règles Internationales et Diplomatie de la Mer* (Paris, 1864), vol. ii. pp. 448 *seq.*

[4] Lord Stowell's view in *The Young Jacob and Johanna* (1798), 1 C. Rob., 20.

[5] Cf. *The Maria* (1915), 1 Prize Cases, 259.

[6] *Hague Convention* (1907), No. XI. Art. 3.

(4) Vessels, either public or private, despatched on scientific, religious, philanthropic,[1] or humanitarian expeditions have long enjoyed immunity, on condition of their abstaining from warlike services, and from commerce other than that necessary for the purpose of the expedition. The Hague Convention confirms this protection.[2] Scientific, etc., expeditions

(5) Cartel ships licensed to engage in the exchange of prisoners of war or on other particular services, *e.g.* the carriage of official communications, as specially agreed upon by the belligerents, are, together with their permitted cargoes, exempt from hostile attack. They must not be employed for purposes of trade, for carrying despatches or arms and munitions. If they exceed their permission or the terms of their license, their immunity is lost.[3] Cartel ships

(6) Hospital ships are inviolable, so long as they are exclusively engaged in the work of relieving the sick and wounded.[4] Hospital ships

[1] Cf. *The Paklat* (1915), 1 Prize Cases, 515.

[2] *Hague Convention* (1907), No. XI. Art. 4.

[3] *La Rosine* (1800), 2 C. Rob., 372; *The Daifjie* (1800), 3 C. Rob., 139; *The Venus* (1803), 4 C. Rob., 355; *The La Gloire* (1804), 5 C. Rob., 192; *The Carolina* (1807), 6 C. Rob., 336.

[4] *Hague Convention* (1907), No. X.: "Adaptation of the Principles of the Geneva Convention to Maritime War." Cf. *The Aryol* (or *Orel*) (1905), decided by the Japanese Prize Court; Hurst and Bray, vol. ii. p. 354; *The Ophelia* (1915), 1 Prize Cases, 210; (1916), 2 Prize Cases, 150.

Vessels in distress

(7) Vessels in distress. Practice as to exemption has varied among different States and at different times. Under French Ordinances and practice, the capture of shipwrecked enemy vessels is authorised.[1] In strict law such capture is in accordance with the general right to capture private enemy property at sea. But through considerations of humanity, the rigour of the rule has not infrequently been relaxed.[2] Juristic doctrine is decidedly in favour of immunity to merchant ships compelled through an accident of *force majeure* to take shelter in an enemy port.[3] Perhaps, however, the standard recommended is too high. At the second Hague Conference no conclusion was arrived at on the point.

Mail-boats

(8) Mail-boats and mail-bags. There is no rule of international law exempting mail-boats from hostile attack. Whatever protection is enjoyed by them is due to special treaties between the states concerned. But enemy mail-bags—

[1] Ordinance of 1681, Art. 26; Rules of 1778, Art. 14; Decree of 6 germinal an VIII. (March 26, 1800) Arts. 2, 8, 19; Decree of 1854. Cf. Despagnet, Sec. 655.

[2] Cf. the case of the *Elizabeth* (1746), which was, indeed, a British warship: Pistoye and Duverdy, I. p. 115.

[3] This was the view of the Institut de Droit International: *Annuaire* (1898), vol. xvii. p. 284.

excluding parcels sent by parcels post [1]—are under the Hague Convention exempt, with the exception of correspondence proceeding to or from a blockaded port.[2]

[1] *The Simla* (1915), 1 Prize Cases, 281.
[2] *Hague Convention* (1907), No. XI. Art. 1.

PART II. NEUTRAL MERCHANTMEN

A. Under the Customary Law

All that has been stated above in reference to the obligations of belligerents towards enemy merchantmen applies even more emphatically in the case of neutral merchantmen; so that the authorities already cited and the arguments advanced need not be repeated here *in extenso*, but should be regarded as supplementary to the exposition, arguments, and authorities in regard to neutral merchantmen.

1. *Visit and adjudication*

Enemy's right as to neutral vessels

The rule of international law defining a belligerent's right in relation to neutral vessels is correctly stated by the United States Government in the Note to Germany (February 10, 1915) after the latter's decree (February 4, 1915) unduly extending the war zone and hence enlarging the liability of neutral shipping: "... The sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained. . . . To declare or exercise a right to attack and destroy any vessel entering a

prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognised." [1]

Adjudication essential

It has long been a definitely established rule that captured neutral vessels are to be taken into port for adjudication. The plea of necessity, military or other, will not furnish valid ground for repudiating or dispensing with this obligation and for destroying the vessel. If it is found impossible for any reason to take her in, including the various circumstances in which it is claimed that an enemy vessel may be sunk (as considered above), it is the duty of the captor to release her. The captor is not a judge; he may not arrogate to himself the rights and functions of a judicial

[1] *American Journal of International Law, Supplement*, vol. ix. (July 1915), pp. 86, 87.

tribunal. The property in a suspected or even offending neutral merchantman is not transferred to the captor by the mere fact of seizure; it is legally transferred only by a valid condemnation pronounced by a properly constituted prize court. It is only after the ownership has thus passed that the captor state may deal with its newly acquired property as it thinks fit. Before the ownership has vested in it, it has no right to deal with a prize as though she were its own, and it has no right to proceed, by itself or its agents, to destroy her.

The Felicity The necessity for adjudication has been frequently emphasised in judicial pronouncements. Lord Stowell observed[1]: "Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication." Dr. Lushington held[2] that a neutral vessel "has the right to be brought *The Leucade* to adjudication, according to the regular course of proceeding in the prize court; and it is the very first duty of the captor to bring it in if it be practicable. From the performance of this duty the captor can be exonerated only by showing that he was a *bona fide* possessor, and that it was impossible for him to discharge it. No excuse

[1] *The Felicity* (1819), 2 Dods., 381, at p. 385.
[2] *The Leucade* (1855), Spinks, 217, at pp. 221, 222.

for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for the detention as well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colours be not brought to a competent court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her."

Belligerent and neutral interests

When, in naval warfare, the interests of belligerents come into conflict with those of neutrals, it does not follow, under the existing law of nations, that the former predominate over the latter. Neutrals have the right to sail the high seas; they are entitled to use this international highway unmolested, as long as they observe the clearly defined obligations of neutrality. Belligerents' convenience may not override neutral rights. Indeed, it may be argued in accordance with the fundamental principles of jurisprudence applicable to the society of states that, as war is from the point of view of international law

an abnormal condition, the right of neutrals to use the high seas and carry on their legitimate commerce even prevails over the claims of belligerents to make use of this or that portion of the open sea for the purposes of their conflict. So long as neutral vessels do not encroach within the limited theatre of warlike operations, so long as they commit no violation of the rules of neutrality, for example, as to blockade running, contraband trading, or unneutral service, they are entitled to be left alone, subject, of course, to visit and search in case of suspicion. The observance of their obligations necessarily implies the enjoyment of relative rights on their part, and a corresponding imposition of indefeasible obligations on belligerents.

2. *When attack is excusable or justifiable*

Cases of excusable attack

Are there any circumstances in which an attack on neutral vessels may be considered excusable or justifiable? An attack is excusable if it is the result of error; that is to say, the act is not an offence against law. But it will be for the assailant to prove strictly and beyond doubt that he really made a mistake, and that before attacking he did his utmost to ascertain the character of the vessel. In every case the presumption is that the assailant intended

to do what he actually did. On discovery of the error, however, he must do everything possible to remedy the effects of his act, and must pay due compensation.

Again, an attack on a neutral ship is excusable if she accidentally enters the area in which an engagement is in progress, and the act results from the legitimate operations against the enemy; it is justifiable if, after due warning, she deliberately enters therein,[1] or clearly acts in complicity with the enemy. The scene of action, in such a case, must be interpreted as the place where fighting is in progress; it does not coincide with the so-called war zone which the exaggerated pretensions of a belligerent purpose to extend over an extraordinarily large area, whereby neutral rights are manifestly invaded. At all events, whatever understanding—for example, as to guidance and directions for sailing—may be arrived at between a belligerent and neutral powers with regard to the restricted use of such area, and whatever right of interference with

[1] In 1800 a Swedish vessel, the *Hoffnung*, was used by the British to cut out Spanish frigates from the harbour of Barcelona (C. de Martens, *Causes Célèbres* (Leipzig, 1859), vol. iv. pp. 219 *seq.*; Ortolan, *Diplomatie de la Mer* (Paris, 1864), vol. ii. pp. 30, 31). Similarly, in 1870 the Germans sank six British vessels in the Seine to prevent the French gunboats from ascending the river and interfering with the German operations (*Parl. Papers* (1871), vol. 71; *Annual Register* (1870), p. 110).

neutral ships a belligerent claims, a belligerent warship is not entitled to make an attack on a neutral vessel found there. The only right of interference is that of visit and search, followed by seizure and removal to port for adjudication when there is valid ground therefor. Attack is, however, justifiable in case the vessel repeatedly attempts to escape after the summons to heave to, or offers forcible resistance to visit. Unlike an enemy merchantman, a neutral merchantman is not entitled to resist visit and search, except where the belligerent acts in an illegitimate manner.

Suspicion no ground for attack

Mere suspicion is not, and can never be, a valid ground for attacking a merchantman. "That a commander may fire on a craft that has aroused his suspicions," observes Sir Edward Fry, "without being *quite* sure of its hostile character, has never received approval or recognition in any treaty or other international document, or otherwise been admitted by the practice of any civilised nation or by any jurist. The argument to the contrary might be stated thus: The commander of a ship of war is under an absolute obligation to protect his ship from destruction or injury; that the development of the power of attack by means especially of torpedoes has increased the danger of attack, and, as a consequence, has

enlarged the right of defence; that this right of defence cannot be effectually acted upon without occasionally causing injury to neutral vessels, and that such injury, when it occurs, must be endured as the result of the exercise of a right of defence.—Even assuming the facts involved in such an argument to be correct, the conclusion cannot be maintained."[1] Pretensions of this kind would render peaceful shipping liable to be injured or even destroyed at the arbitrary discretion of naval officers actuated by extravagant and factitious claims of self-defence. The law of neutrality was not established purely and simply in the interests of belligerents; its purpose is to effect a definite compromise between belligerents and neutrals, to give certain rights to and impose certain duties on neutrals, to confer certain corresponding rights and impose corresponding obligations on belligerents; to restrict and circumscribe the range of lawful conduct of belligerents, and thus to prevent a recourse to excuses of self-defence and necessity. Military necessity cannot properly be considered a justification as against neutrals, whatever validity it may be claimed to possess as against the enemy. Accord-

[1] "The Rights of Neutrals as Illustrated by Recent Events" (a paper read before the British Academy, May 23, 1906), in *Proceedings of the British Academy*, vol. ii. (reprinted, London, 1906), p. 3.

ingly, as Sir Edward Fry concludes, " if there be circumstances under which the right of defence cannot be exercised without injury to neutrals, it ought not in such a case to be exercised at all." [1] The means of hostile attack have no doubt increased considerably in modern warfare ; but so have the means of discovering the approach of enemy forces and of verifying their true character. During the Russo-Japanese War, when Russian warships fired on suspicion, and hence unlawfully, on British vessels in the North Sea, the British protest brought forth assurances from the Russian Government that such proceedings would not be repeated ; which showed that the Russian forces possessed adequate means, if they chose to use them, for ascertaining the character of passing ships. In the case of the present war, various states have strongly protested against the German attacks on merchantmen on grounds of suspicion ; one of the American Notes to this effect has already been referred to.

3. *The destruction of neutral merchantmen*

General rule of non-destruction

(*a*) *General Rule.*—Having considered the question of seizure, adjudication, and attack,

[1] " The Rights of Neutrals as Illustrated by Recent Events " (a paper read before the British Academy, May 23, 1906), in *Proceedings of the British Academy*, vol. ii. (reprinted, London, 1906), p. 3.

we come now to the more particular question of the destruction of neutral prizes. It may be said at once that since adjudication in the case of a neutral vessel cannot legitimately be dispensed with (as was shown above) it follows that destruction may not be resorted to. "As regards the sinking of neutral prizes," wrote Sir Edward Grey, stating the customary rule, "Great Britain has always maintained that the right to destroy is confined to *enemy* vessels only, and this view is favoured by other Powers. Concerning the right to destroy captured *neutral* vessels, the view hitherto taken by the greater naval Powers has been that, in the event of it being impossible to bring in a vessel for adjudication, she must be released." [1] British Prize Courts have for over two centuries held this to be the general law.[2]

Juristic opinion

Juristic opinion is for the most part to this effect. The majority of jurists and publicists who have dealt with the subject regard the prohibition as absolute, and consequently hold that where the suspected or offending vessel cannot be taken into port, she must be released whatever may happen to any contraband cargo on board.

[1] Sir Edward Grey to Sir Edward Fry, June 12, 1907: *Parl. Papers, Miscell.*, No. 1 (1908), pp. 17, 18.

[2] Cf. *The Acteon* (1815), 2 Dods., 48; *The Felicity* (1819), 2 Dods., 381; *The Leucade* (1855), Spinks, 217.

Some writers, however, whilst recognising that the rule of non-destruction is clearly established as a general rule, admit that in certain extraordinary circumstances destruction may be resorted to, subject to the payment of indemnity by the captor. That such admission does not really impair the generality and applicability of the rule will be seen below. Other writers,[1] again, do not even refer to the question, as though it was understood that the very neutrality of the merchantman necessarily protected her from destruction at the hands of a belligerent. They speak, rather, in this respect, only of enemy prizes; and when the word "prize" is used without qualification, it is taken for granted that vessels belonging to the enemy are alone meant, so far as sinking or burning is concerned. This verbal usage is found in the great French auth-
Valin ority, Valin[2]; the word "ennemi" in reference to prize is omitted by him in one or two places, and so some subsequent writers have mechanically copied his text and appear to have interpreted it as though the expressions "vaisseau," "prise,"

[1] G. F. de Martens, *Les Armateurs, les Prises, et les Reprises* (Gottingue, 1795); H. Wheaton, *A Digest of the Law of Maritime Captures and Prizes* (New York, 1815); F. de Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations* (Leipzig, 1856).

[2] *Traité des Prises* (ed. 1763), vol. i. p. 133; *Commentaire sur l'Ordonnance de* 1681 (ed. 1766), vol. ii. pp. 281–288.

etc., applied equally to neutrals.[1] Valin uses these words: "Il est permis aux preneurs par l'art. 19 de notre ordonnance d'enlever les marchandises de la prise en tout ou en partie en relâchant le navire, ou mieux en y mettant le feu ou en le coulant à fond, suivant l'ordonnance du 2 décembre 1693, après en avoir retiré tous les prisonniers." If this Ordinance applied to neutral prizes it could not have spoken in such general unqualified terms of taking off the prisoners; for innocent neutral passengers and crews were not liable to be taken prisoners, whatever treatment neutral property may have been subject to.

Rule respected in naval war

However this may be, what is of the utmost importance is that in the history of naval war belligerents have—with certain exceptions to be presently referred to—regularly and consistently observed this rule. Governments have never expressly claimed the right to destroy neutral prizes, if their formal regulations are to be rationally interpreted and read with the customary law consecrated by long-established practice. Their edicts, ordinances, decrees, instructions, and prize rules speak of "enemy

State regulations

[1] This is emphasised by T. Baty, *Britain and Sea Law* (London, 1911), pp. 22, 23; also in *Revue de Droit International* (1906), p. 434.

prizes "[1] or "prizes"[2]; they cannot have meant to apply the same treatment indiscriminately to neutral and to enemy vessels.[3] The fundamental principle of neutrality demands that neutrals are not to be treated as enemies, that some clear differentiation between them is indispensable, that additional precautions have to be taken by belligerents to ensure their safety and freedom from molestation. And yet not a single provision is to be found in these written codes pointing to such precautions, not a single direction is given to commanders to pay regard to the absolute inviolability of innocent neutral persons found on board prizes. It is reasonable to infer, then, that the said codes did not contemplate the deliberate destruction of neutral merchantmen at all. Even if the omission to differentiate between neutral prizes and enemy prizes were deliberate, and the word "prize" were purposely used in the instructions of this or that state to apply equally to the captured

[1] Cf. the Instructions of Great Britain (*Manual of Naval Prize Law*, Arts. 303, 304), and those of Japan, 1894.

[2] Cf. the Instructions of France, Russia, United States, and Japan (1905): see *Parl. Papers, Miscell.*, No 5 (1909), pp. 99 *seq.*

[3] The German Prize Code, dated Sept. 30, 1909, allows (Art. 113) the destruction of neutral prizes in circumstances somewhat similar to those mentioned in the Declaration of London. But, as is pointed out further on, this part of the Declaration being contrary to the customary law is not binding.

merchant ships of neutrals and to those of the enemy, it cannot be inferred therefrom that the law is thus necessarily altered. No power or group of powers can alter a long-established rule that has so constantly been respected in practice; much less can any power or powers alter a long-established rule by the use of ambiguous or ill-defined generalised expressions in their municipal regulations. Where there is an ambiguity the presumption must be that the expression was used, at all events, compatibly with the existing law. In order to effect a change in the law the express or tacit consent thereto of the society of nations in general is indispensable. By no means can it be said that the society of nations has consented to assimilate neutral vessels and neutral persons to enemy vessels and enemy persons. States are, of course, entitled to issue to their forces what orders they think fit; but their prize regulations would be invalid from the point of view of international law and usage—the inevitable and predominating criterion when other states are concerned—if they directed commanders to do anything or refrain from doing anything in contravention of that law and usage; and commanders acting in accordance with such invalid regulations would be guilty, along with their governments,

Alteration of law

of a breach of international law and of an offence against the society of states as well as against the enemy state directly affected.

Municipal rules and international law

Professor Holland, referring to the British rule in the *Manual of Naval Prize Law* of 1888 that neutral prizes are to be released if they cannot be sent in, describes it as an " indulgence " that can hardly be proclaimed as an established rule of international law, seeing that the prize codes of some countries allow the sinking of neutral prizes in certain circumstances.[1] It is submitted, however, comformably to our previous argument, that, in the first place, " indulgence " is a question-begging expression ; secondly—as we have already emphasised—the municipal dispositions of two or three states cannot create new rules or abrogate existing rules of international law ; and, thirdly, their municipal dispositions are not necessarily to be construed as aiming at neutral prizes, which are not expressly specified. It should be added that just before describing the rule of release as an " indulgence " and " hardly " a rule of international law, Professor Holland doubted whether " even overwhelming necessity would be sufficient to

[1] T. E. Holland, " Neutral Duties in Maritime War," in *Proceedings of the British Academy*, vol. ii. p. 13. Cf. his *Letters to the Times upon War and Neutrality* (1909), p. 148.

justify " destruction—a doubt which destroys or at the least considerably impairs his subsequent conclusion.

(*b*) *Alleged Exceptions.*—Admitting, then, that the rule under the customary law is non-destruction of neutral merchantmen, can it be said that there are exceptions thereto in certain circumstances of extraordinary emergency when the vessel cannot be taken in?

Claims as to exceptions

We have already seen that under the practice of Great Britain and other maritime powers the rule of prohibition was absolute, admitting of no exceptions. Here and there, however, jurists [1] were inclined to the view that in certain exceptions the general rule of prohibition might be disregarded by commanders of warships; and it was also alleged that some few states tacitly claimed such a dispensation in exceptional cases of necessity. But there was never any unanimity as to the exceptions. The conclusions formulated by the Institut de Droit International have already been pointed out in the consideration of enemy prizes. The growing feeling in various quarters that some relaxation

[1] *E.g.* F. de Martens, *Traité de Droit Int.*, vol. ii. p. 126; Calvo, *op. cit.*, vol. v. Sec. 3028; P. Fiore, *Nouveau Droit International Public* (Paris, 1869); F. Perels, *Manuel de Droit Maritime International* (Paris, 1884), p. 334; C. Dupuis, *Le Droit de la Guerre Maritime*, etc. (Paris, 1899), p. 339.

from the general rule of non-destruction is desirable is shown in the transactions of the Institute. In the earlier discussions of this body certain members [1] (for example, Sir Travers Twiss) urged that a clear distinction should be drawn between neutral and enemy vessels, and that it was exorbitant to allow a neutral vessel to be destroyed without adjudication. M. Bulmerincq, who prepared the original draft, said he purposely avoided such discrimination. M. Bluntschli and M. Den Beer Poortugael maintained that the circumstances in which enemy prizes might be destroyed could not all equally apply to neutral prizes. M. de Martens and M. Perels argued that a captured neutral vessel with contraband on board could not be expected to be released in any of the five contingencies, viz. her unseaworthiness, slowness, remoteness of the captor's port, inability to spare a prize crew, his fear of recapture owing to the approach of superior enemy forces. Others proposed that destruction in the specific circumstances should be confined to enemy prizes, and to such neutral vessels as were manifestly subject to condemnation.[2] Eventually the

[1] *Annuaire de l'Institut de Droit International* (1882-1883), vol. vi. p. 134.

[2] *Ibid.* pp. 154, 155, 168, 169.

Institute adopted the article, as originally drafted, which speaks of "prize" only, and draws no distinction between neutral and enemy prizes.[1] At a subsequent meeting (Heidelberg, 1887) it was resolved to limit the application of the article to enemy prizes; and some years later (Oxford, 1913) the right to destroy enemy vessels was expressly recognised.[2]

Destruction and compensation

It has sometimes been asserted that in extraordinary cases destruction might lawfully be resorted to on condition of paying compensation to the neutral owners. But the readiness to pay compensation cannot confer a right to destroy, and the actual payment of it cannot be a retrospective justification of an act of destruction. Such judgments as those of Lord Stowell in *The Felicity*[3] and Dr. Lushington in *The Leucade*[4] appear to have been on this point misinterpreted by some commentators. Lord Stowell declaring that it was "clear in principle and well established in practice" that a captor was bound to release a captured vessel when it was doubtful whether she was enemy property and it was impossible

[1] *Annuaire de l'Institut de Droit International* (1882-1883), vol. vi. p. 221.

[2] *Annuaire* (1913), vol. xxvi. p. 348.

[3] (1819) 2 Dods., 381. Cf. *The Zee Star* (1801), 4 C. Rob., 71; *The Acteon* (1815), 2 Dods., 48.

[4] (1855), Spinks, 217, at pp. 221, 231.

to bring her in, observed: "In fact, where the property was neutral, the act of destruction could not be justified by the gravest importance of such an act to the public service of the captor's own state; and to the neutral it could be justified, under any circumstances, only by a full restitution in value." Dr. Lushington said: "If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages;" and that destruction "could only be justified on the grounds of public policy, and for illegal acts done for such a reason responsibility must attach."

"Justification" of destruction

Now neither of these decisions goes to show that a belligerent may lawfully sink a neutral vessel in certain circumstances on condition that he pays for her. These judges were avowedly concerned only with the remedy they could grant in their own courts to private persons; they were not called upon to deal with the broader question of infringing the rights of neutral states, and with the restrictions imposed by international law on belligerent operations. Lord Stowell, indeed, adverts to this broader question when he says that no exigency of public policy can "justify" the destruction of a neutral merchantman. The word "justify"

is used here in its strictly correct sense, viz. that an illegitimate act cannot be rendered legitimate; but in the second case it is obviously used with a different significance and application. The justification in the first case appertains to the sanction of law and right; in the second case it means no more than compensation, indemnity, or reparation. The clear implication is that to sink a neutral vessel deliberately is an illegitimate act even though it be dictated by state interest, and as such it is an offence against the neutral state concerned; it is not an offence, under strict international law, against the individual owner himself, who, however, is entitled, under the dispensation of our prize courts—and under the fundamental principles of equity recognised by the juridical consciousness of civilised mankind—to have his loss made good. The conclusion that follows from this interpretation is that a neutral merchantman may not be destroyed, and if one is destroyed in contravention of this prohibition the value must be refunded and costs and damages paid, that is, a penalty, too, is imposed on the destroyer. It is clear, then, that if compensation and damages must be paid, it is because a wrongful act has been done deliberately. So that on either interpretation of the word "justify" as used by Lord Stowell,

Payment does not give right to destroy

the rule of non-destruction is vindicated. Those who cite these judgments of Lord Stowell and Dr. Lushington as against the rule of non-destruction appear to hold that because full payment is to be made for doing a certain wrongful act, therefore such an act may lawfully be done if payment is made for it. The fallacy involved in this argument is not less than it is in the following: Because you are to suffer imprisonment for committing robbery, therefore you may lawfully rob if you are prepared to suffer imprisonment. Purgation does not involve legalisation.

Rule of non-destruction consistently observed—with one exception—in past wars

(c) *The Russo-Japanese War.*—This rule of non-destruction was uniformly observed in a long succession of past wars until the beginning of the twentieth century.[1] Some writers have erroneously pointed to examples of British practice to the contrary in the Napoleonic wars. It is true that four American ships—the *Felicity*,[2] the *Acteon*,[3] the *Rufus*,[4] and the *William* [5]—were sunk by the British. But they were not neutral vessels; they were enemy vessels claiming to

[1] See T. Baty, *Britain and Sea Law* (London, 1911), pp. 2–25; J. W. Garner, "Some Questions of International Law in the European War," in *American Journal of International Law*, January, 1916.

[2] (1819), 2 Dods., 381.

[3] (1815), 2 Dods., 48.

[4] (1815), 2 Dods., 55.

[5] (1815), 2 Dods., 55.

sail under a British license, which in some cases was of a doubtful character. Due restitution was none the less made, not on the ground that they were neutral vessels, but because of the breach of the special protection that had been conferred upon them as enemy ships. However this may be, before the Russo-Japanese War belligerents recognised, by their conduct, the general applicability of the rule of non-destruction in reference to neutral vessels; they did not render the prohibition nugatory by claiming that there were various exceptions. They had countless opportunities and temptations. A commander cannot have been in a very benevolent mood on encountering a neutral vessel carrying arms and munitions to his enemy. Yet the rule was invariably observed; its binding force was admitted. In the Russo-Japanese War practice to the contrary was begun by the Russian forces.[1] They sank a number of neutral vessels, viz., the British vessels *Knight Commander*,[2] *St. Kilda*,[3] *Oldhamia*,[4] *Ikhona*,[5] *Hip-*

Departure in Russo-Japanese War

[1] Cf. T. J. Lawrence, *War and Neutrality in the Far East*, 2nd ed. (London, 1904), pp. 250–289; A. S. Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (New York, 1906), pp. 136 *seq.*

[2] (1905) Hurst and Bray, *Russian and Japanese Prize Cases*, vol i. p. 54.

[3] (1908) *ibid.* p. 188.

[4] (1907) *ibid.* p. 145.

[5] (1907) *ibid.* p. 226.

sang [1] ; the German vessels *Thea*,[2] *Tetartos* [3] ; and the Danish vessel *Prinsesse Marie*.[4] The *Hipsang* was not a prize at all ; she was sunk by a pursuing torpedo-boat on the ground that she was trying to evade capture. The reason given for destroying the *Thea* was that she had been engaged in a Japanese " close " trade ; but the Russian Supreme Court found that she had been engaged in the coasting trade, and that this was not a " close " trade, so that compensation was awarded to the owners. In the other cases the ground alleged was the carriage of contraband ; of these the *Oldhamia* was not deliberately destroyed, but was set on fire after becoming a wreck. The Russian Court decreed compensation also in the case of the *St. Kilda* and the *Ikhona*.

British protest

The destruction of the *Knight Commander* was correctly described by Mr. Balfour in the House of Commons as " entirely contrary to the practice of nations." [5] In the House of Lords Lord Lansdowne designated the act an " outrage " and observed that " a very serious breach of international law had been committed by the captors. . . . Under no hypothesis can the Government conceive that a neutral ship could

[1] (1907) Hurst and Bray, *Russian and Japanese Prize Cases*, vol. i. p. 21.
[2] (1904) *ibid.* p. 96.
[3] (1906) *ibid.* p. 166.
[4] (1908) *ibid.* p. 276.
[5] Hansard, vol. 138, 4th ser. p. 1481.

be sunk on the mere fiat of a cruiser's commanding officer, who assumed that the cargo of the vessel included articles which were contraband of war."[1] A note was forthwith despatched to Russia emphatically denying a captor's right to sink a neutral ship owing to the difficulty or impossibility of taking her in for adjudication by reason of the distance of the port, the length of the voyage, the large amount of coal necessary therefor, or inability to provide a prize crew. Such measures, which would paralyse neutral trade, were " contrary to acknowledged principles of international law." The British Government refused to acquiesce in the introduction of a new doctrine whereby, on the discovery of articles alleged to be contraband, the vessel was, without adjudication and notwithstanding her neutrality, liable to treatment which was reluctantly applied even to an enemy ship.[2] In reply, the Russian Government gave assurances that the practice would be discontinued. The following summer, however, the practice was renewed. In answer to Lord Lansdowne's protest against the destruction of the *St. Kilda,* Count Lamsdorff said that the

Russian reply

[1] Hansard, vol. 138, 4th ser. p. 1436.

[2] Lord Lansdowne to Sir C. Hardinge, British Ambassador to Russia, August 10, 1904: *Parl. Papers, Russia,* No. 1 (1905), pp. 11, 12.

previous assurances still held good; and that "the present case was an isolated one, probably due to misunderstanding and the disorganisation of the Russian naval forces in the Far East;" and he promised to order the offending cruisers home.

American protest

The American Government, too, declared, in reference to the destruction of the *Knight Commander*, that the carriage of contraband did not in itself justify the sinking of the vessel, but was not prepared to maintain that a prize might not be legitimately destroyed by a captor in case of "imperative necessity." However, the Russian Government was informed that the United States would "view with the gravest concern the application of similar treatment to American vessels and cargoes." [1]

No legal precedent

In view of these protests, the assurances of the Russian Government, and the disavowal of the acts committed, it is impossible to regard the cases of destruction in the Russo-Japanese War as precedents modifying the existing customary law of nations.

Persons on board

It may be added that the Russian captors, before destroying their prizes, removed the persons on board, though in some cases too little time was allowed for the transhipment.

[1] *Foreign Relations of the United States*, 1904, pp. 333, 337, 734.

Tendency of views after Russo-Japanese War

After the Russo-Japanese War the tendency of juristic doctrine became stronger in favour of the destruction of a neutral prize in certain clearly-defined conditions, *e.g.* when she is found carrying such contraband goods as arms and munitions in very large quantities and it is impossible to take her in, so that to release her would be tantamount to allowing the fighting resources of the adversary to be augmented.[1] Furthermore it was felt that the claims of various states in regard to the destruction of neutral prizes were becoming more markedly opposed to the British rule of absolute prohibition. Accordingly an attempt was made at the Hague Conference of 1907 and at the London Naval Conference of 1908-1909 to arrive at a general understanding on the question.

Growing claims of states

Object of second Hague Conference

(*d*) *The second Hague Conference and the London Naval Conference.*—It is to be noted that the second Hague Conference was not concerned with formulating the law as it then was; its avowed object was to agree upon what the law should be conformably to the desire of the states of the world, and so to make the necessary changes in pursuance of such agreement.

British proposal

Great Britain proposed what she held to be the existing rule, viz., the release of a neutral

[1] Cf. J. B. Moore, *Digest of International Law*, vol. vii. p. 523.

prize which could not be taken in for adjudication.[1]

American proposal

The United States supported the same rule on grounds of humanity and justice, and pointed out that the present construction of warships offered little accommodation for persons removed from captured vessels, and exposed them—non-combatants—to the dangers of battle. Moreover, she proposed the abolition of the capture of private unoffending property.[2]

Russian proposal

Russia proposed that, as absolute prohibition would place powers not possessing overseas ports in a disadvantageous position, exceptions should be allowed in case the safety of the captor or the success of his operations was endangered by an attempt to take in a prize; and that in any case destruction should be resorted to with the greatest reserve after providing for the security of the persons on board, the ship's papers, and as far as possible the cargo.[3]

German view

Germany defended the views of the Russian Government.[4]

Views of other states

Some states supported the American proposal for the abolition of capture altogether, others

[1] *Deuxième Conférence Internationale de la Paix: Actes et Documents* (1907), vol. iii. pp. 903–907.

[2] *Ibid.* pp. 1050, 1141; cf. pp. 750–755, 776–779, 795–808.

[3] *Ibid.* pp. 900, 991–992.

[4] *Ibid.* pp. 992, 993.

opposed it on the ground that it was necessary first to come to an agreement as to contraband and blockade; others, again, suggested sequestration and non-destruction. In the end unanimity was found to be impossible. The result of the deliberations showed that there was a slight majority in favour of admitting prizes into neutral ports, a somewhat larger majority in support of the prohibition of destruction, subject in some cases to the establishment of free access to neutral ports, and a slight majority (though many states abstained from voting) in favour of destruction in general and apart from any proviso.[1]

Object of London Naval Conference

At the London Naval Conference (1908-1909) another attempt was made to adjust the different views of states; but this time it was less a question of establishing a new rule (*lex ferenda*) than of formulating the existing law (*lex lata*). There was, however, marked disagreement as to what was the existing law.

Great Britain, supported by Japan, urged the absolute immunity of neutral prizes from destruction.[2] But the other powers, whilst differing

[1] *Deuxième Conférence Internationale de la Paix: Actes et Documents* (1907), vol. i. pp. 262–264 (General report to the Conference); A. Pearce Higgins, *Hague Peace Conferences*, pp. 89–92.

[2] *Parl. Papers, Miscell.* No. 5 (1909), p. 38.

more or less from each other, proposed non-destruction as the general rule, but that destruction should be exceptionally permissible in circumstances of urgency or necessity whereby the taking of a prize would endanger the safety of the captor or the success of his operations.[1]

A compromise effected

In view of this difference of opinion, a compromise was eventually arrived at and was embodied in the Declaration of London.

B. The Declaration of London on Destruction of Neutral Prizes

General rule

The Declaration of London recognises the general rule of non-destruction and the duty of bringing in for adjudication.[2]

Exceptions

Exceptionally, however, a captor may destroy the neutral prize if he can prove that she was confiscable, and that she could not have been brought in without endangering his safety or the success of his operations at the time[3]; but before destroying her provision must be made for the safety of all persons on board and the ship's papers.[4] The owner of destroyed innocent neutral goods on board is entitled to compensation.[5]

[1] *Parl. Papers, Miscell.* No. 5 (1909), *passim.*
[2] Art. 48. [3] Arts. 49, 51. [4] Art. 50. [5] Art. 53.

Owing to the non-ratification of the Declaration of London, however, it does not possess, as such, binding force.[1] Accordingly the customary law alone remains applicable, with which, however, the Declaration agrees in certain respects. A belligerent may adopt or reject or modify any of the provisions of the Declaration, so long as the adoption, rejection, or modification involves no inconsistency with the customary law. And it must be emphasised that under this customary law, military necessity and readiness to pay compensation—though they may be pleaded in extenuation when a neutral prize is destroyed—cannot be considered a legal justification.

Declaration of London not binding

C. Rules and Practice in the Present War

So far as relates to the destruction of neutral prizes neither Great Britain nor France has made regulations inconsistent either with the Declaration of London or with the customary law, and their practice has conformed throughout to the rules of established law. As for Germany, Art. 113 of her prize code of 1914, which was published on the outbreak of the present war, instructed her naval officers to destroy neutral prizes for contraband trading, violation of

Capture and destruction in present war

[1] Cf. *The Hakan* (1916), 2 Prize Cases, 210.

blockade, or for unneutral service, if to take them in for adjudication might endanger the captor's safety or the success of his operations; which contingency would arise in any of the following circumstances: unseaworthiness of the prize, her incapacity to follow the captor, insufficiency of coal for the voyage, proximity to the enemy's coast, or inability to provide a prize crew. Art. 116 requires that the captor, before proceeding to destroy a prize, should remove all persons on board and ship's papers, and make due provision for their safety.[1]

German proceedings

The practice of the naval forces of Germany has to a very great extent been contrary not only to her own regulations laid down in her prize code, but also—what is much more important—to the long-established and universally respected rules of customary law. Indeed, the number and the magnitude of the violations committed have far surpassed all the breaches of maritime law committed by all the combatants together in the last two centuries. The public vessels of Germany have attacked and destroyed innumerable ships without ascertaining their nationality, their character, or the nature of their enterprise. In many cases the duties of visit and search and

[1] Cf. C. H. Huberich and R. King, *The Prize Code of the German Empire* (New York, 1915), p. 66.

taking in for adjudication were disregarded. Torpedoes were fired at passing ships on mere suspicion. Numerous enemy merchantmen were sunk without warning; and a number of neutral merchantmen were dealt with in the same manner. In some cases where warning was given the time allowed was too short for purposes of transhipment, and due provision was not made for the safety of the persons on board. The very use of submarines against merchantmen—even against enemy merchantmen, as has been shown above—is unlawful. All—belligerents and neutrals alike—who have suffered loss in lives or property as a result of this unlawful conduct are entitled to full reparation.

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