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

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beef had been given to charity, granting that such had been the case, could have been but cold comfort to the butcher; and surely the arbitrary power of the Commissary was such as constantly to cause friction. Three years later, 1534, the Mayor and Council of Oxford “boldly affirm that the sayd Chaun'r Schollers be not Clarks of the Markett, and that they have never used it peaceably, but by wrong usurpation,” and they also affirm that the University should not be allowed “to set the price of conies, nor of other things wh they buy of ye freemen of the Towne.”

But again we see against what conditions the University was fighting in an item from “The Particulars of the University Petition to the King in 1661,” which reads: “Every browne baker to sell ij horse loves for a penny, and they to wey according to the Statute in that behalf provided & the same

1Ib.

loves to be made most of beanes and not all of branne, uppon payne of forfetinge of Xs so often as any of the sayd bakers do offend in any of the premises, besides further punishment as before.”

So the struggle continued, with complaints and petitions from both town and gown until 1771, when Parliament passed an act for “Removing, Holding and Regulating Markets within the City,” and under this Act, as amended successively in 1781, 1812, 1838 and 1888, the Market of Oxford is still administered.

Such is the history in brief of one main point of contention between town and gown, in itself perhaps hardly worthy of so long a digression, but important, because it shows the sources of constant strife and the never-ending opportunities for quarrels and hand-to-hand battles.

Ogle, p. 69.

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

VI.

Russian Seizures of Neutral Merchantmen—The Right of Visit and Search, of Capture, and the Alleged Right of Sinking Neutral Prizes.

By Amos S. Hershey,
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The most important questions of International Law bearing upon the rights of neutrals which have thus far1 arisen from the Russo-Japanese war have grown out of the exercise of the right of visit and search and from the seizure of neutral vessels in the Red Sea by several cruisers of the Russian Volunteer Navy, as also the seizure and (in two cases) the sinking of neutral prizes in the Pacific Ocean by the Vladivostok squadron during the month of July.

Complaints were heard almost at the very beginning of the war of the searching and detention of neutral merchantmen by the

1August 25, 1904.

Russian Mediterranean fleet in the Red Sea and of the detention of several British and American ships at Port Arthur.2 The temporary detention of the British and American vessels at Port Arthur, whether due to

2It was also reported by Admiral Alexieff that the German cruiser Hansa, engaged in transporting German subjects from Port Arthur, was fired upon by Japanese warships; but the circumstances were not described, and, according to Admiral Alexieff's own admission, the vessel appears to have harbored Russians in the guise of Germans. The incident appears to have attracted but little attention. From the military correspondent of the London Times, February 17, 1904. A British steamer (the Fu Pung) was also fired upon by a Russian guardship as it was leaving Port Arthur. This was said by Admiral Alexieff to have been due to a misunderstanding.
the fact that they harbored Japanese refugees or whether caused by motives of military expediency, does not seem to have been regarded as a serious matter by either of the neutral governments concerned, although there appears to have been some diplomatic correspondence and, in one case at least, a claim for the payment of demurrage. It is probable that the temporary detention for military purposes of neutral merchantmen in a beseiged or blockaded port, more particularly at the beginning of a war, would be regarded with a certain degree of leniency by friendly neutrals. A payment of demurrage by the belligerent government to the neutral owners is probably the utmost that would be expected by the neutral Government under these circumstances.

A much more serious matter was the stopping and searching of a number of neutral merchantmen in the Red Sea by the Russian Mediterranean fleet on its return from its projected voyage to the Far East during the second week of the war. Three neutral colliers laden with steam coal, which was doubtless destined either directly or indirectly for Japan, were seized and brought as prizes into the Gulf of Suez within Egyptian territorial waters. Here they were detained for about four days, and in the meantime these waters were used as a base of anchorage from which to overhaul neutral vessels in spite of the protests of the Egyptian Government. The colliers were soon released however, in response to a telegraphic order from the Czar on the ground that these captures had been made before the Russian Government had formally declared coal contraband of war.

The return of the Russian Mediterranean fleet to the Baltic, the continued inactivity of the Baltic fleet, and the practical bottling up or blockade of the Russian fleet at Port Arthur almost ever since the beginning of the war, left the control of the high seas and of contraband trade in the hands of the neutral nations and the Japanese except for an occasional sortie by the Vladivostok fleet which inflicted some serious damage upon Japanese transports. There seems, however, to have been no interference with neutral trade until the seizure of the Allanton on June 16 and the Cheltenham early in July for the carriage of contraband.

These seizures had excited some interest and controversy when the world was suddenly electrified by the news that two cruisers, the Peterburg and the Smolensk, belonging to the Russian Volunteer fleet in the Black Sea, had passed out of the Bosporus and the Dardanelles into the Mediterranean as merchantmen early in July (one of them flying the Red Cross flag), had passed through the Suez Canal, and were holding up and seizing neutral vessels in the Red Sea. These vessels had apparently passed through the Straits (as, indeed, appears to have been their custom for some years past), without protest from Turkey or the Powers;

These seizures will be discussed in our next paper.

It was also learned that the Russian guardship Chernomoretz, a gun vessel belonging to the regular Black Sea fleet, had been sent through the Straits on July 16, but it was subsequently stated that this vessel had gone to the Piraeus in Greece on its usual voyage.

As reported in the case of the British steamer Wen Chow. See London Times (weekly edition), February 19, 1904.

The American steamship Pleiades was by some supposed to have been detained for strategic reasons. See New York Times for February 14, 1904.

We note that the Russian Government has granted compensation to the owners of a British vessel—the steamer Foxton Hall—for loss sustained during her detention at Port Arthur in February. See New York Times for August 4, 1904.

It would, of course, be different in the case of a war vessel.

Two of them, the Frankly and the Ettrickdale, were British, and one, the Matilda, was Norwegian. For a summary of the facts, see Lawrence, War and Neutrality, pp. 114f. The Russian Government has since agreed to indemnity by the owners of the British colliers Frankly and Ettrickdale. See New York Times for September 10, 1904.
but a terrible storm of indignation was excited in England when it was learned that the British liner Malacca, belonging to the Peninsula and Oriental Navigation Company and bound for Yokahama via Hong Kong, had been arrested by the Peterburg in the Red Sea on July 13 on a charge of carrying contraband, and was being brought to Port Said through the Suez Canal as a prize. At about the same time much excitement was created in Germany by the news that the German mail-steamer Prinz Heinrich had been stopped by the Smolensk on July 15 and that a portion of her mail destined for Japan (two mail bags for Nagasaki) had been confiscated, the remaining portion having been transferred to the British steamer Persia which was forcibly detained for that purpose.

Both the British and German Governments at once entered vigorous protests against what they regarded as violations of neutral rights. The German Government claimed that, while "the exercise of the droit de visite in the case of mail-steamers may perhaps be justifiable, the confiscation of mail bags directly contravenes the provisions of International Law." It asked for a disavowal of the Smolensk's action and the return of the captured mail sacks. These demands were readily agreed to by the Russian Government, and the German Government is said to have been assured that the confiscated mail bags would be returned as soon as possible and that the German mails would not again be molested by the Russian auxiliary cruisers. Russia also agreed to indemnify the German shippers and consignees for any losses sustained on account of the seizure of German ships and the detention of German mails.

The British Government, in addition to a protest and a demand for the immediate release of the Malacca which appears to have amounted to an ultimatum, is said to have instructed the British Mediterranean fleet under the command of Admiral Domville to patrol the Red Sea and prevent any further molestation of British steamers by Russian merchantmen suddenly transformed into warships. Charges of "piracy" were freely made by the most conservative London newspapers, and public opinion in England appears to have been a unit in support of the firm attitude of the British Government.

The British protest against the seizure of the Malacca was partly based upon the ground that the contraband which the steamer was alleged to be carrying consisted of 300 tons of British Government stores (each case of which was marked with the broad arrow or Government stamp) consigned to the British naval station at Hong Kong and intended for the use of the British China squadron. Sir Charles Hardinge, the British ambassador at St. Petersburg, is also said to have presented a general protest against the exercise of the right of search and seizure by vessels of the Russian Volunteer Navy, the question of the right of these vessels to pass the Bosporus and Dardanelles not having been raised. The Russian officials contended on the other

3 The news did not reach the public before July 17. Several British vessels had been visited and searched prior to the seizure of the Malacca, but these had merely been detained for a short time.

4 A section of the English press had commented very strongly upon the detention and search of the British mail steamer Osriz by the Russian gunboat Krabi early in May. See Lawrence, op. cit., p. 185.

5 See London Times (weekly edition) for July 22, 1904. Germany does not seem to have raised the question of the status of the Smolensk.

6 The British Government appears to have raised the question of the status of the vessels of the Russian Volunteer fleet rather than to have charged Russia with a violation of the Treaties of Paris and London.
Hand that the Malacca, in addition to British Government stores, had on board munitions of war intended for the use of the Japanese, and that the captain of the Malacca had refused to show the manifest of his cargo.  

The Russian Government, acting, it is said, in accordance with the personal wishes of the Czar and upon the advice of the French Government, finally (on July 21) consented to release the Malacca upon the assurance of the British Government that the war munitions on board the vessel were British Government stores, after a perfunctory or pro forma examination of the cargo by a British and Russian consul.  

Russia also promised that no similar incident should occur in the future and agreed to instruct the officers of her Volunteer Navy to refrain from interference with neutral shipping in the future on the ground that "the present status of the Volunteer fleet was not sufficiently well-defined, according to International Law, to render further searches and seizures advisable." There was no agreement in principle on the broader question of the right of the passage of the Straits on the part of these vessels, and considerable excitement was caused in both England and Germany by the subsequent seizure of one German and several merchant vessels had been sunk on July 23 and 24 by the Vladivostok squadron in one of its occasional sorties on the Pacific Ocean, viz., the Knight Commander, a British steamer refused to stop when ordered to do so.  

The British steamer Hipsang is also reported to have been torpedoed by the Russians in Pigeon Bay, near Port Arthur, on July 16; but this act, which occurred in belligerent waters, does not seem to have excited much interest or controversy, and it belongs to an entirely different order of phenomena from those discussed in the text. One reason given by the Russians for the destruction of the Hipsang was that the steamer refused to stop when ordered to do so. (See special cable to London and New York Times from Shanghai, July 26); another was that they mistook her for a Japanese vessel. (See Associated Press dispatch in New York Times for August 5.) A British naval court of inquiry has exonerated the captain of the Hipsang and has found that he acted correctly in all respects. It is denied that he refused to stop when ordered to do so, and it is claimed that there was no contraband, and that there were no Japanese on board the vessel. See New York Times for August 24 and London Times (weekly ed.) for August 26, 1904.

It will be seen from the above scattered and fragmentary reports that it is not at all clear what the charges against the Hipsang really are. In any case, whether carrying contraband or engaged in an unneutral service, she should not have been destroyed, except in case of necessity or of continued or obstinate resistance to arrest. If the finding of the British naval court of inquiry is correct, it would seem that the owners of the vessel are entitled to indemnity and the British Government to an apology.

Good Hope to locate the Russian Volunteer steamers Smolensk and Petersburgh without delay and convey to them the orders of the Russian Government that they must not further interfere with neutral shipping. He stated that this action was taken at the request of the Russian Government. See New York Times for August 26, 1904. These orders have since been conveyed to the Russian cruisers by British vessels, and no further trouble is anticipated from their source.

The German Scandia and the British Ardova and Formosa. The Ardova is said to have contained military supplies consigned to the United States Government at Manila.

As we write, the news reaches us that several British steamers have again been stopped and visited by cruisers of the Russian Volunteer Fleet. We are also informed of the extraordinary statement made by Premier Balfour to a deputation of the London Chamber of Commerce to the effect that the British Government had ordered two cruisers from the squadron at the Cape of Good Hope to locate the Russian Volunteer steamers Smolensk and Petersburgh without delay and convey to them the orders of the Russian Government that they must not further interfere with neutral shipping. He stated that this action was taken at the request of the Russian Government. See New York Times for August 26, 1904. These orders have since been conveyed to the Russian cruisers by British vessels, and no further trouble is anticipated from their source.

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The Green Bag.
steamer with an American cargo (including flour and railway materials) from New York consigned to various Eastern ports, and the Thea, a German merchantman with a cargo of canned fish consigned to Japanese ports. At about the same time (July 25), news was received of the capture (on July 22), of the Arabia, another German vessel with an American cargo of flour and railway material consigned to Japanese ports, and the seizure of the British steamer Calchas, with a cargo of flour and machinery destined for Japan, on July 26.1

The sinking of the Thea appears to have excited very little interest in Germany, but the sinking of the Knight Commander created a storm of indignation in England which almost rivalled, if, indeed, it did not surpass that caused by the seizure of the Malacca. It was condemned on all sides as a gross outrage on the rights of neutrals and a serious violation of International Law.2 The British Government entered an energetic protest against the sinking of the Knight Commander at St. Petersburg on the ground that “it is not proper that, on the authority of the captain of a cruiser, goods alleged to be contraband of war should be taken from a merchant ship without trial.”3 It is be-

1These cases, which involve the question of contraband, will be considered in the next issue of The Green Bag.

2Even Premier Balfour stated in the House of Commons that it was “contrary to the practice of nations in war time,” and Lord Lansdowne characterized it as a “serious breach of International Law,” and an “outrage” in the House of Lords. See New York Times for July 29, 1904.

3See Premier Balfour’s statement in the House of Commons, cited above. He added: “The proper course, according to international practice, is that any ship reasonably suspected of carrying contraband of war should be taken by the belligerent to one of its own ports, and its trial should there occur before a prize court, by which the case is to be determined. Evidently, if it is left to the captain of a cruiser to decide on its own initiative and authority whether particular articles carried on a ship are or are not contraband, what is not merely a practice of nations, but what is a necessary foundation of equitable relations between belligerents and neutrals would be cut down to the root.” “Under no hypothesis,” said Lord Lansdowne in the House of Lords, “can the Government conceive that a neutral ship could be sunk on the mere fiat of a cruiser’s commanding officer, who assumed that the cargo of the vessel included articles which were contraband.”

4See the report of Vice-Admiral Skrydloff in the New York Times for August 3, 1904. See also the Russian official report in London Times (weekly edition) for August 12, 1904. It is also charged that the Knight Commander did not stop until after several blank shots had been fired. (Admiral Skrydloff’s report says two, the Russian official report says four shots were fired.) Such resistance might, if proven, be held to justify condemnation, but could not possibly justify the sinking of the vessel except as the result of a struggle.

believed that the Russian Government was requested to make ample amends by way of apology and reparation for this “outrage,” and that it received an intimation from the British Government to the effect that a repetition of acts similar to the seizure of the Malacca and the sinking of the Knight Commander would not be tolerated by the English people. A strong protest against the Russian doctrine of contraband was also made by the British as well as by the American Governments.

The Russian Government in its reply appears to have expressed its willingness to make reparation provided it were shown to have been guilty of a violation of any principle of International Law, but to have strenuously insisted at the same time that there had been no such violation. It justified its right to sink the Knight Commander on the ground that the vessel contained contraband of war in the way of railway material and machinery, and because her captor was “unable to bring her to the nearest Russian port without manifest danger to the squadron, owing to her not having enough coal.”4 It was also urged that such action was entirely in accord with the Russian Prize Regulations as well as the principles of International Law. Owing to the strong position taken by the British Government, the Russian Govern-
ment agreed, however, to have the case reviewed by a special Admiralty Court at St. Petersburg and consented to modify its instructions to its naval commanders on certain points. They were accordingly instructed on August 5 "not to sink neutral merchantmen with contraband on board in the future except in cases of direst necessity, but in cases of emergency to send prizes into neutral ports."

These seizures and the destruction of neutral prizes raise a number of very important questions in International Law, but it is our intention to reserve the most important of these, viz., those connected with the great subject of contraband of war for a separate discussion in our next paper. We shall, therefore, confine ourselves for the present to questions relating to the right of visit and search, of capture, the seizure of mails, and the destruction of prizes on the high seas.

The most important question of International Law arising from the seizures in the Red Sea is that of the status of the cruisers belonging to the Volunteer Fleet of the Russian Navy. It was not, as frequently stated in the newspapers, the question as to whether these vessels had the right to pass through the Bosporos and the Dardanelles with or without the distinct purpose of being converted into warships. That is a question of international policy and treaty interpretation rather than of International Law.

The right of visit and search of all neutral merchantmen on the high seas by all lawfully commissioned warships of a belligerent Government is one which has never, so far as we are aware, been denied by any one. The British Cabinet still adheres to its original intention to reserve the most important of international policy and treaty interpretation rather than of International Law.

The right of visiting and searching merchant ships on the high seas, whatever be the ships,

"The Vladivostok Prize Court rendered a decision justifying the sinking of the vessel. See London Times (weekly ed.) for August 12, 1904. The British Government refused, however, to be satisfied with this verdict.

"Chicago Tribune for August 6, 1904. In her reply of August 12 to the British representations, Russia is reported to have refused to recede entirely from her position as set forth in her "Prize Regulations," and to have reserved the right to destroy, in cases of emergency, neutral vessels carrying contraband. At the same time she is said to have assured Great Britain that no more neutral vessels would be sunk unless circumstances should render it impossible to bring them before a prize court. St. Petersburg dispatch to the Chicago Tribune for August 12, 1904. The British Cabinet still adheres to its original contention. Russia's recent reply to the British protest on the subject of contraband is said to include a refusal of the British demands in the case of the Knight Commander. It is understood that Russia still continues to maintain that her admiral was justified in sinking the vessel. See New York Times for September 20, 1904.

4 According to a series of great international treaties, warships are not permitted to pass through the Straits, but merchant vessels are expressly permitted to do so. The present rule goes back to the London Treaty of 1841, which sanctioned the ancient rule of the Ottoman Empire forbidding all foreign ships of war from entering these waters. These stipulations were reaffirmed by the Treaty of Paris (1856), the London Conference (1871), and the Treaty of Berlin (1878). It has been claimed that Russia and Turkey entered into convention in 1891 or 1901 (?) to permit the passage of the Straits by these vessels, but Premier Balliú recently disclaimed all knowledge of such an agreement in the House of Commons. Certain it is that Russia has been in the habit for some years of sending these vessels through the Straits under her merchant flag. The British Government appears to have been saving its rights by protests.

The vessels of modern Volunteer Fleets or Auxiliary Navies occupy a new and somewhat anomalous, although fully established, position in modern warfare and International Law. They are in theory merchantmen when nations are at peace, but may readily be converted into warships in time of war. Those belonging to Russia have crews which are subject to naval discipline and are under the control of officers of the Russian Navy. Originally built by a great voluntary subscription, shortly after the Russo-Turkish war of 1877-78, they are at all times in the service of the State to which they belong, and are used for military, as well as for commercial purposes.

"In the absence of a commission, a right of search and capture does not exist as against neutrals." See Taylor, International Public Law, p. 497, and the cases there cited.

5 Robinson, 359.
of this right entails condemnation and confiscation.

After this statement of the law and the facts so far as these can be ascertained, we may conclude that it is impossible for Russia
ternal merchantmen under convoy of warships of their own nation are bound to suffer visit and search. The English doctrine is best set forth
by Lord Stowell in the case of the Maria, above cited. American jurists have generally followed
the English decisions. In the case of the Nancy, it was held that the presence of an enemy convoy is constructive resistance and a denial of the right
of search, which authorizes seizure and consequent condemnation. See also the dissenting
opinion of Judge Story in the Nereide, 9 Cranch, 440. English and American writers are also generally
agreed that "International Law does not prohibit search of convoyed vessels nor substitute the
word of the commander for actual search." Dana's Wheaton, note 224, p. 695. Cf. Hall, § 272;
Woolsey appears to be alone in expressing the opinion that the right of convoy is destined to become a part of International Law.

Continental publicists are, on the other hand, almost unanimously in favor of exemption from search in the case of convoy. See, e.g., Blunt-
schir, §§ 524 and 826; Calvo, V., §§ 296ff.; and the authorities there cited; Ortolan, Dig. de la Mer
liv., III., c. 7; Hauteville, Droits des Neutres, Tit. XII., c. 1; Heffter, § 170; Perels, Droit Maritime,
§ 66; Bonfils, Manuel, §§ 1597-1605.

Nearly all the maritime Powers of Europe have instructed their naval commanders to respect the word of the commander of a convoy, and many of them have incorporated the principle of freedom from visit of ships under convoy into treaties. Great Britain, on the other hand, still maintains her old position of opposition to this innovation on the rights of belligerents, and has always refused to recognize this right, even in treaties.

The United States occupies a sort of intermediate position on this question. While her writers and jurists have, as a rule, sanctioned the
English doctrine, the Government had accepted the principle of freedom from search under convoy in no less than thirteen treaties, mostly with American States, prior to 1872. (For list, see Hall, p. 729.) Article 30 of our Naval War Code, issued in 1900, declares that "convoy of neutral merchant vessels, under escort of vessels of war of their own State, are exempt from the right of search, upon proper assurances, based upon a thorough examination from the commander of the convoy." If the support or example of the British Government could be secured, the prin-
ciple of freedom from search of vessels under convoy of ships of war of their own nation would, with certain restrictions, have an excellent chance of becoming incorporated among the undoubted
principles of International Law. For the present such a pretention must be denied.

whatever be the cargo, whatever be the destination, is an incontestable right of the law-
fully commissioned ship of a belligerent na-
tion. . . . This right is so clear in principle
that no man can deny it who admits the
legality of maritime capture, because if you
are not at liberty to ascertain by sufficient
inquiry whether there is property that can be
legally captured it is impossible to capture."7

"It is," admits Premier Balfour, "undoubt-
edly the duty of a Captain of a neutral ship
to stop when summoned to stop by a cruiser
of a belligerent and to allow, without diffi-
culty, his papers to be examined." Resis-
tance whether real or constructive (as in the
case of convoy),2 to the attempted exercise

1Premier Balfour in the House of Commons on July 28, 1904. In his remarks to the House of Commons on August 11, Premier Balfour
admitted, however, that "in these days of huge ships, there were difficulties in the way of ex-
amination of cargo which did not exist formerly. This examination, though not forbidden by International Law, was made almost impossible by the difficulty of the operation." The right of visit and search must not be confounded with the right of capture, which is much less absolute and which is only justifiable under certain conditions which we need not enumerate. Of course, the right of visit and search is also limited in several ways. In the first place, it is strictly a belligerent right, and unless there is a strong suspicion of piracy, it cannot be exercised in time of peace. In the second place, it is restricted in its application to merchantmen alone. In the third place, the right of search should be exercised in such a way as to cause the least possible inconvenience or injury to neutrals. In other words, as much regard should be paid as possible to the susceptibilities and interests of neutrals. On the limitations of the right of visit and search, see especially Woolsey, § 208, and Wharton's Dig. III., § 325.

2See especially the cases of the Maria, 1799; Robinson, 340; The Schooner Nancy, 1812, 27 Court of Claims, 99; and The Ship Rose v. U. S.
1901, 36 Court of Claims, 291; also the dissenting opinion of Judge Story in the Nereide, 9 Cranch, 440; and the opinion (obiter dicta) of Justice Johnson in the case of the Atlantica, 3 Wheat. 424. The judges do not always distin-
guish clearly between neutral and enemy convoy.

In view of the suggestion which has been made in some quarters that Great Britain send her merchant vessels to the Far East under the con-
voy of her warships, it may be of interest to pre-
sent the results of my investigation of the sub-
ject of convoy.

It is still a matter of controversy whether neu-
to escape from one of two alternatives. Either she violated a long line of solemn international compacts by sending commissioned warships through the Bosporos and the Dardanelles in the guise of merchantmen, or she violated one of the most cardinal principles of International Law by permitting or authorizing merchant vessels to exercise the strictly belligerent right of search on the high seas. If the Peterburg was a lawfully commissioned warship, she had a perfect right to visit and search the Malacca on the Red Sea. This being the case, if it is true that the Captain of the latter vessel refused to show the manifest of his cargo upon being requested to do so, the Captain of the Peterburg was fully justified in assuming that she carried contraband, in seizing her as a prize of war, and in bringing her through the Suez Canal on his way to a Russian port. If, on the other hand, as seems more probable, the Peterburg was not a lawfully commissioned warship, the Captain of the Malacca had a perfect right to refuse to show his manifest to the Captain of what might, technically speaking, be regarded as a piratical vessel. In any case, whether the Peterburg was a lawfully commissioned warship or not, if, as claimed by him, the Captain of the Malacca did not refuse to show his manifest and if the British Government stores on board the Malacca were mistaken for contraband, then the seizure was a serious mistake and a blunder for which the Russian Government owed ample amends and reparation to all concerned.

Another important question raised by these seizures is whether the right of search applies to mail-steamers and whether mail sacks may be regarded as contraband. The law on this subject is by no means as clear as could be wished. The best rule is probably that laid down in the United States Naval War Code prepared by Capt. Stockton of the United States Navy and issued by the Secretary of the Navy on June 27, 1900. "A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. Mail steamers under neutral flags carrying such dispatches in the regular and customary manner, either as a part of their mail in their mail bags, or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken."

Hostile dispatches, military orders, and the like (excepting diplomatic communications, which are privileged) are, of course, subject to capture, and the vessel carrying them has been suggested that she was a privateer, but privateering was abolished by the Declaration of Paris in 1856, to which Russia was a party, and it is not alleged that she possessed letters of marque.

The real facts will probably never be fully known, both because the dispute was largely a political one and settled on grounds of policy, and because the examination of the cargo of the Malacca was a mere matter of form.

The fact that the Suez Canal is neutralized by an international treaty does not, as some have supposed, prevent its use by belligerents for the transportation of their prizes. See Articles IV and VI of the treaty, which is printed in Holland's Studies in International Law, pp. 289ff.

It is difficult to see how and where the Peterburg obtained her commission. She is said to have passed through the Straits as a merchantman on July 7, to have entered the Suez Canal on July 9, and was busy holding up neutral vessels on July 11 or 12. If she did not have a bona fide commission, it is difficult to avoid the conclusion that from a purely technical point of view she was guilty of an act of piracy when she captured the Malacca. The Official Messenger of St. Petersburg stated on August 2, 1904, that the Peterburg and Smolensk had received a special commission; the term of which had expired by August 2. In that case they were undoubtedly warships, but as such they had no right to pass through the Straits.

The real facts will probably never be fully known, both because the dispute was largely a political one and settled on grounds of policy, and because the examination of the cargo of the Malacca was a mere matter of form.

The text on page 666 of The Green Bag discusses the situation involving the Russian warship Peterburg and the Dutch merchant vessel Malacca. The Peterburg, under claiming to be a lawfully commissioned warship, seized the Malacca on the high seas, assuming she carried contraband, and brought her through the Suez Canal to a Russian port. The Malacca's Captain refused to show his manifest, which led to the Peterburg's claim of contraband.

The text delves into the legal implications of the Peterburg's actions, discussing the rights of search under International Law, particularly with respect to mail steamers and the distinction between legal and piratical vessels. It cites Stockton's Code of 1900, which specifies the conditions under which mail steamers carrying hostile dispatches are liable to seizure.

The text also addresses the question of whether the Suez Canal is neutralized by the international treaty, allowing its use by belligerents for transporting prizes. The legality of the Peterburg's actions is examined, considering the possibility that she did not possess a bona fide commission.

The text concludes with an acknowledgment of the difficulty in determining the facts, as it was a political dispute settled on grounds of policy, and the contents of the Malacca's cargo were not examined.

Quotations and references are included to support the arguments, such as Lord Stowell's decision in the case of the Caroline, and Articles 20 of Stockton's Code.
from condemnation, but also from visit, search, and capture.” This immunity from search and capture has, however, been “granted by belligerents as a matter of grace and favor” rather than of law, and is by no means absolute or unlimited.3

In view of the great variety in practice and the uncertainty of the rule, it is highly desirable that this matter of the right of belligerent search of mail-steamers be referred for discussion and settlement to an International Conference at the close of the war and that, in case of a dispute on this subject arising which cannot be settled through the ordinary channels of diplomacy, it be referred to The Hague Tribunal for an authoritative decision. In the case of the **Prinz Heinrich**, it would appear that the German Government was correct in claiming that the Russians had no right to remove mail bags in a mass from the steamer. The **Prinz Heinrich** was, however, subject to visit and search if there was reasonable ground

“Lawrence, *Principles*, p. 627. Hall (p. 68if) is of the opinion that mail-steamers, “although at present secure from condemnation, are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post-bags may be seized on account of dispatches believed to be within them.” But he thinks that “the secrecy and regularity of postal communication is now so necessary to the intercourse of nations, and the interests affected by every detention of a mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. . . . At the same time, it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be afforded by a neutral Power.” He concludes, “probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral Government on board that no dispatches are being carried by the enemy, but to permit a belligerent to examine the bag upon reasonable grounds of suspicion being specifically stated in writing.”

Taylor, the most recent American authority on *Public International Law* (§668, pp. 750-75), says: “The fact that the neutral carrier is permitted to convey certain classes of mail matter does not deprive the belligerent of the right to search his mail-bags in order to ascertain whether or no he is engaged in the transport of noxious dispatches.”

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1 The cargo is also confiscated in cases where the “owners are directly involved in the knowledge and conduct of the guilty transaction.” Lord Stowell in the case of the *Atalanta*, 6 Robison, 460.

2 During the Mexican War, British mail-steamers were permitted to pass in and out of Vera Cruz. During our Civil War the British Government demanded that the United States should adopt the rule that “all mail-bags, clearly certified as such, shall be exempt from seizure and violation.” A few days later (October 31, 1862), the United States Government issued instructions to the effect that “public mails of any friendly or neutral Power, duly certified or authenticated as such,” found on board captured vessels, “shall not be searched, nor be put, as speedily as may be convenient, on the way to their designated destination. This instruction, however, will not be deemed to protect simulated mails verified by forged certificates or counterfeited seals.” See Dana’s Wheaton, note 229, pp. 659-60. It is to be noted that these instructions merely relate to “public mails, duly authenticated.” For the diplomatic correspondence bearing on this subject, see Bernard, *Neutrality*, pp. 319-23. In 1870, France “insisted upon the condition that an agent of the neutral State should be in charge of the mail-bags and declare them to be free from noxious communications.” Lawrence, p. 627. At the outbreak of the Spanish-American War in 1898, President McKinley declared that “the voyages of mail-steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect to contraband or blockade.” (But the Spanish Government granted no such concession to neutrals.) A similar indulgence to neutrals was granted by Great Britain during the Boer War in South Africa.

3 “On the other hand, many modern cases may be mentioned where no indulgence, or a very limited one, was given. For instance, in 1898, Spain did not duplicate the American concession, and in 1902, Great Britain and Germany would not allow neutral mail-steamers to pass through their blockade of Venezuelan ports, but stopped them instead, and, after overhauling their correspondence and detaining what seemed noxious, sent the rest ashore in boats belonging to the blockading squadron.” Lawrence, *War and Neutrality*, p. 191. It is, however, to be observed that this is a case of a blockade, and has no bearing on the subject of search on the high seas.
for suspicion of the presence of noxious dispatches, in which case the mails should have been opened in the presence of the ship's officers and the objectionable dispatches removed. The mail bags should then have been re-sealed and the vessel allowed to proceed on her voyage.

In respect to the question raised by the sinking of the Thea and the Knight Commander, the modern rule is reasonably clear, although it might be wished that some of the authorities had made a clearer distinction between the right of neutrals and belligerents in this matter. It is that neutral vessels or neutral cargoes must not be destroyed except in cases of extreme necessity and that, in case of such necessity, the ship's papers must be preserved for purposes of adjudication and indemnification of the owners of the ship and cargo who are entitled to full and adequate compensation for their losses. Prizes belonging to the enemy may be destroyed for good military reasons, but the destruction of neutral property can only be justified on grounds of extreme necessity, since it involves the destruction of a part of the evidence on which alone the capture can be justified and inasmuch as neutral property does not vest in the captors until after it has been adjudicated upon.

It is true that the Russian Prize Regulations permit the destruction of prizes in a considerable number of contingencies, viz., unseaworthiness, danger of recapture, shortage of coal, difficulty on account of distance, and danger to the success of war-

1The authorities are not fully agreed as to whether a neutral prize can ever be destroyed, but they all appear to limit the right, if it exists, to extreme cases of necessity. Hall (p. 741) says, emphatically, that “a neutral vessel must not be destroyed.” He observes that “the principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell, who said that “where a ship is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor’s own State; to the neutral it can only be justified by a full restitution in value.”

Dana (see note 186 to Wheaton, p. 485) is of the opinion that “necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or where there is impending danger of immediate recapture from an enemy’s vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence, in the way of papers and persons on board. And, even if nothing of pecuniary value is saved, it is the right and duty of the captor to proceed for adjudication in such a case, for his own protection and that of his Government, and for the satisfaction of neutrals.” Lawrence (p. 406) observes that “a broad line should be drawn between the destruction of enemy and neutral property,” a distinction which Dana fails to make.

Taylor (§ 557, p. 573) says “it is generally agreed that neutral prizes should never be burned.” He does not seem to contemplate the possibility of sinking them.

Professor Holland, in a letter to the London Times (see New York and London Times for August 5, 1904), gives the following summary of Lord Stowell’s opinions on this subject: “An enemy’s ship, after the crew has been placed in safety, may be destroyed. When there is any ground for believing that the ship, or any part of her cargo, is neutral property, such action is justifiable only in cases of the gravest importance to the captor’s own State after securing the ship’s papers and subject to the right of neutral owners to receive full compensation.”

2Enemy prizes were systematically destroyed during the American Revolution and the War of 1812. The destruction of enemy prizes by the Southern Confederacy has generally been justified on the ground that there were no non-blockaded ports to which they could be taken. Neutrals have nearly always, and enemies have generally, been exempt from such treatment. In 1870 the French burned two German vessels and refused restitution in spite of the fact that they had neutral goods on board. Captain Semmes of Alabama fame, who seems to have turned his cabin into a prize court, was in the habit of releasing ships whose cargoes were plainly neutral, on ransom. “But in a large number of the cases of those condemned and burned, there were claims for the cargoes as neutral property. Captain Semmes seems to have condemned the cargo, unless there was positive proof of its neutrality. This practice was carried on by him for four years, and was acquiesced in by neutral nations, who permitted their ships to be searched and their property adjudicated upon by these commanders.” Snow’s Cases, pp. 519-20. For a reproduction of these investigations of Dr. Snow’s, see Scott’s Cases, note on pp. 932-33, Cf. Bernard, Neutrality, p. 420.

3For a reprint of the Russian “Prize Regulations” from the London Gazette, in so far as they bear on the destruction of prizes, see the New York Tribune for August 8, 1904.