QUESTIONS OF AMERICAN NEUTRALITY DURING THE EUROPEAN WAR--1914-1915

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I HEREBY RECOMMEND THAT THE THESIS PREPARED UNDER MY SUPERVISION BY A ERNEST MAHANNAH ENTITLED QUESTIONS OF AMERICAN NEUTRALITY DURING THE EUROPEAN WAR -- 1914-1915.

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Chapter I

Introduction.

When the great war broke out in Europe in 1914, the United States had no desire to enter into it, but preferred to remain neutral, and this policy was formally proclaimed by President Wilson on August 4, 1914. It will be well therefore to consider what neutrality is, to set forth its characteristics, in a word to define the term.

Neutrality is the condition of those states, which in time of war take no interest in the contest, but continue pacific intercourse with the belligerents. "Neutrality is in a sense," says Professor Lawrence, 1 "The continuation of a previously existing state and unless proof to the contrary is shown, neutral states and their subjects are free to do in time of war between other states what they were free to do in time of peace." He states furthermore that international law has affixed to the state of neutrals certain rights and obligations which do not exist when there is no war and it is the setting forth of these changes which constitutes the law of neutrality. Neutrality is a blissful state of 'dolce far niente'. 2 The duties of neutral powers, said M. Léon Bourgeois at the Hague in 1907 may be summed up in the obligation to do nothing. If it were possible for a nation not interested in the war to do this -

that is, withdraw from all relations and intercourse with the nations at war, we would have what might be regarded as ideal neutrality. Such an attitude is obviously an impossibility. The neutral state could usually not afford to cut itself entirely off from the belligerents - neither would it be to the advantage of the latter to be isolated from the rest of the world.

At the opposite extreme, neutral countries feel that the mere existence of a war should not interfere with the ordinary relations between them and belligerent states. Between these views of absolute non-intercourse and non-intervention there has been recognized a general compromise. The neutral must do nothing which would assist either belligerent in the struggle and the belligerent will not interfere with any other relations between the enemy and the neutral. This is not a well defined line and as a consequence much difference of opinion exists as to what constitutes aid in the struggle.

It is not sufficient that a neutral aid the contending belligerents impartially; because it is a practical impossibility, says Professor Spaight, to help both belligerents in exactly the same degree. He says, it is obvious from the force of circumstances that the same measure of assistance may mean much more to one than to the other; and therefore the neutral must help

4. Benton, International Law and Diplomacy in the Spanish American war; p. 13. "Every nation places its own interpretation upon the rights and obligations which belong to it under international law. This is to say that national policies constitute a strong and determining influence upon the principles or usages of international law which a state is willing to recognize and to observe in practice. On the borderlands of international law are disputed questions, and national interests influence the attitude toward such."
neither. This is the first great principle of neutrality; the neutral State, as such, must stand rigorously aloof from the conflict. "In its capacity as a state, friendly to both parties, and within the sphere of its ordinary governmental activity it must take reasonable steps to insure that a belligerent suffers no prejudice from its acts or omissions." 6

Such in general is neutrality; between this state of affairs and belligerency, there is no half-way house. 7 In a note to Count Bernstorff, the Ambassador of the North German Confederation to Great Britain, Earl Granville in 1870 declared that 'benevolent neutrality' is a conception incompatible with the nature and idea of neutrality. In fact, he said, it is no neutrality at all. 8 While the early writers distinguished between different degrees of neutrality, all present day writers adopt the view of Earl Granville. If, says Professor Spaight, the neutral State fails in its obligations the aggrieved belligerent can call it to account, and, if the neutral continues to render aid to the other belligerent, it commits a hostile act which warrants the prejudiced party in regarding it as an active ally of the enemy state. 9 Nor is there any exception to this rule. No matter how just the cause of one and unjust the other, a third nation cannot assist the one and at the same time, retain the status of neutrality with its attending privileges.

There is, therefore, but one kind of neutrality. Im-

7. Henry Clay said in the House of Representatives, January 24, 1817: "Whenever a state of war exists between two independent states I know of but two relations in which other powers can stand towards the belligerents; the one is that of neutrality, and the other that of a belligerent."  
partial neutrality means simply neutrality, and benevolent neutrality means, assistance to one of the belligerents. There is, however, a recognized distinction between the rights and duties of a neutral State on the one hand and those of the individual citizens who compose it on the other. This may be considered a modern development, but it is nevertheless well established at the present time. It is sufficient merely to mention the fact here since it will be discussed more in detail later.

As was suggested above, the rights and duties of neutral states have never been definitely defined. The Neutrality Convention drawn up by the Hague Conference in 1907 enumerates certain fundamental principles governing the rights and duties of neutral powers in case of war; Convention V deals with land warfare and Convention XIII with maritime war. Mr. Scott, one of the American delegates to the Conference tells us, that "the framers of these Conventions felt that although only fragments, they would serve to define neutrality until it might be possible

11. Hall; 5 Ed. p. 72, also Lawrence; p. 587.
12. J. B. Scott, Texts of the Peace Conferences of the Hague; Introduction, p. XXIII. "The Fifth Convention attempts to regulate the rights and duties of neutral powers and of neutral persons in case of land warfare. Short, but important, its guiding spirit is expressed in the opening paragraph of the preamble, namely, to render more certain the rights and duties of neutral powers in case of warfare upon land and to regulate the situation of belligerent refugees in neutral territory." Its further definition would involve us in technical details."

"The Thirteenth Convention concerns and seeks to regulate rights and duties of neutral powers in case of maritime war. The Conference essayed to generalize and define on the one hand the rights and neutrals and the correlative duties of the belligerents, and in the second place to set forth in detail the duties of neutrals, thus safeguarding the rights of belligerents in certain phases of maritime warfare."

p. XXIX.
to regulate as a whole the situation of neutrals in their relation to belligerents." Many situations which arise in time of war are not enumerated in either of the Conventions, because the delegates could come to no agreement on them, while other problems have arisen in the present war which were unknown in wars of the past. Thus many problems require an individual solution, either because there is no standing agreement or because there are no precedents to follow.

In the present war there have arisen, as stated above many new problems, and old problems have come up under new and vastly different conditions, all of which have added to the difficulty of maintaining a strict neutrality. It would be possible to show that in this, the most extensive war of modern times, with the consequent disruption of the normal commercial and political relations of the world, the status of neutrality has been more difficult to maintain than in any previous war. The United States being the only member of the so called 'world powers' not engaged in the struggle has perhaps felt the responsibility most strongly.

However, it is not the purpose of this study to dwell on general principles of neutrality, but rather to consider a few specific problems that have arisen. The problems are considered on the basis of international law and practice, but where the matter is not covered by international law or precedents, the surrounding facts are presented and the test of reason applied to fundamental conceptions of neutrality. In all cases the attempt is made to judge the problem from the view point of each of the belligerents, and also from that of a third disinterested party.
Some of the questions taken up have been chosen because of their technical importance; others because of their popular interest.

It has been necessary to obtain much of the material used in this study from the current literature; in all such cases, allowance has been made for technical inaccuracies and for prejudices which color contemporary events. As far as possible official documents have been used; these have been obtained directly from the State Department at Washington, from the American Journal of International Law, or from the Congressional Record.
Chapter II

Submarine Cables and Wireless Telegraphy.

The question of the status of submarine cables has often been a source of controversy between neutrals and belligerents, and this war is no exception. Science has still further added to the burden of obligations upon neutrals through the perfection of another means of communication, namely that of wireless telegraphy, an invention which has played a very important role in the present war. All the nations engaged in the war are making use of this means of communication in both land and sea operations.

Owing to the very extensive use of wireless telegraphy in this war, the question early arose as to how neutrals should deal with wireless stations on their territory. This question was first raised in the Russo-Japanese war in the form of whether or not a neutral should permit the use of its territory for the maintenance of belligerent communications by wireless. The fifth Hague Convention of 1907 forbids belligerents to erect or make use of wireless stations on neutral territory for purely military purposes. But neutrals are not bound, to forbid or restrict the use of cables or wireless apparatus belonging to their governments or to private individuals; nevertheless the convention stipulates that if any regulations are made in regard to the matter they must be applied impartially to the several belligerents. At the beginning of the present war, there were

very few precedents governing the obligations of neutrals in re-
spect to the use of wireless telegraphy or its stations within
their territory, and the Hague Convention is clearly not broad
enough to cover its wide range of service.

It is also clear that the rules governing the use of sub-
marine cables could not be applied 'en bloc' to wireless telegraphy,
in view of the great differences in the adaptability of the two
means of communication. It was the early realization of this
fact, and at the same time, a desire to maintain strict neutrality
by refraining from helping either belligerent that induced Presi-
dent Wilson on the day following his formal proclamation of neu-
trality to order the establishment of a censorship of wireless
stations in the United States.

It was pointed out that by means of wireless telegraphy,
messages of a purely commercial nature, as for example the an-
nouncement of the arrival or departure of a merchant-man might
be intercepted by the cruisers of an enemy state and thus the
message be as useful as military orders. In such a case the
sending station would become a base of military operations. 3
Since there is no means for a nation thus affected of preventing
such messages from being intercepted by its enemies, the United
States Government deemed it to be a duty incumbent upon it as a
neutral to censor the messages thus sent, whereas messages by
cables did not need to be censored. This, for the reason that if
messages sent are obnoxious to the opposing belligerent he may
stop such communication by cutting the cables. The United States
adopted this means of preventing communication between the Spanish

3. The Independent, August 24, 1914.
Government and the forces in Cuba and the Phillipines, during the Spanish-American war.⁴ The fact that cables can be cut, and in strict accordance with the international practice,⁵ whereas there is practically no means of preventing wireless messages from reaching their destination, constitutes the basis of the American position.⁶

When England cut the German cables near the Azores, soon after the war broke out, Germany was greatly handicapped by having to communicate with the American continent exclusively by wireless and this handicap was increased when the American wireless communication was subjected to a regime of censorship.

While no formal protest was made by the German Government, the German-American Chamber of Commerce protested to the President against "Discrimination in government censorship of wireless stations on our coasts as the German cables have been cut, while the English and French cables are open and practically uncensored." They charged that this policy was a serious discrimination against Germany, and this charge was repeatedly made by the German press in Germany and the United States.

There was nothing irregular in the cutting of the German cables by the British. Such a proceeding is allowed by international agreements; even the International Cable Convention of

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5. See Rules adopted by the Institute of International Law in its Session at Brussels, 1902, given in Benton, International Law and Diplomacy of the Spanish-American War, p. 211.
6. Department of State, Diplomatic Correspondence; European War, 1915. No. 2, p. 58.
Paris of 1884 for the protection of submarine cables, had reference only to the protection of cables in time of peace, and it expressly stated that belligerents may cut cables connected with enemy territory, even if neutral owned. The Institute of International Law came to the same conclusion in 1902.

As to the practice there is certainly no lack of precedent for cutting cables. To recite a recent example, the United States, during the Spanish-American war cut the cables around Cuba, and also the cable between Manila and Hong Kong. Furthermore the United States denied pecuniary liability for it afterward.

Since submarine cables may be cut in order to prevent their use for sending military information to a belligerent, the responsibility is on the belligerent and not on the neutral; exactly as in the case of intercepting contraband trade. "Thus," says Lawrence, "The simple principle that ocean cables are means of communication is sufficient. When they are used by the enemy they may be controlled, or in the last resort cut in any place where it is lawful to carry on hostilities, without regard to ownership or connection with neutral shores just as a railroad passing through a hostile country may be torn up on enemy soil, whether it is prolonged into neutral territory or not." Hershey takes the same view.

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7. Lawrence, Principles of International Law, p. 612.
8. Benton, Spanish American War, p. 211.
11. Lawrence, War and Neutrality in the Far East, p. 201.
Westlake does not approve the American view; he says, there is no doubt that a state is bound in principle not to allow the use of its services for the reception and transmission of letters and telegrams, the latter whether wireless or not, in furtherance of belligerent interests and where such service is not a state monopoly, its exercise in the territory by a private undertaking ought to be subject to similar restraint for such use of the service would be a direct aid to the belligerent and would make the territory a base of operations to that extent.  

In taking this view, he assumes the general principles of communication as being the same without considering the difference in the possibilities of receiving messages or of interrupting them. Lawrence however makes this careful distinction, "Belligerents," he says, "have a right to prevent messages sent by their enemies over neutral means of communication and to this end may destroy property at the bottom of the ocean. It is a violation of neutrality to allow facilities to one belligerent for communicating by means of neutral territory between his forces in the field and his government at home or his military and naval commanders in other parts of the theatre of operations. The application of the last in the case of wireless receiving stations is obvious. The nature of wireless telegraphy prevents the application of the first."  

In accordance with this latter principle it became necessary for the United States to close the German wireless station at Tuckerton, New Jersey on August 24, 1914. This action brought forth a violent protest from the German-American Press. The pro-

test charged the government with taking the position that the use of seven cables by the British Government in sending code messages was not unneutral, whereas the sending of such messages by wireless was unneutral when Germany had no means of communication other than wireless.

On July 8, 1915, the Navy Department took over the wireless station at Sayville, L. I., which was the only remaining privately owned and operated method of communication between the United States and Germany. The step was taken at the request of the Department of Commerce, it being held to be a necessary step for the preservation of the neutrality of the United States. Secretary Redfield pointed out that the plant was really German owned, that it was completed since the war began, that it communicated only with points in Germany, and that German officers of the Navy and Marine were kept stationed there. The submarine situation undoubtedly led to this action, it being supposed that the station communicated with German submarines regarding the sailing of vessels from American ports. Orders were issued by the department that the effect of taking over the control of the plant would not change the status with respect to commercial messages, as all which were accepted would be forwarded by the United States Navy operators instead of commercial operators, the tolls to be turned over to the owners of the station.

The action of the United States was clearly in accord with international law. Neutrals are free to forbid or restrict the use of wireless telegraphic apparatus whether belonging to the government or a private company. If it prohibits or restricts,

17. Lawrence, International Law, p. 646.
it must be partial and see that individuals do likewise. 18

The belligerent powers have acquiesced in the American stand regarding cables and wireless telegraphy. There were some protests due to lax enforcement, but in each case the President and the State Department, sometimes, working with the Navy Department and the Department of Commerce, made a thorough investigation and came to satisfactory agreements with the complaining belligerent. Notably among the instances arising was the action of the station at Honolulu in giving publicity to the arrival of the German warship, Geier. The President, Secretary Lansing and Acting Secretary of the Navy Roosevelt, in conference instructed Rear Admiral Moore, in command of the Naval Station at Honolulu to close the station unless satisfactory explanations were made within twenty-four hours. It was found that the message was sent while the censor's back was turned and the operator who sent the message was severely reprimanded.

Another incident was the violation of the neutrality of the Panama Canal Zone by the captain of the British Collier Protesilaus. He received a message from outside the three mile limit while his ship was in the canal zone, thereby violating Rule 14 of the President's Panama Canal Zone Proclamation of neutrality. Although the captain had not received official information of the new regulations prohibiting the use of radio outfits in the canal except to canal business the British conceded the action to be improper and so, upon receipt of the facts in Washington, the incident was regarded as closed.

Following the naval battle off the coast of Chile between

the British and German squadrons, the British and French governments addressed protests to the governments of Colombia and Ecuador against alleged violations of neutrality, chief among which was the operation of wireless stations in the territories of those countries by the Germans. The same protest was addressed to the United States asking that our government "use its influence to insure the strict enforcement of neutrality," on the parts of Ecuador and Colombia. Secretary Bryan directed the Diplomatic and Consular representatives of the United States in the two countries to make a thorough investigation, both in a formal way with the governments and also by personal and independent inquiry. The Colombian Minister to the United States replied that Colombia had maintained the strictest neutrality ever since the outbreak of the war and had made every effort to compel neutrality on the part of citizens and foreigners under her control and he would guarantee the most severe punishment to any offenders upon presentation of evidence at Bogota. He further stated that the wireless station complained about was now under government censorship in the same manner as wireless stations in the United States, but that despite the most active efforts of the government to maintain its neutrality at all costs, one of the belligerents may have succeeded in erecting wireless stations hidden somewhere along Colombia's long coast line on the Atlantic or Pacific. On December 8, a number of weeks after these protests the Colombian minister of Foreign

19. Some secret wireless stations are said to have been discovered along the coast of Florida and Maine in the early part of the war. One was also discovered at Ensenada, Lower California, just a few miles across the United States boundary line.
Affairs ordered the removal of the high power wireless station at Cartagena on the coast of Bolivar because he felt the plant was being operated by Germans for the transmission of news to German warships. The investigations made by the United States in regard to this matter was evidently satisfactory, as no further representations have been made.

The action of Turkey and also of Great Britain in barring cable messages to neutral countries, which might in any way give information concerning trade with the enemy, was entirely within their own rights, as belligerents, and do not especially concern the United States, as a neutral power, although in the case of the latter, many complaints of American business firms, both at home and abroad, were carried to the British Foreign Office by the State Department urging greater leniency in the censorship of innocent commercial messages.20

Summarizing, we find that the reasons why the United States treated wireless and cable messages differently are: (1) Communications by wireless cannot be interrupted by a belligerent whereas those by cable may be. Also since a cable is subject to hostile attack, the responsibility falls upon the belligerent to prevent cable communication. (2) Wireless messages may be sent plain or in cipher to direct the movements of warships or convey to them information as to the location of an enemy's private or public vessels - a use to which cables cannot be made. This would make neutral territory a base of naval operations, to permit which would be essentially unneutral. (3) As a wireless message can be received by all stations and vessels within a given radius

20. European War No. 3, Department of State, Diplomatic Correspondence with Belligerent Governments. Relating to Neutral Rights and Duties; pp. 71-94.
whatever its intended destination, all messages must be censored, whereas in case of a cable, its very nature makes it incapable of allowing the neutral territory to become a base of naval operations by sending direct messages to war-ships.
Chapter III.

American Loans to the Belligerents.

Another question of some importance which arose early in the War was that pertaining to war loans. The United States Government was confronted with the question whether as a neutral it should allow its nationals to make loans of money to the nations engaged in the war.

Speaking before the American Society of International Law in 1908 on the question, 'How far should loans raised in neutral countries for the use of belligerents be considered a violation of neutrality,' Professor Paul S. Reinsch drew the following significant conclusions: (a) Under the present status of the law a neutral nation could not be held responsible by a belligerent for having allowed its subjects to make loans to the other party in the war. (b) The general desire of combatants to avail themselves of the opportunity to borrow money has in recent wars done away with the motive on the part of the belligerents to object to that practice.¹

The great European war has confirmed the truth of these propositions, for the belligerents have directly or indirectly attempted to negotiate loans in this country, which is practically the only market open to the world. The second proposition laid down by Professor Reinsch has found its confirmation in the fact that no belligerent has complained to the United States Government for allowing its citizens to make loans to its enemies for the purpose of carrying on the war.

The Government at Washington stated its attitude regarding loans early in September, 1914, when the State Department gave out the following notice in reply to certain inquiries as to the attitude the government would take in case American bankers should be asked to make loans to foreign governments during the war in Europe: "There is no reason why loans should not be made to the governments of belligerent nations, but in the judgment of this government loans by American bankers to any foreign nation which is at war is inconsistent with the true spirit of neutrality."

A short time later when J. P. Morgan, representing the banking syndicate with which the French Government was seeking to negotiate a loan, undertook to ascertain the attitude of the government, President Wilson expressed his disapproval of loans to any of the belligerent governments on the broad grounds that financial assistance of that kind might jeopardize the neutrality of the country. The negotiations were thereupon broken off with France and likewise with Austria, the latter government having, at this time, been making inquiries about a loan of $100,000,000 in America.

Since that time the Allies and two or three neutral nations which have since become involved in the war bought large quantities of supplies in this country. Payment for these was not made in gold but provisions were made for payment by credit.

2. The Literary Digest; Sept. 5, '14, pp. 404-405.
3. The Independent; Aug. 31, '14, p. 316; Also, The Outlook (Feb. 3, '15). In reviewing the action of the president in this case, said, "As to loans from financiers in this country to belligerents, the government has no right to prevent such loans, but in one case at least, the President by expressing his wish, has exerted his influence against a proposed loan and it was not carried into effect.
Great Britain and France early incurred obligations of this nature amounting to $80,000,000; Russia procured a debt for $25,000,000 and France a separate credit of $26,000,000. On March 26, 1915, Count Bernstorff signed a contract with New York bankers whereby the German Imperial Government received $10,000,000 in credit. It was understood that there would be no payment of funds into the German Treasury. The notes were to be delivered directly in this country and the proceeds to be used as a credit for the German Government in the purchase of various articles, or in payment of obligations contracted before the war. Likewise, on March 29, 1915, the French Government established an additional $50,000,000 credit loan through the J. P. Morgan syndicate. Thus before March 31, the available statistics showed the French had established $76,000,000 in credit in the United States. It is probable that there had been other French loans established with individual banking institutions against shipments of certain commodities which would make the grand total $100,000,000.

The largest single loan of the year, however, was the Anglo-French Loan of $500,000,000 made in September. The announcement in the newspapers of Sept. 28 gave the terms: A bond issue of $500,000,000 to be floated, drawing 5% interest and issued to the syndicate at 96; the money to remain in the United States and to be used only in payment for commodities.

One of the rabid pro German papers, in speaking of this loan, said, there were two interests at work; the one of the Morgan group, holding that the money should be paid towards

liquidating the heavy debt due for munitions in America; the second, that of the grain and meat dealers who wanted the money held for payment of provisions. It continued, "Anyhow, in no case, will any of the cash advanced be permitted to leave the country." The daily papers in speaking of the attitude of the United States Government, said the loan was regarded by high officials as a commercial credit, not differing from other commercial transactions in war supplies, which are permitted under domestic and international law.

While no belligerent government has protested to the United States Government against allowing American bankers to make war loans, there have been some protests on the part of German-Americans who threatened to withdraw their deposits from any bank taking part in any English or French loan. Such protests however were local and of no great consequence.

The statistical data cited above, which is by no means exhaustive, will be sufficient to give some idea of the vast scale on which the belligerent nations have borrowed in the United States. But it is significant that they have all been credit loans. The question arises how are we to reconcile the action of the administration in allowing war loans to be floated in this country after having earlier disapproved them. We are first confronted with the proposition that it might be no breach of neutrality to change the policy; and such is quite generally conceded to be the case.

Going back still further, it would be well to observe just how much the policy has changed. In the early part of the war before any loans were made, the government flatly disapproved of such loans being made and has never, as yet approved it.
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Referring again to Secretary Bryan's statement in regard to the establishment of credits in the United States, "The Government has not felt it was justified in interposing objections to the credit arrangements which have been brought to its attention. It has neither approved nor disapproved - it has simply taken no action in the premises." It would hardly be fair to say that the government has weakly acquiesced in, or bowed down to, the inevitable. Two things should be noted: First, it was a proposed loan which would have taken $50,000,000 worth of gold from the United States which President Wilson disapproved - all loans which have actually been made are as cited above credits, secured by notes, which are to be expended in the United States for supplies. Secondly, at the time of the first proposed loan, Americans owed large sums abroad and were adopting various plans for meeting the debt. International trade was partly paralyzed. Now the debt has been shifted to the other side. And, if we strive to promote the safe transportation of supplies which belligerents are permitted to buy here, we may reasonably promote payment for these supplies. The credit loans were negotiated that payments might be made.

This argument is based upon national rather than international considerations, which brings up the fact that the matter of loans is regulated by municipal, rather than by international law. The Hague Convention number V, Article 18 of 1907 stipulates, that the making to one of the belligerents of a loan by a neutral person shall not be considered a hostile act.5

This is cited, not because it is now in force, but because it sums up the laws and practices of nations at the present time better than any other single statement. The interpretation is, that since a neutral person is not prohibited from making loans, he is left to his own judgment and to such regulations as his own government may see fit to impose upon him. The action of the United States Government at first, therefore, not only accorded with the needs of the country, as cited above, but also with advanced ideas of international morality and American disfavor of war.

It has been shown that owing to the vast proportions of the war and its long duration, the business depression as a consequent result, were credit loans not available, would have a ruinous effect on American industry. But it will not be necessary to go into details. The theme does not depend upon this point alone for its establishment; it is mentioned incidentally to show that the acquiescence of the government, under the greatly changed conditions, in permitting credit loans may be as praiseworthy as the earlier disapproval.

No nation lives to itself alone; no one nation can stop a war, in which half the population of the world is involved. Whatever our ideas for peace and how ever much we may desire to

6. "The decision of the United States Government opposing loans by American bankers to nations at war is heartily to be approved of. It does not haggle over the matter whether or not the laws of nations will allow such loans. This decision by our government is proof of a real desire to put an end to war, without regard to our own interests; it would be our own present interest to make loans to both belligerents but we lend to neither, thereby keeping clear from complications and helping the cause of peace." (Independent) Aug. 24, 1914
do nothing which would in any way aid in carrying on the struggle, we are forced to admit, it would be a poorly conceived policy which would cause any unnecessary suffering without something definite by way of return.

The fact that no government has protested to the United States might be expected because it would seem rather inconsistent for one belligerent which had established a loan in this country, to argue that it is a breach of neutrality for the same government to allow another belligerent to float a loan in its country.

There was however an investigation in connection with the Federal Reserve Banks accepting the notes of the belligerent nations which had been given in payment for arms and munitions. Dr. Jastrow argued that the acceptance and indorsement of such notes, by Federal Reserve Banks in the United States constituted a violation of neutrality, inasmuch as such notes are legal obligations of the United States government. It was pointed out that Federal Reserve Banks are private institutions, and that their operations are privately directed, subject only to general supervision analogous to the supervision of all banks. 8

Professor Jastrow seemed to think that notes given in payment for exported arms, become an obligation of the United States,

7. Professor of Politics in the University of Berlin.
8. Professor Jastrow, it is suggested, might have been misled by the language in the act reading, "the said notes, (Federal reserve notes,) shall be obligations of the United States and shall be receivable" at such and such institutions. This is simply the kind of language that is used of all American money, and if the use of Federal reserve notes in this connection compromised the Government, the same thing would be true of purchases effected by national bank notes, United States notes, Treasury notes, gold and silver certificates and the like.
when rediscounted at the Federal Reserve Bank. The Federal Reserve act makes it plain that such is not the case. Such notes must be indorsed by at least one bank - a private institution - and to the extent of that indorsement is, of course an obligation of the member bank, which might be a regular national bank or a state institution. All obligations arising from such a transaction would lie against the signers and indorsers of the notes to reimburse the Federal Reserve Bank.

In only one case would such notes become obligations, in any sense, of the Federal Reserve bank, though even then it must be kept in mind that the Federal Reserve Bank is a privately owned institution. Such a case would arise if the Federal Reserve Bank should tender the ammunition notes in question to the Federal reserve agent as a basis for the issue of Federal reserve notes. If the paper, arising from sales of ammunition should depreciate in value, the Federal Reserve Board might call on the Federal Reserve Bank for additional security to protect the Federal reserve notes, and that would be the extent of its obligation. Even this condition would arise rarely. Most Federal Reserve banks do their rediscounting of commercial paper with ordinary money. But, even if Federal Reserve notes should be used for rediscounting notes in payment for ammunition, no obligation of the United States would in any sense be created.

Sometime later, former Representative Fowler charged that the Reserve banks were violating American neutrality by advancing money to buy arms for the entente allies. But the charge was dismissed, the board holding that it was without jurisdiction in the case or without power to impose the regulations and restric-
tions which Mr. Fowler requested, upon either Federal Reserve Banks or National Banks.

Concerning the charge of unfairness on the part of Government in early disapproving of war loans and permitting trade in contraband, Mr. Bryan summed up the reasons President Wilson considered war loans to be inconsistent with the spirit of neutrality and he went on to show wherein the making of war loans differs from trading in contraband: "The policy of disapproving of war loans effects all nations alike, so that the disapproval is not an unneutral act. The case is entirely different in the matter of arms and ammunition, because prohibition of exports not only might not, but in this case, would not operate equally upon the nations at war.

"Then too, the reason given for the disapproval of war loans is supported by other considerations which are absent in the case presented by the sale of arms and ammunition. The taking of money out of the United States during such a war as this might seriously embarrass the government in case it needed to borrow money. Again a war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan." The result of this would be to arouse more partisan feeling on the part of great numbers of American people. "On the other hand," said Mr. Bryan, "contracts for and sales of contraband are mere matters of trade. The manufacturer, unless peculiarly sentimental, would sell to one belligerent as readily as he would to another. No general spirit of partisanship is aroused, no sympathies excited.

The whole transaction is merely a matter of business." The reasons were therefore based upon national expediency, rather than international considerations.

In fact, in replying to the charge of inconsistency and breach of neutrality on the part of the United States in allowing American citizens to make loans to belligerent nations, Secretary Lansing took the position that no violation of domestic or international law is involved in the flotation of big loans in this country. He explained that the administration voiced its objection chiefly to loans by popular subscription or those which would take large sums of gold from the United States. He said, so far as the State Department officials were able to observe, the loans were essentially what is known as 'credit loans' to pay for obligations incurred or about to be incurred for the purchase of supplies. Such a loan is viewed as a private commercial transaction, not differing from the traffic in contraband or other war supplies, over which a neutral government is not obliged to exercise any control.

Mr. Lansing based his argument that there is no legal obstacle to loans being made by bankers in this country upon the practice of nations, and especially of the United States. It is true the United States refused a loan of money to France in 1798, and one to Buenos Ayres in 1816, both on the grounds of neutrality. These loans were considered a violation of neutrality largely because they partook of a national character, being negotiated by the envoys of the United States. The authorities are practically all agreed that loans of money may not be made or guaranteed by

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11. Moore, Digest VII, p. 978: In the case of Buenos Ayres, the American agent, Col. Devereus, offered his services to pro-
During the early nineteenth century and preceding, however, subjects of neutral countries were more reluctant in making loans than they were later. This may be due to the fact that there is a greater necessity for war loans being floated in neutral countries than has ever been the case in the past.

A few examples of loans showing the practice in some of the later wars may be cited: In 1854, during the Crimean war France protested in vain against a Russian loan being brought out in Amsterdam, Berlin, and Hamburg. In 1870, during the Franco-German war, a French loan and also a North German Confederation Loan was brought out in London. In 1877, during the Russo-Turkish war, Japanese loans were floated in London and Berlin, and Russian loans in Paris and Berlin. Large Japanese loans were also floated in the United States.

No further evidence need be given to show the tendency in the practice of nations, regarding war loans. Professor Reinsch, says on this point, "Response to public sentiment might lead some neutral governments as a matter of public policy, to forbid the public advertisement and issue of war loans, but it must be noted that the credit of a nation may be looked upon as a national asset, which ought to be available to it in times of need."

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15. Hershey, International Law as applied during the Russo-Japanese War; p. 81.
Without going into the moral and economic aspects of the case, let us consider the opinions of the writers on international law. As is usually the case on a question of international law, the authorities are not in agreement; the earlier writers quite generally, and some of the late writers maintain that belligerent loans should not be contracted by neutrals, either nations or individuals. Halleck cites Vattel as contending that the loaning of money to one of the belligerents, by the subjects of a neutral state is not such a breach of neutrality as to be either a cause of war or of complaint, provided the loan is made for the purpose of getting good interest and not for the purpose of enabling one belligerent to attack the other. He says, "Phillimore very properly regards this as a manifest frittering away of the important duties to furnish the one as the other of the 'two main nerves, iron and gold; for the equippage and conduct of war."

The United States Supreme Court held in the case of

17. This extreme view is advocated by such writers as Bluntschli (Volkerrecht, Sec. 768) and Calvo (Le Droit International, Sec. 1060).
19. Droit des Gens, III, Chapt. II, Sec. 16.
20. On International Law III, Sec. 151.
21. Halleck cites the case of Demetrius DeWutz v. Hendricks 1824, as does also Phillimore (III. p. 274 of T4t. Law, 3 ed, 1825). In this case the court held, "The principles which have been laid down prohibit the neutral government from assisting a belligerent by money, in the shape of a loan, or in any other form as much as by arms; and it has been held unlawful by English law for an English subject to raise a loan for the purpose of supporting the subjects of a foreign state at war with a government in alliance with our own." It has been pointed out that the connection of alliance was the basis of this decision; Moore (Digest,VIII, p. 978) says, in 1883 the law officers of the crown advised the British government that subscriptions by individuals of a neutral nation were inconsistent with neutrality and contrary to the law of nations; but that "loans if entered into merely with commercial views" would not be an infringement of neutrality.
Kennet vs. Chambers\textsuperscript{22} that a 'suit cannot be maintained on a loan made expressly to effect a belligerent object or to aid in an insurrection in a foreign state against a government at peace with the state of the lender.' Professor Moore remarks that this loan was made to effect not merely a 'belligerent object' but an actual violation of the neutrality laws of the United States. Whatever may have been the law at that time, Taylor says,\textsuperscript{23} "Usage had entirely discredited those publicists who have attempted to give an unreasonable and impracticable extension to the rule that neutral individuals may lend money to belligerent states, by denying directly, or by implication, to individuals composing a neutral community the exercise of a right withheld for obvious reasons from the state as such."

Hall\textsuperscript{24} takes somewhat the same view—thus he says, "It is difficult to understand why modern writers repudiate analogy and custom by condemning the negotiation of a loan by neutral subjects under ordinary mercantile conditions."\textsuperscript{25} He continues, "Outside the boards of works on International law, a healthier rule is unquestioned. A modern belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy for the purchase of money, than because they are open for the purchase of cotton." The reason this is so, he explains, is

\textsuperscript{22} Moore, Digest VIII, p. 978.

\textsuperscript{23} Taylor, International Public Law, 1901; p. 673.

\textsuperscript{24} Hall, Int. Law, ( 6 ed.) ; pp. 580 - 591.

\textsuperscript{25} Hall cites Bluntschli, (Sec. 768) as saying the neutral state must abstain from making loans for purposes of war, and the rule is equally applicable to loans negotiated by private persons. He also mentions the fact that Wheaton, Manning, DeMartens, Kluber, Heffter, and Twiss make no mention of loans whether by the sovereign or by subjects. Wharton (Int. Law Digest, III, p. 508) says, 'The lending of money by persons in neutral countries to a belligerent government is not a violation of neutrality. It is remarkable that a contrary view should be taken.'
that, in theory and in fact an article of commerce in the fullest sense of the word. To throw upon neutral governments the obligation of controlling dealings in it would be to set up a solitary exception to the fundamental rule that states are not responsible for the commercial acts of their subjects. The existence of such an exception would burden states with a responsibility which they would be wholly unable to meet.

The present day theory, which is comformable to the general practice of nations is that money is, and should be treated as contraband. Thus Oppenheim says,26 "Several writers maintain either that a neutral is obliged to prevent such loans and subsidies altogether, or at least that he must prohibit a public subscription on neutral territory, for such loans and subsidies. On the other hand the number of writers is constantly increasing who maintain that, since money is just as much an article of commerce as goods, a neutral is in no wise obliged to prevent on his territory public subscriptions on the part of his subjects for loans to the belligerents. In contradistinction to the theory of International Law, the practice of the states has beyond doubt established the fact that neutrals need not prevent the subscription for loans to belligerents on their territory."

In the United States Supreme Court in U. S. v. Diekelman27 Chief Justice Waite said, "What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but when destined for hostile use, or to procure hostile supplies, they do." Lawrence says,28 "Money is a form of merchan-

27. Atherly-Jones, Commerce in War, 1907; p. 82.
28. Lawrence, Principles of International Law, 4 ed. p. 631
dise, and neutral subjects may trade in it; though if they send to one belligerent specie or negotiable securities, the cruisers of the other may capture them on their voyage as being contraband of war. But neutral governments are in no way bound to prevent their subjects from taking stock in loans issued by belligerents."

He adds that no war of any magnitude runs its course without a resort to neutral money markets.

Westlake analyses the situation as follows, "Since money is truly described as the sinews of war, and it is no part of the business of a state to deal in money, its loan by a neutral state to a belligerent would necessarily have a special character, not only as aiding the latter in fact but also as disclosing an intent by an unneutral act. Tried by tests which have been suggested as imposed by the theory of neutrality loans by neutral individuals to belligerent states must be pronounced legitimate, and such they are in fact held to be."

The authorities are practically agreed that loans of money to belligerent states may not be made or guaranteed by a neutral state as such. Thus it is argued by some that the United States had become involved in a breach of neutrality, through the agency of the Federal Reserve Banks in some of the war loans. It has been already shown that the working of the act creating Federal Reserve Banks indicates that they are no more under the control of the government, by way of obligations to it, than national banks.

The question as to gifts, subscriptions, and subsidies need not detain us here because they have never been an issue in

30. See Wilson & Tucker, International Law, 5 Ed. p. 305; also Hall, International Law, 6 ed; p. 590.
the present war. In fact, in all cases, with the possible ex-
ception of the Federal Reserve notes, it has been clear to all
parties concerned that the loans floated in this country were made
by private individuals and were of a strictly commercial nature.
Therefore, it would appear from the weight of evidence based upon
the practice of nations and modern theory that the United States
has been quite within the bounds of neutrality as to both the
rights and duties of a neutral in permitting American citizens to
advance war loans to the belligerents.
Chapter IV.

THE SALE OF ARMS AND MUNITIONS OF WAR TO THE BELLIGERENTS.

With respect to the sale of arms and munitions of war by American citizens the policy of the United States Government has been well defined and consistent from the beginning of the war. From the announcement by President Wilson in his Neutrality Proclamation until the present time the government has made no attempt to interfere with American citizens in their lawful traffic in the munitions of war. There has been a great deal of opposition to this policy of the government; an opposition which has manifested itself not only through the governments of the Central Powers, but also in the Congress and the press of this country.

The complaints have been to the effect that it is unnatural for the United States Government to allow the trade as it is being carried on in the present war. The belligerents have not denied the general right of neutral individuals to sell munitions to

1. The circular issued by the State Department October 15, 1914 pertaining to 'Neutrality and Trade in Contraband' called attention to the fact that American citizens were not allowed to fit out or supply vessels in American ports, or military expeditions on American soil in aid of a belligerent. These are prohibited by the Neutrality Laws of the United States and by the laws of nations. It was expressly stated that all other contraband trade is legal; neither the laws of the United States nor of the nations prohibit it. (Amer. Jour. of International Law, Supp; Jan. 1915, pp. 124-126)
belligerents, but their complaints have been to the effect that under the peculiar conditions in the present war, the situation is so affected as to make the trade unneutral. The special circumstances, as gathered from the several diplomatic dispatches may be roughly summed up in four groups. First, the great extent of the trade; Secondly, there is only one nation furnishing munitions; Third, the munitions industry has been built up in America as a result of the war; and finally, and perhaps the greatest element of all, one side only in the conflict can procure the supplies. These special circumstances will be considered as they are found to exist in the war; but it will be well first to note the opinions of international authorities on the question of the right of neutral individuals to sell contraband to belligerent nations. We may observe by this means whether or not the great number of men who have written on international law, and who are largely responsible for the codification of it, anticipated that many special circumstances might arise which would make the rules which they observed to exist non-effective. At any rate we will have established the American position, as it is based upon the law and practice of the past.

First, considering the American writers, an examination of all the important writers of the United States reveals the fact that with the exception of Field and Woolsey all have taken the view in regard to the sale of munitions as was expressed by Thomas Jefferson in 1793. Mr. Jefferson was Secretary of State

2. In a note of Feb. 16, 1915 the German Government formally admitted the right of neutral individuals to sell arms and munitions to belligerents in ordinary circumstances. Ibid, July 1915; pp. 90-96.
3. Outlines of an International Law Code, Sec. 964.
4. International Law, P. 320, Note l.
at this time when complaint was made by the British Government that American citizens were selling munitions of war to the French Government, which was then Great Britain's enemy. The reply which he sent to the American Minister at London was to the effect that "Our citizens have always been free to vend and export arms; it is the constant occupation and livelihood of some of them; to suppress their calling, the only means of their subsistence because a war exists in foreign and distant countries in which we have no concern would scarcely be expected; it would be hard in principle and impossible in practice."  

With the exception of Phillimore the British writers are unanimous in this view. Phillimore takes the view that it is the duty of a neutral to abstain from every act which may make better or worse the condition of a belligerent, rather than the common view that it is the right of neutrals to carry on their accustomed trade upon the breaking out of a war.  

Phillimore makes no distinction between neutral nations and neutral individuals, a distinction which nearly all the later writers make. French jurists are likewise generally agreed that a neutral nation is under no obligation to restrain its subjects from selling munitions of war to belligerents.  

Since the Germans have complained most in regard to the American policy it will be especially significant to observe the opinions of German authorities on international law. Perels,

in referring to the question as to whether a neutral state is obliged to prevent its subjects from furnishing war materials to belligerents says: "It cannot be doubted in fact that unless there is a notorious favor shown towards one of the belligerents, there is no obligation to forbid the assistance."\textsuperscript{9}

Geffcken, after a somewhat lengthy discussion of trade in contraband came to the conclusion that it was no violation of their duties as neutrals if states allowed their subjects to sell and export munitions of war to belligerents. Professor von Bar argued very effectively that the prohibition of contraband trade by neutrals would injure incalculably not only the commerce of neutrals but even their manufacturing industry, and in a large measure the product of their agriculture, forests, and mines. He maintains that what a belligerent may demand is only that the relations between a neutral and his adversary shall remain as they were before the war.\textsuperscript{10} Herr Kriege expressed the official German view in regard to abolishing contraband, when he said, "neutral states are not bound to prevent their subjects from engaging in a commerce which from the point of view of belligerents must be considered as illicit."\textsuperscript{11} Moreover the German Government ratified Convention V which was drawn up at this conference, Article 7 of which reads, "A neutral Power is not called upon to prevent the

\textsuperscript{9} Manuel de Droit Maritime International, p. 270.
export or transport on behalf of one or other of the belligerent arms, munitions of war, or, in general, of anything which can be of use to any army or fleet."

While this convention is not technically in force in the present war, yet, it affords a concise and authoritative statement of the acknowledged rule of law. That it is in accord with the German theory is evident from the foregoing citations of German writers. That it is in accord with German, as well as French, English, American, and Austrian practice will be seen in the course of this paper. We will endeavor to compare the actions of other governments in previous wars in which situations somewhat analogous to the 'special circumstances' in the present war have arisen.

We will first consider the extent of the munitions trade by American citizens. Never before in the history of the country has there been such a great traffic in firearms, explosives, and the materials used in their manufacture. We can get only a vague idea as to the volume of the munitions trade from the number of dollars worth exported from this country. The figures are, at best only approximations. Then, too, much of the so-called munitions is food-stuffs, clothing, and such material as will be used by the civil population. It is equally true that a vast quantity of merchandise shipped from the United States ostensibly for the civil population will find its way into the armies. Regardless of these sources of error, many shipments leave American ports, with the port authorities ignorant as to their intended use. It is not required by the Government that the officials at the ports should find whether the goods being shipped are what they purport
to be, much less that they should ascertain the purpose for which
they will be used.12

The vast extent of this trade is best appreciated when
reckoned on the basis of nations requiring outside supplies on
the one hand, and the number of markets open on the other hand.
In the present war there are ten belligerent nations dependent
in part at least for outside supplies, and the United States is
the only market open to them for munitions. The proportion of
nations selling to those buying is therefore one to ten. On the
same basis, it is doubtful if there ever was a greater ratio in
any previous war than three to five. The fact that the ten
combatant nations include the largest in the world, and they
supporting the largest armies in their history would have a ten-
dency to make the given ratios mean as much as they indicate.
So great has been the demand for munitions in this country that
in order to meet it, companies engaged in the manufacture of
articles ranging in variety from clocks to locomotives have con-
verted their shops into munitions factories, and those originally
engaged in the manufacture of fire-arms and explosives have in-
creased their output by doubling and trebling their plants and by
working three shifts of men instead of one. In some instances
flourishing cities have been built up from small towns by the
location of factories for the manufacture of explosives.

12. Mr. Frank R. Rutter, Assistant Chief of the Bureau of Foreign
and Domestic Commerce commented in regard to this. He said,
"The impossibility of distinguishing accurately between muni-
tions of war and commercial shipments must be clearly recog-
nized. It is not practicable to ask our exporters to declare
whether each individual shipment is destined for the supply of
armies or for commercial use. Many shippers are undoubtedly
uninformed and, in any event, such a requirement would meet
vigorous opposition. Yet in no other way can commercial ship-
ments be distinguished, even in a general way."
These figures by themselves are apt to be misleading. If we grant that neutrality is dependent upon the magnitude of the supply of munitions which neutral individuals may furnish, it is quite evident that the limit could not be based upon a certain fixed amount as determined by quantity or value alone. In other words there must be a proportion between the magnitude of the war and the supplies. It is only reasonable that more supplies of munitions will be required in a war involving thirteen nations, including the leading military nations of the world than in a war, as for example between two South American nations, or in fact, in any of the wars of the past. If the supplies furnished by the neutrals in past wars have been relatively small, it does not follow that the neutral must, in order to be consistent with the practice of the past, furnish no larger supplies in the present world war. It has been stated by the British Minister of Munitions that less ammunition was used by the British forces during the entire Boer War than was consumed in one battle during the present war.

"It follows naturally that in the cases of world-wide wars like the present conflict," says Professor Garner, "the recourse to neutral markets will be larger, and it is impossible to fix a point beyond which permission to resort to those markets ceases to be consistent with neutrality, if recourse in any degree is to be recognized as lawful. To hold that it is not unneutral for a state to permit its subjects to sell arms and munitions to belligerents so long as the magnitude of the war is not such as to create a demand for large quantities of such supplies, but that it becomes unneutral when by reason of the widespread character of the war the resulting demand assumes large proportions, is
again to introduce quantitative distinctions in the place of distinctions founded on juridical principle." Furthermore, there is no evidence to show that any country has ever restricted the trade of its nationals in munitions of war to belligerents lest the trade become so great that its neutrality should become involved thereby.

The international jurists have not been unanimously agreed on this point in the past, although it is safe to say that all recent writers on international law maintain that trade of neutrals with belligerents should not be impeded, except by the police powers of the enemy belligerent. Woolsey, Field, Phillimore, Hautefeuille, Kleen, Gesner, and Bluntechli argue that a neutral state should place some restrictions upon its citizens in time of war, especially upon contraband trade. But the majority of writers deny that such should be the case. They point out that such practice has not been followed in the past. Examination of all the later writers shows that they, without regard to nationality uphold the doctrine that neutral trade in contraband should be unrestricted. They point out that it is impossible to draw a line between those amounts which constitute small and large trade in contraband. There is no sense in laying down a rule of law.

14. There are, of course, instances in which embargoes have been laid, thereby cutting off all trade in certain articles, but no country has ever allowed a trade to exist and then attempted to limit it by setting an arbitrary boundary. See Spaight, War Rights on Land; pp. 478-478.
16. Holland, Studies in International Law; p. 131; "The presumption of relations between belligerents and neutrals is in favor of neutrals being entitled to carry on their trade, or otherwise pursue their ordinary avocations, as if the war to which they are no parties, were not being waged."
which would be dependent upon a practical impossibility.\textsuperscript{17}

Such a rule would be very difficult to enforce; it would entail all the difficulties incident to the enforcement of a total restriction.\textsuperscript{18} Furthermore with due consideration for the large number of nations the American merchants are now furnishing munitions, it may be doubted if the proportion of American made munitions is any larger relatively than German made munitions in any of the recent wars; the Spanish-American, the Russo-Japanese, the Balkan, or the Turko-Italian. For, notwithstanding the enormous quantities being shipped from this country, the arsenals

\textsuperscript{17} Lawrence, Principles of International Law; pp. 669-702. Some writers who desire to place as many restrictions as possible upon trade in contraband, have drawn a distinction between large and small commercial transactions. The latter they regard as a continuation of such ordinary trade as may have existed before the war, whereas the former are called into existence by the war and cannot be considered in any sense a prolongation of the previous operations of neutral merchants. If these statements are to be regarded as an expression of existing law, it is sufficient, to say that the rule they advocate has never been adopted. If on the other hand, they are held to be set forth what the law ought to be, we may remark that the difficulty of drawing a line between a small trade and a large one, is so great as to amount to an impossibility. Moreover, it is by no means certain that international trade in arms on a large scale is confined to times of war. A firm like Krupp of Essen makes artillery for half the armies of the civilized world during periods of profound peace, and lastly it may be argued that the burden placed by the proposed rule upon neutral governments would be too great for them to bear. The stoppage of large shipments of arms for belligerent purposes from the ports of a great country would require for its effective enforcement an army of spies and informers.

\textsuperscript{18} Davis, Elements of International Law; p. 403, shows that by virtue of the internal administration of different countries, some could effectively regulate or prohibit contraband trade on the part of their subjects, if it should become desirable to do so; whereas in England and America, "where no such supervision exists in time of peace, it could be established in time of war only by special legislation, and could be maintained only at considerable expense and at the risk of violating some of the existing guarantees of individual rights."
of the belligerent countries are working over time, and very many other industries have been turned into the manufacture of munitions. The exceptionally large armies, stretching along battle fronts of hundreds of miles, and the continuous firing day after day for months at a time have created demands for arms and ammunition here-tofore unknown in the history of the world. All of this goes to show that while the amounts from this country are exceptionally large from our view point they are after all small in comparison with the total amounts used. It might be therefore contended that the trade has not yet reached such proportions as would justify complaint, assuming as the standard, the complaints of governments made in former wars.19

The contention put forward by the German and Austro-Hungarian Governments that the conception of neutrality has been given a new aspect by the fact that in the present war the markets of but a single state have become the chief, if not the sole, source of foreign supply for the belligerents, cannot be admitted as sound.20 If the argument were sound, it might be turned to a defense of the American position. In the absence of legal principle upon which to base the argument it might be maintained that neutrals are allowed to furnish a certain proportion of the total amount of munitions required for the war. So long as the amount furnished does not exceed the given proportion, the question of neutrality does not arise. Whether the munitions come from several different nations or from one, makes no difference; this will be

determined solely by economic laws. This argument is more plausible than the other alternative, namely that traffic in arms and munitions is legitimate, so long as the markets of other neutral powers are open to belligerents, but that it ceases to be consistent with the spirit of neutrality the moment the number of such states is reduced to one. Such argument virtually denies that one nation may allow its citizens to trade in contraband although all or several nations may allow their citizens to do so.

There are no other instances on record in which during a war there has been only one nation furnishing munitions, so we can cite no practice; but it is submitted that none of the text writers have laid down any principles which might be so construed as to make the furnishing of munitions by one nation alone a breach of neutrality.

The third special circumstance which has been put forward as affecting the status of neutrality in the present case is that traffic in munitions in the United States is a new industry, one which has sprung up as a result of the war, and is therefore unneutral. In a memorandum of April 4, 1915, Count Bernstorff said, "In contradiction with the real spirit of neutrality, an enormous new industry in war materials of every kind is being built up in the United States. Not only the existing plants are kept busy and enlarged, but also new ones are continually founded." International agreements for the protection of rights of neutrals, he continued, originate in the necessity of protecting existing industries of the neutral countries and were never intended to encourage the creation of entirely new industries in neutral states.\(^1\)

The government of the United States pointed out that such a principle is unfounded in international practice. There are no instances of a government being required to interfere with the development of new industries by its citizens whether in time of war or peace. If the munitions industry is new in the United States, it came into existence to supply a demand. There is no principle in the international code which could be interpreted as making this a breach of neutrality, nor is there any likelihood that such an agreement will be reached in the future because such a rule would tend to direct the trade in munitions to those countries which had well developed munitions works at the time such a rule would go into effect.

The three claims just considered are based upon the assumption, which is contrary to the generally accepted view as cited earlier, that a neutral nation is bound to exercise some control over the business affairs of its subjects as a means of remaining neutral. The merits of the special circumstances do not seem to warrant such a departure from the established rule. The fourth complaint is based upon the fact that one of the belligerents is cut off from the supply. This principle virtually denies the right of neutral individuals to trade in munitions with any of the belligerents to any extent when one is cut off from the supply. The Germans maintain it is not sufficient that the neutral be willing to furnish munitions to all the belligerents alike, but it must do it, otherwise the neutral is not treating the belligerents impartially, and is therefore not neutral. Without digressing further at this point to cite the theory and law governing this "special circumstance" we may point out that the practice of
Germany and Austria-Hungary during the Boer War was the same as that of the United States is now. The records show that both Germany and Austria sold munitions in great quantities to the British during this war when the Boers were effectually cut off from all outside supplies. If the supplies were smaller amounts it was due to no restrictions by the German or Austrian governments. The trade was regulated by the natural law of supply and demand just as the American trade in the present war.

Germany has maintained that in order to remain neutral under the existing circumstances the United States must prohibit all munitions leaving this country. Since impartial treatment is the essential feature of neutrality, and the test is one of fact and not of theory, it becomes evident under the special circumstances, in which Germany and Austria find themselves unable to procure supplies from American ports, that the United States government must either restrict the British in their sea opera-


23. Secretary Lansing to the Austro-Hungarian Government, Aug. 12, 1915: "During the war between Great Britain and the South African Republics, the patrol of the coasts of neighboring neutral colonies by British Naval vessels prevented arms and ammunition reaching the Transvaal or the Orange Free State. The allied republics were in a situation almost identical in that respect with that in which Austria-Hungary and Germany find themselves at the present time. Yet, in spite of the commercial isolation of one belligerent Germany sold to Great Britain, the other belligerent, hundreds of thousands of kilos of explosives, gunpowder, cartridges, shot, and weapons; and it is known that Austria-Hungary also sold similar munitions to the same purchaser, though in smaller quantities.

"While, as compared with the present war, the quantities sold were small the principle of neutrality involved was the same. If at that time Austria-Hungary and her present ally had refused to sell arms and ammunition to Great Britain on the ground that to do so would violate the spirit of strict neutrality, the Imperial and Royal Government might with greater consistency and greater force urge its present conten-
tions, so supplies can reach Germany, or else the United States must refuse to allow any munitions to leave this country. The fallacy of this position lies in the fact that a neutral is not required to furnish supplies in equal amounts to each of the belligerents. The requirements of impartiality are satisfied by his keeping the markets open to all buyers without discrimination. This being done, the neutral has no right, much less obligation, to announce that under no circumstances will it be permitted any of the belligerents to cut the other off from the supply. Such a restriction would be unjustified in warfare; in order to make it effective, as in the present case, the neutral would practically be taking part in the conflict.

Such a restriction would be contrary to the theory so unanimously maintained by the leading writers of the world. The prevailing theory is based upon sound practical considerations. As has been well expressed by Chancellor Kent in *Seton v. Low*: "A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet at the same time from the law of necessity, the powers at war have the right to seize and confiscate the contraband goods, and this they do from the principles of self-defence."

The authorities on international law are agreed that unless for certain reasons of national policy, trade with belligerents should be restricted that there is no justification for any interference on the part of neutral governments with the trade of

24. New York Supreme Court; 1799 in Snow, International Law; Naval War College, 2 Ed, p. 135, 1898; Also Hall, Treatise on International Law, 4 Ed, p. 84.
their citizens. Restrictions upon the rights of trade enjoyed by peaceable citizens is nothing more than interference with their liberty. The neutral resents such interference, not altogether as a matter of dollars and cents, but also as involving his guaranteed rights and privileges. The American citizen is naturally opposed to war but he is not in the habit of taking part in one in which he has no immediate concern. He does not see the morality of interfering with the legitimate trade of peaceable citizens because a few foreign nations see fit to disturb the world's peace to gratify a desire to take possession of a strip of territory which at some time during the past ages may have belonged to themselves.

The fact to which both Germany and Austria-Hungary refer that they are not able to intercept the contraband with the enemy cannot affect the status of neutrality of the United States. From the neutral view point the German inability to stop munitions from flowing into the enemy territory has no greater significance than the failure of the Allied forces to take Constantinople. The one is a naval failure, the other an army failure. Moreover, 

25. Spaight, War Rights on Land; pp. 475-476: "If a neutral power were held responsible for all the commercial transactions of its subjects with belligerents, most of the nations of the world would have to rewrite their constitutions whenever a war began. The outbreak of hostilities between two states would have the effect of establishing in every country not participating in the war a system of governmental interference with private persons and their business transactions which would have only to be tried once to stand condemned as intolerable and impossible."

26. Dr. Dernburg - Address at the Annual Meeting of the American Academy of Political and Social Science, July, 1915: "Germany does not question the legal rights of neutral citizens to trade in munitions of war; she has only complained of inequality of treatment she is receiving, in that food-stuffs are shut out of Germany whereas there is free transit of arms to Great Britain."
the German contention is inconsistent with her practice in the past. For Example, Germany's conduct during the Crimean War was the same as that of the United States, against which she now complains. During that war large quantities of arms and military stores were supplied to Russia by the manufacturers and merchants of Belgium and Prussia, notwithstanding the fact that the Prussian Government had expressly prohibited the transport of munitions of war from a foreign state to the belligerents. Since the transport took place entirely by land, the Anglo-French belligerents had no opportunity to protect themselves against the traffic by any exercise of the right of capturing contraband at sea. The differences in this case and in the present war are, to say the least, not of such a nature as to strengthen the German-Austrian contention during the present war.

In addition to the complaints by the German and Austrian Governments, a great many Americans have contended that the United States should prohibit the shipment of munitions from the country, in order to preserve its neutrality. The Government explained its stand in four communications from the State Department. First, in a circular to the American People, issued October 15, 1914, by the State Department, with reference to 'Neutrality and Trade in Contraband'. The Secretary summed up the laws of the United States so far as they pertain to trade in contraband. The essential parts are as follows: "In the first place it should

be understood that, generally speaking a citizen of the United States can sell to a belligerent government or agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law, by any treaty provision, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, etc., or are food-stuffs, clothing, horses, etc. for the use of the army or navy of the belligerents.

"Furthermore, a neutral Government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales therefore, by American citizens do not in the least affect the neutrality of the United States.

"Neither the president nor any executive authority of the government possesses the legal authority to interfere in any way with trade between the people of this country and the territory of a belligerent. There is no act of Congress conferring such authority or prohibiting traffic of this sort with European nations, although in the case of neighboring American Republics, Congress has given the President power to proclaim an embargo on arms and ammunition when in his judgment it would tend to prevent civil strife.

"For the Government of the United States itself to sell to a belligerent nation would be an unneutral act, but for a private individual to sell to a belligerent any product of the United States is neither unlawful nor unneutral, nor within the power of the executive to prevent or control.

"The foregoing remarks however do not apply to the outfitting or furnishing of vessels in American ports or of mili-
tary expeditions on American soil in aid of a belligerent. These acts are prohibited by the neutrality laws of the United States."

On January 20, 1915, in a letter to Senator Stone, Secretary Bryan wrote: "There is no power in the executive to prevent the sale of ammunition to the belligerents. The duty of the neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighboring American Republics and then only when civil strife prevailed. Even to this extent the belligerents in the present conflict when they were neutrals, have never, so far as the records disclose, limited the sale of munitions of war."

The United States has itself taken no part in contraband traffic, and has, so far as possible, lent its influence toward equal treatment for all belligerents in the matter of purchasing arms and ammunition of private persons in the United States."

In the note of April 31, 1915 the Secretary wrote in response to the German memorandum of April 4, 1915:" I note with sincere regret that, in discussing the sale and exportation of arms by citizens of the United States to the enemies of Germany, Your Excellency seems to be under the impression that it was within the choice of the United States, notwithstanding its professed neutrality and its diligent efforts to maintain it in other particulars, to inhibit this trade, and that its failure to do so manifestly an unfair attitude toward Germany."

29. European War, No. 2, p. 58.
Finally, in reply to the Austrian note of June 29, 1915 the Secretary of State explained at some length why the United States took its position: "The Government of the United States is surprised to find the Imperial and Royal Government implying that the observance of the strict principles of law under the conditions which have developed in the present war is insufficient, and Asserting that this Government should go beyond the long-recognized rules governing such traffic by neutrals and adopt measures to "maintain an attitude of strict parity with respect to both belligerent parties." To this assertion of an obligation to change or modify the rules of international usage on account of special conditions the Government of the United States can not accede. The recognition of an obligation of this sort, unknown to the international practice of the past, would impose upon every neutral nation a duty to sit in judgment on the progress of a war and to restrict its commercial intercourse with a belligerent whose naval successes prevented the neutral from trade with the enemy.

"The contention of the Imperial and Royal Government appears to be that the advantages gained to a belligerent by its superiority on the sea should be equalized by the neutral powers by the establishment of a system of non-intercourse with the victor.

"Manifestly the idea of strict neutrality now advanced by the Imperial and Royal Government would involve a neutral nation in a mass of perplexities which would obscure the whole field of international obligation, produce economic confusion and deprive all commerce and industry of legitimate fields of enterprise, already burdened by the unavoidable restrictions of war."
Mr. Lansing called attention to the fact that in the past, Austria-Hungary and Germany, especially the latter had exported arms in larger quantities than any other country, not only in time of peace but in times of war, and he remarks, that "never during that period did either of them suggest or apply the principle now advocated by the Imperial and Royal Government."

In each of these cases, contentions put forward were declared to be inconsistent with the rights of neutrals and the established rules of war-fare. Such claims seem to be a result of belligerents holding different views in regard to certain matters than when they are neutral. Thus, in view of these contentions of a few years previous, both Germany and the United States at the Hague Conference of 1907 joined in the unanimous vote that contraband trade should be unrestricted in times of war. Such countries as Germany, France, Austria, Belgium, and Great Britain which have large munitions' industries are unwilling to legislate away their rights to profit by them in time of war when the demand and prices are best, even though in time of war one may suffer from the effects of vast quantities being shipped into the territory of its enemy from one or more of the other countries which have extensive munitions' industries. If this is true of all nations, in general, it is idle to think or expect one country to take it upon itself to restrict such trade when all the others are involved in war.

30. International jurists (Westlake and Bluntschli) at the time of the Franco-German war, both German and English foresaw that the trade which had assumed such great proportions in the war then being waged would be restricted for the wars of the future immediately upon the restoration of peace, and so today we hear the same predictions.
Nations which do not manufacture munitions on a large scale are opposed to restrictions on trade in time of war because such restrictions would interfere with their only chance of equipping their armies after war has broken out.

To cite the practice in the wars of the past would be merely to reiterate facts familiar to all readers. "The growth of a moral sentiment against making money out of the miseries of war-fare" says Lawrence "may in time check the eagerness of neutral merchants to engage in contraband trade. Meanwhile belligerents must trust to the efficiency of their own measures of police on the high seas to keep cargoes of warlike stores out of the ports of their enemies." 31

Even granting that neutral states should impose some restrictions on contraband trade carried on by its citizens, it must be admitted that the neutral state shall be the judge as to when

31. Principles, International Law, pp. 699-702. Also Snow gives an excellent summary of the situation in the following words found in International Law-Naval War College, 2Ed. 1899; pp. 134-136: "When it comes to the shipment of heavy guns, rifles, and ammunitions in enormous quantities, it has been argued that there is hardly much difference in principle between such sales and those of ships; that the one may affect the course of the war as much as the other." ** Perhaps international law may develop in the direction of limiting such trade, but this seems doubtful at present, and the German practice in the war between Spain and the United States, did not seem to conform to such theories. The trade between Krupp's establishments in Germany and Spain in war-like stores, carried overland, apparently suffered no restriction. The great difficulty of making a distinction between contraband upon a large and small scale would alone present a serious obstacle to such a rule. On the whole, we may conclude that the assumption by the neutral states of the task of preventing contraband trade is not likely to be undertaken for the benefit of belligerents as an addition to the other and increasing duties required from the neutral state during modern warfare."
the trade has reached such proportions as to endanger its neutrality. If left to the judgment of each of the belligerents there would clearly be no agreement and ultimately, trade of all kinds would depend upon the caprice of war, for it must be remembered that there is no agreement as to what even constitutes contraband.

The foregoing discussion shows that international law and practice sanction the right of neutral individuals to trade in contraband with belligerent nations. Would it therefore be neutral to prohibit them from doing so? This question has come up in the present war. Not only the governments of the Central Powers but a great many American citizens have asked the government to lay an embargo on the shipment of arms and munitions as a neutrality measure. While there have been a number of instances of embargoes having been laid in the wars of the past, there are no instances in which they were resorted to as a neutrality measure. In some cases they have been laid in accordance with treaty stipulations but in most cases they are laid as measures of national policy, either as a usual practice in times of war, or as the special circumstances of any war may determine. In the present case it is argued that for the United States Government to lay an embargo on munitions would be neutral. We will make an

32. Moore-Digest, Vol. VII, p. 958: Such a point was brought out by Mr. Seward in reply to a protest by Mexico: "If Mexico shall prescribe to us what merchandise we shall not sell to French subjects, because it may be employed in military operations against Mexico, France must equally be allowed to dictate to us what merchandise we shall allow to be shipped to Mexico, because it might be belligerently used against France. Every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce in that case, instead of being free or independent, would exist only at the caprice of war."
vestigation into this phase of the subject. An embargo would first of all require the passage of a law and the consequent repeal of several of the existing neutrality laws. It involves legal and moral principles, international and municipal considerations; in fact, the general questions of militarism and democracy, in addition to the great and ever present consideration of neutrality.

There may well be doubt as to the effectiveness of enforcing such an embargo. There are two difficulties to be encountered in the United States, which would exist, perhaps to a greater extent, than in any other country. First, the great

33. In ordinary times of peace there being no executive power resembling the royal perogative in monarchical countries, any such regulations would have to be made in the ordinary way for it would need take the form of law. Spaight, War Rights on land, p. 479, says, "In case a prohibition is made, it is an instance of municipal law imposing a greater obligation than international law."

34. Westlake, Collected Papers on International Law, p. 390: "A mere municipal law may not confer a complete right on a foreign state, so that a failure in its due execution would be recognized as in itself sufficient ground for a demand of indemnity; but a failure to execute it to the best ability of the government would be one of the strongest proofs of unfriendliness, and as long as international relations are guided by policy rather than by law, the tention of those relations, due to an unfriendliness pointedly testified, will continue to be a much surer road to war than one of the minor breaches of international law, which might be overlooked or stoned for."

35. Wharton, as cited by Moore, VII, p. 971: "To establish a national policy which could prevent the sale of such (staples) would impose on neutral states a burden, not only intolerable, but incompatible with constitutional traditions. It might be possible in islands the size of Great Britain; but in a country so vast as the United States, and with an ocean frontier so extended, it would be impossible to establish a police that could preclude such exportation without resting in the national government powers and patronage inconsistent with republican institutions, and so enormously expensive as to make it more economical to interpose in a war as a belligerent than to watch such war as a neutral."
extent of sea coast and consequent force required to effectively police it to see that no munitions were loaded on ships; and secondly, the great degree of liberty which the American citizen enjoys does not make for the enforcement of laws which can be construed in any way as interfering with those fights.

Nor is the case entirely hypothetical; we have the case of President Grant forbidding the State arsenals to sell arms to the belligerents in 1870-71, and even in this case the order was circumvented by American merchants buying arms from the arsenals and then shipping them to France. "The export of arms to France was carried on quite openly and on an enormous scale, and the impossibility of effectively checking the trade was indeed admitted by the German authorities themselves, who instructed the North German Consul at New York not to interfere with it." Spaight says, "in practice it is absolutely impracticable to control the sale of munitions of war when the market conditions are good, that is, when the demand exceeds the supply.

An act of Congress changing our neutrality laws during the progress of a war is bound to have some influence, direct or otherwise on the belligerents. It will in any case affect them differently. In so doing it would be contrary to the spirit of neutrality. Of course, the matter of neutrality is, in the main

37. War Rights on Land; pp. 477-478: He cites a number of incidents to support the following statement: "Neither patriotism, nor Bureaucrat vigilance, nor national sympathy with the belligerent's cause is sufficient to prevent men who have arms to sell them to a belligerent who will pay well for them."
38. Mr. Sutherland, Speech in Congress (Jan. 27, 1916 - Cong. Record; p. 1798) "If peace prevailed throughout the world, we might pass an act prohibiting for the future the transportation of munitions of war from our country to any other country without affecting the question of neutrality at all. But this
a policy which is determined upon by the nation acting through its government. In general, neutral nations may allow or refuse to allow their citizens to trade in contraband. Most writers state the existing rule as it was drawn up by the Hague, Convention 13, Article 7, of which reads "A neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, munitions, or, in general, of anything which could be of use to any army or fleet." From the negative statement, we may reasonably assume that a nation may prevent such export but it is plainly stipulated that it is not bound to prevent it. As a matter of fact, however, neutral nations have almost universally asserted and maintained the right of their citizens

is not the situation. A condition of war prevails in Europe. It is idle for us to pretend that the act of Congress with reference to this question will not have a very profound effect upon the warring nations in Europe. If we should pass a law here prohibiting the shipment of munitions abroad it would be a very great aid to and would very greatly strengthen the hands of one of the contending parties in the war." On the same day, Representative Townsend remarked in a speech "We could not be embarrassed if at this time we take action which certainly we had a right to take at the beginning of the war and which has been postponed too long already." Congressional Record; Jan. 27, 1918, p. 1798 - Mr. Smoot remarked, "The question of a prohibition at this late date will meet difficulties that would not have been met if a prohibition had been imposed at the beginning of the war, and might perhaps be very embarrassing for our country to enforce," but he takes into consideration no differences in the existing conditions. As. Prof. Westlake wrote during the Franco-Prussian War, concerning the charges made by Prussia to England against her unneutral conduct in allowing her citizens to sell munitions to France: "It must be allowed that to change an existing rule to the prejudice of one belligerent during the war, and that in compliance with the express request of the other belligerent that our neutrality should be made favorable to him, would be a clear breach of neutrality even though there might be the most excellent reasons for giving a general preference to the new rule on future occasions." - Collected Papers on International Law; p. 378.
to trade in contraband.\(^{40}\) Germany, has by virtue of her well
developed munitions industry profited more perhaps than any other
nation. The United States has from the first, "allowed its citi-
zens to make, vend, and export arms" to belligerent nations sub-
ject always to the risk of punishment by way of confiscation if
captured by the opposing belligerent. Professor Moore cites
eighteen pages of extracts from various presidents and secretaries
of state, in nearly all of which this policy repeated as being
that of the United States.\(^{41}\)

In contradiction to the view frequently expressed, there
is reason for the existing practice of allowing neutral nations
to furnish munitions to belligerents, both from the standpoint of
neutrals and the necessity for arms on the part of the belligerent;
the practice does not therefore exist simply because there is no
law against it. As to the quantity of this trade, it has been
shown there is no practicable way of limiting it.

Trade in contraband by private persons is largely regulated
by municipal law and the international practice is based entire-
ly upon a compromise between the municipal laws of the belligerent
and neutral states. The neutral state is not held responsible
for seeing that its citizens send as many cannon balls to Germany
as to France, in time of war, any more than it is responsible for
seeing that the same number of plows are sent to Russia as to
Guatemala in times of peace. If, therefore, an attempt is made
by the government to interfere in any way, there may be a con-

\(^{40}\) Lawrence principles of International Law, p. 699.
The Government at Washington, in choosing its course, has taken into consideration the welfare of its own citizens and at the same time has attempted to abide by the established rules of international law. The first consideration was and should have been, for the welfare of the American citizens, who, as a result of the war in which they had no part found their commerce suddenly cut off, not only the belligerent powers which soon included the greater part of Europe, but also with the rest of the world because the great part of American shipping is done in foreign vessels. The natural result was that the American industries were greatly interfered with, many men were thrown out of employment, and other bad conditions prevailed. Thus when there was opportunity for improvement, resulting from the clearing of the seas of one hostile fleet, and the development of great need for munitions, it would have been a doubtful policy for the Government to have interfered and prohibited it.

Thus in opposition to the embargo on munitions the question of national policy was a determining factor. This was brought out in Secretary Lansing's reply to the Austrian note:

"But in addition to the questions of principle, there is a practical and substantial reason why the government of the United States has from the foundation of the Republic to the present time advocated and practiced unrestricted trade in arms and military

42. Mr. Bryan: "This Government holds that any change in its own laws of neutrality during the progress of a war which would affect unequally the relations of the United States with the nations at war would be unjustifiable departure from the principles of strict neutrality, by which it has consistently sought to direct its actions."

supplies. It has never been the policy of the country to maintain in time of peace a large military establishment, or stores of arms and ammunition sufficient to repel invasion by a well equipped and powerful enemy. It has desired to remain at peace with all nations and to avoid any appearance of menacing such peace by the threat of its armies and navies. In consequence of this standing policy the United States would, in the event of an attack by a foreign power be at the outset of a war seriously, if not fatally, embarrassed by this lack of arms and ammunition and by means to produce them in sufficient quantities to supply the requirements of national defense. The United States has always depended upon the right and power to purchase arms and ammunition from neutral nations in case of foreign attack. This right, which it claims for itself, it cannot deny to others. 44

In the same note it is argued that should the theory that neutral nations ought to prohibit the sale of arms and ammunition be generally adopted, it would result ultimately in every nation becoming an armed camp. The Secretary pointed out that this would

44 This point was emphasized by Representative Robinson in a speech in the House (Jan. 27, 1916-Cong. Record; p. 1797): During all the wars in which we have been engaged the United States has been compelled to purchase abroad much of the munitions which we have used in war. While it is true that as a result of the increase in this trade we are now manufacturing in the United States greater quantities of munitions than ever before in the history of the country, it is also true that at this time we are not equipped with sufficient machinery and factories to supply the demands of the United States in case she should become involved in war. In considering the matter of placing an embargo on arms and munitions, we should bear in mind the necessities of the United States itself, and not too quickly commit this government to a policy which would deny her the means of self-defense in case we should become involved in a war with a foreign power. For if we assert as a doctrine of humanity, or as a doctrine of international law, that a neutral nation cannot sell arms to a belligerent, then we must expect to have that doctrine invoked and applied against us in case we should find ourselves compelled to combat an aggressive enemy.
force militarism on the world and work against universal peace.45

As to the argument advanced by the Austrian note that the Hague Convention by means of its general terms allowed a departure under peculiar circumstances from the specific wording of Article 7, Mr. Lansing replied that it was for the neutral state to decide as to when such case had arisen and not for the belligerent. It might be well to bear in mind that the United States does not base its argument entirely upon the Hague Convention but upon the principles and practices of international law as well.

The question as to why, if it is not an unneutral act to furnish supplies to one side in the conflict, would it be unneutral to place an embargo on arms and munitions even though it did work to the disadvantage of one side only, was answered in the following manner.

Trade in contraband is an established practice, and is normally the rule whereas embargoes are exceptional and cannot be resorted to if the effect is to deprive one of the belligerents of substantial advantages which he has already gained over his enemy.46 Germany contends that were an embargo established, she could end the war within three months: The Anglo-French Allies would admit that such an embargo would work very much to their disadvantage. It is clear that under the circumstances then it would be giving a decisive advantage to the one side if an embargo were laid; it would affect only one side, but the advantage in the latter case would come from the act of a neutral state, and not as in the prevailing condition, from the successes of one of

46. This view is expressed by Professor Garner in his article, previously referred to in the American Journal of International Law, July, 1916.
the belligerent parties.

Would it have been unneutral for the United States to have established an embargo at the beginning of the war? At this time, it would not have been an unneutral act; the seas were open to all ships of all nations. No nation had any advantage; regardless of the fact that German ships were driven from the seas within a few weeks, and the Allies would have been without ammunition in due time; the situation would have early arisen in that event which would ultimately arise now were the American supplies cut off, yet it would have been within the bounds of neutrality at that time.47

It would have been bad policy for the United States both from a national standpoint and from the viewpoint of American industry but the legality from the international side is unquestioned. The fact that practically all the European nations with the possible exception of Germany and Austria, depend upon neutral markets for war supplies of arms and munitions, as does the United States, would not have altered the situation because nations are given the right to allow or refuse to allow their citizens to deal in contraband trade with belligerents; even though the warring countries had depended upon neutral countries for their supplies in time of war, there are no agreements by which such supplies are guaranteed.

If, as the State Department maintains, it is a breach of neutrality to put an embargo on the export of munitions at such a

47. Senator Lodge, speaking at the Worcester Chamber of Commerce banquet said, "If we had put this embargo on in August of the year the war started, while it might not have been good business policy perhaps, no great objection could have been registered against it, as conditions were entirely different. As the war now stands one side can import freely. The other side cannot import at all. It would simply place the nation or side which has lost control of the seas on the same basis with the nation or side which has gained control of the sea."
time as this, are we not forced to admit ultimately that an embargo could not be laid even though the vital interests of the country demanded it? This is a pertinent question because it has come up a number of times during the present war. It has been earnestly argued in Congress and in the press at different times, that an embargo should be proclaimed to protect national interests, as a retaliatory measure for the unlawful acts of Great Britain, and for other reasons. If the principle be true that an embargo at this time would be an unneutral act, any reason which might be given for laying one would not be sufficient to keep the Allies from complaining of an unneutral, or even an unfriendly act on the part of the United States.

We will answer these questions after considering actual cases of countries in the present war which placed embargoes on the export of munitions after the war had broken out, and even after Great Britain had gained control of the seas. There are some important differences. Holland and Denmark had their markets open to Germany by land, as well as to Great Britain by sea. Also, as in the case of Norway, Sweden, and Spain the embargoes on munitions were laid ostensibly to preserve the supplies for their armies, as most of these countries mobilized the outbreak of the war. Only, in so far as such actions have in the past been considered by belligerents as sufficient and bona fide reasons of

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48. Cong. Record, Jan 27, 1916; p. 1794 - Senator Hitchcock said, the wheat shipping was being held up and agricultural interests thereby imperilled because the ocean-going ships were carrying munitions of war instead of grain. He maintained that an embargo is therefore a matter of domestic concern, "not only because of the legitimate interests which are imperilled, but because it is no business of any country in Europe, whether we place an embargo upon the exportation of arms and ammunition or whether we do not."
a non-intentional interference on behalf of either belligerents in the struggle, it would be a better excuse in the eyes of the belligerents that any reasons the United States might offer at this time. Nevertheless, whatever be the reason, whether it be retaliation for wrongs committed by the belligerent, or as a matter of state policy, an embargo which would affect the contending parties unequally must be construed as unequal. Applying this doctrine to the European countries, then in which the effects were unequal upon the different belligerents, we must conclude they were breaches of neutrality, whether any nations complained or not. As to the justification, and this applies to the United States, as well, national policy may justify a breach of neutrality, just as it may at times justify open hostilities. If, in the opinion of any sovereign state, national expediency demands certain action, which would be in conflict with neutral duty, the state owes obligations to itself above those of belligerents. This is a dangerous rule unless judiciously applied. It is respectfully submitted that the present circumstances would not alter the position the Administration has taken thus far in the present war.

A few charges which have come to the attention of the State Department from the German and Austrian Foreign Offices and from the Press should be considered. Some are only of relative importance and are referred to in this connection only to define the position of the administration in regard to them, that we may determine whether or not the United States has been consistent in the adopted policy.

First, in regard to the action of Great Britain in cutting off the German food supply and in otherwise interfering with
neutral commerce. If, as the German and Austrian protests charged, Great Britain exceeded her legal rights, the United States would be justified in demanding reparation. It is fitting to say here that the United States has taken the view that the actions of Great Britain are within the rights of a belligerent power, and the seeming disadvantages to Germany are due to Great Britain's superior naval strength. A neutral is not bound to see that one belligerent gains no advantage of the other; there is no justification for a neutral nation to depart from the rule of impartiality, unless, of course, it wants its neutrality to cease.

Opinions differ and some disagree with the Secretary of State with respect to Great Britain's restrictions on American commerce. It presents a real problem in itself and cannot be discussed here. Suffice it to say, that even though the action of Great Britain in maintaining an irregular blockade is a violation of the rights of the United States as a neutral, there is no doubt that the United States must determine for itself when it is justified in taking retaliatory action; Secretary Lansing brought this point out very clearly in his note to the Austro-Hungarian Government, in which we find the following: "The right and duty when this necessity exists rests with the neutral, not with a belligerent. It is discretionary, not mandatory. If a

49. Secretary Lansing to the German Ambassador April 21, 1915.
51. In 1812, the United States availed itself of the opportunity of establishing an embargo as a preliminary to the outbreak of war, Moore, VII. p. 143-44. This embargo, as a preliminary to the outbreak of war, is sometimes considered a retaliatory measure, but was in fact the prelude to the war which was imminent.
neutral power does not avail itself of the right a belligerent is not privileged to complain, for in doing so it would be in the position of declaring to the neutral power what is necessary to protect that power’s own rights."

In the Austro-Hungarian note of June 29, 1915, the minister for Foreign affairs suggested that the United States seemed to have departed from the Thirteenth Hague Convention in the prevention of the delivery of vessels of war and in the prevention of certain deliveries to vessels of belligerent nations." Secretary Lansing replied that it was only necessary to point out that the prohibition of supplies to ships of war rests upon the principle that a neutral power must not permit its territory to become a naval base for either belligerent. "To permit merchant vessels acting as tenders to carry supplies more often than three months, and in unlimited quantities," said Mr. Lansing, would defeat the purpose of the rule and might constitute the neutral territory a naval base."

On April 4, 1915 the German Ambassador in a memorandum to the State Department appealed to the United States to put an

53. "If it is the will of the American people that there shall be a true neutrality, the United States will find means of preventing this onenided supply of arms or at least of utilizing it to protect legitimate trade with Germany, especially that in food-stuffs. This view should all the more appeal to the United States Government because the latter enacted a similar policy toward Mexico." The Ambassador then calls attention to the speech President Wilson made (Feb. 3, 1914) with reference to withdrawing the embargo on the importation of arms into Mexico. At this time the President said, "As the conditions on which the proclamation of March 14, 1912 was based, have essentially changed, and as it is desirable to place the United States with reference to the exportation of arms or munitions of war to Mexico in the same position as other powers, the said proclamation is hereby revoked. The Executive order under which the exportation of arms and ammunition into Mexico is
embargo on munitions, citing the action taken in Mexico as a precedent for the action. Mr. Bryan replied that, "in dealing with Mexico we put an embargo on munitions of war, but that was not the act of a neutral nation. It was the act of one intervening indirectly in the war to bring about a certain result. When we were occupying Vera Cruz, although not at war with Mexico, a shipment of German arms which would have been contraband if there had been a state of war, reached its Mexican consignees and would have been used against our troops if they had been obliged to undertake more extensive operations."

The action in this case cannot be considered as coming under the rules of international law. The United States had not forbidden was a joint resolution of Congress—determined upon in circumstances which have now ceased to exist. It was intended to discourage incipient revolts against the regularly constituted authorities of Mexico. Since that order was issued the circumstances have undergone a radical change" (American Journal of International Law, July 1914; p. 580)

54. Professor Canfield, in a press dispatch gave out the following:
"There is no parallelism between our relations to Mexico and our relation to the belligerents in Europe." He points out that in dealing with Mexico in prohibiting the export of arms, President Wilson was acting under an express statute of Congress, which was passed in recognition of our peculiar relations to Mexico and of the possibility that the arms exported to Mexico might some day be used against us. It is to be noted also in the case of Mexico we are dealing not with one friendly state, which was at war with another friendly state, but with two factions contending for mastery within a single state. And we dealt impartially with both factions, depriving neither of any advantage to which it was legitimately entitled as against the other. In the case of the belligerent nations of Europe the situation is a very different one. Our relations to them are governed by the rules of international law."

That Mr. Taft thinks the conditions are essentially different is attested by the following letter to Professor von Mach. It will be recalled that owing to his recommendation the act of Congress was passed giving the President authority to lay an embargo on arms to Mexico, which he very soon put in effect. In the letter to Professor von Mach, referred to he said, "I cannot think that it would be wise to pass a law changing all the rules of international law heretofore prevailing with respect to the sale of ammunition and arms to belligerents by
recognized the contending parties in Mexico as belligerents, so in a legal sense, there was no war in Mexico. If there is no war there can technically be no neutrals, for the term presupposes the existence of belligerents.

Another point in connection with munitions which caused an exchange of diplomatic notes was the contention by Germany that Hydro-aeroplanes are war vessels. On January 19, 1915 the German Ambassador entered a protest in which he said, "There can be no doubt that Hydro-Aeroplanes must be regarded as war vessels, whose delivery to belligerent states by neutrals should be stopped under Article 8 of the Thirteenth Convention of the Second Hague Conference. Hydro-Aeroplanes are not mentioned by name in the convention simply because there were none at the time of the conference."

Secretary Bryan replied that the fact that Hydro-Aeroplanes arise from and alight upon the sea does not give them the character of a vessel. He then called attention to the fact that neutral countries. Nor do I think in the present exigency it would be an act of neutrality to do so, because it would inure only to the benefit of one of the belligerents."

55. From press dispatch of Dec. 1916: The Curtiss works at Hammondsport, N.Y. have sold and sent to England the well known hydro-aeroplane, America, and five hydro-aeroplanes of the same type. Thirty-six hydro-aeroplanes of a different type have been ordered by England and are under construction by the same firm. Also Russia has ordered a number of these vessels from Curtiss for use in her navy.

56. From Note of January 29,; "The fact that a hydro-aeroplane is fitted with apparatus to arise from and alight upon sea, does not, in my opinion, give it the character of a vessel any more than the wheels attached to an aeroplane fitting it to arise and alight upon land give the latter the character of a land vehicle. Both the hydro-aero-plane and the aeroplane are essentially air-crafts; as an aid in military operations, they can only be used in the air; the fact that one starts its flight from the surface of the sea, and the other from land is a mere incident, which in no way alters their aerial character."
the Imperial Government includes ballons and flying machines and their component parts as conditional contraband. Since there are no specific rules bearing upon this particular type of machine the argument of the Secretary may be deemed conclusive.

During the course of the war, complaints have been made that submarines built in the United States have been delivered to the allies. One charge was made by Count Bernstorff that submarines were being built for the Allies by the Seattle Dry Dock and Construction Company. The Navy Department made a careful investigation, and measures were taken to prevent further deliveries during the war.

It was found that the Schwab Companies were making submarine parts to be shipped to Canada; there to be assembled and used by the Allies. President Wilson decided such a course would be a violation of the spirit of neutrality and Mr. Schwab promised that none of the submarines built in his factories would pass through Canadian ports or be used by the Allies.

"In view of these facts I must dissent from your Excellency's assertion that "there is no doubt that hydro-aeroplanes must be regarded as war vessels," and consequently, I do not regard the obligations imposed by treaty or by the accepted rules of international law applicable to air craft of the latest kind. I further call to your excellency's attention that, according to the latest devices received by this department, the German Government includes "ballons and flying machines and their component parts," in the list of conditional contraband, and that in the imperial prize ordnance, drafted Sept. 10, 1910, and issued in the Reichs Gesetzblatt on August 3, 1914, appear as conditional contraband "airships and flying machines" (article 23, section 8). It thus appears that the Imperial Government has placed and still retains air craft of all descriptions in the class of conditional contraband, for which no special treatment involving neutral duty is, so far as I am advised, provided by any treaty to which the United States is a signatory or adhering Power."
be delivered till after the war. 57

Upon complaints made by Germany that the parts were still being shipped to Canada, investigations failed to reveal any evidence that such was the case. The State and Navy Departments have continued to make frequent inquiries into the situation and have not found that the promise by Mr. Schwab was being violated.

We now come to a consideration of the unofficial and semi-official acts carried on by the German and Austro-Hungarian officials and sympathizers. These acts have been wide spread, and in some instances there has been evidence indicating that the work carried on was approved if not encouraged by the same government. No positive proofs of this have as yet been produced, but there is a general feeling throughout the country that the German and Austro-Hungarian Governments have permitted their representatives to the United States to, at least, violate American hospitality which they enjoyed, and at a time when conditions render the position of the United States extremely critical.

The extent of this propaganda is not, and perhaps will never be known, nor the extent to which the governments of the respective nations are responsible. The investigations by the Federal Grand Juries and Secret Service Agents brought out many

57. During the Russo-Japanese war it was charged that the German government failed to prevent, if it did not directly or indirectly encourage, the sale to Russia of a number of transatlantic steamers belonging to its auxiliary navy, and that it permitted the exportation overland of torpedo boats to Russia, the several parts of the vessels being exported as half furnished manufactures and put together in Russian ports, this for the purpose of disguising the real nature of the transactions thus avoiding the charge of non-conformity to the technical rules of neutrality relating to the sale of war vessels to belligerents. See Herschey, International Law and Diplomacy of the Russo-Japanese War; pp. 91-92.
plots against manufacturing concerns, railroad companies, and steamship lines, either by attempts to destroy them or by inciting labor troubles in them. No doubt many accusations made by the daily papers have been unjustified, but many cases have been established by undeniable evidence or self confession.

The case of the Austrian Ambassador, Dr. Dumba, was one of the first and most notorious, because of the high position he occupied in the United States, and the diplomatic immunities which he enjoyed. He admitted that he proposed to his government plans to instigate strikes in American manufacturing plants engaged in the production of munitions of war, and that he employed an American citizen to bear official dispatches to his government. He was for these reasons declared to be no longer acceptable to the United States and was accordingly recalled.

The action of the President was the only course to be tak-

58. Dr. Franz Boaz of Columbia University said, "We decry the hysterical intolerance that characterizes the utterances of a great part of the Eastern press and of many citizens who should know better—the absurd mania of denunciation and espionage that sees a plot in every accident, such as any expert chemist would expect in a dangerous industry that is carried on by inexperienced workmen working overtime, and in every transaction that, owing to war conditions does not proceed in a normal way."

59. Official note to the Austro-Hungarian Government: "By reason of the admitted purpose and intent of Dr. Dumba to conspire to cripple the legitimate industries of the people of the United States and interrupt their legitimate trade, and by reason of the flagrant violation of diplomatic propriety by employing an American citizen protected by an American passport as the secret bearer of official dispatches through the lines of her enemy to Austria-Hungary, the President directs me to inform Your Excellency that Dr. Dumba is no longer acceptable to the Government of the United States as Ambassador of His Imperial and Royal Majesty in Washington. Believing the Imperial and Royal Government will realize that the Government of the United States has no alternative but to request the recall of Dr. Dumba on account of his improper conduct, the Government of the United States expresses its deep regret that this course has become necessary."
en consistent with the dignity of the United States. There have been other examples quite similar to this in the history of the United States which have been handled in the same manner.60

Among the effects of the German military and Naval attaches, certain papers and documents were discovered which proved beyond reasonable doubt that these men were involved in far reaching propaganda against the peace and good order of the United States. There is not wanting also circumstantial evidence to show that they were instrumental in stirring up trouble in Mexico and certain plots against American factories and shipping.61

The action of these men were somewhat similar to those of Citizen Genet in 1793 and the treatment accorded them, likewise the same. The United States Government would have been justified in dealing with them more severely than it chose to do, but there is no ground for breach of neutrality on the part of the United States for not taking more stringent measures.

60. After the outbreak of the Crimean War, rumors became rife that a system of enlistments in violation of the neutrality laws of the United States was carried on in this country under the supervision of the British Minister, Sir John Crampton, and of certain British Consuls. Precise proof was eventually disclosed at the trial of a man named Hertz. The United States asked for Crampton's recall together with that of the implicated consuls. The British Ministry procrastinated and objected until it became necessary for the United States to act for itself. Secretary of State, Marcy, accordingly sent to the Minister his passports and revoked the exequatur of the Consuls at New York, Philadelphia, and Cincinnati.

(Political Science Quarterly-Sept. 1915; p. 387-388.

61. As yet it is not known whether Horn, the Vanceboro bridge wrecker received his $700 from the German Military attache, Von Papen, before he attempted his work of destruction or after it. The German Embassy maintains that the money was advanced after the arrest and for his legal defence. It appears quite clear that von Papen supplied with funds the man Koenig who was at the head of a much more destructive propaganda than any with which Horn was connected.
The arrest of Robert Fay, who claimed to be a lieutenant of the Saxon Army revealed a series of attempts to destroy American shipping. Fay claimed to be acting through the cooperation of the German Secret Service though independent of the German Embassy. With him were arrested two accomplices. They were all arrested for conspiracy in a bomb plot.

More recently plots have been disclosed by the Federal Grand Jury in San Francisco voting indictments against thirty-two men and firms on the various charges of conspiracy to organize a military expedition, plots to blow up Canadian tunnels and American powder mills, conspiracy to defraud the Government in the alleged shipping plots involving the destruction of the Retriever, Sacramento, Mazatlan, the Olson, and Mahoney; the specifications in the latter charge were given in three groups: Conspiracy to violate neutrality by making San Francisco a supply base for belligerent ships at sea, conspiracy to defraud through false manifests, and conspiracy to defeat neutrality by supplying belligerent ships.

62. The German Government has denied that these men were acting under orders in the knowledge of the German Government. It is suggested that many so called self confessions are made with the end in view of receiving more lenient treatment for misdemeanors, as acts of war.

63. Among these may be mentioned the following: Franz Bopp, consul General for Germany, Baron von Schack, Vice consul general, Baron von Brincken, attaché Maurice Hall, consul general for Turkey, Dr. Simon Reimer, German naval officer, and other German consular officials, and prominent German business men. It was given out from Washington that these indictments were the first which the Federal Government has attempted to secure against any foreign representatives, notwithstanding consular officers are subject to the jurisdiction of the country in which they are resident, and may be treated by the law as are any other persons. The fact that the Government has seen fit to bring action against these German and Turkish officials indicates that the Administration intends to prosecute wherever prosecution will lie, any offender against American neutrality.
with stores to which they were not entitled.

No attempt will be made to enumerate the numerous plots against American arms and munitions factores; it is sufficient to say there have been many explosives and labor troubles of various kinds, in addition to many plots which were discovered to prevent their being carried out. There have been many indictment in which the evidence was clearly against German sympathizers who were acting against the laws of the United States out of sympathy for the Fatherland; it may reasonably be expected that in many other instances the same force has been at work and unsuspected by

64 Gompers in an interview as reported by the New York Times - August 17, 1915, said, "Without regard of any sympathy for the one or the other side of the nations involved in the war, had it not been for the honesty of the men at the head of some of these organizations primarily in interest, there would have been great strikes inaugurated at the instance of the agents of foreign nations.

Far reaching efforts by foreign influences had been made to stir up later troubles that would impede the shipment of supplies to the allies.

65. New York Times - January 21, 1916. In response to the Bennet resolution asking the names of all persons "arrested in connection with the criminal plots affecting the neutrality of our Government," the Attorney General sent to Chairman Webb of the House Judiciary Committee a list of seventy one individuals and four corporations indicted for such offenses. The attorney General said he, could not furnish a list of arrested persons as it would convey an incomplete and misleading impression. "Such a list would not include persons who have been indicted but never arrested, having become fugitives from justice; it would not include persons who have been indicted but never arrested, having surrendered to the court, and would include persons arrested and not further proceeded against, as well as persons arrested and not indicted." He explained that the list transmitted contained names of all persons who had been indicted in the Federal courts in connection with criminal plots affecting the neutrality of our government so far as it related to the European war, and exclusive of the Mexican situation, which cases "date back several years and are very numerous."

The majority of these were German, although the list contains the names of five Englishmen who were indicted for enlisting troops in this country for the British Army. About the same number are Montenegrine who were arrested in the west for violating neutrality, by traveling as a military organization across neutral territory.
the Federal authorities; equally true is it that there have been many unwarranted accusations against German sympathizers. The United States has thus far taken the stand that this activity by German officers and subjects is being carried on without knowledge or approval of the German Government, and has accordingly dealt with the various offenders as private persons guilty of statutory offences.

In addition to the secret agencies which have been at work, some acts of a public nature have been done as a part of the official business of the German Embassy. For example, official declarations were published and distributed calling attention to the fact that "Germans working in factories in neutral countries, particularly in the United States producing war supplies for the enemy, render themselves liable to prosecution for treason under paragraph 89 of the Penal Code, penalizing such assistance to an enemy with a maximum of ten years imprisonment."

Large advertisements have at various times been inserted in the daily papers by the German Embassy warning American citizens not to travel on British ships because of the danger in passing through the war zone. Such notices were published in the leading eastern papers for a few days preceding the last departure of the Lusitania, warning travellers against this danger. Extensive activities of this kind have been unknown in the diplomatic history of the past. Without entering into a discussion as to the rights of diplomatic agents to engage in such activities, there is no doubt that such are not for the best interests of the country and might be classified as indirectly interfering with the internal affairs of the country.
Chapter V.

PROTEST AGAINST THE USE OF DUM DUM BULLETS.

Aside from the general question of munitions, charges have been lodged against the United States Government for allowing the sale of illegal instruments of warfare, namely dum dum bullets, by its citizens and also for not protesting against the use of such by the armies of various belligerents.

As early as Sept. 9, 1914, the German Emperor protested to the United States against the alleged use, by French and British soldiers of "bullets which spread and made unnecessarily large and painful wounds." Some time later the Secretary of State informed the German Ambassador that while the United States would take under consideration, charges of improper practice - referring to the use of dum dum bullets - it could not, in the interest of neutrality, investigate or comment on them.

A result of further protest made by the German Government and at least one by the French Government, the United States saw fit to change its attitude and on January 7, 1915 there appeared in the newspapers an extensive report of an investigation which the State Department had carried on.

In a note to Count Bernstorff, Secretary Bryan wrote, "the President directs me to inform you that in case any American company is shown to be engaged in this traffic he will use his influence to prevent, so far as possible, sales of
such ammunition to the powers engaged in the European war, without regard to whether it is the duty of this government upon legal or conventional grounds to take such action."

The note continued, "Investigation discloses that the Remington Arms-Union Metallic Cartridge Co. has sold 100,000 soft nosed bullets for the use of sportsmen and that the cartridges will not fit the rifles of any belligerent. The department is in receipt from the company of a complete detailed list of the persons to whom these cartridges were sold. From this list it appears that the cartridges were sold to firms in lots of twenty to 2,000 and one lot each of 3,000, 4,000 and 5,000. Of these only 60 cartridges went to British North America and 100 to British East Africa. If, however, you can furnish the department with evidence that this or any other company is manufacturing and selling for the use of the contending armies in Europe cartridges whose use would contravene the Hague Convention, the government would be glad to be furnished with the evidence."\(^1\)

The charges made early in the war by the French that the Germans had used soft nosed bullets, as well as the charges by the Germans, were substantiated in part by evidence given out by the Red Cross physicians, who stated that the wounds in many cases consisted of a small round hole on the said in which the bullet

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1. On Feb. 3, 1915, The Outlook Commenting on the stand taken by the Washington Government said, "As to the charges that the United States ought to, but did not, suppress the sale of dum dum bullets to Great Britain, it is shown that whenever charges have been made thorough investigation has followed at the factories, and that no evidence of such sale was forthcoming nor has since been produced by the persons making the charges, although the records of the manufacturers were laid before them."
entered, but a badly torn and lacerated opening on the side from which it emerged. As suggested earlier, the description of the wounds thus produced conforms nearly, if not entirely with that of the wounds produced by the so-called "dum-dum" bullet, the use of which is contrary to international agreement, as reached in the Hague Conference of 1899. In view of the fact that the United States did not sign this declaration, it is not binding upon this country to enforce it; however, since the American delegates were instructed to favor a more inclusive proposition at that time, President Wilson felt the United States Government might stand by the Hague declaration because it has the same ultimate purpose in view; namely, the amelioration of suffering.

The investigations cited above preclude any chance that the dum-dum bullets were being furnished by American manufacturers. Further investigations revealed the fact that none of the belligerent governments were furnishing their armies with dum dums. It may be the French complaint was well founded, however, as it is known they were fighting a contingent from Saxony at the time they suffered the most severe wounds, the results of which caused them to protest to the United States.

The Scientific American published the following statement pertaining to dum-dum bullets:—"It will be appreciated that, as in the Indian campaign, the bullet can be easily prepared by any

3. Declaration III.
4. It is well known that the people in this part of the German Empire hunt a great deal; also that soft nosed bullets are very extensively used for big game. It is at least possible that the Saxons may have used some private ammunition against the French in battle.
5. October 3, 1914.
soldier individually, without the knowledge of his superiors; and if such bullets have been used in the present war, this is their undoubted source. In view of the established facts in relation to wounds made by modern bullets, there is little object or reason for any government intentionally supplying this form of ammunition."

This last point was emphasized still more a week later in a quotation from the Medical Record of New York, -- "Dum-dums are not used in the present war, but a legitimate substitute (referring to the Spitz bullet) is used, which is just as bad. This bullet is quite short, of conical shape, tapering gradually so that the center of gravity is thrown back near the base; consequently, in spite of its great initial velocity and flat projectile, it has a tendency to turn sideways upon meeting any obstacle, although it will go through the soft parts, making a small clean-cut channel, and do little or no injury unless it hits a vital organ. The wounds it produces are very much lacerated and otherwise attended with destructive effects which are not unlike the wounds inflicted by dum-dum bullets.........There is no occasion to use dum-dums, for the Spitz bullet is almost as destructive, and its employment is just as brutal."  

Finally, in an elaborate article based upon careful observation and scientific experiment, Mr. E. C. Crossman draws the following conclusions, -- "There is very little evidence that use has been made of expanding bullets in the present war. Any exceedingly large wounds appearing to be caused by dum-dums may have been caused by a sharp-point bullet in its original tumbling act.

6. The Literary Digest; October 10, 1914, p. 681.
The regular army Spitzer bullet as used by the British, French, and Belgians, is more deadly than the soft nose or dum-dum. They weigh less, but take a staggering, tumbling, spinning course through the flesh, causing a ripping, tearing wound. The German Mauser bullet makes a clear-cut hole in the flesh. 7

This, no doubt, accounts for the fact that the Germans have made more complaints than the Anglo-French allies.

In the light of all its evidence, we would conclude that while no false reports were purposely given out, there is no reason to think that any government is furnishing its army with dum-dum bullets; and the United States, by its active investigation of the matter, has manifested a desire to assist in maintaining international agreements for the benefit of humanity and also to maintain neutrality in spirit by suppressing the export of ammunition which is contrary to those agreements.

Chapter VI

TREATMENT OF ARMED MERCHANTMEN IN AMERICAN PORTS

The status of armed merchantmen has given rise to much discussion in this country, both in Congress and in the Press and has been the subject of prolonged diplomatic controversy. Great Britain anticipating difficulty as early as August 9, 1914 directed the British Chargé d'Affaires to deliver a note to the Secretary of State calling attention to the fact that Great Britain and Germany held different opinions as to the right of converting merchantment into auxillary warships on the high seas. This note was the fore-runner of an avalanche of diplomatic correspondence which revealed the fact that the principal opposing belligerents differed in respect to the status of merchantmen, which were not converted into warships but which were armed for self-defense.

Being concerned only with questions of American neutrality, we need not consider the merits of the controversy regarding submarine warfare as carried on against enemy and neutral commerce; neither are we concerned with the MoLemore or Gore Resolutions introduced in the House and Senate respectively warning American citizens from traveling on armed belligerent merchantmen. These are incidental questions and readily resolve themselves into matters of state policy. The real question which bears upon neutrality is whether belligerent merchantmen mounting guns are entitled to the hospitality of neutral ports such as is enjoyed by unarmed merchant vessels, or whether they should be treated
as ordinary men-of-war. It will be necessary then to define the action which the United States has taken to compare this policy with the theory and practice of the past.

If the contention be admitted that merchantmen may carry some armament (for self-defense) then we need not consider the question of conversion at all. On the other hand if we take the view that a merchantship becomes a man-of-war, within the meaning of the Hague Convention immediately upon mounting any arms for any purpose whatsoever, then we should be concerned in considering the circumstances of time and place in which the armament was mounted.

Assuming, however, as the United States Government has, that there may legally be armed merchantmen, the place or time of mounting the armament makes no different. All that is required is that the ships conduct themselves in a manner prescribed by the usage of nations for such armed merchantmen. The German Government denies that there can technically or legally be such a thing as an armed merchant vessel. In other words, it recognizes no distinction between a merchant vessel armed for defense only and a merchant vessel converted into an auxillary warship. This was clearly brought out in a memorandum from the German Foreign Office, to Ambassador Gerard, under date of October 15, 1914, in which it was said, "If the Government of the United

1. From Supplement of American Journal of International Law - July 1915, p. 238. The note said: "The equipment of British merchant vessels with artillery is for the purpose of making armed resistance against German cruisers. Resistance of this sort is contrary to international law, because in a military sense a merchant vessel is not permitted to defend itself against a war vessel. It is a question whether or not ships thus armed should be admitted into ports of a neutral country at all. Such ships, in any event, should not receive any better treatment in
States considers that it fulfills its duty as a neutral nation by confining the admission of armed merchant ships as are equipped for defensive purposes only, it is pointed out that so far as determining the warlike character of a ship is concerned, the distinction between the defensive and offensive is irrelevant. The destination of a ship for use of any kind in war is conclusive, and the restrictions as to the extent of armament afford no guarantee that ships armed for defensive purposes only will not be used for offensive purposes under certain circumstances.

To this memorandum, Acting-Secretary Lansing replied at some length, restating the position taken by the United States in the instructions issued by the State Department on September 15, 1914. He called attention to the fact that the practice of a majority of nations and the consensus of opinion by the leading authorities on international law, including many German writers, supported the proposition that merchant vessels may arm for defense without losing their private character and that they may employ such armament against hostile attack without contravening the principles of international law. He went on to point out that the purpose of an armament is to be determined by various circumstances:

"This Government considers that in permitting a private vessel having a general cargo, a customary amount of fuel, an average crew, and passengers of both sexes on board, and carrying a small armament and small amount of ammunition, to enjoy the hospitality of an American port as a merchant vessel, it is in no way violating its neutral ports than a regular warship, and should be subject at least to the rules issued by neutral nations restricting the stay of a warship."
In view of the divergence of opinion on this point, it is submitted that the view of the neutral should prevail, providing there is reasonable ground for its claim. For if the neutral should adopt the views of one belligerent the opposing belligerent might have some grounds for complaint, especially, if the change of policy worked a hardship on the latter. It is necessary, therefore, that we should determine what has been the American practice in the past. It will be interesting to call attention also in passing, to the practice of each of the belligerents, before the present war, in respect to the status of armed merchantmen. Inasmuch as the belligerents hold different views as to the status of merchant ships mounting armament, it is evident that if the United States departs from its customary practice the presumption, at least, will be that the reason for doing so was to prejudice either one side or the other in the conflict.

We find that the practice of nations generally, has been to allow merchant ships to carry arms for self-defense. To quote Mr. A. Pearoe Higgins, "The right of a merchant ship to defend herself, and to be armed for that purpose, has not, so far as I am aware, been doubted for two centuries, until the question has again become one of practical importance. The historical evidence of the practice down to the year 1815 is overwhelming." He goes on to point out that Dr. Schramm, in his elaborate denial of the right, fails to distinguish between the position in which a belligerent warship stands to an enemy merchant ship, and that in which

it stands to a neutral merchant ship. 4

Senator Lodge in a recent speech in the Senate 5 showed
that the practice of ships engaged primarily in trade, but carry-
ing armament for their own defense, goes back to a very remote per-
iod. He suggests the probable reason for introducing the practice
was to provide protection against pirates on the high seas, and
barbarians on the shores of distant lands. As time went on, pir-
acy disappeared, but privateering in time of war made it neces-
sary for merchantmen to sail under convoy. It was in part to
avoid the necessity of convoy that ships were permitted to arm.
Not only were belligerent merchant ships permitted to arm, but in
Great Britain, as late as the eighteenth century, orders were is-
sued making it compulsory for them to do so. Thus the practice
became primarily for protection against capture by the forces of
the enemy. It was so generally recognized as late as 1815, that
Chief Justice Marshall, in the case of the Nereide, said, "In point
of fact, it is believed that a belligerent merchant vessel rarely
sails unarmed."

There is no evidence to show that the practice of arming mer-
chant vessels has been discontinued. Privateering was formally
abolished by the Declaration of Paris in 1856; not all the nations
ratified the treaty but principally for the reason that it did not

4. Schramm-Das Priesenrecht in seiner neuesten Gestalt: "The belli-
gerent acts in the exercise of the right of visit and search and
of seizure with recognized, lawful authority **. Accordingly,
the merchant vessel has to suffer this encroachment by the belli-
gerent; an act of defense on the part of the merchant ship would
constitute an encroachment upon the legal rights of the belli-
gerent. This applies to neutral as well as to enemy merchant
ships. The latter have no exceptional status. They do not
possess the right of self-defense. (Translated by T. H. Theis-
ing, Legislative Division; p. 309).

5. February 18, 1916.
include more extensive reforms.6 This Conference, however, did not abolish the right of a merchant ship to carry arms, even though it formally abolished one of the evils, for the protection against which merchant ships had been allowed to arm. As a matter of fact, privateering had largely ceased to exist before the Declaration of Paris, and the right of a merchant ship to resist capture by enemy cruisers was quite as well established.7

The United States steadily maintained the right of merchantmen to carry arms under certain conditions which will be enumerated later. There have not been many court decisions since the Nereide on which to base this statement. In the case of the Panama8 in 1859, Justice Gray in rendering the judgment remarked: "Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant vessel as part of her equipment, and solely for her defense against "enemies, pirates, and assailing thieves," according to the ancient phrase still retained in policies of marine insurance."

Chancellor Kent in his Commentaries on American Law9 says the subject has many times arisen in the Supreme Court of the United

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6. Notably among those not ratifying was the United States, the representatives of which insisted upon the additional article - Immunity of private property on the ocean from hostile capture. (7 Moore; pp. 583-585).
7. It was established by practice and universal assent that a merchantman armed only for defense did not thereby lose her character as a merchantman and that when war existed the armed merchantmen, both of the belligerent and of the neutral, retained all the rights and privileges which belonged to the merchantman when entirely unarmed. * * There was never any doubt as to the broad rule that a merchantman armed for defense did not lose her character as a peaceful trader. * Senator Lodge Speech in the Senate, Feb. 18, '16.
8. Scott, Cases, pp. 788-786: Justice Gray quotes Pratt, Contraband of war, Chapters XXII, XXV, and XL and cites the cases of Dutch and Spanish Ships and The Happy Couple.
9. Volume 1; pp. 95-96; He mentions the cases of Brown v. United States, Dos Hermanos, and Amiable Isabella.
States and the doctrine of the law is considered to be that private citizens cannot acquire a title of hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own defense.

In 1877 Secretary of State, Fish passed upon the question of a trading vessel armed for protection and defense, and in 1884, Secretary Gresham declared there were no laws violated by ships carrying arms for self-defense. The United States Naval War Code of 1900 recognizes the right of merchant ships to resist capture.

Nor is the practice peculiar to the United States alone. It is recognized by the international law writers of Great Britain, France, Italy, Belgium, Sweden and by a few German writers. In addition to these writers we find that the Italian 'Codice per la Marine Mercantile,' of 1877 reads "Merchantmen, on being attacked by other vessels, including war vessels, may defend themselves against and even seize them." Likewise, the Russian Prize Regulations of 1896, and the Japanese Naval War Code of 1904 recognize the right of merchant vessels to resist attack.

10. 2 Moore, Digest; p. 1070; This contains the articles of the Revised Statutes pertaining to the arming of merchantmen.
11. Article 10-Paragraph 3: The personnel of merchant vessels of an enemy who in self-defense and in protection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war.
15. Article 15; - The right to stop, examine, and seize hostile or suspected vessels and cargoes belongs to the ships of the Imperial Navy. Vessels of the Mercantile Navy have a right to do so only when they are attacked by hostile or suspected vessels.
That the right of a merchant vessel to carry arms to resist attack is pretty generally accepted by all the countries is attested by the fact that the best known authorities at the meeting of the Institute of International Law, held at Oxford in 1913 adopted the following rule, which appears as Article 12 of the Manuel des lois de la guerre maritime: "Outside the conditions determined in articles 5 and following the public and private vessels with their personnel may not make hostile attacks against an enemy. It is, however, permitted that they may employ force for defense against the attacks of an enemy's vessel." The discussion at the institute showed there was some opposition to the second statement. Professors Triepel and Niemeyer argued against its being inserted in the rule.\textsuperscript{15} The article was ultimately voted, however, with a large majority.\textsuperscript{16}

In view of these facts, the contention that the right of a merchant vessel to carry arms is obsolete, is unsound.\textsuperscript{17} The doctrine is recognized today though the reasons for its existence may be different from what they were originally.

Whatever the reasons may be, the rule is well established and

15. Professor Triepel desired to obtain its suppression, on the ground that an enemy merchant ship had no right to resist capture (as distinct from an attack), while Professor Niemeyer supported its suppression on the ground that to insert such a provision was equivalent to conceding that a contrary opinion was impossible.


17. The right of a belligerent to visit and search neutral vessels is wholly different from a belligerent's rights as to enemy ships. The belligerent is permitted to visit and search a neutral vessel so that he may see whether the vessel is in fact, neutral, and whether there is on board contraband goods subject to seizure. In the case of enemy merchantmen the right to capture only exists. Such vessels may flee, or defend themselves to the extent of their powers. - Congressional Record; March 8, 1916;pp. 4329-30.
should not be changed by the act of one belligerent during any war unless, because of certain radical differences arising, it should have become notoriously inequitable. The Germans have declared such to be the case in the present war. It will, therefore, be necessary to consider the special circumstances which are cited by the Germans and justifiable reasons for departing from the established practice of nations.

The distinguishing feature between an armed merchantman and a converted merchantman is that the former carries armament for defense only; and this is determined by fact. There are no limitations as to the amount of armament, or the character of the crew. If it be established that the vessel is engaged in commercial pursuits - and does, in fact, commit no offensive acts against the enemy it is a merchant vessel, and entitled to all the rights and immunities of merchant vessels in neutral ports.

The German Government maintains that submarines have, by their peculiar nature, put the armed merchantmen on the offensive. The submarine dares not approach near enough to warn the merchantman of its intention without being at the mercy of the latter. The German Foreign office points out that the submarine is unable to withstand the fire of even small guns, such as are mounted on merchantmen. Furthermore, in most cases, it asserts that the merchantmen attack before being fired upon, and in so doing, they act upon the offensive, which virtually constitutes them warships, or even pirates.

16. In the case of the 'Charming Betsy' (2 Cranch, 120-121), Chief Justice Marshall said: The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps it would be difficult precisely to make the limits, the passing of which would bring a captured vessel within the description of the acts of Congress on this subject. See also: Snow, International Law, 1888; p. 83.
Before proceeding further, we may review the action of the United States in respect to armed merchantmen in the present war. On September 19, 1914 the State Department issued a circular pertaining to the status of armed merchant vessels, a copy of which was sent to each of the belligerent nations. The main points are as follows:

A. A Merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war.

B. The presence of an armament and ammunition on board a merchant vessel creates a presumption that the armament is for offensive purposes, but the owners or agents may overcome this presumption by evidence showing that the vessel carries armament solely for defense.

C. Evidence necessary to establish the fact that the armament will not be used offensively, must be presented in each case independently at an official investigation. Indications to this effect are:

1. That the caliber of the guns carried does not exceed six inches.
2. That the guns and small arms carried are few in number.
3. That no guns are mounted on the forward part of the vessel.
4. That the quantity of ammunition carried is small.
5. That the vessel is manned by its usual crew, and the officers are the same as those on board before war was declared.
6. That the vessel carries passengers who are as a whole unfitted to enter the military or naval service of the belligerent whose flag the vessel flies, or any of its allies, and particularly if

the passenger list includes women and children.

(10) That the speed of the vessel is slow.

E. The conversion of a merchant vessel into a ship of war is a question of fact which is to be established by direct or circumstantial evidence of intention to use the vessel as a ship of war.

This is a brief summary of the long existent American practice. Prior to these orders, the United States had informally requested all the belligerent powers not to arm merchant ships destined for American ports. On the 4th September, 1914 Sir Cecil Spring-Rice issued the following communication to the Secretary of State regarding two British armed merchantmen in particular, and armed merchantmen in general:

"I have the honour to inform you that at the request of your Department I drew the attention of my Government to the fact that two British merchant vessels, the Adriatic and the Merrion, were at present in United States ports, and that they were carrying guns - the former four and the latter six."

"I have now received a reply from Sir Edward Grey, in which he informs me that His Majesty's Government hold the view that it is not in accordance with neutrality and international law to detain in neutral ports merchant vessels armed with purely defensive armaments. But in view of the fact that the United States Government is detaining armed merchant vessels for offensive warfare, and in order to avoid the difficult questions of the character and degree of armament which would justify detention, His Majesty's Government have made agreements for landing the guns of the Merrion, the Adriatic having already sailed before the orders reached her. In the case of the latter ship, the passenger list and cargo proved

20. Ibid; p. 231.
that she was proceeding to sea on ordinary commercial business.

These and other papers relative to the case will be duly communi-
cated to your Department.

"This action has been taken without prejudice to the general
principle which His Majesty's Government have enunciated and to
which they adhere."

For a number of weeks there were no other British armed-mer-
chantmen in American ports; however, in addition to the instruc-
tions already sent out, Secretary Lansing in his reply to the Ger-
man protest\(^21\) said very plainly that the United States Government
recognized the right of belligerent merchant vessels to carry arms
in self-defense. Accordingly, when Great Britain, later consider-
ed it necessary to arm her merchantmen carrying American commerce,
the vessels were allowed the customary rights and privileges of
merchant ships in neutral ports, upon assurance from the British
Foreign Office that the armament was to be used for defense only.\(^22\)

Likewise the armed Italian merchant vessels Guiseppe Verdi, San

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\(^{21}\) October 15, 1914:—"The practice of a majority of nations and
the concensus of opinion by the leading authorities on inter-
national law, including many German writers support the pro-
position that merchant vessels may arm for defense without los-
ing their private character, and that they may employ such
armament against hostile attack without contravening the prin-
ciples of international law."

\(^{22}\) Cecil Spring-Rice to the Secretary of State; Aug. 25, 1914;
From Supplement, American Journal of International Law; July
1915; p. 230: "** I have the honor, in view of the fact that
a number of British armed merchantmen will now be visiting
United States ports, to reiterate that the arming of British
merchantmen is solely a precautionary measure adopted for the
purpose of defence against attack from hostile craft.*** I
have at the same time been instructed by His Majesty's Princi-
pal Secretary for Foreign Affairs to give the United States
Government the fullest assurances that British merchant ves-
sels will never be used for purposes of attack, that they are
merely peaceful traders armed only for defence, that they will
never fire unless first fired upon, and that they will never
under any circumstances attack any vessel."
Guglielmo, Caserta, Stampalia, Verona, and others upon assurance from the Italian Ambassador in each case that the guns would be used only for self-defense, were allowed to land, discharge their cargoes, reload, and depart. There was a great deal of newspaper comment regarding these ships at the time, largely due to the fact that they came within a few days of each other, and also because the British and French vessels arriving at American ports had been for most part unarmed, in accordance with the wishes of the State Department.23

In all cases of armed merchant vessels arriving at American ports, the rules contained in the circular of September 19, 1914 were applied. On the fifteenth of October 1915, the State Department received a communication from the German Foreign Office relating to this circular, which said in part:—This ruling wholly fails to comply with the principles of neutrality. * * * It is a question whether or not ships armed to make resistance against German cruisers should be admitted into ports of a neutral country at all. "In any event," the note continues, "Such ships should not receive any better treatment in neutral ports than a regular warship and should be subject at least to the rules issued by neutral nations restricting the stay of a warship." It went on to say, that the distinction between defensive and offensive armament was irrelevant; The de-

23. Note to Berlin; Nov. 7, 1914; Ibid. p. 239; This Government is not unmindful of the fact that the circumstances of a particular case may be such as to cause embarrassment and possible controversy as to the character of an armed private vessel visiting its ports. Recognizing therefore, the desirability of avoiding a ground of complaint, this Government, as soon as a case arose, while frankly admitting the right of a merchant vessel to carry a defensive armament expressed its disapprobation of a practice which compelled it to pass upon a vessel's intended use, which opinion, if proved subsequently to be erroneous might constitute a ground for a charge of unneutral conduct.
tination of a ship for use of any kind in war is conclusive, and restrictions as to the extent of armament afford no guarantee that ships armed for defensive purposes only will not be used for offensive purposes under certain circumstances.

It is submitted that this view may be true, but to no greater extent than in previous wars. If the neutral country has the solemn assurance that a belligerent will allow the armed merchant vessels flying its flag to use their guns for defense only, the neutral can do nothing further in the cause of neutrality unless evidence appears that the promise was made in bad faith.

There were some complaints made by Germany that armed merchantmen fired upon German submarines at sight - before any attempt was made by the submarine to attack the merchant vessels. This, the Germans argued, was taking the offensive, whereas the Allies maintained that since the purpose of the submarine in the vicinity of an enemy merchantman was to destroy, and since the Germans had allowed them to destroy, in many cases, without notice, it is purely a case of self-defense when the merchant vessel fires upon the submarine before the latter has come near enough for its own projectiles to take effect on the merchant ship.

Aside from this general disagreement the German Government complained that British merchantmen carried secret instructions

24. Press Dispatch of March 6: "It is stated semi-officially in German newspapers that British instructions have been added to the published documents, photographic reproduction of these instructions have been made. ** The character of these instructions is shown clearly by the emphatic request to keep them secret, as well as by the fact that regular gunners are employed. Numerous unprovoked attacks on German submarines prove that these instructions have been understood perfectly by British merchantmen. "By them it is rendered clear that the armed British Merchant ships have official permission treacherously to attack German submarines everywhere when they come near them: that is, to wage war against them unscrupulously."
to attack submarines under any and all circumstances. While there has been much newspaper comment in regard to this charge, the fact has not, as yet, been established. On October 21, 1915, the British Government made public circulars of the Admiralty's Orders to Merchantmen. These were issued early in the war to the merchant marine and were revised from time to time, though they had not been made public to the other nations. They are in the main as follows:

"Armament is supplied solely for the purpose of resisting attack by an armed enemy vessel and must not be used for any other purpose whatever.

"The armament is supplied for the purpose of defense only. The object of the master should be to avoid action whenever possible.

"Experience has shown that hostile submarines and air craft have frequently attacked merchant vessels without warning. It is important, therefore, that craft of this description should not be allowed to approach to short range, at which a torpedo or bomb launched without notice would almost certainly be effective. British and allied submarines and air craft have orders not to approach merchant vessels. Consequently it may be presumed that any submarine or aircraft which deliberately approaches or pursues a merchant vessel does so with hostile intention. In such cases fire may be opened in self-defense in order to prevent the hostile craft from closing to a range at which resistance to a sudden attack with bomb or torpedo would be impossible."

Apart from the so called secret instructions, the submarine brought up a new question with respect to armed merchant vessels. By self-defense it had usually been understood that a ship should not fire unless ordered to stop or was itself fired upon. Obvious-
ly if a merchantman should wait until a submarine had approached near enough and discharged a torpedo it would be too late to offer resistance. It was in view of this and other difficulties that Secretary Lansing sought to avoid difficulty by seeking to have the belligerents adopt a compromise agreement - the main points being the guarantee of humane treatment of belligerent merchantmen by Germany and the giving up of armaments on merchant vessels by the Allies.

The conditions of Secretary Lansing's proposal were:

1. A noncombatant has the right to traverse the high seas in a merchant ship entitled to fly a belligerent flag, and rely upon the rules if international law and the principles of humanity if the vessel is approached by a belligerent war vessel.
2. A merchant vessel of any nationality should not be subject to attack until the belligerent warship has warned her to stop.
3. Any belligerent-owned merchant vessel should promptly obey any order from a belligerent warship to stop.
4. No such merchant vessel should be fired upon unless she tries to flee or to resist by force and even in such cases any attack upon her by the warship must stop as soon as the flight or resistance ceases.
5. Only in case it should be impossible for military reasons for the warship to supply a prize crew or to convoy the merchant ship into port will she be justified in sinking such merchantman, and in that case passengers and crew must be removed to a place of safety.

26. The Secretary explained that the proposal was not submitted for the purpose of changing recognized, or even challenged principles of international law, but that the subject had
On March 1, 1916 the German Government practically agreed to the terms of the proposal, subject to like agreement thereto by her enemies. The German Secretary of State for Foreign Affairs on that day addressed a communication to the American Ambassador in which it was said, "It is in accordance with Germany's wishes also to have maritime war conducted according to rules, which without discriminatingly restricting one or the other of the belligerent powers in the use of their means of warfare are equally considerate of the interests of neutrals and the dictates of humanity. Proceeding from this view, the German Government have carefully examined the suggestion of the American Government and believe that they can actually see in it a suitable basis for the practical solution of the questions which have arisen."

By the twenty-fourth of the same month all the Entente Powers through their embassies had handed Secretary Lansing formal responses uniformly rejecting this proposal, as they had indicated their Governments would do when the tentative plan was first issued. They gave as their reasons that the 'compromise' was virtually a case of giving up a well founded right, namely to arm merchantmen in self-defense, in return for nothing more than the assurance that their enemy would abide by the long established duties imposed by international law in maritime warfare.

It was understood that the proposal was not intended to alter established laws nor to establish doubtful rules of conduct.

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been taken up wholly on humanitarian grounds, and because the Wilson Administration was anxious that something should be done to avoid embarrassing controversies which seemed inevitable unless some such arrangement could be made.

27. From Extension of Remarks by Representative Decker, March 8, 1916—Congressional Record; p. 4335: A portion of the Secretary's note: "In proposing this formula as a basis of condition
It was made on the grounds of humanity and with a desire on the part of the United States to bring the belligerents to an equitable agreement in regard to a practice, which by a series of retaliatory measures had endangered noncombatant, and even neutral, lives on the high seas. Nevertheless, in the course of the argument, the Secretary used some unhappy expressions, which have since been bitterly attacked in Congress and in the press. Because of its admirable summary of the effect of changed conditions on existing laws, we may quote his remarks:

"Prior to the year 1915 belligerent operations against enemy commerce of the high seas had been conducted with cruisers carrying heavy armaments. In these conditions international law appeared to permit a merchant vessel to carry armament for defensive purposes without losing its character as a private merchant vessel. This right seems to have been predicated on the superior defensive strength of ships of war, and the limitation of armament to have been dependent on the fact that it could not be used effectively in offense against enemy naval vessels, while it could defend the merchantmen against the generally inferior armament of piratical ships and privateers. The use of the submarine however, has changed these relations. Comparison of the defensive strength of a cruiser and a submarine shows that the latter, relying for protection on its power to submerge, is almost defenseless in point of construction. Even a merchant ship carrying a small calibre gun would be able to use it effectively for offense against the submarine.

All declarations by the belligerent Governments, I do so in the full conviction that each Government will consider primarily the humane purposes of saving the lives of innocent people rather than the insistence of doubtful legal rights which may be denied on account of new conditions."
"Moreover, pirates and sea rovers have been swept from the main channels of the sea and privateering has been abolished. Consequently the placing of guns on merchantmen at the present date of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. Any armament therefore, on a merchant vessel would seem to have the character of an offensive armament.

"It would therefore appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, removing crews and passengers to places of safety,*** and the merchant vessels of belligerent nationality should be prohibited from carrying any armament whatsoever."28

In conclusion the Secretary said, "I shall add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying an armament of any sort, in view of the character of the submarine warfare and the defensive weakness of the undersea craft, should be held to be an auxilliary cruiser and so treated by a neutral as well as by a belligerent Government, and my Government is seriously considering notifying its officials accordingly."

In regard to this last paragraph, Senator Sterling in a speech on February 18, 1916 said, "This paragraph from the memorandum suggests a dangerous and vicious principle. Without reference

28. Taken from the Congressional Record; March 8, 1916; pp. 4447 - 4448.
to any nation here involved the proposal therein contained would subordinate one of the contending powers to the interests of that nation whose strength on the high seas lay in the superiority of her submarine fleet. Under the operation of this principle the legitimate commerce of half a dozen other opposing nations as between themselves as well as their commerce with neutral nations carried in enemy merchantmen might if wholly defenseless be made the easy prey of that power which was superior in submarine strength and which chose to be remorseless in its use.29

Senator Lodge was opposed to it on the ground that it was inequitable and would amount in fact to changing during the progress of the war an existing practice of the United States, and what is pretty generally considered to be a law of nations. Such a procedure was strongly opposed by the United States Government during the munitions controversy. President Wilson, in a letter to Senator Stone, reiterate that it was not a case of changing a law, or even a custom, for, said he, "No nation, nor group of nations has the right while war is in progress to alter or disregard the principles which all nations have agreed upon in mitigation of the horrors and sufferings of war."

The Nation30 commenting editorially remarked, that to follow out the last paragraph of Secretary Lansing's memorandum would "reverse a ruling of the State Department deliberately made since the war broke out." Each time the matter has come up it has been decided in the same way. Furthermore, since the State Department was not satisfied with the British plea, in regard to

29. Congressional Record; p. 3182.
departure from the recognized rules of search and blockade, of
'changed conditions,' the Department should not be willing to
grant the assertion by Germany that the coming of the submarine
had nullified the old supreme commands of humanity at sea.

It would appear that rather than alter long standing rules of
international law and practice to accommodate a new instrument
of warfare - that the submarine itself should be compelled to
observe the old rules or withdraw from the scene of action.31
The weakness of the suggestion of the State Department lies in
this; that because the deadly submarine is not strong on defense,
you must therefore make the merchant ship absolutely helpless
against it.

In conclusion, it appears that, with the exception of the un-
fortunate paragraph above considered, the policy of the United
States Government has been consistent in the present war with
its practice in the past. We must not overlook the fact that
this paragraph was a part of a rejected proposal, and does not
in any way bind the Government now; the harm lies in the fact,
that it showed a near acquiescence of the Government in the Ger-
man submarine policy.

Upon the rejection of this proposal, the United States Govern-
ment had to rely solely upon international law, in dealing with
the question of armed merchantmen. Accordingly, Secretary Lan-
sing compiled a circular notice,32 designed to cover the new
situations arising in the present war. This circular is thorough-
ly in agreement with that of September 19, 1914, but it is more

31. See the Outlook - February 9, 1916.
32. This circular bears the date of March 25, 1916 although it
was not made public until April 27, 1916.
specific. After stating that it is necessary for a neutral Government to determine the status of an armed merchant vessel of belligerent nationality which enters its jurisdiction, in order that the Government may protect itself from responsibility for the destruction of life and property by permitting its ports to be used as bases of hostile operations by belligerent warships, the note says:

"A neutral Government has no opportunity to determine the purpose of an armament on a merchant vessel unless there is evidence in the ships papers or other proof as to its previous use, so that the Government is justified in substituting an arbitrary rule of presumption in arriving at the status of the merchant vessel. On the other hand, a belligerent warship can on the high seas test by actual experience the purpose of an armament on an enemy merchant vessel, and so determine by direct evidence the status of the vessel." ** In brief, a neutral Government may proceed upon the presumption that an armed merchant vessel of belligerent nationality is armed for aggression, while a belligerent should proceed on the presumption that the vessel is armed for protection. Both of these presumptions may be overcome by evidence - the first by secondary or collateral evidence, since the fact to be established is negative in character; the second by primary and direct evidence, since the fact to be established is positive in character."

It was also stated in the note of March 25, that vessels carrying merchandise but acting under orders from the government to take the aggressive would be considered as warships; likewise, ships engaged intermittently in commerce and under a commission
of its government possess a status tainted with a hostile purpose which it cannot throw aside; and these should be treated as war-ships.

The Government has endeavored and obtained assurances from the belligerent Governments that their armed merchant ships were armed for defensive purposes only and it has carefully investigated all charges of violations of the promises thus made. It has consistently abided by the practice of the past in regard to the treatment of armed merchant vessels, in neutral ports and is not guilty of breach of neutrality with respect to them. Whether, or not the existing practice is in accordance with present day ideals, and should be changed does not affect the application of them so long as they remain in force.
Chapter VII.

INTERNMENT OF BELLIGERENT WARSHIPS AND PRIZES IN AMERICAN PORTS.

During the present war as in the Russo-Japanese War a great many belligerent warships sought refuge in neutral waters, and many of these were eventually interned. There have also been some instances of Prize Ships being taken into neutral ports. In this chapter a study of the more important cases involving such internments in American waters will be made in the light of the law and practice of the United States in the past.

The general principle of internment of belligerent warships in neutral waters is analogous to that of internment of belligerent troops in neutral territory. There are, of course, some differences in the practices in the two cases which will be brought out later. We are first impressed by the lack of precedents in the practice of internment of warships. This practice came into existence for the first time, on a considerable scale during the Russo-Japanese War in 1904.2

The late adoption of this principle in maritime warfare is no doubt due to the increased feeling of responsibility on the part of neutral countries3 to aid neither side in the conflict; directly or indirectly. It was felt that to allow a warship to seek

1. Takahaashi, International Law as applied to the Russo-Japanese War; pp. 417–418. He presents a list of thirty Russian war vessels which were interned in neutral ports during the war.
safety in a neutral port from the attack of an enemy was in fact rendering effective aid. The attacking vessel might remain just off the port an indefinite time awaiting the enemy to leave port, but the vessel being under no obligation to leave would remain in safety until the way of escape seemed clear, at which time it would be free to sail out and engage in active hostilities.

It was the manifest inequality arising from such treatment of belligerent warships in neutral ports which caused the principle of internment to be invoked during the recent war between Russia and Japan. In this war much of the fighting took place on the sea. It very soon became evident to the neutrals controlling ports within easy reach of the theatre of operations that some entering them, otherwise they would be open to the charge of breach of neutrality for allowing their ports to become naval bases for one or the other of the belligerents. Thus the action of France, Great Britain, Germany, and the United States in causing certain unseaworthy Russian ships to intern within a reasonable time after arriving in their respective ports was sanctioned by the other countries of the world, and the principle, which had long existed in the theoretical sense, came to be recognized as an important feature of modern warfare.4

The fact that there is a difference between the treatment of warships and armies5 is due to the difference in the methods of carrying on hostilities on land and on sea. It is permissible for belligerent warships to run into neutral ports of their own accord, to avoid a storm or even to escape an enemy. While in

4. Naval War College - International Law Topics, 1905; p.162.
5. Oppenheim International Law II; p. 374.
the port she may make certain repairs needed to render her seaworthy, or she may take on coal, or even provisions for her crew, in sufficient quantities to enable her to make the nearest home port or a certain designated neutral port. Having accomplished her purpose she may put to sea and resume her belligerent activities. This, in contrast to the strict ruling that an army crossing a neutral boundary under stress of danger is required to be interned by the neutral government, whose territory it has invaded.

There are many and varied conditions which must be taken into consideration in either case. It must be borne in mind that while the general principles are universally recognized, the nations differ with regard to many of the details. It will be sufficient for our purpose to consider the American practice and also to study the compromised agreement reached at the Hague Conference in 1907 pertaining to internment of belligerent war vessels.

During the Russo-Japanese War one Russian cruiser was interned in San Francisco harbor and a number of others were similarly detained in the port of Manila until the close of the war. The Cruiser Lena, early in the war, sailed into San Francisco in an unseaworthy condition. Although the bad condition of the vessel was not due to any hostile action, nevertheless the port authorities, upon examination, felt that the extent of the repairs needed to make the ship ready for the sea would be sufficiently great to constitute a case of 'fitting out a war vessel in a neutral port.' The Secretary of War by authority of the President, therefore, ordered the ship to intern.

In all other cases, so far as the records show, the ships were allowed to repair such damages as were caused by the elements,
as distinct from those inflicted by the enemy. Thus, in the case of the Russian squadron under Admiral Enquist which sailed into Manila, the President directed that a strict enforcement of the twenty-four hour stay be applied in view of the fact that damages to the ships were due to the acts of the enemy in battle and not to the action of the elements or to accidents. It was maintained by the Government at Washington that to allow vessels injured in battle to refit in a neutral port would practically make the neutral port a naval base for the belligerent.

The plan of limiting the stay of a warship in a neutral harbor was first adopted by Great Britain in 1861 as a result of difficulties arising when a Confederate and a Federal cruiser were lying in a British port at the same time. Until then there had been no restriction as to the length of time a belligerent warship might remain in neutral ports. Indeed, France has not as yet seen fit to limit the stay of such vessels in ports under her jurisdiction. Commander Von Uslar of the German Navy thinks the United States exceeded its measure of duty in the case of the Russian squadron in Manila. He advocated a compromise agree-

6. Naval War College - International Law Topics and Discussions, 1905; p. 168. See Telegram of June 5, 1905 of the Secretary of War to the Governor of the Philippine Islands.
8. Naval War College-International Law Situations; 1905; p.189: He says, "The old rules of neutrality do not restrict the stay of the ships of belligerents in any respect more than in times of peace. They permit all articles of equipment to be supplied, and any repairs to be made that do not immediately contribute to enhance the fighting capabilities. The new principle advanced by England in 1861, was accepted first by the United States and later by many other countries, limits the duration of the stay to 24 hours, and permits sufficient coal to be taken on board to enable the vessel to reach the nearest port of her own country, or some nearer destination and repairs to restore sea worthiness." The German delegation upheld a similar proposition at the Hague Conference in 1907 (Hershey, Essentials of International Law; p. 470.
ment which would apply to the twenty-four hour ruling when the ports are near the sphere of operation of the hostile fleets, but would apply the French rules in case of a great distance. Such a rule might easily operate to the disadvantage of one nation. For example, had the rule been applied in the Russo-Japanese War by the United States the Lena would have been allowed to engage in hostilities again after having been protected for a number of months in a neutral port while undergoing repairs. With regard to the squadron in the Philippine Islands the question would arise whether the port of Manila was far enough distant to come under the French ruling. While the same treatment in all cases may occasionally be inequitable, it seems to be more desirable from the standpoint of the neutral than any compromise, or "sliding-scale" rule such as the German Admiral suggested.

The United States has therefore adopted the twenty-four hour limit allowing the captain reasonable time to make repairs on the ship, although not to repair or render more effective its armament. The American authorities at the port recommend the amount of time the ship be allowed, after having made a thorough examination of the condition of the ship. Upon the expiration of this time, the ship is given the customary twenty-four hours

10.Convention XIII, Article 12 of Hague Convention:— In default of special provisions to the contrary in the legislation of a neutral power, belligerent warships are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention. The principle underlying the rules is that a belligerent armed vessel should not be permitted to remain in a neutral port longer than is absolutely necessary in order to procure innocent supplies or to effect repairs requisite for insuring seaworthiness. See Hershey, Essentials of International Public Law, p. 470.
in which to leave. Failing to do this it is interned.

In the present war the first warship to intern was the German cruiser Geir which entered Honolulu on October 15, 1914. The ship was in very bad condition and the commander asked for a week in which to repair. On October 20 the American Naval Constructor upon examination recommended that the time be extended eight more days to place the boilers in seaworthy condition. On the twenty-seventh the German Consul at Honolulu requested eight or ten days more in which to make additional repairs, which further inspection had found to be necessary. The collector of customs immediately cabled the Treasury Department for instructions. The Counselor of the State Department instructed the authorities to notify the Captain of the Geir that three weeks from the time of entering the port would be allowed the Geir for repairs. If she was yet unfit to leave American waters by November 6, the United States would feel obliged to insist that she be interned until the expiration of the war. At the expiration of the given time the Captain, feeling that his ship was still unseaworthy, interned November 8, 1914.

Vigorous protests were made by Germany with respect to two of the officers, together with their orderlies, who had been granted sick leave and had left Honolulu two days before the Counselor of the State Department announced the action which the

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3. Diplomatic Correspondence-European War, No. 2; pp. 49-50.
10. European War, No. 2, Op. Cit. p. 50: In a note to the German Ambassador of Oct. 30, 1914 Counselor Lansing explained that "the circumstances in this case point to the gunboat Geir as a ship that at the outbreak of war finds itself in a more or less broken-down condition and on the point of undergoing general repairs, but still able to keep the sea. In this situation, the Government believes that it does not comport with a strict neutrality, or a fair interpretation of the Hague Convention, to allow such a vessel to complete unlimited repairs
United States would take in the matter. These men had embarked to the United States, where they were detained as a part of the crew of the interned cruiser. The German Ambassador argued that since these officers and men had left Honolulu before the official notification of internment that they did not in fact belong to the company of a ship on the point of being interned; and should therefore be allowed to travel freely in the United States. Mr. Lansing denied them this privilege. He pointed out that these officers and men were not only 'duly incorporated in the armed forces of a belligerent power' but were also in a sense a 'part of an organized body of such forces entering a neutral port.' The fact that they were granted a sick leave by the Captain could not, he said, be properly urged as separating them from the German in relation to its subsequent treatment. "They arrived within United States' jurisdiction as a part of the organized armed force of the German Empire, and this fact," said Mr. Lansing, "in the opinion of this Government, appears to be the crux of the whole matter." 12

In general the crew of an interned warship 13 is detained just as the members of an interned army. This has been the practice of the United States, and the German Ambassador in his note of November 11, 1914, 14 states the same view. There can, in fact, in a United States port.

11.Ibid; p. 58.
12. European War. No. 2; 53: - Mr. Lansing pointed out that were a distinction made on the grounds set forth in the German note a ship in danger from her enemy might enter a neutral port, and before the twenty-four hour period had elapsed, and before there was any danger of internment, her officers and crew might leave her and afterwards claim the right to return to their country as individuals. This course, he said, would manifestly not comport with the principles of neutrality as they are understood by the Department.
14. European War No. 2; - p. 58.
be no other view of the situation. Of course, by permission of
the enemy, either as an act of comity or as an exchange agreement,
the neutral may permit interned crews to return to their home
country. But it is a fundamental rule that the Neutral may
not, of its own accord, permit interned crews or portions of them
to leave its territory.

On the day following the arrival of the Geier, the Locksun, a
German steamer belonging to the Norddeutscher-Lloyd Co. and carry-
ing a cargo of coal put into Honolulu harbor. Upon protests by
the British and Japanese Ambassadors under date of October 28,
an investigation was made which disclosed the fact that the
Locksun had constituted herself a tender to the Geier. On Novem-
ber 7, therefore, the State Department notified the German
Ambassador that arrangements had been made to intern the Locksun
unless she left the port immediately. The ship was accordingly
interned as an auxiliary war vessel.

The German Ambassador entered a protest against this action;
he did not deny that the Locksun had furnished coal to the Geier,
but he said the United States' Neutrality laws allowed this under
the circumstances of the present case, and that the vessel should
therefore retain its innocent character. He said, "The Locksun
cannot be considered as a man-of-war, not even an auxiliary ship,
but is a simple merchant ship. As to the alleged coaling of His
Majesty's Ship Geier from the Locksun the neutrality regulations
of the United States only provide that a vessel can be prevented

15. In a few cases during the Russo-Japanese War certain officers
of the Renault interned Russian vessels were given permission
by the Japanese Government to return home (See Moore, Digest,
16. European War, No. 2; p. 51.
from taking coal to a warship for a period of three months after having left an American port. As the Locksun left the last American port (Manila) on August 16 she ought to be free on Nov. 16.

Mr. Lansing replied that the question involved did not relate to the amount of coal which either the Locksun or the Geier had taken on in three months but rather related to the association and cooperation of the two vessels in belligerent operations. He argued that in so far as the Locksun had taken the part of a supply ship for the Geier it was 'stamped with the belligerent character of that vessel, and has really become a part of her equipment.'

The German Ambassador likened the case of the Locksun to that of the tug F.B. Dalzell, which he had reported to the State Department on Oct. 31 as carrying victuals and information to the British warship Essex from the port of New York. There were two great differences in the cases however as Secretary Bryan pointed out in his reply of December 11, 1914. In the first place, a thorough investigation conducted by the American authorities failed to reveal any evidence that the F.B. Dalzell had carried the victuals and information, as alleged by the German Ambassador, and secondly the latter being an American vessel could not be subject to internment as that term is understood in international law.

17. European War. No. 2; p. 52. See also Note to German Ambassador (p. 54) in which Mr. Bryan calls attention to a ruling made by the Alabama Claims Commission, "So far as relates to the Tuscaloosa (tender to the Alabama), the Clarence, the Tacony, and the Archer (tender to the Florida) the Tribunal is unanimously of the opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals and be submitted to the same decisions which apply to them respectively.
18. Ibid, p. 53; Note to the Secretary of State, November 21.
We may next consider the case of the Cormoran. There appears to have been no questions arising in connection with this vessel as it asked immediately upon arrival for permission to intern. The Cormoran is a German converted cruiser which had on board 22 officers and 355 men when it arrived, at Guam, Dec. 14, 1914. Permission having been granted by the United States Government the ship interned the following day.\(^{20}\)

On March 10, 1915, the German converted cruiser *Prinz Eitel Friedrich* entered the port of Newport News, Virginia for provisions and repairs. The United States Naval authorities made examination on the eighteenth and reported that it would require 14 working days to repair the ship. Thereupon the State Department notified the German Government, and also took steps to notify the Captain that the *Prinz Eitel Friedrich* would be allowed until midnight of the close of the sixth day of April to complete her repairs. If she did not leave the territorial waters of the United States within the following twenty-four hours, she would be under the necessity of accepting internment under American jurisdiction during the continuance of the war.\(^{21}\) The ship was accordingly interned April 7, 1915.

On April 11, 1915, the German auxiliary cruiser *Kronprinz Wilhelm* arrived at Newport News. The following day, Ambassador Bernstorff asked the State Department to allow the ship to land 61 persons belonging to the crews of enemy vessels sunk by her. He also asked for permission to make repairs and to take on supplies of coal and provisions. In this case Acting Secretary Lan-

\(^{20}\) American Journal of International Law; Vol. IX, April, 1915, p. 486.

\(^{21}\) European War No. 2; Op. Cit. p. 125. See also Law Notes, May 1915; p. 38.
Bing reported that the United States Naval authorities estimated it would require six working days to put the ship in seaworthy condition. The Government would therefore allow the Kronprinz Wilhelm until midnight of April 29 to repair, but she must leave the territorial waters of the United States within twenty-four hours thereafter or intern. It was specifically stated that the proposed repairs allowed the ship in Newport News would not cover the damages to the port side of the cruiser incident to the service in which the vessel had been engaged.

In the case of these two last mentioned ships the officers were given permission by the port authorities to go ashore, under certain specified restrictions, and likewise the privates were allowed to land when accompanied by a guard furnished either from Fort Monroe or from the Navy.

Some weeks after the internment it appears that four officers from the Kronprinz Wilhelm and two from the Prinz Eitel Friedrich escaped from the port while on a leave of absence from the ships. All possible efforts were made by the United States authorities to recover these men but without success, so far as reported.

This incident brings up the interesting question as to what extent the United States is responsible for the keeping of the crews of war vessels interned in her ports. Such interned crews are not prisoners of war. They voluntarily choose to remain in the territory or jurisdiction of the neutral. The neutral is under obliga-

22. April 21, 1915. See European War. no. 2; p. 189.
23. Taken from the press reports of Oct. 14, 1915. It was also reported on June 11 that certain members of the Prinz Eitel Friedrich crew escaped during her stay in the harbor before she was interned, despite the fact Collector Hamilton had Captain Thierichens' word that he would allow none of his officers or men to leave the ship without permission from the United States authorities.
tion to the other belligerent to exercise due care that the men remain. The assumption is that the interned men sought the asylum of the neutral to escape the results of a conflict with the enemy. Once they have crossed the boundary they are safe from the attack of the belligerent. Since the belligerent may not pursue his enemy across the border, it is manifest that the neutral should exercise its authority to restrain the forces which sought their safety in the neutral territory from recrossing and attacking the enemy at a more favorable time.

By virtue of the fact that officers are considered to be responsible agents of their respective Governments, it has become quite common, if not customary, for the neutral to grant interned officers certain privileges and liberties. They are frequently allowed to travel about freely upon giving their word that they will not leave the country. Since this practice is so common, it may be doubted whether a belligerent would instigate proceedings for breach of neutrality against a neutral in such a case as the present one. It is expected the neutral will take due diligence to prevent interned men from escaping, but as indicated above, by the general practice of nations, the solemn promise of the officer is considered to be 'due diligence.'

While there is universal agreement as to the right of a belligerent to intern warships in neutral ports, the right of a belligerent to bring prize ships into neutral ports for safe keeping is not unanimously conceded. The hospitality once accorded to prize

24. Oftentimes interned officers and even private sailors are permitted by the enemy to return to their home country upon giving their work that they will not participate in the continuation of the struggle. There were examples of this during the Russo-Japanese War.
ships has gradually lessened. Professor Wilson\textsuperscript{25} remarks that formerly prizes were freely admitted to neutral ports, but in recent years neutrality proclamations have often forbidden the privilege. Mr. James Brown Scott after pointing out the objections of neutrals to their ports being used as depositories for the spoils of war, by citing the actions of the European nations during the American Civil War and the Crimean War comes to the conclusion that the attitude of neutral nations is against the admission of prizes, except for humanitarian reasons.\textsuperscript{26}

Professor Westlake\textsuperscript{27} has left a valuable discussion as to why a prize ship should be treated differently in a neutral port than a ship which originally belonged to the captor. He says that a prize sailing under the war flag of her captor stands in principle, for the purpose of her reception into a neutral port, on the same footing as if she had originally belonged to her captors. But there is always the danger of a conflict on board her between her own crew and the prize crew, and, if she is ac-

\textsuperscript{25} Naval War College, 1905; pp. 666-69: In 1898 and also in 1904 Great Britain denied all belligerent war vessels the privilege of taking prizes into ports of the British Dominions. Likewise, the French Government in these two wars issued decrees that no prize vessels would be allowed to enter ports under its sovereignty except in the case of forced delay or justifiable necessity. In 1904, Denmark notified the belligerents that prizes must not be brought into a Danish harbor or roadstead except in evident case of stress, nor must prizes be condemned or sold therein."

\textsuperscript{26} American Journal of International Law, January 1916; pp. 104-112. During the Crimean War most of the neutral States except Austria forbade prizes coming into their ports except under stress, and some forbade them under any circumstances. For example Hamburg, Lubeck, Bremen, Oldenburg, Sweden, Denmark, Belgium, Tuscany, The Two Sicilies, Hanover, and Mecklenburg. During the Civil War, Great Britain, France, Belgium, Netherlands, Spain, and Portugal forbade prizes coming into port except in case of force majeure.

\textsuperscript{27} International Law; Vol. II; pp. 213-215.
companied by a ship of war, of a conflict between the two ships; and this furnishes a sufficient reason for a special objection being taken by neutrals to the reception of prizes in their ports. Indeed, says Professor Westlake, even if the captors are so superior that no such danger practically exists, their retention of the prize is a continuous exercise of force over the captured crew; and no exercise of force can in theory be permitted in neutral waters.

There is no question but that the belligerent may be strengthened by the use of neutral ports in which to deposit his prizes. He not only places some incumbrances upon the neutral, to his own relief, but he also recovers his prize crew with a minimum loss of time: Notwithstanding the fact that this is a means of rendering assistance, there is no rule of international law which forbids it. The odium of assisting in the war is overcome by impartial application on the part of neutrals, that is, the neutral must admit the prizes of all the nations in the war, if it admits one. Hall is of the opinion that a neutral may permit or forbid the entry of prizes as it thinks best. He says, however until express prohibition is made by the neutral the belligerent is held to have the privilege not only of placing his prizes within the security of a neutral harbor, but of keeping them there while the suit for their condemnation is being prosecuted in the appropriate court. Like most of the writers of the time Hall is aware that the usual practice in recent times is for neutral states to restrain belligerents from bringing prizes into their

harbors, except in cases of danger or want of supplies.

Judging the attitude of the United States Government in the light of the foregoing principle, we must conclude that this Government has usually taken the view that belligerents have the right to bring their prizes into neutral ports, for the neutrality proclamations of the United States have not denied the privilege of doing so. Phillimore, in considering the action of the courts with regard to the matter of allowing prizes to be brought into neutral ports says, "An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793-1815) leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port is irregular, but clearly valid. This is also the law of France." Even at this early time, Phillimore seems to have looked upon a treaty made before the outbreak of war as needed to make the reception of prizes a strictly legitimate act.

We have the position of the United States some years later (1843) summed up by Mr. Wheaton, then American Minister to Prussia. In communication with the Secretary of State, Mr. Wheaton wrote, concerning the Bergen Prizes: "If then, there was no express prohibition in this case, and if there was no treaty existing between Denmark and Great Britain by which the former was bound to refuse to the enemies of the latter these privileges, then the American cruisers had an unquestionable right to send their prizes into Danish ports. When once arrived there, the

31. Ibid., Section 139. See also Hall, Op. Cit., pp. 614-15; Bluntschli, Volkerrecht, (Sections 777 and 857) agrees that this is the existing law but that it is in the course of being changed.
neutral Government of Denmark was bound to respect the military right of the possession, lawfully acquired in war by the captors on the high seas and continued in the neutral ports into which the prize was brought. In 1855 Attorney General Cushing expressed the opinion that the right of asylum in neutral waters for prizes is presumed where it has not been previously denied.

We will next consider the Hague Convention pertaining to prizes in neutral ports. In Convention Thirteen which deals with the rights and duties of neutral powers in maritime warfare, there are three articles dealing with the disposition of prizes in neutral ports. Articles XXI and XXII consider the rights of prizes in neutral ports to seek shelter from storms, to take on supplies and provisions; they need not therefore be considered here. Article XXIII, which deals with prizes in neutral ports awaiting the decision of the prize court, reads as follows: A neutral power may allow prizes to enter its ports and roadsteads whether under convoy or not, when they are brought there to be sequestrated pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go aboard the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

The Report of the Conference points out that neutral States are left free to admit prizes or not. Article XXIII only says that their neutrality is not compromised if they do admit them and keep them; they can make such arrangements as they think fit.

32. Moore, Digest of International Law, VII; p. 982.
33. Ibid; p. 985.
and remove them to the port most convenient to themselves.\footnote{34}

This Article is not legally in force because both Great Britain and Japan reserved Article XXIII in signing the Convention. Likewise, it did not meet with the approval of the United States; the Senate in ratifying the Convention reserved and excluded Article XXIII.\footnote{35}

Regardless of the legality of this article it may be said to represent the majority opinion of nations, and whether ratified or not, a practical adherence of it would not therefore be condemned in the council of Nations.

The first prize ship in the present war to be brought into an American port was the \textit{Farn}. This was a British steamer seized on her way from Cardiff to Montevideo by the German Cruiser \textit{Karlsruhe}, on October 5, 1914. The circumstances of the \textit{Farn} are rather unusual. It was laden with coal at the time of capture, and it appears that a German prize crew was put on board, and the ship was used as a tender to German warships until January 12, 1915, at which time she was sent into the port of San Jaun, Porto Rico. The ship was interned, and also the prize crew, but not as a prize. The United States seems to have taken the view that capture and continued possession had made the ship in fact German owned, and that use by its new owners had made it a fleet auxiliary. The \textit{Farn} was therefore interned as an auxiliary war vessel.\footnote{36}

\footnote{34. Higgins, The Hague Peace Conference; p. 476.}
\footnote{35. Scott, Texts of the Hague Peace Conferences; p. 331.}
\footnote{36. European War No; 2; Op.Cit.p.140: An enemy vessel which has been captured by a belligerent cruiser becomes as between two Governments the property of the captor without the intervention of a prize court. If, said Mr.Lansing, in his note to the British Ambassador, no prize court is available this Gov-}
In the more recent case of the Steamship Appam we have an example of a prize being brought into an American port awaiting adjudication by the Prize Court. The Appam was captured off the Canary Islands by the German Converted Cruiser Moewe and sent into Hampton Roads, February 1, 1916 under charge of a German prize crew. At first there was some doubt as to the Government's attitude, regarding the Appam's technical status, but it was decided that the ship should be treated as a prize of war.37

The British Government, true to its traditional belief and practice that neutrals should not grant the right of asylum to prizes of war,38 set up the claim that the Appam should be released to her British owners. Much might be said, both in justification of and against the action of the United States in this case. As has been pointed out the United States has never denied the right of belligerents to bring prizes into her ports, at the same time there are no records to show that prizes have been interned in American ports before the present war. The fact that they have not been brought into American ports may be largely due to the geographical situation of this country with respect to the theatre of operations in the great maritime wars of the past.

37. Review of Reviews; March 1916, p. 375.
38. See Dr. Lushington's decision in the case of the Polka (1854), in Roscoe's Prize Cases, Vol. II; pp. 301-302.
It was announced in the press\(^9\) that the final decision of the United States Government with regard to the Appam was determined by the old Treaties of 1799 and 1828 with Prussia. Mr. James Brown Scott,\(^4\) relies almost exclusively upon the Hague Convention, mentioned above in justifying the action of the United States. He says, "In as much, as neutrals are admitted to have the right to exclude prizes, or to admit them on conditions it is evident that any neutral can enforce articles 21, 22, or 23 of Hague Convention Thirteen if it should so desire, irrespective of the question whether the Convention is or is not legally binding."

The reason for this proposition being considered at the Hague was, as Mr. Ranauilt said, 'to render rarer and to prevent, the destruction of prizes.' By allowing the belligerents to bring prizes into her ports, the United States is, at least encouraging to some extent the practice of preserving ships from destruction. The question which confronts the belligerent is not whether or not to capture the enemy's vessels, but whether or not to destroy them. The reason why the right of asylum in neutral ports for prizes is not a part of the code

\(^{39}\)The Outlook, February 16, 1916; p. 350. Without having access to the official correspondence, this statement may be open to doubt. The treaties of 1799 and 1828 made mention of the receiving of prizes of one by the other of the contracting parties in case the one should be engaged in hostilities. But these treaties were to be in force only a limited time, not to exceed thirteen years. Furthermore, it was agreed in Article XIX of the treaty of 1799 that "conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, etc., they shall be obliged to depart as soon as possible." If these two treaties are applicable it comes from an interpretation which is not evident upon reading. See Malloy Treaties and Conventions, etc. Vol. II, 1776-1909; pp.1492-1493.

\(^{40}\) American Journal of International Law; January 1916; p. 111.
of international law may be attributed to the selfish interests of a few of the powerful maritime States, which have ports of their own conveniently situated in the various parts of the world. Thus, it appears that in case of the Appam the United States, acted not against established American principles in the premises, and in accord with the provisions of the Hague Convention and for the benefit of mankind in the present war.
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