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THE LAW OF WAR AND NEUTRALITY AT SEA

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## XI. UNNEUTRAL SERVICE

Apart from the carriage of contraband and the breach of blockade the subjects of a neutral state may assist a belligerent in a number of ways. Almost all of these various acts of assistance may be considered as falling within the category of unneutral service. It must be stated at the outset that the present position of the law relating to unneutral service is one over which widespread dissatisfaction has been expressed, and rightly so. Difficulty has been experienced in defining the distinguishing features of unneutral service. Covering as it does a great variety of disparate acts the concept of unneutral service has come to signify little more than any service rendered by a neutral subject to a belligerent contrary to international law, excluding the acts of contraband carriage and blockade breach.<sup>1</sup>

The vagueness characterizing the concept of unneutral service therefore provides one reason for the divergencies that have often attended attempts to enumerate the specific acts making up this category. To the foregoing must be added the peculiarities that have marked the historical development of this area of the law. During the nineteenth century the efforts of states were directed primarily to the task of regulating contraband and blockade. The development of rules regulating the acts whereby neutrals rendered assistance to a belligerent, but which fell outside contraband and blockade, was sporadic and uneven. Unneutral service was conceived largely in terms of the carriage of certain persons and dispatches for a belligerent, and frequently treated as a situation analagous to the carriage of contraband. Little attention was given to other acts that might qualify as coming within this category. Nor does there appear to have been any serious attempt to distinguish more clearly between the various possible acts of unneutral service and to attach consequences to their commission commensurate with the precise nature and degree of assistance rendered a belligerent.

In the provisions of the 1909 Declaration of London relating to unneutral service the endeavor was made not only to provide a greater measure of uniformity in the practice of states than had previously existed, but also to enlarge upon those acts that could be regarded as constituting unneutral service. The Declaration sought further to distinguish between acts whose commission would result in the same treatment a neutral vessel

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<sup>1</sup> This can hardly be regarded as a satisfactory definition, yet is perhaps the best that can be given. No doubt it is true that acts of unneutral service generally involve a closer relationship with, and a greater degree of control by, a belligerent than is the case in contraband carriage. But as will be presently noted, there are some acts of unneutral service that appear to require no more intense a relationship with a belligerent than is involved in the carriage of contraband.

would undergo when liable to condemnation on account of carrying contraband and acts whose commission would result in neutral vessels receiving the same treatment as that accorded enemy merchant vessels. But since the Declaration was never ratified its provisions relating to unneutral service have never been binding upon states. Even as a general indication of what the practice of states ought to be in this regard Articles 45-47 of the Declaration of London may no longer be considered as wholly satisfactory. The conditions in which naval hostilities are now conducted have been greatly transformed during the past half century. This transformation has undeniably affected the kinds of aid a neutral may render to a belligerent (thus extending the scope of unneutral service) as well as the severity of the measures a belligerent may take in preventing an enemy from receiving such assistance.

The resulting situation is, therefore, not essentially unlike the situation encountered in many other areas of the law relating to neutrality in naval warfare; no clear and continuous development can be traced from nineteenth century practice to the present. Nevertheless, it is apparent that the scope of unneutral service has expanded and that the consequences attached to the performance of acts coming within this category have—in certain instances at least—become more rigorous. In fact, the variety of acts included within the category of unneutral service prevents a useful discussion either of the general characteristics of acts of unneutral service or of the general liabilities attending the commission of these acts. As distinguished from contraband carriage and blockade breach, the consequences following upon the commission of acts of unneutral service may be almost as varied as the acts themselves.

#### A. ACTS OF UNNEUTRAL SERVICE RESULTING IN LIABILITY TO THE SAME TREATMENT AS ENEMY WARSHIPS

The most serious forms of unneutral service occur when neutral merchant vessels (or neutral private aircraft<sup>2</sup>) directly participate in the military operations of a belligerent, either by entering into the actual hostilities or by serving in any capacity as a naval or military auxiliary to

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<sup>2</sup> In the discussion to follow it is assumed that the rules relating to unneutral service are, at the very least, equally applicable to neutral private aircraft. This is surely a conservative assumption, and it is altogether likely that as practice with respect to neutral aircraft develops the rules regulating the behavior of the latter will be much more severe. The 1923 Hague Rules of Aerial Warfare offer little guidance in this respect, providing only that "a neutral private aircraft is liable to capture if it is engaged in unneutral service" (Article 53 (c)). Certainly, the draft rules relating to the control of radio in time of war, and rendering an aircraft liable to be fired upon if found transmitting information for the immediate military use of an enemy, may be expected to be acted upon by a belligerent. Furthermore, neutral private aircraft found directly participating in hostilities or serving as an auxiliary to a belligerent's armed forces may be expected to receive similar treatment. But what of neutral private aircraft operating directly under the control or orders of a belligerent, even though not performing



belligerent forces (e. g., as colliers, troopships; laying of mines, reconnoitering). In performing these acts neutral merchant vessels (and aircraft) are considered to acquire an enemy character and must bear the same treatment accorded to enemy warships (and military aircraft). As such they are always liable to capture and—if necessary—to attack and destruction on sight.<sup>3</sup>

services related to military operations? And, finally, what of neutral aircraft known to be transporting enemy persons—particularly persons incorporated in the armed forces of an enemy—though not under the direct control or orders of an enemy? It would be futile to present an oversimplified analogy to the rules governing neutral merchant vessels. Where interception and seizure is rendered impossible, neutral private aircraft will run the strong risk of being shot down when known to be engaged in the above described acts. Nor is it clear that such action on the part of a belligerent would necessarily prove unlawful.

<sup>3</sup> *Law of Naval Warfare*, Article 501a: "Neutral merchant vessels and aircraft acquire enemy character and are liable to the same treatment as *enemy warships and military aircraft* . . . when engaged in the following acts:

1. Taking a direct part in the hostilities on the side of an enemy;
2. Acting in any capacity as a naval or military auxiliary to an enemy's armed forces."

On the other hand, Article 46 of the Declaration of London stated: "A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which she would undergo if she were a merchant vessel of the enemy:

- (1) If she takes a direct part in the hostilities.
- (2) If she is under the orders or control of an agent placed on board by the enemy Government.
- (3) If she is chartered entire by the enemy Government.
- (4) If she is at the time and exclusively either devoted to the transport of enemy troops or to the transmission of information in the interest of the enemy.

"In the cases specified in the present Article, the goods belonging to the owner of the vessel are likewise liable to condemnation."

Neither paragraphs 2 nor 3 of Article 46 of necessity involve acts in direct support of a belligerent's military operations, but paragraphs 1 and 4 do clearly imply such support. In this latter respect, then, there is an evident divergence between Article 46 of the Declaration of London and Article 501a of the *Law of Naval Warfare* (as well as the position taken in the text above), the difference consisting in the more severe treatment permitted by the latter. There is strong support for the position that the acts in question should be regarded, when performed by neutral vessels, as resulting in the same treatment as enemy warships. Thus Articles 2 and 61 of the French Naval Instructions of 1934, and Articles 141, 179, and 180 of the Italian War Law of 1938, provide for either the attack upon or capture of neutral merchant vessels directly participating in hostilities. See also *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 653 ff. Article 65 of the Harvard Draft Convention, which is described in the commentary as correctly reflecting existing law, states that: "A belligerent may treat as an enemy warship: (a) A neutral vessel taking a direct part in hostilities on the side of the enemy; (b) a neutral vessel exclusively engaged at the time in the transportation of enemy troops." Articles 38-40 of the German Prize Law Code of September 1939 are, in this respect, somewhat equivocal, though the same inference may be drawn. And for a clear statement in support of the more severe treatment, see H. A. Smith, *op. cit.*, pp. 101, 105.—It is interesting to note that Article 16 of the U. S. Naval War Code of 1900 provided that: "Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction." Whereas the 1917 and 1941 *Instructions* followed the Declaration of London, Article 501a of the *Law of Naval Warfare* signifies—in a sense—a return to this earlier and more severe position.



The general principle involved is reasonably clear, and no attempt need be made to enumerate all of the acts that may result in this assimilation to an enemy's armed forces. It is not the mere fact of assisting a belligerent that permits this severe treatment. Nor is it simply the consideration that the belligerent exercises a close control and direction over the neutral merchant vessel. The decisive consideration is rather that the services rendered are in direct support of the belligerent's military operations. It is this support, leading as it does to the identification of the neutral merchant vessel (or aircraft) with the belligerent's naval or military forces, that permits a treatment similar to that meted out to these forces.

These considerations would seem to have an even broader application. It may be recalled that in an earlier discussion<sup>4</sup> concerning the liability of enemy merchant vessels to attack it was concluded that the retention of immunities traditionally granted belligerent merchant vessels is dependent upon their not being integrated in any manner into the belligerent's military effort at sea. Among the acts which may lead to such integration are sailing under convoy of belligerent warships or military aircraft and participation in the intelligence system of a belligerent's armed forces. There would appear to be no valid reason why neutral merchant vessels should escape treatment similar to that taken against belligerent merchant vessels, if found performing these same acts. It is true that the acts do not of necessity imply either direct participation in hostilities or serving as a naval or military auxiliary to a belligerent. Yet the relationship to the belligerent's military effort is sufficiently close to warrant the loss of the exemption from attack and destruction that must normally be accorded neutral merchant vessels.<sup>5</sup>

<sup>4</sup> See pp. 67-70.

<sup>5</sup> In the case of neutral vessels under convoy of belligerent warships the high degree of identification with the belligerent whose protection is sought is obvious. Although opinion has been unsettled in the past over the consequences to be attached to this act there is now a substantial consensus that the mere fact of enemy convoy is sufficient to assimilate a neutral vessel to the status of the belligerent warships providing protection. For a review of pre-World War II practice, see *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 674-80. A similar conclusion may be drawn with respect to neutral merchant vessels that deliberately reveal the position of the warships of one belligerent to an enemy. There is no reason why the neutral vessel that sends in position reports on belligerent warships should receive preferential treatment over enemy merchant vessels performing the same act, and the latter are, in this case, liable to attack (see pp. 67-8). In this respect, Article 6, paragraphs 1 and 2, of the unratified 1923 Hague Rules for the Control of Radio in Time of War provided:

"The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.

2. A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The Prize Court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation."

H. A. Smith (*op. cit.*, p. 108) states of these provisions: "The wording is not quite so clear as

## B. ACTS OF UNNEUTRAL SERVICE RESULTING IN LIABILITY TO THE SAME TREATMENT AS ENEMY MERCHANT VESSELS

Neutral merchant vessels (and aircraft) may be found operating directly under the control of a belligerent government, though not in support of the belligerent's military operations at sea. Thus a neutral vessel may be chartered entire to a belligerent government for the purpose of undertaking commercial voyages. If not chartered it may nevertheless be under the orders of an agent placed on board by the belligerent government. The precise form such control may take will vary, but in all instances where neutral merchant vessels are found to be operating directly under enemy control, orders, charter, employment, or direction, they may be considered as having thereby acquired enemy character and are liable to the same treatment normally accorded enemy merchant vessels.<sup>6</sup>

The reason for distinguishing between the present and the preceding category must be found in the nature of the service that is performed. In both categories there is a close identification with the belligerent on whose behalf the acts of unneutral service are performed, and it is this identification with—or control by—a belligerent that permits the imputation of enemy character to neutral merchant vessels. But in the former category the identification extends to the belligerent's armed forces and to his military operations at sea, whereas in the present category this is not the case. Although acquiring enemy character because operating directly under enemy orders or control, such neutral merchant vessels must not be attacked and destroyed at sight so long as they remain clear of all participation in, or direct support of, combat operations.

In this connection a problem of considerable importance arises as a result of the attempt by belligerents to institute a system of passes for neutral shipping. In principle, it is clear that such devices as the navicert and ships warrant are intended to establish an effective control over the activities of neutral merchant vessels. Neutral merchant vessels by submitting to such a system thereby ease the belligerent's task of patrolling the high seas in search either of contraband carriers or of blockade runners. It seems reasonably well-established that a neutral merchant vessel in accepting a safe-conduct pass from a belligerent subjects itself to the control of the latter and performs an act of unneutral service. The same conclusion would appear warranted in the case of a neutral vessel that cooperates with a belligerent by voluntarily applying for, and accepting, a navicert or

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it might be, and Article 6 (1) should not be interpreted as meaning that a neutral vessel or aircraft not otherwise engaged in the enemy service may be sunk without warning merely because she makes a signal that warships are in the neighborhood. The use of force without warning can only be justified if there is a deliberate intention to transmit intelligence of military value to the enemy."

<sup>6</sup> See *Law of Naval Warfare*, Article 501b.



ship's warrant.<sup>7</sup> If this reasoning is accepted then it must be further acknowledged that Germany would have been on solid ground in seizing and condemning neutral merchant vessels during both World Wars for the mere act of sailing with a navicert issued by the Allied authorities.<sup>8</sup>

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<sup>7</sup> And as might be expected, a substantial number of German writers have taken the view—which is not easy to refute—that any neutral vessel submitting to the type of contraband controls established by Great Britain during the two World Wars commits an act of unneutral service. See, for example, Bruns, *op. cit.*, p. 85.

<sup>8</sup> The above conclusions are by no means generally accepted, however, and it must be admitted that the entire problem raised by navicerts is still a matter of doubt and uncertainty. In both World Wars Germany threatened to treat neutral vessels participating in the Allied system of navicerts as acquiring enemy character by virtue of submitting to Allied control, though in practice the German conduct of unrestricted submarine warfare precluded any substantive development in German prize law with respect to the rules governing unneutral service. In one World War II decision, however, the German Supreme Prize Tribunal did consider the implications of the navicert system at some length. Thus in *The Ole Wegger and Other Vessels* [1942], a number of Norwegian whaling vessels were condemned which operated for the Norwegian Shipping and Trade Mission in London. The vessels were found to be under the control of the British Government, and thereby engaging in unneutral service in the sense of Article 38 (3) of the German Prize Law Code ("Aid to the enemy occurs if a vessel is chartered by the enemy government or is under its command or its control"). Part of the evidence accepted by the *Oberprisenhof* as proof that the vessels were under enemy control was the presence on board of ships' warrants issued by the British Ministry of War Transport, in accordance with the Order in Council of July 31, 1940. The following passages taken from the judgment deal with navicerts and ships' warrants respectively, and in view of their interest are quoted at some length:

"... In examining the application for a navicert, the British authorities may obtain valuable information concerning the purpose and destination of the proposed voyage. This applies all the more in the case of a ship's navicert. It has practically the effect of a safe-conduct, which is intended to guide ships safely through the British contraband control. Moreover, the British authorities are thus enabled to extend the preliminary examination to the entire cargo of the ship. Any further examination on the high seas or in the port of control need therefore only ascertain whether the ship and its cargo are covered by the navicert. This means a considerable relief for the British naval forces, for the examining man-of-war is soon freed for other tasks . . .

"... The control which is sought by the introduction of ships warrants . . . aims not at the prohibition of an individual voyage by means of military measures, but at the planned control of the entire maritime traffic of a shipowner by British authorities, with the intention thus to eliminate the application of military measures in the individual case, either entirely or in part . . . It is precisely a control of this kind, however, which is envisaged by Article 38 (3) of the German Prize Regulations. A vessel subject to this control thereby assists and facilitates the military and economic conduct of warfare of the enemy Government, and, subject to the special circumstances of the case, renders unneutral service." *Annual Digest and Reports of Public International Law Cases, 1943-45*, Case no. 193, pp. 532-7.

No clear indication was given as to the nature of the "special circumstances" referred to in the concluding sentence. It does appear though that the fact that navicerts or ships' warrants are made "compulsory" by one belligerent was not interpreted as necessarily depriving the other belligerent of the right to seize neutral merchant vessels (for hostile assistance) which complied with the system. And it may be noted that in response to action by the German Government during World War I (1918), whereby Swedish steamers carrying non-contraband cargoes to overseas countries were granted safe-conduct passes, the United States (Great Britain

## C. ACTS OF UNNEUTRAL SERVICE RESULTING IN LIABILITY TO SEIZURE

A neutral merchant vessel may aid a belligerent by the performance of acts that result in no greater a degree of identification with the belligerent than is involved in the normal case of contraband carriage. It is therefore important to distinguish not only between the nature of the services performed on behalf of an enemy but also between the varying degrees of identification with an enemy that may be involved quite apart from the specific services. In undertaking to carry certain persons or dispatches for a belligerent a neutral vessel may be operating in the exclusive employment, or under the direct control, of the former. The enemy character thereby acquired by the vessel is the consequence of the intensity of the relationship maintained with the belligerent rather than of the actual services that are performed. On the other hand, the carriage of certain persons or dispatches may be undertaken in much the same manner as the carriage of contraband, that is without implying a direct control by—or a close relationship with—the belligerent. In the latter event the unneutral service thus rendered a belligerent results in a liability to seizure and to subsequent condemnation. Nevertheless, the vessel in performing these acts does not lose her neutral character, and the act of seizure therefore places a much more serious responsibility upon the captor than is normally incurred with respect to the seizure of enemy merchant vessels (or of neutral vessels that may be considered as having acquired enemy character).<sup>9</sup>

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and France concurring) declared in a note to the European neutrals that "such control may operate to deprive vessels accepting the same of their neutral character, and the United States Government accordingly reserves the right to deal with any vessel which has subjected itself to enemy control as the circumstances in each case may warrant." cited in Hackworth, *op. cit.*, Vol. VII, pp. 106-7.—Rowson (*op. cit.*, pp. 197-8) expresses the opinion that "when navicerts are voluntary the degree of voluntary cooperation with a belligerent which is demanded of the neutral implies unneutral service on his part towards the other belligerent, to whom corresponding rights are automatically given. When navicerts are compulsory, the neutral had no choice and the opposing belligerent was not justified in drawing irrebuttable conclusions unfavorable to the neutral in respect of the carriage of goods covered by a navicert to neutral territory." On this reasoning the Order in Council of July 31, 1940 may be understood as reducing a neutral vessel's liability for unneutral service, since the neutral shipper had the choice either of complying with the system thus introduced or of risking seizure (with the presumption—rebuttable—of carrying goods with an enemy destination or origin). But Rowson's argument is open to serious question. Nor does it appear to have been accepted in the decision of the *Oberprisenhof*, quoted above. The truth of the matter is, it would seem, that neutral merchant vessels have been placed by belligerents in an unenviable position, since measures on the part of one belligerent compelling neutral vessels to comply with a system of contraband controls may nevertheless allow an enemy to seize vessels so complying on the basis that the latter have committed an act of unneutral service.

<sup>9</sup> See pp. 349-54 dealing with the destruction of neutral merchant vessels following their seizure.



### 1. *Carriage of Enemy Persons*

According to the customary law a belligerent was entitled to prevent neutral vessels from transporting persons actually incorporated in the armed forces of an enemy. On this point at least state practice during the nineteenth century was clear, and neutral vessels that knowingly transported military or naval personnel in the service of an enemy were liable to seizure and subsequent condemnation. Equally well settled was the rule that in the absence of a treaty a belligerent had no right to remove any enemy persons—including military or naval personnel—from a neutral vessel on the high seas without first seizing the offending vessel and placing her in prize.<sup>10</sup>

On many points, however, the practice of states was uncertain. The right of a belligerent to prevent the carriage of enemy persons other than those embodied in the armed forces of an enemy furnished an example. At least one state, Great Britain, claimed the right to seize neutral vessels if found carrying enemy agents sent out on public service of an enemy, at the public expense of an enemy.<sup>11</sup> Still further, it was not entirely clear

<sup>10</sup> The rule forbidding removal on the high seas was affirmed during the American Civil War in the case of the *Trent*. The *Trent*, a British mail steamer on her way from Havana to Nassau, was intercepted by the U. S. S. *San Jacinto* and compelled to surrender two Confederate commissioners sent out by the Confederate Government to represent the latter in France and Great Britain. Both the commissioners, Mason and Slidell, as well as their secretaries, were made prisoners of war. Great Britain immediately demanded their release, contending, in the first instance, that since the terminus of the voyage was neutral territory the persons seized could not be regarded as "contraband of war," and a neutral vessel carrying such persons could not be considered liable to seizure for contraband carriage. Later, Great Britain contended that a neutral vessel could not be prevented from carrying diplomatic agents sent out by a belligerent to represent it in a neutral state. The United States, although complying with the demand for release of the prisoners, maintained that the error on the part of the capturing officer consisted only in a failure to have seized the *Trent* and to have brought the vessel in for adjudication. For a brief account of the incident see Hyde, *op. cit.*, pp. 2165-7. No agreement was reached on the status of Mason and Slidell, but it would appear that if not diplomatic representatives in the strict sense (if only because the Confederacy had not been accorded recognition at the time by neutral states) they came very close to this status. In any event, this aspect of the incident does illustrate the rule—which remains valid today—that a neutral vessel carrying *bona fide* diplomatic representatives sent out by a belligerent to a neutral state, or returning from a neutral state, is not liable to seizure for such carriage. Nor can a belligerent intercept the vessel and remove the personnel. The incident of the *Trent* also illustrated the inapplicability of the law of contraband to cases involving the carriage of enemy persons. Having a neutral destination, Mason and Slidell were not "contraband." On the other hand, seizure of the vessel might have been based on the ground that they were public agents in the service of the enemy and sent out at the public expense of the enemy.

<sup>11</sup> Both the 1866 and 1888 editions of the British Manual of Naval Prize Law made provision to this effect. For a general review of the entire problem, see U. S. Naval War College, *International Law Situations*, 1928, pp. 74 ff. Very doubtful is the claim that prior to World War I a neutral vessel could be seized and condemned if found making a voyage with a view to transporting individuals (e. g., reservists), who though not incorporated at the time of seizure in the enemy's armed forces would become so upon reaching enemy territory. But Oppenheim-Lauterpacht (*op. cit.*, p. 833) and Stone (*op. cit.*, p. 514), among other writers, contend that

whether a vessel could be condemned for carrying persons in the armed forces of an enemy if both the owner and master of the vessel were found to be ignorant of this fact.<sup>12</sup>

But Article 45 of the Declaration of London stated with respect to the carriage of enemy persons that the liability of a neutral vessel to condemnation and, in general, to the same treatment accorded as for the carriage of contraband would arise in the following circumstances:

(1) If she is making a voyage especially with a view to the transport of individual passengers who are embodied in the armed forces of the enemy . . .

(2) If, with the knowledge of the owner, of the one who char-  
ters the vessel entire, or of the master, she is transporting a mili-  
tary detachment of the enemy, or one or more persons who,  
during the voyage, lend direct assistance to the enemy.<sup>13</sup>

Article 47 of the Declaration contained a provision, at the time alto-  
gether novel, which read as follows:

Any individual embodied in the armed force of the enemy, and  
who is found on board a neutral merchant vessel, may be made a  
prisoner of war, even though there be no ground for the capture of  
the vessel.

It would prove difficult to state with any assurance the precise modi-  
fications the provisions of Article 45 would have made—if generally  
accepted—in the customary law, since in many respects the latter was far  
from clear. In general it may be said that Article 45 sought to restrict  
quite severely belligerent powers. In substance, the category of persons  
neutral vessels were forbidden to carry was limited to persons “embodied  
in the armed forces of an enemy,” and even then condemnation could follow  
only if the vessel was either making a voyage “especially with a view to

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the customary rules allowed seizure in this latter instance. No mention is made of the point  
in pre-World War I British prize manuals, nor is the matter dealt with in the 1900 U. S. Naval  
War Code. But there need hardly be any doubt over this point today. As will be noted  
presently, vessels making such voyages are liable to seizure and condemnation.

<sup>12</sup> Or if those in control of the neutral vessel were forcibly constrained to carry enemy mili-  
tary or naval personnel. In either case, however, the vessel could be seized on probable sus-  
picion of acting in the service of the enemy. Failure to obtain subsequent condemnation of  
the vessel did not serve to prevent the captor from removing the noxious personnel—once in  
the captor’s port—and making them prisoners of war.

<sup>13</sup> Article 45 went on to state that in the circumstances described—which included in para-  
graph 1 “the transmission of information in the interest of the enemy”—goods belonging to the  
owner of the vessel were likewise liable to condemnation. The concluding paragraph of Article  
45 declared that the provisions of the Article “do not apply if when the vessel is encountered  
at sea she is unaware of the opening of hostilities, or if the master, after becoming aware of  
the hostilities, has not been able to disembark the passengers. The vessel is deemed to know  
of the state of war if she left an enemy port after the opening of hostilities, or a neutral port  
after there had been made in sufficient time a notification of the opening of hostilities to the  
Power to which such port belongs.”



the transport of individual passengers" or knowingly transporting a "military detachment" of the enemy.<sup>14</sup> Article 47, however, went in the other direction of granting belligerents a power heretofore denied them by the customary law. Nevertheless, this power to remove persons from neutral vessels, even though "there be no ground for the capture of the vessel," extended only to individuals embodied in the armed forces of an enemy.<sup>15</sup> As it turned out this provision too was destined to give rise to later controversy between neutrals, who maintained Article 47 represented an unwarranted extension of the belligerent's right to interfere with neutral vessels, and the belligerents, who considered Article 47 as being far too restrictive in modern conditions.

Since 1914 state practice with respect to the carriage of enemy persons has therefore been very unsettled. At the beginning of the hostilities a number of the belligerents accepted Articles 45 and 47 of the Declaration of London, only to modify them—by way of extending belligerent powers of intercepting enemy persons—as the war progressed. The neutral states, as might be expected, fell back upon the strictest possible interpretation of belligerent powers. The result has been that the disputants have appealed, as the circumstances of their respective situations dictated, to the customary rules, to the provisions of the Declaration of London, and to the novel conditions alleged to justify departure from both the customary law and the Declaration of London.

Doubtless a belligerent must be accorded, at the very minimum, those powers provided for in Article 45 of the Declaration of London. Where a neutral vessel is encountered making a special voyage for the transport of members of an enemy's armed forces she may be seized and condemned. Nor does it appear useful any longer to question the belligerent right to seize neutral vessels specially undertaking to transport individuals who, upon reaching an enemy destination, will be incorporated into the enemy's armed forces. The same right of seizure may be considered applicable to neutral vessels found making a voyage for the purpose of conveying public agents of an enemy (though not *bona fide* diplomatic representatives of an enemy destined to or from a neutral state), regardless of whether such conveyance is to an enemy destination or to a neutral state, so long as the purpose is to promote the military operations of the enemy. Admittedly, neither of these latter grounds for seizure were recognized by the Declaration of London, and their support in the customary law is questionable. Yet it is clear that in each instance the neutral merchant vessel renders a distinct

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<sup>14</sup> The additional category of "persons who, during the voyage, lend direct assistance to the enemy" is far from clear and never seems to have been satisfactorily explained.

<sup>15</sup> Thus, Article 47 compensated in part for the restrictions contained in Article 45. Belligerents could remove enemy military personnel from neutral vessels even though these personnel were traveling in a private capacity and at their own expense. Nor did it matter—according to Article 45—that the owner or master of the vessel possessed no knowledge of the status of the passengers carried.

and important service to an enemy, and one which belligerents can hardly be obliged to permit.

In practice, however, the core of neutral-belligerent controversy during the two World Wars has concerned the circumstances in which a belligerent is entitled to intercept a neutral merchant vessel at sea and, though not seizing the vessel, to remove certain categories of enemy persons found on board. It should be noted that there are two distinct, though related, questions involved here. The first is whether or not there is a belligerent right of removal at all, except after first seizing the vessel for due cause and sending her in for adjudication. And if there is a right of removal that may be exercised either in place of, or independently from, seizure, to what categories of enemy individuals does this right extend?

Despite neutral opposition during World War I to conceding any belligerent right to remove enemy persons from neutral merchant vessels at sea, it would now seem that—in principle—the practice of states may be regarded as having sanctioned this belligerent measure.<sup>16</sup> Nor does it appear that a

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<sup>16</sup> The attitude of the United States in World War I, both as a neutral and later as a belligerent, is reviewed in Hackworth, *op. cit.*, Vol. VI, pp. 622-38, and *U. S. Naval War College, International Law Situations, 1928*, pp. 90 ff. In brief, the position of the United States was that there existed no legal right—apart from treaty—to remove any enemy person from a neutral vessel on the high seas without first seizing the vessel and placing it in prize. Seizure was considered justified only when exercised in order to prevent a neutral vessel from knowingly engaging in the transport of individuals actually incorporated in the armed forces of an enemy. Thus Article 45 of the Declaration of London was accepted whereas Article 47 was rejected, a position confirmed in paragraphs 36 and 89 of the 1917 *Instructions*. Yet in reviewing World War I practice, and its effects upon the law, the Naval War College concluded in 1928 that: "It is now generally admitted . . . that a belligerent should be permitted to remove enemy combatants from a neutral vessel and that it should not be longer necessary to bring such a vessel to port to render such action lawful" (p. 106). And the 1941 *Instructions* stipulated in paragraph 92 that: "Enemy nationals found on board neutral or enemy merchant vessels as passengers who are actually embodied in the military forces of the enemy, or in public service of the enemy, or who may be engaged in or suspected of service in the interests of the enemy, may be made prisoners of war." As will presently be seen, all of the belligerents during World War II asserted the right to remove enemy military personnel from neutral vessels, and—as distinguished from World War I—the disputes with neutrals no longer concerned the exercise of the right itself but the extent of the right. Thus in the case of the *Asama Maru*, which involved the removal by a British warship in January 1940 of twenty-one German nationals carried on board a Japanese steamship, the Japanese Government did not deny the right of a belligerent to remove enemy military personnel from a neutral vessel on the high seas. (Indeed, the Japanese Naval Regulations in World War I had expressly permitted the practice.) What the Japanese did deny was the right of a belligerent to remove enemy persons other than those incorporated in an enemy's armed forces. The incident of the *Asama Maru* is carefully reviewed by H. W. Briggs, "Removal of Enemy Persons From Neutral Vessels On The High Seas," *A. J. I. L.*, 34 (1940), pp. 249 ff. Professor Briggs concludes, however, that even by 1940 there existed "no legal right of removal of any enemy person from a neutral vessel on the high seas." Contrast this view with that expressed by Hyde (*op. cit.*, p. 2173): "It is believed that, at the present time, an enemy person whom a belligerent may lawfully intercept in transit, such as one embodied in an armed force and en route for a military service, may be justly removed from the neutral ship of which he is an occupant."



right of removal can be exercised by belligerents only as an alternative to the lawful seizure and condemnation of neutral merchant vessels. For the right of removal may be exercised even though no sufficient reason may exist for the seizure of a neutral vessel.<sup>17</sup>

The further problem of the categories of enemy persons that a belligerent may remove from neutral vessels remains unsettled. A strict interpretation of this belligerent right would probably admit—following Article 47 of the Declaration of London—the removal only of those persons actually embodied in the armed forces of an enemy and, perhaps, public agents sent out in the service of an enemy to perform missions directly related to the conduct of military operations. But belligerents have not demonstrated a readiness to adhere to this restrictive interpretation and have insisted upon including reservists, and even all able-bodied enemy nationals capable of rendering military service upon reaching their home country.<sup>18</sup> More recently it has been suggested that the belligerent right of removal should extend to any enemy individual returning to his own country who may prove of value to the war effort<sup>19</sup> (not merely the military effort in a narrow sense). And on the basis of this reasoning belligerents might easily assert a right of removal to include any enemy national sent out by his government to a neutral country, there to undertake services in support of the enemy's war effort.

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<sup>17</sup> As, for example, when a neutral vessel engaged in a normal commercial voyage but is found carrying passengers who, though embodied in the armed forces of an enemy, are traveling in a private capacity at their own expense.

<sup>18</sup> The British view, expressed in a note to the Japanese Government during the *Asama Maru* incident, cited in Briggs (*op. cit.*, pp. 250-1) is that: ". . . under modern conditions, where conscription laws impose a liability to military or naval service on all able-bodied males, it is obvious that a right to remove 'military persons' would be illusory if it did not cover individuals who, though not on the peace-time strength of their country's armed forces, are under a legal liability to serve and are actually on their way to take their place in the ranks. Such persons are precisely those who are likely to be found travelling on neutral ships in time of war . . ." The French Instructions of 1934, in Article 64, provided for the removal of enemy persons from neutral vessels—even where no cause existed for capturing the vessel—if making up a part of the armed forces, if en route to join these forces and, finally, if capable of military service (*aptés au service militaire*). On the other hand, the German Prize Law Code of 1939 provided, in Article 77, that enemy persons undertaking a voyage on neutral vessels in order to join the enemy armed forces could be made prisoners of war only after the vessel had been captured (presumably on any one of a number of grounds). It may also be noted that Article 38 (5) of the German Code declared that: "Aid to the enemy occurs if a vessel undertakes the voyage for the purpose of transmitting messages in the interests of the enemy or conveying members of the enemy forces or persons desirous of joining the enemy forces . . ." In effect, then, the Code did not appear to stipulate a right of removal independent of capture.

<sup>19</sup> In a current review of the problem the observation has been made that it "appears unlikely that the old rules concerning the removal of persons from neutral shipping can much longer survive, even extended to include reservists and that it would appear foolhardy for a nation to permit any person of value to an enemy's war effort—particularly scientists—to return to his own country." Cmdr. Joe Munster, U. S. Navy, "Removal of Persons from Neutral Shipping," *The Judge Advocate General Journal*, (October, 1952), p. 18.

Certainly these latter suggestions cannot be taken—and are not put forward—as indicative of present law, however prophetic they may be in pointing the way to future practice. But where the precise limits to the belligerent right of removal may now be placed is a matter upon which no final word can be given.<sup>20</sup>

## 2. *Carriage of Dispatches*

According to the customary practice of states the carriage of dispatches for a belligerent is treated on the same basis as the carriage of enemy persons. Neutral merchant vessels found carrying dispatches of a public nature for and in the service of a belligerent, and particularly dispatches concerning military operations, are liable to seizure and condemnation.<sup>21</sup> But one clear exception to this rule covers the official correspondence maintained between an enemy and a neutral state. Since a neutral state has the undoubted right to carry on official intercourse with the belligerents, such correspondence as it may send to, or receive from, belligerents is inviolable, and neutral merchant vessels conveying these dispatches must not, for that reason, be seized.<sup>22</sup> Furthermore, according to Hague Convention XI (1907) enemy dispatches in the form of ordinary postal correspondence are normally considered as inviolable, and a neutral merchant vessel carrying such dispatches among her postal correspondence is not, for that reason, liable to seizure.<sup>23</sup>

In view of the developments in the means of communication the carriage of dispatches now forms a subject of distinctly limited importance, but to the extent that it is still applicable to hostilities at sea the customary rules remain valid, though subject to the modifications already observed in examining the rules governing the carriage of enemy persons.<sup>24</sup> On the

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<sup>20</sup> For one indication of the interpretation presently given to the belligerent right of removal see *Law of Naval Warfare*, Article 513.

<sup>21</sup> Such carriage may occur between two parts of an enemy's territory, between two enemy states, or between an enemy agent abroad in a neutral state and his government.

<sup>22</sup> Thus the correspondence between a neutral government and that government's representative in an enemy state must not be disturbed, even though it may contain information harmful to the interests of the other belligerent. The same immunity seems to extend to the carriage of dispatches between an enemy government and its diplomatic representatives in neutral states.

<sup>23</sup> But Article 2 of Hague Convention XI states that neutral mail ships are not exempt from the rules governing neutral merchant ships in general, and although they cannot be seized for carrying enemy dispatches among their regular postal correspondence, neutral mail ships may be seized for unneutral service. For a more general discussion on mail in time of war, see pp. 90-5.

<sup>24</sup> These changes will principally concern the belligerent right to remove dispatches from a neutral vessel without seizing the vessel as prize. The customary rule forbidding removal without seizure was equally applicable to enemy persons and dispatches. But the Declaration of London, while providing in Article 47 for the removal of enemy military personnel, even though no cause might exist for seizure of the neutral vessel, failed to refer to the removal of dispatches. Might, therefore, a belligerent remove from a neutral vessel dispatches intended for the enemy without seizing the vessel? Hyde (*op. cit.*, pp. 2173-4) and Oppenheim-Lauterpacht (*op. cit.*, p. 844), among others, answer this question affirmatively, and this position would appear to be sound.



whole, however, the "transmission of information in the interest of an enemy" <sup>25</sup> has now taken on new forms that bear only a faint resemblance to the more traditional act of carrying dispatches, and it may prove misleading to endeavor to fit these new forms into a legal framework designed to regulate quite different acts. The transmission by radio or wireless of information to an enemy concerning military operations at sea is hardly comparable—save perhaps in name—to the carriage of dispatches. The former acts will normally prove of much more serious moment to the immediate security of a belligerent's forces. And whereas such transmission of information assuredly gives rise to the belligerent right to seize the offending neutral merchant vessel, earlier pages have indicated that the preventive measures a belligerent may now resort to are considerably more severe in character.<sup>26</sup>

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<sup>25</sup> The phrase is taken from Article 45 (1) of the Declaration of London, which provided, in this respect, for the seizure and condemnation of a vessel making a voyage "with a view to the transmission of information in the interest of the enemy."

<sup>26</sup> See pp. 319-21.