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Some Questions of International Law Arising from the Russo-Japanese War, Pt. III

Amos S. Hershey

*Indiana University School of Law*

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SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

III.

The Conduct of the Powers in Respect to Their Neutral Obligations.

By Amos S. Hershey,
Associate Professor of European History and Politics, Indiana University.

In a previous paper attention was called to the fact that "the present Russo-Japanese War promises to present an exceptionally interesting and important field for the application of certain principles of International Law, more especially of some of those modern rules governing the rights and duties of neutral States and individuals which are of comparatively recent origin and to the growth of which the United States has so largely contributed." A number of delicate questions relating to the laws and principles of neutrality have already arisen; and, while we cannot hope to touch upon all such questions, or to enter upon an exhaustive discussion of any one of them within the limits of this paper, we may perhaps be able to throw some light upon doubtful points by an examination of past precedents and fundamental principles, and thus assist the reader in coming to an intelligent decision as to whether the conduct of the neutral Powers has thus far been in conformity with their international obligations.

At the very outset of the struggle an extremely interesting question arose in respect to the proper treatment of the sailors of the Russian vessels (the Koriets and the Variag) whose crews had been rescued by neutral cruisers belonging to various nationalities which were lying in the harbor of Chemulpo at the time of the sinking of these vessels by the Japanese fleet on February 8th. The Japanese, who appear to have feared that the rescued sailors would be surrendered to the Russians, at first demanded their surrender as prisoners of war; but at least the British Government insisted upon taking those under its charge into British territory with a view to interning them until the close of the war or until other arrangements could be made. The Japanese Government, however, at last generously consented to their release on parole, and a wise and easy solution of what seemed at one time to be a very perplexing problem was thus made possible. In the event of an unwillingness on the part of the Japanese Government to consent to such an arrangement, the obligations of neutrality would probably have best been fulfilled by interning them in neutral territory until the close of the war, in accordance with Premier Balfour’s suggestion in the British Parliament. This is now universally admitted to be the proper course to pursue in the which expressed regret that the incident had created so much feeling.

The Russian Press also showed considerable irritation over the fact that the commander of the Vicksburg did not join in the protest of the captains of the other neutral vessels in the harbor of Chemulpo against the violation of Korean neutrality by the Japanese fleet. In so doing it is perhaps needless to say that the captain of the Vicksburg was acting clearly within his rights and that he was guilty of no impropriety or act of unfriendliness toward Russia. His conduct seems to have been entirely correct.

1 See The Green Bag for May, 1904.
2 June 25, 1904.
3 These were the French cruiser Pascal, the British cruiser Talbot, the Italian cruiser Elba, and the American gunboat Vicksburg. The charge made by the Russian newspapers that Captain Marshall, the commander of the Vicksburg, refused to assist in the rescue of the Russian sailors from the sinking Variag, was admitted to be false by the Russian Government.

4 See the Evening Post for February 25th, for Balfour’s reply to an inquiry in the House of Commons. The Hague Conference of 1899 failed to agree upon the proper disposition of shipwrecked, wounded, or sick belligerents, landed at a neutral port.
Some Questions of International Law.

analogue case of an army which has been forced to retreat into neutral territory. The surrender of these sailors to Russia under the circumstances would have furnished a just cause for protest on the part of Japan, and might have tended in future wars either to discourage rescue from a sense of humanity for fear of offending one of the belligerents on the one hand, or to have encouraged it from motives of partiality on the other.¹

In the earlier period of the war there were frequent comments in the Russian press on what was called "American meddling."²

¹ A different course was followed by the British Government in the famous case of the Deerhound, a private yacht belonging to the Royal Yacht Association of England. The owner of this yacht, acting at the request of Captain Winslow of the Kearsarge, helped to rescue the officers and crew of the Alabama upon the occasion of the latter's sinking at the hands of the Kearsarge during the Civil War. To the surprise of Captain Winslow, the Deerhound, after picking up a certain number of men, largely officers (including Captain Semmes) of the Alabama, hastily and surreptitiously steamed off with its precious cargo to Southampton. Several of these had, as it seems, already surrendered themselves to the Kearsarge as prisoners of war, and there was some evidence of collusion between Captain Semmes and the owner of the Deerhound. To be sure, the Deerhound was a private yacht instead of a warship, but she seems to have had a sort of semi-official character as a boat belonging to the Royal Yacht Association. In any case, the British Government would probably have best performed its neutral duties by informing the officers and men of the Alabama as prisoners of war. For the facts of the case, see the Claims of the United States Government against Great Britain, Vol. III, pp. 291-308 (1st sess. 41st Cong. 1866). For a somewhat different view of the law and the facts, see Bernard, The Neutrality of Great Britain During the American Civil War, pp. 429-30.

² A loud outcry was raised by the Russian press late in February in consequence of a report that an application had been made to the United States Government by the Commercial Cable Company (presumably acting in the interest of Japan), for permission to connect Japan with Guam in the Philippine Islands (and thus with the rest of the world), by means of a submarine cable, it being feared that the two existing cables connecting Nagasaki with Shanghai would be cut by the Russians. In such a case Japan would have been cut off from telegraphic communication with the rest of the world.

In Russia the view was said to have prevailed that the granting of such a permit by the United States would constitute a breach of neutrality, although there seems to have been no official intimation or expression of opinion to this effect on the part of the Russian Government. Our Government appears to have been similarly non-committal. In reply to an informal inquiry by Count Cassini, the Russian ambassador, at Washington, as to the truth of this report, Secretary Hay is said to have denied that the United States Government was at present considering such an application. (See Chicago Record-Herald for March 2, 1904). There thus appears to have been no official expression of opinion on either side, but it is interesting to notice that telegraph and telephone materials are included in the list of articles considered contraband of war published by the Russian Government on February 28.

The legality of propriety of laying such a cable would seem to depend upon the question of fact as to whether it was an enterprise in which the animus vindendi or the animus belligerandi predominated.

² Slightly adapted from an editorial in the London Times (weekly ed.), for March 7, 1904. For some official utterances of American statesmen on this head, see Wharton's Digest III, §399.
tended to sail for the Orient in spite of an announcement by Japan to the effect that she desired no foreign troops, and numerous applications are said to have been made by American citizens for permission to enter the military and naval service of Japan. It was also reported in February that a movement was on foot at Atlanta to provide a warship for the service of Japan. At a mass meeting held in New York on February twelfth (at which the majority of those present were Japanese, but which was also attended by a number of American citizens—mostly Jews, it is said) a committee reported in favor of raising a Japanese war-fund of $5,000,000 by loans, gifts and contributions to the Red Cross Society. The question was raised as to whether American sympathizers could contribute to the Japanese war-fund without violating the neutrality laws of the United States or the obligations of International Law. The Japanese Consul General, M. Uchida, is reported to have said that he thought this point had not been definitely settled, although he declared that he should be ready to receive contributions; but he was of the opinion that there could be no legal objection to the purchase of Japanese war-bonds as an investment, and he said that there was no question but that Americans could donate as much as they liked to the Japanese Red Cross Society. The recent successful floating of a large Japanese war-loan in England and the United States, as also the successful floating of a still larger Russian loan in France, also raises the question as to the legality of such loans.

In respect to the legality of foreign enlistment, it may be said that such enlistment is entirely and explicitly forbidden by the United States Neutrality Act of 1818 and by the British Foreign Enlistment Act of 1870, and, we presume, by laws or by proclamations of neutrality in most countries. Our own law prohibits all American citizens not only from enlisting or entering the military or naval service of either belligerent, but also from hiring another to enlist or from hiring another to go beyond the jurisdiction of the United States with intent to enlist. The levying of troops within the borders of a neutral State or "anything like recruiting on a large scale" is distinctly forbidden in modern times by the law of nations, and the failure to prevent these things would constitute a serious breach of neutrality. But on the other hand "a State is not expected to take precautions against the commission of microscopic injuries." It is not implied for a moment that the Government of a neutral country is obliged to keep watch over each unit of its population, and (that it) can be made responsible if a man here and another there crosses its frontier for the purpose of taking service with a belligerent. Besides although there is no right of expatriation known to International Law, it is always open to any individual to renounce his nationality and enroll himself as a citizen or to enter the service of another State. The failure of the United States Government to prevent the departure of a certain number of her citizens for the Orient and the enlistment of these in the Japanese army could not be made a serious ground for complaint on the part of Russia, although such conduct on the part of our citizens would be a

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2 It should, however, be remembered in this connection that the municipal laws of a State are not necessarily the measure or standard of its international obligations. "It is not the duty of a neutral government to prohibit the enlistment of its subjects in the service of a foreign belligerent, such service taking place beyond its territorial jurisdiction. The neutral ruler may punish by municipal penalty a subject so engaging, but, in default of treaty stipulation, he is under no international obligation so to do." Walker, The Science of International Law, p. 446.

3 Lawrence, Principles, p. 533.

4 Hall, Treatise, p. 601.

5 Lawrence, op. cit., p. 533.
violation of our own Neutrality Law. On the other hand our Government could not permit the levying or recruiting of troops in this country by agents or friends of the Japanese Government.

Our Neutrality Law also forbids any one from “fitting out and arming,” or “knowingly being concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service” of either belligerent. Since the incorporation of this principle in the Treaty of Washington in 1871 and the Geneva Award of 1872, no one is likely any longer to deny that this rule forms an integral part of International Law, and the proposal to present Japan with a war-vessel, if made, was on the face of it absurd. The Government of the United States would have been bound by its international obligations to have prevented the fitting out, arming, and the equipping within its jurisdiction, as well as the departure, of such a vessel, and every contributor to such a fund would have been liable to arrest and punishment for a violation of the Neutrality Act of 1818.

“The duties of neutrals happily do not impose any checks upon the humane impulses of the citizens of neutral countries, or upon the practical expression of their sympathies in case of the wounded, the widows, and the fatherless,” and there can be no sound objection to contributions to any Red Cross Society, at least on the part of neutral individuals.”

As to the question whether American sympathizers with Japan have a right to make gifts or voluntary contributions to a fund set aside for the purpose of assisting

Japan to carry on the war, the case is by no means so clear. There can, however, be no real question as to the legality of the purchase of war-bonds as an investment. Of course it would be a flagrant breach of International Law if such a loan were in any way to be advanced, supported, or guaranteed by a neutral Government. Although the legality of loans by neutral individuals to belligerent States has been denied by some eminent publicists, such a position is not in conformity with the practice of nations. “Money is a form of merchandise, and neutral individuals constantly trade in it with belligerent governments. It can be transferred with the greatest ease, far more easily in fact, than other commodities. Commercial transactions in it could not be prevented except by an amount of espionage and interference which would outrage human nature and render all trade impossible. No war of any magnitude takes place without a free resort by the combatant powers to neutral money markets. The stock in loans issued to provide funds for the conflict is bought and sold in other countries, just as freely as shares in foreign mines and railways. . . . When practice points entirely in one direction it is idle to pit against it a so-called rule

2 E.g., by Bluntschli, §768; Phillimore, III., §151; Calvo, §§628-30 (5th ed.); and Halleck (Baker’s ed.), II., p. 193. The cases De Wutz v. Hendricks, Common Pleas, 1824, 9 Moore, 586; Thompson v. Powles, Chancery, 1828, 2 Simon 194; and Kennett v. Chambers, U. S. Supreme Court, 14 Howard 38, upon which the view of these publicists seems to be founded, merely go to the extent of holding that contracts to raise loans for the purpose of aiding communities whose belligerency or independence has not been recognized are illegal or invalid. This is a good example of the excessive deference which is sometimes paid to the decisions of judges whose opinions are often mere obiter dicta or are given a more extended application than they deserve. In dealing with the decisions of courts we should always remember that they are necessarily of limited application both as to subject matter and in respect to nationality. We should never forget that International Law is based upon the general practice of nations. This is one of the greatest objections to the teaching of International Law by the main or exclusive use of the “Case System.”

1 This would only be the case if they actually enlisted or were hired or retained to go abroad with intent to be enlisted. It would not be a crime, under our neutrality law, for them merely to leave this country with intent to enlist, U. S. v. Kazinski, 2 Sprague 7. For official opinions on the subject of enlistment, see Wharton’s Digest III., §392.

2 From editorial in London Times for February 13, 1904.
based on nothing better than the statement that gold is a prime necessity in war. It certainly is; and nearly all agree that a belligerent may lawfully confiscate any supplies of it he may find in a neutral vessel on its way to the enemy. Money is contraband of war, and must be treated like other articles in the same category. The neutral lender in it lends at his own risk, but he commits no breach of the common law of nations by lending, and his government is under no obligation to attempt the impossible task of preventing him.\(^1\)

But it is claimed that gifts or voluntary subscriptions stand upon a different footing from ordinary loans. In 1823 the law officers of the British Crown, in response to an inquiry from the British Cabinet in respect to the legality of certain funds which were being raised in behalf of the Greek revolutionists whose belligerency had been recognized by the British Government, gave an opinion to the effect that "voluntary subscriptions of the nature alluded to were inconsistent with neutrality and contrary to the law of nations."\(^2\) In commenting upon this opinion, Lawrence says, "Even in deciding, and rightly deciding that voluntary gifts and subscriptions were illegal, the British law officers took care to add that the belligerent against whom they were directed would not have the right to consider them as constituting an act of hostility on the part of the neutral government. Moreover, they abstained from recommending a prosecution of the subscribers on the ground that it would be almost certain to fail."\(^3\)

But of what use, we may ask, is a prohibition in International Law which can not be made effective, or a rule for the non-enforcement of which a neutral State cannot be held responsible. The only apparently sound argument in favor of such a rule which occurs to us is one which is based upon the doctrine of intent. It might be urged that we ought to distinguish, as in the case of the sale, construction, or exportation of a war-ship, between a \textit{bona fide} commercial transaction and an intent to render assistance to one of the belligerents. But the rules of International Law have fortunately not been devised to satisfy the demands of logic or of any system of classification, and the doctrine of intent, at least as applied to ships of war,\(^4\) is one of very doubtful value and validity. For, as an able writer has well said, "in international wrongs . . . the intent is not the thing chiefly or primarily regarded."\(^5\)

So far as can be ascertained, the people and Government of the United States have fully discharged their neutral obligations toward both belligerents in this war up to the present time.\(^6\) President Roosevelt's Proclamation of Neutrality, issued on February 10th, was more than usually full and explicit and it takes advanced ground on all important questions. In accordance with the terms of our Neutrality Law, the acceptance of commissions and enlistment in the military or naval service of either belligerent are strictly forbidden.\(^7\) In accordance with the requirements of International Law as well as of our Neutrality Act,
Some Questions of International Law.

it also prohibits "the fitting out and arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either belligerent," as also the "increasing or augmenting of the force of any ship of war, cruiser, or armed vessel in the service of either of the said belligerents." For the same reasons it also prohibits the preparing or setting on foot of any military expedition or enterprise against the territory of either belligerent, and it forbids the use of our ports or territorial waters for any military purpose. It also directs the enforcement of the two twenty-four rules, viz., the rule requiring that vessels belonging to either belligerent and entering a neutral port during the war be required to leave within twenty-four hours after their arrival except in case of necessity, and the rule which provides that an interval of at least twenty-four hours must elapse between the departure from a neutral port of vessels belonging to opposing belligerents. These rules are now so generally observed by neutral States that they are in all probability in process of becoming a part of the law or practice of nations, if, indeed, they do not already deserve that description. The same may be said of two other requirements, likewise inserted in the President's proclamation and now generally observed by the practice of nations, to the effect that ships of war belonging to either belligerent shall only be permitted to take in a supply of coal at any of our ports sufficient to take them to the nearest home port, and that the same vessel, after having once been furnished with coal, shall not receive another supply at any of our ports within three months, unless she shall in the meantime have entered a port of the government to which she belongs.

In a subsequent executive order, issued on March tenth, President Roosevelt warned all officials of the Government, whether civil, naval, or military, not only to observe all obligations of neutrality during the present war between Japan and Russia, but "also to abstain from either action or speech which can legitimately cause irritation to either of the combatants." This proclamation is said to have produced a good effect in Russia and to have somewhat alayed the feelings of irritation of the Russian Government and people against the United States. Although doubtless an act of wisdom and discretion on the part of our President, this additional proclamation was not necessary from the point of view of our international obligations, and it can hardly be said to be binding upon the majority of those to whom it is addressed.

If the United States seems to have a clear record in the matter of the faithful observance of her neutral duties in this war, the same may be said of England and France. The Governments of both of these States appear to have performed their neutral obligations under somewhat difficult circumstances in an admirable spirit of fairness and impartiality.

France is said to have made an elaborate apology to the Japanese Government for having allowed the small Russian Mediterranean fleet to remain at Jibutil, a port in French Somaliland, for a longer period of time than the twenty-four hour rule per-