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### Disrupting a delicate balance

The Allied blockade policy and the law of maritime neutrality during the Great War

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## **Disrupting a Delicate Balance:**

### **The Allied Blockade Policy and the Law of Maritime Neutrality during the Great War**

by

Stephen C. Neff

The Great War is well known as an epic duel between the rival alliance groups of major powers. Less well known – but no less epic in its way – was its role as a duel between two distinct juridical outlooks. The one sees law chiefly as a collection of rules, with general principles useful, perhaps, as a way of organising one’s thinking but not as having legal force in their own right. The other sees general principles as the primary engine of law, with specific rules emanating from them by way of deduction.<sup>1</sup>

The contrast between these two rival frames of mind has seldom, if ever, been so vividly demonstrated as in the disputes during the Great War over the blockade policies of the Allied powers and their impact on the law of maritime neutrality. The following discussion will elucidate the most salient features of these blockade policies.

### **The Inheritance from the Past**

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<sup>1</sup> For perceptive observations to this effect, see 2 John Westlake, *International Law: War* (2nd ed., 1913), at 190-98.

On the eve of the Great War, the law of neutrality had the interesting distinction of being, at the very same time, the richest and most detailed part of international law, and the least developed conceptually. There was a reason for this: that neutrality, perhaps more than any other area of international law, had its origin in the ad hoc practices of nations, rather than in the more orderly and reflective minds of treatise writers. Beginning in the Seventeenth Century, states had begun to make provisions for treatment of neutral traders during wartime in the network of treaties of friendship, commerce and navigation. These typically provided that, when one of the parties was at war with a third state, merchants of the other could trade freely with that enemy state, subject to two key exceptions: neutral ships could be captured for carriage of contraband of war and for breaching blockades.<sup>2</sup>

Not until the middle of the Eighteenth Century, however, did serious thought even begin to be given to the question of the conceptual basis of these practices. When it did, a three-fold division of scholarly opinion promptly emerged.<sup>3</sup> One could be termed the conflict-of-rights, or necessity, approach, originally articulated by the renowned Swiss writer Emmerich de Vattel. In his famous treatise of 1758, he posited that the right of belligerents to interfere with neutral trade with their enemies arises out of necessity. A belligerent has a right to interfere with neutrals trading with its enemy whenever that interference is necessary to bring about victory in the contest, even if the rights of neutrals are adversely affected.<sup>4</sup> The second approach could be termed the code-of-conduct thesis, first advanced in 1759 by the Danish writer and diplomat Martin Hübner. His idea was that a set of rules, admittedly more or less arbitrary, should be fixed, with neutrals allowed to do any kind of trading which those rules permitted, while conversely being barred from any trading which the rules did not permit.<sup>5</sup> On this thesis, the material impact of the neutrals' activity on the outcome of the conflict would be of no relevance. Finally, there was what might be termed the community-interest approach, put forward by the Italian writer Abbe Ferdinando Galiani in his general treatise on neutrality (the first ever written) of 1782.<sup>6</sup> His idea was that, on grounds of public policy, the law should

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<sup>2</sup> See Stephen C. Neff, The Rights and Duties of Neutrals: A General History (2000), at 27-38.

<sup>3</sup> See *ibid.*, at 44-60.

<sup>4</sup> Emmerich de Vattel, The Law of Nations, or The Principles of Natural Law (Charles G. Fenwick trans. 1916 [1758]), at 270-71.

<sup>5</sup> 2 Martin Hübner, De la saisie des bâtiments neutres; ou Le droit qu'ont les nations belligérantes d'arrêter les navires des peuples amis (1759), at 114-18.

<sup>6</sup> Abbé Ferdinando Galiani, De' Doveri de' Principi Neutrali verso I Principi Guerreggianti, e di Questo verso I Neutrali (1782).

explicitly prefer the interests of those at peace to the concerns of those at war, with neutrals having a comprehensive, and non-derogable, freedom to trade with belligerent countries.

In the course of the Nineteenth Century, the code-of-conduct school gained the upper hand over its two rivals. It animated the work of the French writer on maritime law, L.-B. Hautefeuille in mid-century and received its most thorough-going exposition at the end of the century, at the hands of the Swedish writer Richard Kleen.<sup>7</sup> Ironically, the very completeness of the triumph of the code-of-conduct approach highlighted a disturbing feature of it: the lack of a coherent policy or philosophy underlying this area of the law. There was perpetual jostling for juridical position between the interests of neutrals and belligerents – which of course were not fixed sets of states -- but no general agreement as which category should be preferred in difficult or doubtful cases. As a result, specific rules governing specific situations arose in a haphazard manner over the course of centuries. No less an authority than Kleen himself pronounced neutrality to be, of all areas of international law, the “most anarchic.”<sup>8</sup> John Westlake, the Cambridge professor of international law, was of much the same mind. Establishing some kind of preference or priority between rights asserted by belligerents and those claimed by neutrals, he pointed out, “supposes some standard by which to judge them, lying deeper than the so-called rights.” In the absence of such a standard, the law in this area could only be “a working compromise between demands.”<sup>9</sup>

Attempts were made to arrive at a codification of the various “working compromises” which constituted the law of neutrality. At the Second Hague Peace Conference of 1907, conventions were drafted on neutrality both in land and maritime warfare.<sup>10</sup> Significantly, the prominent French lawyer Louis Renault, much in the spirit of Westlake, stressed that the task at hand was to reach agreement on a host of specific issues, rather than to construct a system of deductions from axiomatic general principles. Debates over “general considerations,” he cautioned, “might give rise to lengthy discussions, inasmuch as neutrality is not viewed in the

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<sup>7</sup> See L-B. Hautefeuille, Les droits et les devoirs des nations neutres en temps de guerre maritime (3d ed., 1868); and Richard Kleen, Lois et usages de neutralité d'après le droit international conventionnel et coutûmier des États civilisés, 2 vols. (1898-1900).

<sup>8</sup> I Kleen, supra note 7, at vii-viii.

<sup>9</sup> Westlake, supra note 1, at 195.

<sup>10</sup> Hague Convention V on the Rights and Duties of Neutrals in Land Warfare, Oct. 18, 1907, 205 C.T.S. 299; and Hague Convention XIII on the Rights and Duties of Neutrals in Maritime Warfare, Oct. 18, 1907, *ibid.*, at 395.

same light by everybody.” The fruitful way forward was therefore to deal with “particular cases,” which could be “presented in concrete and precise shape.”<sup>11</sup>

The same approach was taken shortly afterward at the London Naval Conference of 1908-09, which produced a menu of rules on blockade, contraband, unneutral service, destruction of prizes at sea and sundry other topics.<sup>12</sup> By way of example, attention may be drawn to the Declaration’s treatment of the controversial continuous-voyage principle, which allowed contraband goods to be captured and condemned while en route to a neutral port, provided that the eventual or ultimate destination was enemy territory.<sup>13</sup> (For this reason, it is sometimes called the “ultimate destination” principle.) The idea was much opposed by continental European lawyers. Kleen, for example, denounced it as “veritable piracy.”<sup>14</sup> The rule agreed in the Declaration of London was that the continuous-voyage principle could be applied to absolute contraband, but not to conditional contraband or to blockade.<sup>15</sup> (Absolute contraband comprised goods useful solely for war, such as arms and ammunition; while conditional contraband comprised dual-use goods, useful in both war and peace, and treatable as contraband when actually used for war.) It was hard to state a principled reason for allowing the continuous-voyage principle in the one scenario but not the others. The reality was that it was a working compromise between those who favoured the continuous-voyage concept per se and those who opposed it.

The Declaration of London, however, never entered into force because the foremost naval power, Great Britain, declined to ratify it.<sup>16</sup> The norms of the Declaration nevertheless were drawn upon in the formation of the British Admiralty’s naval instructions.<sup>17</sup> They were

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<sup>11</sup> 1 James Brown Scott (ed.), Proceedings of the Hague Peace Conferences: The Conference of 1907 (1920), at 278.

<sup>12</sup> Declaration Concerning the Laws of Naval War, Feb. 26, 1909, Cd. 4554. Reprinted in D. Schindler and J. Toman, The Laws of Armed Conflicts (1988), at 845-856 (hereinafter the ‘Declaration of London’). For a comprehensive commentary on the Declaration, see Norman Bentwich, The Declaration of London (1911).

<sup>13</sup> For a thorough treatment of the continuous-voyage principle, see generally Herbert W. Briggs, The Doctrine of Continuous Voyage (1926).

<sup>14</sup> 1 Kleen, supra note 7, at 205.

<sup>15</sup> Declaration of London, arts. 19, 30, 35.

<sup>16</sup> On the political and strategic debates in Britain over ratification, see Bernard Semmel, Liberalism and Naval Strategy: Ideology, Interest, and Sea Power during the Pax Britannica (1986), at 109-18; and John W. Coogan, The End of Neutrality: The United States, Britain, and Maritime Rights 1899-1915 (1981), at 125-47.

<sup>17</sup> Geoffrey Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflicts (1983), at 247-48.

also incorporated into the naval instructions of both Germany and France.<sup>18</sup> In the Turkish-Italian war of 1911, the rules of the Declaration were adhered to by both sides.<sup>19</sup>

The compromises embodied in the Declaration of London, however, were always liable to be rendered obsolete by developments in the real world. Technological changes, most obviously, posed a constant threat to the stability of the rules. Inventions such as submarines, electric telegraphs and undersea cables, and the greater size of merchant ships made applications of law from the age of wood and sail all the more difficult to adapt to modern times. Regarding blockade specifically, the obvious problem was that a close-in blockade of the traditional kind – in which a cordon of ships tightly enveloped a target area, with a view to capturing any vessels attempting either to enter or leave the area – was no longer feasible. The patrolling ships would be too vulnerable to attack by enemy submarines.

Some writers contended that the rules governing blockades should stay fixed in the face of such changes. The British writer Thomas Baty, for example, a consistent and vocal champion of the rights of neutrals, contended that, if scientific changes worked to make blockading more difficult than it had been in the past, then that was simply bad luck for would-be blockaders. “If science steps in to render blockades more difficult,” he asserted, “it might well be argued that it is not the province of law to correct the indiscretions of science.”<sup>20</sup>

Not surprisingly, the governments of the Allied powers during the Great War took a different view of the matter. They earnestly attempted, throughout the conflict, to make adjustments to past practices so as to render the economic isolation of the enemy feasible even in contemporary conditions.

### **Blockade Modern-style**

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<sup>18</sup> G. Bottié, *Essai sur la genèse et l'évolution de la notion de neutralité* (1937), at 287-88.

<sup>19</sup> H. Reason Pyke, *The Law of Contraband of War* (1915), at 176-77.

<sup>20</sup> Thomas Baty, “Neglected Fundamentals of Prize Law,” 30 *Yale L.J.* 34-47 (1920), at 45.

Even before the War broke out, the British government, appreciating the significance of the various technological developments, had revised its traditional blockade policy. In 1911-12, it devised a new strategy which discarded the practice of close blockading by a dedicated, permanently stationed cordon of ships, in favour of frequent sweeps of the high seas by the main British fleet.<sup>21</sup> One of the consequences of enforcement of blockades from far at sea was that ships plying their trades between one neutral port and another were much more likely to be encountered by blockading squadrons than in the past, when blockades were tightly confined to enemy ports. The potential for belligerent interference with inter-neutral trading therefore became very much greater now than previously.

The legal obstacles to so-called long-range blockading were daunting. But the Allied powers' legal acumen, strongly fortified by a sense of desperation, was mobilised for the task. In the course of the War, the Allied powers adopted six major legal strategies for coping with the challenges: the expansion of contraband lists; the reclaim of traditional, pre-Declaration of London rights; the extended use of existing traditional belligerents' rights; expansions in the employment of traditional rights; the rigorous use of the continuous-voyage principle; the invocation of the principle of reprisal; and the deployment of certain sovereign-right measures. Each of these will be briefly considered in turn.

Beforehand, however, it is only necessary to note, very briefly, some of the broader legal points about this six-fold programme. The guiding idea behind it, as with traditional blockades, was the economic isolation of the enemy countries from the outside world. That is to say, that the spirit of the traditional law of blockade suffused the Allied policies – but at the same time, many of the specific rules inherited from the past needed to be modified, or even discarded, because of novel modern conditions. For this reason, it is probably best not to employ the term “blockade” to the Allied policy because that expression connotes a close-in operation of the traditional kind. Instead, the Allies cobbled together a number of ad hoc practices which, in the aggregate, amounted to the functional equivalent of a traditional blockade. To this congeries of practices, the term “blockade policy” will be employed in this discussion. (Alternatively, the expression “long-range blockade” is sometimes used.) The

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<sup>21</sup> A. C. Bell, History of the Blockade of Germany and the Countries Associated with Her in the Great War, Austria-Hungary, Bulgaria, and Turkey, 1914-1918 (1937), at 29-31. See also Maurice P. J. Hankey, The Supreme Command 1914-1918 (1961), at 98; and Marsden, “The Blockade,” in F. H. Hinsley (ed.), British Foreign Policy under Sir Edward Grey (1977), at 488-90.

policy was not planned out beforehand in a coherent fashion. Instead, it was improvised gradually under the pressure of events.

The following discussion does not purport to be anything like a comprehensive account of the Allied blockade policy. Rather, the intention is to identify the principal legal strategies that were employed in the implementation of that policy and to note objections that were made to them on the basis that marked departures from traditional rules received from the past.

### *The expansion of contraband lists*

Traditionally, contraband lists, set out in friendship, commerce and navigation treaties, tended to be very short, comprising only materials that had a clear connection to the waging of war, such as arms and ammunition.<sup>22</sup> This was reflected, to a large extent, in the Declaration of London, which contained three lists of goods: absolute and conditional contraband, plus a “free list” of goods which could never, under any circumstances, be treated as contraband.<sup>23</sup>

The law of contraband had three features that were very attractive to the Allied powers, when contrasted to the traditional law of blockade. The first was that the capture of contraband was permitted to be done on a sporadic basis. Blockades, in contrast, had to be effectively maintained, meaning that they had to have at least the potential to capture every would-be violator – therefore requiring the continuous stationing of a cordon of ships around the blockaded area. Second, contraband could be captured on the high seas anywhere in world, so long as enemy destination could be established. Captures for blockade violation could only be made at or near the line of the blockade itself. Finally, the continuous-voyage principle (according to the Declaration of London) could be applied to the capture of absolute contraband, but not to blockade.<sup>24</sup>

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<sup>22</sup> Neff, *supra* note 2, at 32-34.

<sup>23</sup> Declaration of London, arts. 22, 24, 28.

<sup>24</sup> Declaration of London, arts. 19, 30, 35.



There was, however, a key drawback to the law of contraband: that it only applied to goods which actually qualified as contraband. The solution to this problem of restricted contraband lists was all too simple and obvious: to expand contraband lists beyond the traditional narrow range of items – and the further beyond, the better (for the blockaders). This began very early in the conflict and continued throughout it. By the end of 1914, the Allies had extended their contraband lists massively beyond what the Declaration of London had prescribed.<sup>25</sup> An especially notable step came in early 1915, with the declaration of foodstuffs as contraband,<sup>26</sup> which won the approval of British prize courts.<sup>27</sup>

### ***Reclaiming traditional rights***

At the outset of the struggle, efforts were made to ensure that the belligerents adhered de facto to the rules of the Declaration of London, despite its not being legally in force. The Central powers stated at the outset that they would do so.<sup>28</sup> The Allies were less cooperative, insisting from the beginning on some modifications. Departures from the contraband provisions of the Declaration have just been mentioned. In addition, the Allies insisted, contrary to the Declaration, on applying the continuous-voyage principle to conditional contraband as well as to absolute.<sup>29</sup> This policy won the approval of British prize courts.<sup>30</sup> In October 1915, a further element of the Declaration, holding the national character of vessels to be determined by the flag flown, was disclaimed as being “no longer expedient.”<sup>31</sup> More strikingly, in March 1916, the British government announced that the Declaration’s prohibition against applying continuous voyage to blockades, being similarly “no longer expedient,” would also no longer be adhered to.<sup>32</sup>

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<sup>25</sup> See Proclamation of Aug. 4, 1914; Proclamation of Sep. 21, 1914; Proclamation of Oct. 29, 1914; and Proclamation of Dec. 23, 1914, in Bell, *supra* note 21, at 722-26.

<sup>26</sup> Proclamation of Mar. 11, 1915, in *ibid.*, at 726-27.

<sup>27</sup> See *The Haken*, [1918] A.C. 148.

<sup>28</sup> Arthur S. Link, *Woodrow Wilson and the Progressive Era 1910-1917* (1954), at 153-54.

<sup>29</sup> Order in Council of Aug. 20, 1914, in Bell, *supra* note 21, at 712; and Order in Council of Oct. 24, 1914, *ibid.*, 713. On this policy, see Briggs, *supra* note 13, at 107-21.

<sup>30</sup> *The Kim*, [1915] Prob. Div. 215; and *The Louisiana*, [1918] A.C. 461.

<sup>31</sup> Order in Council of Oct. 20, 1915, in Bell, *supra* note 21, at 715.

<sup>32</sup> Order in Council of Mar. 30, 1916, in *ibid.*, at 716.

Full repudiation of the Declaration by Britain and France came in July 1916, when the British government promulgated what it called the Maritime Rights Order in Council. Here too, expediency was invoked as the basis for the move. Henceforth, the British government announced, the Allied powers would “exercise their belligerent rights at sea in strict accordance with the law of nations” instead of the terms of the Declaration.<sup>33</sup> James Brown Scott, who was a key figure on the American government’s Joint Neutrality Board, later offered the wry observation that the Declaration of London “unfortunately has gone down like many a ship it was drafted to preserve.”<sup>34</sup>

### *Expanding the scope of existing belligerents’ rights*

Another means by which the blockade policy was effectuated concerned the exercise of traditional belligerents’ rights in different ways, for which there was no historic precedent. One important change lay in the proceedings of prize courts, which will be discussed below in connection with continuous voyage. Another notable change was the manner in which the traditional belligerent right of visit and search was carried out. The uniform, traditional practice had been that visit and search of neutral vessels on the high seas was carried out at sea. A detachment of persons from the belligerent naval vessel boarded the neutral ship for an inspection of the ship’s papers, to determine the nature and destination of the cargo which was being carried. If there was no evidence of contraband carriage, then the neutral ship was simply left to continue its voyage.

During the Great War, the British navy instituted an important change. In March 1915, it began to require that neutral vessels interrupt their voyage by sailing to an Allied port for the visit-and-search process.<sup>35</sup> The justification given was that the large size, and huge cargo

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<sup>33</sup> A. C. Bell, *supra* note 21, at 717-18.

<sup>34</sup> James Brown Scott, “In Memorium: Louis Renault,” 12 Am. J. Int’l L. 606 (1918), at 609.

<sup>35</sup> On the British policy of requisitioning of neutral vessels, see Order in Council of Mar. 23, 1915, in S. D. Fess, The Problems of Neutrality when the World Is at War: A History of Our Relations with Germany and

capacities, of modern merchant vessels made the traditional rapid process obsolete.<sup>36</sup> To some extent, this was true. But another important reason for the policy (as will be explained below) was that the decision of whether to condemn the cargo was no longer being made simply on the basis of the ship's papers, but rather on the basis of an elaborate statistical analysis of the over-all trading pattern of the neutral state of destination. This determination could not be made rapidly at sea.

This new practice of diversion for visit and search was greatly to the detriment of neutrals for two reasons. One was the delay (and hence expense) that they incurred. The other was the fact that, once the neutral ship was physically located in an Allied port, it was exposed to the risk of being requisitioned by the Allied government, on the ground of necessity, for the war effort – without any need for condemnation by a prize court. This practice won the approval of British prize courts.<sup>37</sup>

### *Continuous voyage and the rationing of neutral countries*

As noted above, a key stricture of the Declaration of London from which Britain liberated itself at the beginning of the conflict was the prohibition against applying the continuous-voyage principle to conditional contraband. This became one of the most potent weapons in the juridical arsenal of the Allies, since it enabled them to ensure that neutral countries bordering Germany – the Netherlands, Belgium, Denmark and Switzerland – did not function as “pipelines” through which goods could be imported into the enemy territories. This policy worked in close conjunction with the expansion of contraband lists – the longer the contraband lists, the more goods became subject to being captured on the basis of the continuous-voyage principle.

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Great Britain As Detailed in the Documents That Passed between the United States and the Two Great Belligerent Powers (1917), at 30-32.

<sup>36</sup> Charles Seymour, American Diplomacy during the World War (1934), AT 35-38.

<sup>37</sup> The Falk, [1921] 1 A.C. 787. On this practice, see Robert W. Tucker, The Law of War and Neutrality at Sea (1955), at 338-44.

When applied on a rigorously systematic basis – as it came to be – the continuous-voyage principle became the cornerstone of what became known as a rationing policy imposed upon the neutral countries in the vicinity of Germany. The idea was that the neutral countries in proximity to Germany would be allowed to import sufficient food and other materials for their own domestic usage, but that all attempted imports above that level would be stopped. The determination of what constituted a “normal” level of imports was made unilaterally by the Allied powers – and they were not disposed to give the neutral states the benefit of any doubts. Once the normal import quota for a neutral country of a given type of good was reached, all further cargoes would be presumed to be ultimately destined for the enemy and condemned accordingly.

Changes in prize-court procedures (referred to above) were instituted to make this rationing programme operate with the greatest possible effectiveness. Traditionally, neutral exporters were allowed to send goods to other neutral countries without interference, if they themselves had no reason to believe that the goods would later be forwarded to a belligerent. So long as delivery to a bona fide importer in the neutral state of destination could be satisfactorily proved – as it typically could on the basis of the ship’s papers – the neutral carrier and exporter would have nothing to fear. British prize courts, however, ceased to be satisfied with the evidence of the ship’s papers and instead began to condemn goods on the basis that were destined in fact for re-export to the enemy, with no regard to the knowledge or intention of the neutral exporter.<sup>38</sup> Moreover, the statistical information that formed the basis of the condemnation was not available to the neutral carriers. In principle, it was open to the neutrals to present their own evidence as to the likely future travels of goods that they carried; but in practice that was effectively impossible.

With this system in operation, it was virtually impossible for neutral carriers to know beforehand what risk of condemnation they were running at the outset of their voyages. The United States government, on behalf of its nationals who were affected by this policy, objected to condemnations based on what it called “conjectural conclusions to be drawn from trade statistics.” It insisted that the traditional rules be faithfully adhered to: that a given neutral cargo could not lawfully be condemned simply on the basis that previous cargoes of similar goods had been forwarded to the enemy. “That is a matter,” maintained the United States,

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<sup>38</sup> The *Norne*, [1921] A.C. 765.

“with which a neutral has no concern and which can in no way affect his rights of trade.” Knowledge or intention of re-export, on the neutral’s part, was required; and the bare fact of re-export could not be a basis for condemnation.<sup>39</sup> The British government, not surprisingly, remained unmoved by these protestations.

### ***Reprisal as a justification of policies***

Acts of reprisal are actions which are inherently unlawful, but justified as a response to the commission by the other party of a prior unlawful act. Reprisals therefore function as, in effect, as a kind of law-enforcement measure (of a self-help character). The very nature of reprisal gives a clear indication of its value for the Allied blockade policy: that it could justify the resort to actions that were actually contrary to international law in normal circumstances. The drawback was the absolute necessity of a prior unlawful act on the enemy’s part.

The key early stages of the Allied blockade policy, instituted in March 1915, were justified on this ground. The precipitating act by the enemy was Germany’s declaration, the previous month, of a “war zone” comprising all of the waters surrounding Great Britain, to be enforced by means of submarine warfare. In response, the British government asserted “an unquestionable right of retaliation.”<sup>40</sup> This took the form of a prohibition against neutral ships sailing to any German port. Although the key word “blockade” was scrupulously eschewed, a key feature of the order was a flat prohibition against neutral ships taking cargoes either to or from Germany – meaning that it was effectively a proclamation of a blockade, though without a close investment of the enemy’s shoreline by a dedicated blockading squadron.

Another example of reprisal occurred in February 1917, in response to Germany’s adoption of the policy of unrestricted submarine warfare. That led the British to tighten the

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<sup>39</sup> Sec’y of State to Amb. in Great Britain (Page), Oct. 21, 1915, [1915 Supp.] FRUS 578-89, at 582.

<sup>40</sup> Order in Council of Mar. 11, 1915, in Bell, *supra* note 21, at 714-15. See also Edwin J. Clapp, Economic Aspects of the War: Neutral Rights, Belligerent Claims and American Commerce in the Years 1914-1915 (1925), at 76-92.

blockade policy further, by providing that any ship carrying any goods to any neutral port giving access to enemy territory would be presumed to be carrying goods destined to the enemy, unless it first put into an Allied port.<sup>41</sup>

The principal legal issue which arose concerned the permissibility of taking reprisals when the party prejudiced by them would not be the original wrongdoer, but rather an innocent third party, i.e., a neutral rather than the opposing belligerent. In certain contexts, this poses no problems. For example, medieval reprisals were invariably directed not against a wrongdoing sovereign, but instead subjects of that sovereign who happened to be within easy reach, i.e., present in the territorial jurisdiction of the ruler who was exercising the reprisals. Similarly, belligerent reprisals in response to enemy war crimes are directed not against the actual war criminal but instead against other soldiers belonging to the enemy armed force. These instances, however, were based, at least implicitly, on the existence of a bond between the original wrongdoer and the reprisal victim – common nationality in the case of medieval reprisals, and membership of the same armed force in the case of belligerent reprisals. It is a sort of collective-responsibility or common-enterprise thesis. The directing of reprisals against foreign innocent parties was, however, a controversial step.

The issue was vigorously contested during the War.<sup>42</sup> In its defence, the British government insisted that a flat rule that reprisals must have no effect on neutrals would give so great an advantage to “the determined lawbreaker” as to be unacceptable “to the conscience of mankind.”<sup>43</sup> The British government went on to posit that “the true view” must be that reprisals are founded on the basic principle

that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make an attack on the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to

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<sup>41</sup> Order in Council of Feb. 16, 1917, in Bell, *supra* note 21, at 719.

<sup>42</sup> See, for example, Edward Yntema, “Retaliation and Neutral Rights,” 17 Mich. L. Rev. 564-88 (1919).

<sup>43</sup> British Amb. (Spring-Rice) to Sec’y of State, Apr. 24, 1916, [1916 Supp.] FRUS, at 377.

the adoption of measures precisely identical with those of his opponent.<sup>44</sup>

The British prize courts broadly supported this stance. The leading case on the subject, concerning the measures of March 1915, rejected the contention that neutrals have a right “to be saved harmless” from any measure of reprisal taken by one belligerent against another. The true question to be answered, it held, is whether a given reprisal act “subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.”<sup>45</sup> Even though the measures in question were directed proximately against neutral traders (or would-be traders), the longer-term goal was to injure the enemy for its prior unlawful act. In other words, it was held permissible for Britain, in effect, to use restrictions on neutral trade instrumentally, as a means towards achieving a longer-term goal of injuring the enemy powers – provided only that a less drastic means of action was not available under the circumstances.

### ***Sovereign-right measures***

The final category of actions taken to bolster the blockade policy comprised the exercising of various measures that were within the sovereign prerogatives of the belligerent states, and hence were, at least on their face, unconstrained by the international law of neutrality. Most obviously, a belligerent country could reduce its own trading with neutral countries which failed to adopt “cooperative” policies, such as taking rigorous steps to prevent the re-exporting of materials to the enemy states. This amounted simply to exerting straightforward economic pressure against the targeted neutral states. The two most important sovereign-right measures, though, were navicerting and blacklisting.

Navicerts, which began to be issued in 1916, were certificates issued by the British government to neutral carriers relating to a particular cargo, confirming that “there would be

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<sup>44</sup> *Ibid.*, at 378.

<sup>45</sup> The *Stigstad*, [1919] A.C. 279, at 286. See also A. Pearce Higgins, “Retaliation in Naval Warfare,” 8 *Brit. Y.B. Int’l L.* 129-46 (1927).

no objection on the part of the British Government to this consignment.”<sup>46</sup> They were, in essence, pre-voyage clearances, enabling carriers of navicerted goods to proceed on their intended journeys without the risk of being ensnared in any of the blockade measures, such as diversion into a belligerent port for visit and search. A key feature of the system was that a ship was exempt from visit and search only if its entire cargo was navicerted. The effect, of course, was to give a large disincentive to carriers to carrying any non-navicerted goods at all. Moreover, the system was self-policing to a large extent. Exporters, anxious that their trade not be disrupted, were expected to be loud in insisting that carriers not commingle their cargoes with any that were not navicerted.<sup>47</sup> It has been estimated that considerably more than 50,000 navicerts were issued in the course of the War.<sup>48</sup>

Opponents of the navicert system objected to it on several grounds. One was it had the effect of taking the determination of ultimate destinations of goods out of the hands of prize courts and placing it instead in the hands of the administrators who issued the navicerts.<sup>49</sup> In addition, it could be contended that neutrals who availed themselves of the navicerts were thereby became active participants in the Allied blockade programme, contrary to the fundamental duty of neutrals to abstain from participation in the hostilities. This was all the more clearly the case in light of the fact that the granting of navicerts corresponded very closely with Britain’s own export controls over its own nationals.<sup>50</sup> Moreover, the navicerting process took place in the territories of the neutral countries – and therefore could be argued to amount, on the part of the Allied states, to engaging in belligerent activity in the neutral countries, in breach of another fundamental principle -- that belligerent operations must not take place on neutral territory.

The British government saw the matter in a different light. From its standpoint, the holders of navicerts were simply persons, of their own free will, had provided the British government with relevant information about their intended trading voyages. The British government, in turn, was responding to this information by refraining, as a matter of unilateral

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<sup>46</sup> H. Ritchie, The ‘Navicert’ System during the World War (1938), at 9.

<sup>47</sup> For an excellent brief description of the system, see C. G. Fitzmaurice, “Some Aspects of Modern Contraband Control and the Law of Prize,” 22 Brit. Y.B. Int’l L. 73 (1945), at 83-85.

<sup>48</sup> For an excellent brief description of the system, see C. G. Fitzmaurice, “Some Aspects of Modern Contraband Control and the Law of Prize,” 22 Brit. Y.B. Int’l L. 73 (1945), at 83-85.

<sup>49</sup> Thomas D. Brown, Jr, “The World War Prize Law Applied in a Limited War Situation: Egyptian Restrictions on Neutral Shipping with Israel,” 50 Minn. L. Rev. 849 (1966), at 854-55.

<sup>50</sup> Ritchie, supra note 46, at 8-9.



practice, from exercising its various blockade-related rights against the holder. No one could doubt that it was the sovereign prerogative of a state to refrain from fully exercising rights which it possessed. It was also pointed out that navicerting involved no element of coercion or violence exercised on the neutral parties, or any operation of Allied armed forces in neutral territory.<sup>51</sup>

The other notable sovereign-right measure – and the one that caused the most concern and outrage in the United States – was blacklisting. The policy was first applied in China in 1915, and then in South America. But the dramatic extension was to the United States in July 1916.<sup>52</sup> The first published list contained the names of 85 American firms and caused consternation in business circles. Fears were expressed that the blacklist would be extended by “secondary blacklisting,” i.e., blacklisting firms that traded with any firm on the primary blacklist. The American government lodged a formal protest against the practice. Its principal objection was to the unilateral and ex parte character of the blacklisting policy. Neutrals who were accused of carrying contraband or violating blockades had a right to defend themselves in prize-court proceedings and to have a judicial pronouncement made on their alleged wrongdoing. Victims of blacklisting, in contrast, had no such opportunity. Blacklisting, the United States government objected, “condemns without hearing, without notice, and in advance.”<sup>53</sup>

At the same, though, there were doubts in the American government as to whether blacklisting could actually be said to violate international law. The American ambassador in Britain admitted (to his government) that the policy “may possibly be legal.”<sup>54</sup> The United States did, however, enact legislation authorising the government to refuse clearance from American ports to vessels which refused to carry cargoes from blacklisted firms.<sup>55</sup>

The reverse of blacklisting, and acting as a positive incentive, was “whitelisting,” i.e., compiling lists of neutral firms which were free of suspicion of contact with the enemy.

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<sup>51</sup> On the navicert system, see generally Ritchie, *supra* note 46.

<sup>52</sup> The legal basis for the policy was given by the British Trading with Enemy (Extension of Powers) Act 1915, 5 & 6 Geo. 5, c. 98.

<sup>53</sup> Acting Sec’y of State to Ambassador in Great Britain (Page), July 26, 1916, [1916 Supp.] FRUS, at 422. See also Ernest R. May, *The World War and American Isolation 1914-1917* (1959), at 329-34; James Brown Scott, “The Black List of Great Britain and Her Allies,” 10 *Am. J. Int’l L.* 832-43 (1916); and Thomas A. Bailey, “The United States and the Blacklist during the Great War,” 6 *J. Modern Hist.* 14-36 (1934).

<sup>54</sup> Amb. in Great Britain (Page) to Sec’y of State, July 22, 1916, [1916 Supp.] FRUS 412-13, at 413.

<sup>55</sup> Shipping Act, Sep. 7, 1916, ch. 451, sec. 36, 39 Stat. 738.

American authorities observed that whitelisting had “the great advantage [to the belligerent doing the listing] that it stimulates reliable concerns to put themselves unreservedly in the hands of the [belligerent] authorities as a means of getting on to the list.”<sup>56</sup>

### Post-mortems

In the aftermath of the conflict, various figures commented on the significance of the War for the law of maritime neutrality. In Britain, Hersch Lauterpacht lamented that the law of neutrality had been rendered so uncertain as to be, in effect, non-justiciable by tribunals.<sup>57</sup> Others were less gloomy. Daniel Chauncey Brewer, an American lawyer, for example, writing about the law of neutrality during the War, saw the conflict as “a cleansing fan” that would sweep away the “arbitrary creations” of the prior law of neutrality and replace them with “something stable and permanent” founded upon “eternal principles.”<sup>58</sup> To Maurice Hankey, who served as secretary to the Imperial War Cabinet in Britain, the War had provided the salutary lesson of exposing “the folly of attempting, in times of peace, to draw up rules for the conduct of war in matters where there is known to be a fundamental difference of opinion and outlook between the various nations concerned.” Such futile attempts at agreement, he maintained, only had the effect of bringing international law into disrepute.<sup>59</sup>

Within the British government, there was some sense of relief that the blockade policy had worked as well as it had – coupled with fears that future wars might go less well. In particular, there was some stock-taking as to the relative merits of relying on reprisal as a justification for actions taken, as opposed to reliance on the traditional law of blockade –

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<sup>56</sup> Consul general at London (Skinner) to Sec’y of State, Oct. 22, 1917, [1917 Supp. 2] FRUS 984.

<sup>57</sup> 2 Hersch Lauterpacht, International Law: Being the Collected Papers of Hersch Lauterpacht, ed. by E. Lauterpacht (1975), at 41.

<sup>58</sup> Daniel Chauncey Brewer, Rights and Duties of Neutrals: A Discussion of Principles and Practices (1916), at 243-47.

<sup>59</sup> Maurice Hankey, The Supreme Command, 1914-1918 (1961), at 101.

suitably adapted to modern conditions, of course. During the conflict, the matter had been considered by an International Law Committee, formed by the British government in 1917 to consider various war-related issues. It reported its relief that reprisal had been available for use as a justification of the various blockade-policy measures.<sup>60</sup> But it was aware too of the weakness of reprisal because of its critical dependence on the occurrence of a prior unlawful act by the enemy. In future conflicts, it was feared, the opposing belligerent might not prove so obliging in that regard as Germany had during the Great War. In addition, there were worries about the lawfulness of reprisal measures that were directed proximately against neutral parties, with a view to injury being eventually visited upon the enemy.

Worries on this second point were proved by events to be well founded. In 1930, an arbitration between Portugal and Germany considered a German contraband measure affecting Portugal, which had been instituted as a reprisal against the Allied departures from the contraband rules of the Declaration of London. The arbitral panel ruled, contrary to the British prize courts, that, while it is permissible for reprisal acts to have collateral or incidental effects on third parties, it is not lawful for the acts to be “directly and wilfully” pointed against the third parties – i.e., that a belligerent is not entitled to retaliate against its enemies through neutral powers.<sup>61</sup> This has been confirmed as the correct rule for countermeasures by the International Law Commission’s Articles on State Responsibility of 2001.<sup>62</sup>

Prudence dictated, therefore, that, in the defence of British actions during the War, reliance should be placed on the law of blockade per se, rather than on reprisal. Perhaps the most articulate defence of the British blockade policy, on this basis, in the wake of the conflict was by H. W. Malkin, the legal adviser to the British Foreign Office.<sup>63</sup> He maintained that the British measures actually were consistent with the law of blockade – or at least with that law as suitably updated and adapted to modern conditions. Specifically, he argued that extending the continuous-voyage principle to blockade as well as to contraband was entirely consistent with the underlying purpose and principles of blockading.<sup>64</sup> The fact that the Declaration of

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<sup>60</sup> Memorandum of the International Law Committee, “The Freedom of the Seas,” B.R. 7, in British Archives File CAB 21/307 (1918), at 1.

<sup>61</sup> *The Cysne*, 2 Rep. Int’l Arb. Awards 1052 (1930), at 1056-57.

<sup>62</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001), at 75-76. See also *The Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. Rep. 7, para. 83.

<sup>63</sup> H. W. Malkin, “Blockade in Modern Conditions,” 3 Brit. Y.B. Int’l L. 87-98 (1922-23).

<sup>64</sup> *Ibid.*, at 92-95.

London contained a rule disallowing it could therefore be regarded, on this thesis, as a mere historical anomaly, a compromise hammered out at the London Naval Conference, reflecting misgivings from the previous century about that extension by the American government during the American Civil War.

At the same time, Malkin readily conceded that the new style of blockading has “travelled a long way from the original idea of the naval investment of a particular port, corresponding to a close siege by land.” He contended, however, that it was more important to look not at particular, specific rules inherited from the past but rather to “[t]he underlying principles.” In this vein, he in effect advanced the suggestion that the principle of effectiveness was the true foundation on which the law of blockade rested. He posited that

the extent of a belligerent’s right to interfere with sea-borne commerce is conditioned by the extent of his command of the sea, and that the real principle underlying the idea of blockade is the right of a belligerent to deny to the commerce of his enemy the use of areas of the sea which he is in a position effectively to control. In other words, if a belligerent has a sufficient force at his command to enforce his being able to examine practically every ship which crosses a certain area of sea, he is entitled to say that his enemy’s commerce shall not be carried on across that area.<sup>65</sup>

More generally, Malkin pleaded for a view of international law that focusses on “underlying principles” rather than on specific rules.

There is a considerable tendency [he noted with regret] to hold that when a thing is done for the first time it must be illegal because it has not been done before, but if it is done again to accept it on the ground that there is a precedent for it. This, however, is an unscientific method of procedure, and the true test surely is whether the new development is consistent with the

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<sup>65</sup> *Ibid.*, at 96-97.

main underlying principles of law and is necessitated by the changed circumstances in which it is applied.<sup>66</sup>

The problem, of course, lies in discerning what these much-vaunted “underlying principles” actually are. Suspicious minds will readily note that the proposition of effectiveness advanced by Malkin amounts, in effect, to guaranteeing to belligerents the fullest possible benefit of their actual strength. This is clearly a policy tailor-made for major maritime powers – coincidentally the very state which Malkin advised. It is evident, then, that there is room for worry that a reliance on general principles and the spirit – as opposed to the letter – of traditional rules, coupled with high sensitivity to changed circumstances, carries at least some risk of making law subservient to power. But it is arguable too that a stubborn and dogmatic insistence on adherence to the letter of traditional rules – an insistence that law is, so to speak, all rules and no spirit -- runs the risk of preventing the development of law in accordance with the ever changing exigencies of international life.

This contest between these two basic mentalities did not arise in the Great War. Nor was it resolved by that conflict. Nowhere in the Treaty of Versailles is there even a hint of the resolution of this particular aspect of that momentous contest. The tension between fundamental principles, on the one hand, and specific rules, on the other, may therefore be said to be, in a manner of speaking, greater than the Great War itself. It continues to haunt international lawyers, and probably always will.