1904

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

Amos S. Hershey
*Indiana University School of Law*

Follow this and additional works at: [http://www.repository.law.indiana.edu/facpub](http://www.repository.law.indiana.edu/facpub)

Part of the [International Law Commons](http://www.repository.law.indiana.edu/facpub), and the [Military, War, and Peace Commons](http://www.repository.law.indiana.edu/facpub)

**Recommended Citation**


[http://www.repository.law.indiana.edu/facpub/1940](http://www.repository.law.indiana.edu/facpub/1940)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
vailed that Lord Wellesley announced that he would prohibit by military force the usual decoration on November fourth by the Orange Societies of William's statue in Dublin. This action naturally aroused the anger of the Orangemen. When, therefore, shortly afterwards, Lord Wellesley attended the theatre in state, the Orange fanatics were on hand in force to hoot his lordship. During the disturbance thereby created a bottle was thrown on the stage, and part of a child's rattle, pitched from the gallery, struck near the vice-regal box. The rioters were turned out, and Forbes and other ringleaders were arrested. That the hooting was preconcerted was plain, and if Forbes and his companions had been punished as common rioters the affair would have ended at once. But Wellesley and Plunkett persuaded themselves of the advisability of filing a criminal information against Forbes and ten other members of the Orange lodges who had taken a prominent part in the disturbance, not only for riot and for intent to injure the lord-lieutenant, but for a preconcerted criminal conspiracy to effect such purposes—and this, too, after the grand jury had refused to find an indictment. The trial of the information was a ridiculous fizzle, utterly unworthy of the ability displayed in the prosecution. The testimony of a customs clerk and of another witness who was an applicant for government patronage, on which the prosecution relied to prove the intent to inflict personal injury, utterly failed, and the remainder of the evidence was equally trivial and improbable. The jury disagreed and the prosecution was finally dropped.

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

IV.
The Construction, Sale and Exportation by Neutral States and Individuals of War Ships, Submarine Boats, and Other Vessels Adapted to Warlike Use and Intended for Belligerent Service.

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

In a previous paper reference was made to the fact that "the only serious charges of a violation of neutral duties on the part of a great European Power lie against Germany, viz., the failure of the German Government to prevent the sale to Russia of several transatlantic steamers belonging to its auxiliary navy, and the exportation of a number of torpedo boats to Russian territory." "These transactions," it was said, "raise some very difficult and delicate questions which are inseparably connected with a great historical controversy." These we shall now proceed to consider.

The charge has been freely circulated in the newspapers, and has even been made on the floor of the German Reichstag that the Russian Government has purchased several vessels (notably the Füst Bismarch of the Hamburg-American Line), belonging to a great German transatlantic line, whose vessels are auxiliary cruisers of the German navy. In reply to the strictures of Herr

1See The Green Bag for July, 1904.
Some Questions of International Law.

Bebel, who maintained that "such sales accomplish indirectly the reinforcement of the Russian navy," Chancellor von Bülow is reported to have defended them on the ground that, "according to the principles of International Law hitherto prevailing, the sale of the vessels of a private firm to a foreign state was admissible." "At any rate," he declared, "the question was a doubtful one." He admitted that "the principle of neutrality forbids a neutral State from giving direct or indirect support to either belligerent through furnishing ships for war transportation purposes." However, "in the case of the Russian transports, it was not to a State, but to private firms that the vessels were sold. There could not be any question of taking sides against Japan, since she also had full liberty to buy vessels from Germany." 1

It has also been charged on the floor of the German Reichstag, 2 as well as in the newspapers, that the German Government has permitted the exportation of a number of torpedo boats and destroyers for the use of the Russian navy. It is charged that, for the purpose of disguising these transactions, "the several parts of the vessels are being exported as half-finished manufactures and put together in Libau, Russia," whither, it is reported, a large number of German workmen have been sent. It is also asserted that these submarine boats were originally built for the German Government which refused to take them because the terms of the contract (i.e., the stipulations as to time limit), under which they were built had not been strictly observed.

It appears, however, that Germany is not the only country in which Russian agents have been busy in making and soliciting contracts for the purchase or construction of vessels for the Russian navy or for the use of Russia in the present war, but that Russian agents have also been busy in other countries, and that the Japanese have also been active in a similar direction. Germany appears, however, to be the only State in which such acts have been defended, if not encouraged, by the official or responsible head of the Government.

It is reported that Russia has ordered five armored cruisers to be built at Trieste, 3 where Japan was said to be busy negotiating for the purchase of a number of vessels at an earlier period 4 of the war. Russia is also said to have purchased a number of fast cargo vessels in England. These, it is supposed, are to be altered so as to enable them to be used as transports. 5 It is also stated that several new battleships had been ordered by Japan in England prior to the beginning of the war, and that these are now being built. 6 The Russian and Japanese Governments are said to be competing sharply for the purchase of transports in Holland and Belgium, 7 and we have heard repeated rumors to the effect that agents of both the Russian and Japanese Governments have been negotiating for the purchase of cruisers of several South American States, more particularly with the Government of the Argentine Republic. 8 It has also been vaguely rumored that Turkey has been purchasing ships on Russia's account. 9

Nor is this all. It has even been asserted that Japanese (and possibly also Russian) agents have been at work in the United States. It is reported that a contract has been awarded the Newport News Shipbuilding Company of Newport News, Va., for the

1Chicago Tribune for June 1, 1904. This report has since been contradicted by the Vienna correspondent of the London Times.
2Ibid. for Apr. 14, 1904.
3N.Y. Times for May 28, 1904.
4Chicago Record-Herald for Apr. 10, 1904.
5N.Y. Times for May 14, 1904.
6See especially H. W. Wilson in London and N.Y. Times for May 26, 1904. It has recently (June 2oth) been reported that the negotiations with Argentina have failed.
7N.Y. Times for June 13, 1904.
The Green Bag.

construction of four Lake submarine boats destined for service in the Japanese Navy in the present war.\(^1\) A stockholder of the Lake Submarine Torpedo Boat Company of Bridgeport, Conn., is reported to have been practically completed for the sale of the submarine torpedo boat *Protector* to representatives of the Japanese Government, the Japanese agent having outbid the agent of the Russian Government.\(^2\) This torpedo boat is since supposed to have been shipped as cargo on board the Norwegian steamer *Fortuna*, bound nominally for Cork, but really for Japan; and a Russian newspaper (the *Novoe Vremya*) has expressed the hope that the United States Government will make a detailed explanation of why the boat was allowed to leave the territory of the United States.\(^3\)

These reports may be more or less wanting in accuracy and authenticity, but, assuming that they are substantially correct, they may serve to give a foreground of life to our discussion as to whether the construction, sale, and exportation on the part of neutral States and individuals, of warships, torpedo boats, and other vessels adapted to warlike use and intended for belligerent service constitute a violation of neutral obligations, and to what extent or under what circumstances a neutral State can be held responsible for such violation.

It, of course, goes without saying, that the direct sale of a war vessel by a neutral State to either belligerent would be a gross breach of neutrality, for which ample redress or reparation by the injured State ought at once to be demanded, and, if necessary, exacted.\(^4\)

\(^1\) *N. Y. Times* for May 11, 1904.
\(^2\) *Chicago Record-Herald* for Apr. 28, 1904. Another stockholder has recently (June 15th) claimed that the *Protector* was sold to Russia.
\(^3\) *N. Y. Sun* for June 10 and 14, 1904. The *Protector* appears finally to have turned up in Kronstadt, Russia. See *N. Y. Times* for July 8, 1904. Several other Lake submarine boats are since reported to have left the United States for Russia.
\(^4\) *Chicago Tribune* for June 12, 1904.

Since the settlement of the famous "Alabama Case" by the Treaty of Washington in 1871, and the Geneva Award of 1872, there can scarcely be any more room for doubt but that the fitting out and departure from, as well as the arming and equipping\(^5\) in, a neutral port of a vessel intended for the use of either belligerent is a serious violation of neutrality, if knowingly permitted by a neutral government. The First Rule of the Treaty of Washington declares that "a neutral State is bound to use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace, and also like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use."\(^6\)

Although the principles incorporated into this rule have not won the unreserved approval of all English publicists,\(^7\) and have have

\(^5\) The arming and equipping of such a vessel, as also the augmentation of the force of a war vessel in a neutral port, had been prohibited by International Law, as well as by the British and American Neutrality Acts, many years before.

\(^6\) For the Three Rules of the Treaty of Washington, see, e.g., Wharton's Dig. III., p. 630.

\(^7\) E.g., Hall (§225 and notes) and Lawrence (§§262 and 263). Hall, although he insists that this is not the law, was of the opinion that such a usage is in course of growth. He seems moreover to have looked upon such a rule or usage as healthy and desirable, if not based upon the doctrine of intent in place of which he suggests the alternative principle of the character of the vessel. Lawrence thinks "the question is still far from settlement." He says that "the old principles have been thoroughly discredited and the maritime Powers have come to no agreement upon new ones." That the First Rule of the Treaty of Washington is probably a rule of International Law is admitted by Walker (Manual, §65) "provided a fair interpretation be accorded to the phrase 'due diligence.'" The general consensus of opinions of publicists, with some dissent in England, is that they (the Three Rules of the Treaty of Washington) are a correct statement of existing International Law." Foster, *American Diplomacy*, p. 429.
Some Questions of International Law.

not been formally accepted by the Powers, they may now be regarded as forming an integral and important part of the correct practice of International Law. They have, generally speaking, found favor in the eyes of continental jurists, and they were adopted, although in somewhat altered language, by the Institute of International Law in 1875. They have long since been incorporated in the Neutrality and Foreign Enlistment Acts of the United States and Great Britain, and the British Foreign Enlistment Act of 1870, which has been pronounced by a leading authority to be "perhaps the best and fairest expression of the modern rule anywhere to be found in public law," goes at least one step farther than our own Neutrality Act and the Treaty of Washington. It prohibits not only the commissioning, equipping, and dispatching, but also the building or construction, of "any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State."

True it is that there is a long line of American jurists and statesmen who have held, in the language of Judge Story, that "there is

---

1 The United States and Great Britain agreed, according to the terms of the Treaty of Washington, to abide by these rules in their future relations with each other, and to invite other maritime Powers to accede to them, but this has never been done. The failure to invite or secure the adhesion of the maritime Powers does not, however, destroy their validity or impair the value and importance of the decision of the Geneva Board of Arbitration as a precedent. Additions to International Law are usually the result of a natural growth rather than of formal legislation, and if all such additions had to wait for the formal sanction of the Powers, there would be, comparatively speaking, little growth or progress. If the decisions of national prize courts constitute an important source of International Law, how much greater should be the value of the decisions of International Courts of Arbitration as precedents.

Although the value and importance of the decision of the Geneva Board of Arbitration as a precedent can scarcely be called into question, there is still some difference of opinion in regard to the correct meaning of the phrase "due diligence"; there are serious objections to the American doctrine of intent; and all of the decisions of the Geneva arbitrators (or rather the reasoning on which some of these decisions was based) have not been fully accepted on all sides.

2 See, e.g., Calvo in Recueil de Droit International, VI., pp. 453 ff; Bluntschi in the same review, II., pp. 452 ff; Calvo, Le Droit Int. IV., §2,623; Blunt's trans.) III., §1,555; Rivier, II., §68, pp. 495 ff.


4 The United States Neutrality Acts of 1794 and 1818 and the British Foreign Enlistment Acts of 1819 and 1870. The British Act of 1819, like the United States Act of 1794 and 1818, prohibited the fitting out, as well as the arming, of any vessel with intent, etc.; but the administrative and preventive powers (viz., those requiring bond and authorizing a warrant for the head of a State to sell, to a belligerent, ships of war completely equipped and armed for battle. Mr. Clay, Sec'y of State to Mr. Tacon, Wharton's Dig. III., p. 521.
nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." The American view that vessels built or sent out in and which only exposes the persons engaged in the venture which no nation is bound to prohibit. It is a commercial adventure, the conditions of maritime warfare have been very radically changed. What might have been a reasonable rule as applied in the time of sailing ships, might now, in the age of swift ironclads, be intolerably oppressive. In the cases of the Santissima Trinidad, U. S. v. Quincy, and the Meteor, the courts were dealing with small sailing vessels, which had been converted into privateers, the possession of which by one or the other belligerent made very little differ-

ence in the general result of the struggle; whereas, the possession of an ironclad ship might well turn the scale one way or the other, as indeed it did in the war between Chili and Peru, in 1880-1881. This great power of inflicting injury upon one of the belligerents, it is fair to say, ought not to be permitted to neutral citizens, and the neutral nation is alone in a position to restrain them.

"In view of these facts, it is believed that the doctrine set up by the United States Neutrality Act and by the Federal Courts, that the 'intent' of the owner or shipbuilder is the criterion by which his guilt or innocence is to be judged, is wholly inadequate; it would not for a moment stand the test of the rule of 'due diligence,' as applied by the Geneva tribunal." 2

2 Snow's Cases, note on "The Three Rules of the Treaty of Washington" on pp. 437-38. This note has been reproduced, with the addition of a few references, in the recent enlargement and revision of Dr. Snow's work, entitled "Scott's Cases," p. 720. The value to the student of this otherwise excellent work is greatly impaired by the fact that it is impossible to distinguish in respect to the notes between the contributions of Dr. Snow and those of Dr. Scott except by a comparison of the two texts. We trust that this fault may be corrected in a subsequent edition.

The American doctrine of intent has also been justly and severely criticised by a number of English writers. Walker (The Science, etc., p. 500) points out that it "leaves open to fraud a wide and open door. Who may know the intent of a crafty and secret mind? A thousand tricks and devices may be employed to disarm suspicion. An unarmed vessel may be dispatched from a neutral port, arms and men from another, and the intent with which these elements were prepared and gathered together may only become apparent on their combination at some spot far beyond the bounds of the neutral jurisdiction." Lawrence (p. 548) says, "nothing is more difficult to prove than intentions. They have frequently to be inferred from actions of an ambiguous character. Moreover, the two intents—that of selling and that of making war—may co-exist in the same mind." Bernard (Neutrality, p. 389) declares, "In international wrongs . . . the intent is not the thing chiefly or mainly regarded; and in international wrongs of this particular class the only intent and the only inadvertance which are really material are, first, that hostility in the persons who constitute or direct the expedition which makes it noxious instead of harmless; and secondly, that connivance or negligence on the part of the neutral Government which makes the nation

1 The best and most authoritative statement of this view is by Dana. See Dana's Wheaton, note 213, p. 563. A recent defence of this view may be found in Taylor. International Law, V., c. 2.
In view of the unsatisfactory and inadequate character of the older body of doctrine, would it not be well to take a step or two even beyond the First Rule of the Treaty of Washington and broadly assert that a neutral State is bound to use due diligence (i.e., a kind and degree of diligence reasonably sufficient under the circumstances), to prevent not only the fitting out, arming or equipping, and departure of any vessel intended for the use of either belligerent, but also the construction, sale and exportation

"due diligence on the part of the sovereign Government signifies that measure of care which the Government is under an obligation to use for a given purpose. This measure, when it has not been defined by international usage or agree-

ment, is to be deduced from the nature of the obligation itself, and from the considerations of justice, equity, and general expediency on which the law of nations is founded." Anything more vague and unsatisfactory that this definition can scarcely be imagined. The Geneva arbitrators adopted in substance the American definition, although couched in somewhat different language. They held that due diligence should be "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part."

This definition has been criticised (e.g., by Lawrence, pp. 538-39) on the ground that it accepts the principle of a "changing standard" of neutral obligations, and "imposes different degrees of responsibility upon different neutrals in the same war, and thus destroys that impartiality which is the essence of neutral duty." But it is doubtful whether any definition which has been or which might be framed would be wholly free from difficulty or to which serious objection might not be made. Lawrence suggests (p. 540) that "the kind and amount of diligence a careful Government would use to put down smuggling ought to be used by neutral States to fulfil the obligations of their neutrality." This suggestion would certainly seem to furnish a good practical working rule or standard of neutral obligations, but it may be doubted whether even this would give us the precise and absolute standard which Lawrence seems to be in search of. Certainly some account should also be taken of the "emergency" and of the "risks" or "magnitude of the results of negligence." For example, the same degree or amount of diligence would scarcely be required in the case of a small submarine boat as in the case of a large warship.

The complexity which surrounds this doctrine of intent and the fine distinctions to which it may lead in practice may be seen by consulting the case of the U. S. v. Quincy (Supreme Court of the U. S., 1832, 6 Peters, 445). In that case a distinction was made between a fixed and present intent on the one hand and a conditional or contingent intent on the other. It was held that if the intent was to send the vessel in question to the West Indies in search of funds with which to complete her armament, with no present or fixed intention of preying upon the commerce of a friendly State, but with a mere conditional or contingent intent or wish to fit her out after her arrival there, it was not an illegal transaction. On the other hand the older English doctrine to the effect that a ship adapted for war is a mere article of contraband unless she left the neutral port in a condition capable of committing hostilities the moment she entered upon her voyage was wholly unsatisfactory and absurdly inadequate. This view presupposed innocence on the part of the owner or shipbuilder unless she was at least partly armed and equipped in the neutral port. This was in substance the doctrine laid down in 1863 in the case of the Alexander (Att. Gen. v. Sillen, Hurlstone and Colman, 2 Exchq. Rep. 11, 431) by Chief Baron Pollock and Baron Bramwell. On the Alexander, see specially Bernard, Neutrality, pp. 353-54 and note, and Walker, The Science, p. 499.

'There has been considerable controversy as to the true meaning of the phrase "due diligence." The American contention at Geneva was that it meant diligence "commensurate with the emergency or with the magnitude of the results of negligence." The British case set forth that "due diligence on the part of the sovereign Government signifies that measure of care which the Government is under an obligation to use for a given purpose. This measure, when it has not been defined by international usage or agree-

ment, is to be deduced from the nature of the obligation itself, and from the considerations of justice, equity, and general expediency on which the law of nations is founded." Anything more vague and unsatisfactory that this definition can scarcely be imagined. The Geneva arbitrators adopted in substance the American definition, although couched in somewhat different language. They held that due diligence should be "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part."

This definition has been criticised (e.g., by Lawrence, pp. 538-39) on the ground that it accepts the principle of a "changing standard" of neutral obligations, and "imposes different degrees of responsibility upon different neutrals in the same war, and thus destroys that impartiality which is the essence of neutral duty." But it is doubtful whether any definition which has been or which might be framed would be wholly free from difficulty or to which serious objection might not be made. Lawrence suggests (p. 540) that "the kind and amount of diligence a careful Government would use to put down smuggling ought to be used by neutral States to fulfil the obligations of their neutrality." This suggestion would certainly seem to furnish a good practical working rule or standard of neutral obligations, but it may be doubted whether even this would give us the precise and absolute standard which Lawrence seems to be in search of. Certainly some account should also be taken of the "emergency" and of the "risks" or "magnitude of the results of negligence." For example, the same degree or amount of diligence would scarcely be required in the case of a small submarine boat as in the case of a large warship.
of any war ship whatsoever for or to any other than a bona fide neutral purchaser? Nay, would it not be well to go still farther and insist that a neutral State is bound to use due diligence to prevent the construction for, or sale to, a belligerent purchaser, or the exportation to a belligerent destination, of any vessel which is adapted or readily convertible to warlike use? It will be said that this is an invasion of the commercial rights of neutral individuals who depend upon shipbuilding for a livelihood or for profit, and that it imposes onerous and difficult burdens upon neutral States. Besides, "if a distinction is to be made between vessels serviceable for warlike use and other vessels, where, it may be asked, are we to fix the line?" It is very doubtful whether our shipbuilding interests would greatly suffer by an adoption of these principles; but, even supposing that this were the case, have communities or nations ever hesitated to sacrifice the vested rights or commercial interests of certain individuals, or even classes, to the general welfare of society as a whole? If they have not hesitated to exact these sacrifices in the interest of particular communities or nations, how much less hesitation should there be when the welfare of humanity at large or the collective interests of civilization are at stake! But, it may be asked, should we not go still one step farther, and, as has frequently been suggested, prohibit all trade in arms and ammunition or implements of warfare between belligerents and neutrals? To this piece of apparently unanswerable logic we may reply that to compel neutral States to assume such responsibilities would indeed involve the imposition of such burdens that they might in some cases prefer the status of belligerency to that of neutrality. In framing rules of International Law we must be careful never to exceed the limits of the practical, and we must avoid the mistake into which our Legislatures so often fall of framing rules which are to difficult or which are impossible to enforce.

Would the prohibition of the construction for, or sale to, a belligerent purchaser, or the exportation to a belligerent destination of all vessels adapted or readily convertible to warlike use be impossible of execution or too difficult to enforce? Some at least of our modern States have already burdened themselves with considerable responsibility in this direction. According to our own Neutrality Law, such a vessel might indeed be built and sold as an article of commerce, but it could not be suffered to depart from any of our ports if intended for the use of either belligerent. In England, since the enactment of the British Foreign Enlistment Act of 1870, such a vessel could not even be built or contracted for. According to the older statutes, the Alabama might have been built and sold as an article of commerce, if she had not been directly intended for the service of the Confederacy. But, as an able writer has well said: "It is clear that proof of an intention hostile in fact, or constructively hostile, in the builder of a ship or his workmen, or in

---

1 In case the destination were nominally neutral, but really belligerent, the doctrine of "continuous voyage" might be made to apply.


3 As stated in the text, it is very doubtful whether these interests would suffer to any considerable extent. Even under the interpretation given to our present law, it is rather difficult to imagine a case where such a vessel might be so disposed of (if sold to a belligerent purchaser or dispatched to a belligerent destination) as to free the neutral trader or builder from all taint of suspicion of being engaged in an illegal venture or an unlawful transaction (see, e.g., the cases of the Meteor and the U. S. v. Quincy, cited above). In practice it is very difficult to distinguish between a belligerent and a commercial intent. It only opens the door to fraud. There is no attempt at such a distinction in the case of contraband of war where the character of the articles or the belligerent destination furnishes the essential justification of capture. The main difference between the two cases would be that in the case of contraband the right of capture belongs to the belligerent; in that of vessels adapted to warlike use and intended for a belligerent destination, the duty of prevention would rest on the neutral, as it indeed already does to a very considerable extent.
Some Questions of International Law.  

The maker or purveyor of guns or ammunition, has really little or nothing to do with the question whether the belligerent nation has sustained injury from the neutral. To the United States it was of no consequence at all what were the intentions of Laird or Miller, or their riggers or ship carpenters, or whether these persons, or any of them, were animated by partiality to the Confederates, or were merely working, in the exercise of their respective trades, for what they could get. What was of consequence to the United States was the intention with which the vessels were dispatched from England by those who had at that time the real control of them. . . . Nor did it matter to the United States whether the vessels were purchased ready-made or were built to order. . . . In a word, as between nations, the intent which impresses on an armed ship dispatched from a neutral port the character of a hostile expedition is the intent which governs the dispatch of the ship, not the intent which presided over its preparation.*

In respect to the difficulty of distinguishing between vessels serviceable for warlike use and other vessels, it must be admitted that this is a real and serious difficulty; but it is one which might, we think, be overcome. That there is no reason for relieving a neutral Government from a duty preventing their exit from neutral ports, and what was of consequence to the fact that "mail steamers of large size fitted for commerce." Hall calls especial attention to the fact that "mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns by the exercise of proper care and exertion on the part of the neutral government. 

There can be little question (provided the facts have been stated correctly) but that the German Government has been guilty of a violation of neutrality, especially in the matter of the torpedo boats. The fact that these were not fully completed in neutral territory, but were exporter in ports to Russia, ought not to free the German Government from responsibility (provided it had knowledge) any more than the fact that the Alabama received her armament in Portuguese waters absolved the English Government during our Civil War. Besides, both the First and the Second Rules of the Treaty of Washington seem expressly to cover this case. The fact is, that any kind of a modern war vessel is a weapon with such tremendous possibilities of destruction that it approximates to a hostile expedition, and that the exportation of such vessels, in whole or in part, for the use of a belligerent from a neutral port amounts in effect to the use of neutral territory as a base of military operations, or the origination of a proximate act of war on neutral soil—acts which are clearly forbidden by International Law. 

In respect to the sale of the German transatlantic steamers, there is, perhaps, more of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen. He remarks that these vessels "melt insensibly into other types," and he thinks that "it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralysing the whole ship-building and ship-selling trade of the neutral country." Part of this argument has been dealt with above. Hall certainly exaggerates the injury to shipbuilders. We would not presume to say to what extent experts can distinguish between the different classes of vessels. In order to secure a proper enforcement of the law, guarantees or bonds might be exacted from ship-builders and ship-traders, such, e.g., as are required by the terms of our own Neutrality Act. The burden of proof should be thrown upon the ship-builder as is done by the British Act of 1870. He is liable if he has "reasonable cause to believe, etc." See above.

*This is a question for experts. Hall (p. 620) says: "Experts are perfectly able to distinguish vessels built primarily for warlike use; there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral Government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce." Hall calls especial attention to the fact that "mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns

1 Bernard, op. cit., pp. 196-97. This argument was used by Bernard against the American claims, but it merely proves the inconsistency or inadequacy of the American doctrine of intent. This doctrine is now mainly open to criticism because it does not go far enough. It is too narrow and restricted in its scope. By prohibiting the commercial as well as the belligerent intent, much of the difficulty and doubt to which it has given rise vanishes.

2 This is a question for experts. Hall (p. 620) says: "Experts are perfectly able to distinguish vessels built primarily for warlike use; there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral Government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce." Hall calls especial attention to the fact that "mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns

3 Hall certainly exaggerates the injury to shipbuilders. We would not presume to say to what extent experts can distinguish between the different classes of vessels. In order to secure a proper enforcement of the law, guarantees or bonds might be exacted from ship-builders and ship-traders, such, e.g., as are required by the terms of our own Neutrality Act. The burden of proof should be thrown upon the ship-builder as is done by the British Act of 1870. He is liable if he has "reasonable cause to believe, etc." See above.

4 Hall is one of the leading German authorities on International Law.
of either belligerent, but to exercise a reasonable diligence in compelling the like conduct on the part of all persons within its jurisdiction. Total abstention—not mere impartiality—is in these matters the real extent of neutral obligation.

In the case of the submarine boat Protecor, which was shipped as cargo on board the Norwegian steamer Fortuna, and which cleared from New York early in June, the Government of the United States could in no wise be held responsible whatever her destination, although the owners or builders might, under certain circumstances, be indicted under our neutrality laws. As Mr. Cass, Secretary of State, said in 1860: "A government is responsible only for the faithful discharge of its international duties, but not for the consequences of illegal enterprises, of which it had no knowledge, or which the want of proof or other circumstances rendered it unable to prevent." The case of the submarine is distinctly one in which our Government neither actually had knowledge nor was 'charged' with it . . . To make sure that no submarines were building in the United States, we should have to maintain a constant inspection of every shipyard and boat-yard in the country, which is, of course, out of the question." It is one of the duties the diplomatic representatives of the belligerent States in neutral countries to call the attention of such and similar violations of neutrality on the part of neutral individuals to neutral Governments. "If the attention of our Government were called, however, by the Russian or the Japanese representative at Washington to the fact that a submarine was building, supposed to be intended for use against his country, our effective responsibility would then begin. That

---

1 See, e.g., the opinion of Sec. Clay to Mr. Rivas Salmon in 1827, Wharton's Dig. III., p. 520. This is not, however, in accordance with the newer, and, as we believe, the sounder rules.

2 See editorial in N. Y. Tribune for May 14, 1904, and the opinion of Chancellor von Bülow, cited above. This seems also to have been the opinion of Sec. Clay. See Wharton's Dig. III., p. 520.

3 Walker, The Science, etc., pp. 374 and 388.

4 Mr. Cass, Sec. of State, to Mr. Molina, 1860. See Warton's Dig. III., p. 603.

5 See an excellent editorial on this subject in the N. Y. Times for June 13, 1904.