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

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

VIII.

The Rights and Privileges of Belligerent Armed Vessels in Neutral Ports.

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NEXT to the questions relating to contraband, the most important issues raised during the present war from the standpoint of International Law have thus far been those connected with the rights and privileges of belligerent armed ships in neutral ports.

One of these questions was raised almost at the very beginning of the war when the Russian gunboat Mandjur remained in the neutral harbor of Shanghai where she was lying at the outbreak of hostilities) in defiance of the orders which had been issued by the Chinese authorities, acting upon the representations of the Japanese consul, that she leave that port within twenty-four hours.\(^1\)

Japan repeated her demands at Peking and is even said to have threatened a resort to force, but the conduct of the Chinese Government seems to have been extremely weak and vacillating. After prolonged negotiations and repeated agreements to disarm on the part of the Russian authorities—agreements which do not appear to have been effectively carried out—the Mandjur was finally disarmed and dismantled, and the important parts of her machinery and armament were placed in the custody of the Chinese Government toward the end of March.\(^2\)

Another case of the abuse of the hospitality of neutral ports on the part of a Russian vessel arose in February. The Dmitri Donskoi, a cruiser belonging to the Russian Mediterranean fleet, obtained coal at Port Said on the plea that it was needed to enable her to steam to Cadiz on her return voyage to Russia. But the coal thus obtained for an innocent purpose was used in stopping and overhauling several neutral vessels in the vicinity of the Mediterranean entrance to the Suez Canal. “It is quite clear,” says Lawrence\(^3\) “that the neutrality of Egypt was violated in a gross and open manner. It is an accepted rule that no proximate acts of war must take place in neutral waters, and they must not be used as a base of operations by either party.”

An Associated Press dispatch of February 20, 1904, stated that friendly communications between France and Japan had been exchanged with respect to the stay of the Russian Mediterranean squadron at Jibutil in French Somaliland—a stay which exceeded the twenty-four hours supposed to be prescribed by International Law. But the explanation of France for not ordering the Russian vessels to leave Jibutil within that period of time was said to have been entirely satisfactory to the Japanese Government. It appears that the French au-

\(^{1}\)November 5, 1904.

\(^{2}\)The reluctance of the Mandjur to leave Shanghai appears to have been due to the fact that a large Japanese cruiser was said to have been lying outside the harbor. Mr. De Lessar, the Russian minister at Peking, maintained, however, that the presence of the Mandjur in Shanghai was necessary for the protection of the Russian Consulate there. This question derived additional importance from the fact that the neutrality of China had in a sense been guaranteed by the Powers. The solution of the problem was anxiously awaited by the whole world. See The Green Bag for June, 1904, for the second article of this series entitled, “The Hay Note and Chinese Neutrality.”

\(^{3}\)On the case of the Mandjur, see the newspapers from February 10 to March 26, 1904. See especially an article in Collier’s Weekly for April 9.

\(^{4}\)War and Neutrality, p. 116.
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authorities at that port also permitted the Russian vessels to take in a full supply of coal. The British Government, on the other hand, not only insisted upon the enforcement of the twenty-four hour rule, but refused to supply Russian warships with more coal than was needed to carry them to some nearer neutral destination.

The right of belligerent warships to coal in neutral ports has been much discussed during the present struggle. It has derived particular interest and importance from frequent reports that the Russian Baltic fleet intended speedily to leave the Baltic Sea for the Far East—a departure repeatedly announced, but always deferred until the middle of October. It is well known that Russia has no coaling stations of its own, and that if the Baltic Fleet ever proposes to reach its destination, it must depend upon accompanying colliers for its coal—a difficult and dangerous expedient—or upon neutral ports for sufficient supplies.

It is generally believed that the French and German Governments would raise no objections to the granting of supplies of coal to Russian vessels at French and German ports, at least in quantities sufficient to enable them to reach the next neutral ports, but the British Government has taken much more advanced ground. In her Neutrality Proclamation of February 10, 1904, Great Britain instructed the authorities in British ports not to permit belligerent warships to take on more coal than is necessary to carry them to the nearest home port, “or to some nearer named neutral destination,” and in a more recent set of instructions, sent to the Governors of British Colonies and Dependencies, even more advanced ground than this was taken. The British authorities were advised that they were in the future to refuse to grant facilities for coaling or provisioning in British ports to belligerent vessels “proceeding to the theatre of war or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war.”

The Baltic Fleet would not be permitted to pass through the Kiel Canal. In this respect at least, as also in disarming the Russian warships at Tsing-Tau, Germany has perhaps more than fulfilled her neutral obligations.

“This phrase is omitted in the American proclamation of neutrality.

From the text of a proclamation issued by the Governor of Malta on August 12, 1904. See London Times (weekly ed.) for August 26, 1904. The “Instructions” themselves have not been published, so far as we are aware. The Proclamation of the Governor of Malta also declares that “such fleet shall not be permitted to make use in any way of any port, roadstead, or waters subject to the jurisdiction of His Majesty for the purpose of coaling either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to any such port or roadstead or within the said waters at the same time or successively.”

The Egyptian Neutrality Order of February 12, 1904, provides that “before the commander of a belligerent ship-of-war is allowed to obtain coal in any port of Egypt, he must obtain a formal authorization from the authorities of the port, specifying the amount he may take. Such authorization is to be granted only after the receipt from the commander of a written statement, setting forth the name of the port to which he is
The question of the rights and privileges of belligerent armed ships in neutral ports came up in a very acute form in the month of August when a number of vessels belonging to the Russian Fleet at Port Arthur succeeded in escaping to various neutral ports on the Chinese coast after their defeat at the hands of the Japanese on August 10. The Russian torpedo boat destroyer Ryeshitelni, which had taken refuge in the Chinese port of Che-Foo, was seized and towed out of the harbor by several Japanese destroyers on the night of August 11, in spite of the fact that the Russian vessel was partially disabled and that she had been at least partly disarmed, in accordance with the demand of the Chinese Admiral at Che-Foo. This was an undoubted violation of Chinese neutrality and of the law of nations on the part of Japan, the serious character of which has in nowise been weakened by to go next, and the amount of coal he has at the moment in his bunkers. He will then be permitted to take what is sufficient for the purpose declared to be in view, and no more.” Lawrence, War and Neutrality, pp. 134-35. But, as Lawrence points out, experience has shown that this rule may be evaded as in the case of the Dimitri Donskoi. (See above.) He suggests (p. 136) that there he added to the rule “a clause to the effect that any coal obtained by means of them for cruising purposes, or for steaming to a different destination, unless in the event of chase by an enemy, shall disqualify both the vessel and her commander from receiving further supplies in any port of the same neutral during the same war.” “This,” he thinks, “would put an end to evasions.” It seems to us, however, that even this amendment would be insufficient. It would not prevent the Baltic Fleet from making use of neutral ports to speed it on its destination to the Far East. Only such total prohibitions as are contained in the Proclamation by the Governor of Malta would appear to be sufficient for this purpose.

This was the case, at least, according to the statements of the Russian commander and Admiral Alexieff. But the fact of disarmament was denied by the Japanese Navy Department. For the official statements on both sides, see London Times (weekly ed.) for August 19, 1904. See also New York Times for August 15. The fact that the Ryeshitelni was partly disarmed was practically admitted by M. Takahira, the Japanese Minister at Washington, in an interview published in the New York Times for August 28, 1904. See also Count Cassini’s interview in the New York Herald for August 19.

the specious grounds on which it has been defended.

The Japanese are said to have attempted to justify their action on the ground that China had failed to enforce her neutrality over against Russia that the neutrality of China was plainly imperfect inasmuch as she was incapable of fulfilling her neutral obligations, and that, in the face of plain proofs of such incompetence, Japan was compelled to enforce her belligerent rights. It was also said that Japan did not intend to repeat the Mandjur farce, and that she could not afford to break up her fleet for the purpose of watching Chinese ports in which Russian vessels are abusing the privileges of asylum and taking advantage of China’s inability to enforce neutral rights.

Without examining into the truth or seriousness of these charges, it is sufficient to observe that none of them, even if fully proven, would justify the violation of Chinese territorial sovereignty. One international wrong does not justify another, and there are other ways of obtaining redress for violations of neutrality, which are not too gross or serious, than that of an attack upon territorial sovereignty. As stated by Daniel Webster, then (1841) Secretary of State, in the case of the Caroline, in order to excuse such an act as the violation of neutral territorial sovereignty, one must “show a necessity of self-defense, instant, overwhelming, leaving no choice of means.

Amongst the violations of Chinese neutrality by Russia were enumerated the constant violations of the neutrality of Chinese territory between the Great Wall and the Liao river, Russia’s disregard of the neutrality of the treaty-port of Niu-Chwang, the sinking of a Chinese vessel named the Hipsang, and the use by Russian agents of the Chinese port of Che-Foo as a base of supplies and military operations during the war. (It is claimed that Che-Foo has been used by Russia as a wireless telegraphy station and that Chinese junks have been using this port as a base for the blockade of Port Arthur.)

See Tokio Correspondent to the London Times (weekly ed.) for August 19, 1904.

See Wharton’s Digest, 1, §50c.
and no moment for deliberation.” And as our most eminent jurist has well said in a famous case, “if there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and remain in them while allowed to remain, under the protection of the Government of the place.” “It is the duty of the belligerent to refrain from the exercise of hostilities within the shelter of neutral territorial waters, and, if any vessel, whether belligerent or neutral, be assailed within such limits, it is incumbent on the neutral Government in the first instance to defend her against her assailant, and, if she be captured, to exert itself to the utmost to effect restitution or otherwise to secure redress for the injury.”

The Japanese Government refused to offer any apology, disavowal or restitution for this gross violation of Chinese neutrality, and it must be admitted that her conduct in this matter, although altogether exceptional, constitutes a blot upon a record which is, thus far, otherwise remarkably clean and spotless from the standpoint of International Law.

Three of the escaped vessels of the Russian fleet at Port Arthur sought refuge at the German harbor of Tsing-Tau near the entrance of Kiao-Chow Bay (the German concession on the Shan-Tung peninsula) on the night of August 11, viz.—the battleship Czarcevitch, the protected cruiser Novik and several torpedo-boat destroyers. The Novik, which was not seriously injured, was ordered to leave within twenty-four hours, in accordance with the instructions of the German Government; but the Czarcevitch and several of the torpedo-boat destroyers, being in an unseaworthy condition, were permitted to remain to the end of the war on condition that the vessels be disarmed and their crews kept in the custody of the German authorities until the end of the war.

On August 12 the Russian cruiser Askold and the destroyer Grosotvoi arrived at Shanghai—the former vessel being badly damaged, but the latter apparently in fairly good or reject the principle supposed to underly the decision of Napoleon in the case of the General Armstrong, it has no applicability in the case of the Ryeshitelni. In the latter case, Japan was clearly the actual as well as the real aggressor, and the Russian commander had placed himself under the protection of the Chinese Admiral who proved to be a weakling or a coward.


See the London Times (weekly ed.) for August 19, 1904. The German Government is said to have taken the position that belligerent warships may repair damages for purposes of navigation in any neutral port, but that their armament must not be repaired or augmented. See New York Times for August 14, 1904.
condition. The Russian consul was at once requested by the Chinese authorities at Shanghai to arrange for their departure from that port within twenty-four hours. He replied that, inasmuch as the ships needed repairs, the Chinese demand was not in accordance with the laws of neutrality, and that reasonable time must be allowed for the necessary repairs. Upon demand of the Japanese consul that the Russian warships leave Shanghai forthwith or disarm, the Chinese local authorities requested the Commissioner of Customs to report upon their condition and ascertain the period required for repairs. That official, having inspected the Grosovoi on August 16, reported that the destroyer's boilers and machinery needed repairs. On the other hand, it was admitted that she had come to Shanghai without reducing her speed.

In the meantime the situation was changed by the receipt of telegraphic instructions from the Wai-wu-pu and the Nanking Viceroy directing that both vessels forthwith disarm or leave port, and an intimation on the part of Japan that unless this were done, she (Japan) would send a portion of her fleet into the port and capture these vessels, as in the case of the Ryeshitelni. In no case, it was announced, would the Japanese Government tolerate a state of affairs which permits Russian vessels to find asylum in Chinese harbors and make repairs that would enable them to resume belligerent operations. Upon the downright refusal of the Russian consul general to agree even to discuss this proposition, the Chinese authorities again changed front and ordered that a reasonable time be allowed for necessary repairs. But on August 19, after another threat on the part of Japan, the Chinese authorities at Shanghai demanded that the destroyer Grosovoi leave that port within twenty-four hours, and that the cruiser Askold complete her repairs within forty-eight hours and afterwards depart within twenty-four hours, or that both vessels disarm. Upon the second refusal of the Russian consul general to discuss such a proposition, the question was referred to the Consular Body as a whole. This body met on August 22, but failed to accomplish anything, owing to the inflexible opposition of the Japanese consul to any action affecting the rights of belligerents. On August 24, apparently after the Czar had ordered the disarmament of the vessels, the Chinese executed another volte face, and extended the time for the departure of the warships. On August 27 the Japanese Government addressed a note to the Powers informing them that, unless Russia forthwith disarm her warships at Shanghai, Japan would be forced to take whatever steps she deemed necessary to protect her interests in that quarter. This veiled threat seems to have had the desired effect, for the Askold and Grosovoi were finally dismantled and disarmed during the first week of September, although not until after further delays and a long controversy between the Japanese, Russians and Chinese authorities with respect to the disposal of the crews of these vessels. It was at last agreed that the crews be interned in such Chinese treaty-ports as contained Russian consulates.

The last case to be considered in this con-

1See New York Times for August 28, 1904.

2The Russians proposed that the precedent set in the case of the Maudjur be followed, and that the crews be sent home at the first opportunity which presented itself. The Japanese insisted, however, that the same procedure be followed as in the cases of the Russian vessels at the German port Tsing-Tau, viz., that the crews be retained on Chinese territory. It is claimed by the Japanese that the Russians violated their parole in the case of the paroled crews of the Varyag and the Koretch who have been drafted into the service of the Baltic Fleet. See Shanghai Dispatch to the Chicago Tribune for August 29, 1904. See New York Times for October 27, 1904, for confirmation of this report.

For the facts bearing on the whole controversy see especially London Times (weekly ed.) for August 19 and 26 and September 2 and 9, 1904.
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It is generally supposed to govern such cases, it should be observed in the first place that the so-called Right of Asylum of belligerent armed ships in neutral ports only exists, as a matter of strict law, in cases where the vessels are driven into port by stress of weather or when they have been otherwise reduced to an unseaworthy condition; but permission to enter a port and enjoy its hospitality, at least for a short time, is assumed in the absence of any express notice to the contrary. As stated by Hall, it has hitherto generally been held that “a vessel of war may enter and stay in a neutral harbor without any special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety; she may take in such provisions as she needs, and if a steamer she may fill up with coal; nor is have been concluded; that the officers and crew shall be paroled not to leave San Francisco until some other understanding as to their disposal may be reached between the United States Government and both the belligerents; that after disarmament the vessel may be removed to a private dock for such reasonable repairs as will make her seaworthy and preserve her in good condition during her detention, or may be so repaired at the navy yard if the Russian commander should so select; that while at a private dock the commandant of the navy yard at Mare Island shall have custody of the ship and the repairs shall be overseen by an engineer officer to be detailed by the commandant and that, when so repaired, if peace shall not then have been concluded, the vessel shall be taken back to the Mare Island Navy Yard and be there held in custody until the end of the war.”—From the Army and Navy Journal for September 17, 1904. It was finally agreed between the United States and Russia that the “officers and crews of the Lena shall have the freedom of San Francisco, but that they may not go beyond the bounds of the city during the present war nor return to Russia, except upon the conclusion of an agreement upon this point between Russia and Japan.” Washington Dispatch to the London Times for September 19, 1904.

In stating the law or custom which has

1See the New York Times and Chicago Tribune for September 13, 1904.

2The main features of the conditions prescribed are that the Lena be taken to the Mare Island Navy Yard and there disarmed by removal of small guns, breech blocks of large guns, small arms, ammunition and ordnance stores and such other dismantlement as may be prescribed by the commandant of the navy yard; that the captain give a written guarantee that the Lena shall not leave San Francisco until peace shall

connection is that of the armed transport Lena, a converted cruiser of the Russian Volunteer Navy, which arrived at the port of San Francisco on September 11. Her captain stated that the ship’s engines and boilers needed repairs. It was believed at the time that the vessel was on a cruising expedition with the object of preying upon neutral commerce or of capturing Japanese vessels in the Pacific. The Japanese Consul at San Francisco promptly demanded that the vessel be required to leave within twenty-four hours. Mr. Stratton, the Collector of the Port, refused to permit an inspection of the ship by the Japanese Consul, rightly insisting that “the neutrality of the United States will be maintained without regard to any request or act of the Japanese Consul,” and that “this matter is between the United States and the Russian Government.” An inspection of the vessel by the American naval authorities showed that the boilers were in such a bad condition that, although the ship could make ten knots an hour with them, it would not be seaworthy in a storm. It was estimated that she would need six weeks for temporary repairs. In the meantime all necessary precautions were taken to prevent interference or the sending in to the vessel of unauthorized supplies.

Acting upon the written request of the commander of the Lena addressed to Rear Admiral Goodrich, President Roosevelt issued an order on September 15 that the Russian cruiser be disarmed and taken in custody by the United States naval authorities until the close of the war between Russia and Japan.
there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her."

It has generally been assumed in current discussions (and Japan appears to have acted on this assumption) that it would be a breach of International Law for a neutral State to permit belligerent warships to remain in a neutral port longer than twenty-four hours, except in case of necessity, or to allow such vessels to take in supplies of coal oftener than once in three months, and then only in

3Hall, §231, p. 630. But Hall (p. 631) admits that "in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency toward the enforcement of a harsher rule becomes more defined with each successive war." As everyone knows, the rule is entirely different with respect to belligerent troops which have been driven into neutral territory or which have sought refuge on neutral soil. Such troops are interned and kept there until paroled or until the close of the war. See Arts. 57 and 58 of the Regulations Respecting the Laws and Customs of War on Land adopted by The Hague Conference, Holls, p 160.

Dana (note 208 to Wheaton, p. 524) thus defines the obligations of neutrals in respect to the use of its ports by belligerent cruisers: "It may be considered the settled practice of nations, intending to be neutral, to prohibit belligerent cruisers from entering their ports, except from stress of weather or other necessity, or for the purpose of obtaining provisions and making repairs requisite for seaworthiness. They must not increase their armament or crew, or add to their belligerent efficiency. It is now the custom to fix a short time for the stay of such vessels, after they have done what is permitted them, or the marine exigency has passed,—usually twenty-four hours. These rules are, however, at the option of the neutral."

Taylor (p. 690) lays down the following rules: "In addition to the observance of all quarantine rules, local revenue and harbor regulations, the belligerent ship must respect all prohibitions designed to prevent the use of the neutral port for purposes other than those of immediate necessity. While the fighting force of such a ship may not be reinforced or recruited in such a port, nor supplies of arms and warlike stores or other equipments of direct use for war obtained, such supplies and equipments may be purchased as are necessary to sustain life or carry on navigation. If she is in need of repairs she may procure whatever is needful to put her in a seaworthy condition including masts, spars and cordage. But she cannot make such structural changes as will increase her efficiency as a fighting machine, either of offense or defense. She may take in such provisions as she needs; and, if a steamer, she may purchase enough coal to enable her to reach the nearest port of her own country."

quantity sufficient to take them to the nearest home port or to some nearer neutral destination. It is true that neutral States are under an international obligation to prevent their ports from being used as a base of military operations or as a constant and regular base of supplies (whether of arms, coal or supplies), or for the purpose of augmenting the force of an armed vessel in the service of a belligerent or of increasing its military efficiency. It is also true that a considerable practice has grown up in recent times in favor of the twenty-four hour rule and in favor of strictly limiting the supply of coal permitted to belligerent vessels in neutral ports. But the details and specific content of such means or measures for carrying out their international obligations has been left by International Law to neutral Governments. 2

The rule limiting the stay of belligerent armed vessels in a neutral port to twenty-four hours, "except in the case of stress of weather, injuries or exhaustion of provisions necessary for the safety of the voyage, save that an interval of twenty-four hours must elapse between the sailings of vessels of opponents," was first introduced into international practice by France in 1861. See Walker, Science, p. 455. Similar regulations were adopted by Great Britain, Spain, and Brazil. On January 31, 1862, the British Government published a series of neutrality regulations more stringent than any heretofore issued. They provided that "war vessels of either belligerent should be required to depart within twenty-four hours of their entry, unless they needed more time for taking in innocent supplies or effecting lawful repairs, in which case they were to obtain special permission to remain for a longer period, and were to put to sea within twenty-four hours after the reason for their remaining ceased. They might freely purchase provisions and other things necessary for the subsistence of their crews; but the amount of coal they were allowed to receive was limited to as much as was necessary to take them to the nearest port of their own country. Moreover, no two supplies of coals were to be obtained in British waters within three months of each other." Lawrence, Principles, pp. 310-11.

These restrictions upon the liberty of belligerent ships in neutral ports were adopted by the United States in 1870, and they have been re-imposed by Great Britain and the United States in successive wars. They have also been copied, either in whole or part, by other States, e.g., by Spain and Brazil. It is well known that the twenty-four-hour rule was enforced by Great Britain and Portugal during the Spanish-Ameri-
As has been said, neutral Governments may impose such conditions upon belligerent armed vessels in their ports as they deem necessary or advisable for the purpose of enforcing their neutral obligations provided such rules or regulations as they choose to make are impartially enforced against both belligerents. But they are bound by the law of nations to make such rules and provide such means for their enforcement as may be necessary to insure a strict and im-

partial neutrality—a neutrality which consists in absolute abstention from any acts or services which would tend to strengthen the fighting forces of either belligerent or which would amount to an actual or potential participation in the war. For this reason a belligerent armed vessel should not be allowed to remain in a neutral port for a longer period of time than is absolutely necessary in order to procure innocent supplies or to effect necessary repairs (i.e., those absolutely necessary); and steamships should not be allowed to coal except in case of necessity, and then only in quantity sufficient to take them to the nearest home port or (better still) to the nearest available neutral destination. 3

The measure or amount of repairs permitted or supplies allowed to belligerent armed vessels in neutral ports should be determined by what is absolutely needed to make them navigable or seaworthy as distinct from rendering them more efficient as fighting machines or increasing their warlike capacity. 2

Speaking generally, we may say that a belligerent ship must not leave a neutral port a more efficient fighting machine than she entered it, except in so far as increased efficiency may come from increased seaworthiness or a better supply of provisions. On the other hand, neutrals may permit the supply of things necessary for subsistence, and they may repair in their ports and waters damage due to the action of the sea. A distinction is drawn between what is necessary for life and what is necessary for war. 7

1 It has also been customary to interpose a time limit of twenty-four hours between the sailings of two or more hostile ships in belligerent waters. The object of this rule is to prevent fighting in the neighborhood of neutral waters. It dates from the middle of the eighteenth century. This is the custom which is generally referred to in treatises as the twenty-four-hour rule.

2 Under this rule the engines and boilers of such a vessel might be repaired, but not so her guns or armament.

3 Lawrence, War and Neutrality, p. 121. Lawrence adds, "It is not very logical, because a man must live before he can fight, and those things