

International Law Studies—Volume 3

International Law Discussions

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INTRODUCTORY.

THE PREPARATION OF THE CODE.

The publication of a code to determine the course of action in maritime war is in itself an act significant of the progress that has been made in recent years in the conduct of hostilities. The issue of such a code by the United States in 1900 is in accord with the precedent set in the publication in 1863 of rules prepared by Dr. Lieber for the government of armies in the field. This codification of rules for the regulation of land warfare by Dr. Lieber was followed by such regulations as those of the Geneva Convention of October 30, 1868, the Declaration of Brussels of 1874, the Oxford Resolutions of 1880, and other later rules pertaining to the conduct of war upon land.

These rules for warfare upon the sea were prepared by Capt. Charles H. Stockton, U. S. N., in accordance with an order of the Secretary of the Navy, made in 1899, while Captain Stockton was president of the Naval War College. He was requested to draw up a set of rules which should serve for the Navy the purpose which the rules drawn up by Dr. Lieber served in the Army. Captain Stockton consulted with various officers of the Navy and also with several civilians who were interested in maritime international law.

The preliminary draft of the code prepared in the main by Captain Stockton was sent out with the following memorandum:

The regulations respecting the laws and usages of war at sea, a preliminary draft of which is herewith forwarded, are proposed, primarily, to be put in force for the Navy of the United States. For that reason, and on account of our existing laws in regard to privateers and the capture of enemy merchant vessels, the articles relating to privateers and letters of marque, and to the capture and destruction of private property at sea, are included in the code.

If the code should be presented to other countries as an international *projet*, it is presumed that these articles would be omitted or modified, in view of our adherence to the Declaration of Paris during the late war and of the stand, as to the capture of private property at sea, taken by the President of the United States in a recent message and in his instructions to our representatives at The Hague Conference.

The regulations for the laws of war upon land, adopted at The Hague Conference, cover a number of subjects that are applicable to the naval service afloat and ashore, such as those bearing upon

matters of prisoners, spies, military occupation, etc., and hence these matters are not included in the Naval Code, which extends, by Article 55, the authority of the laws of war to the naval service, when applicable and when not in conflict with the proposed Naval Code. These regulations for land warfare, as adopted at The Hague, accompany this memorandum and have been adhered to by the United States, but are not yet in force for the Army of the United States, though it is presumed that, after submission to and confirmation by the Senate, they will be duly promulgated and authorized.

I am informed unofficially by the Judge-Advocate General of the Army that the present, or "Lieber Code" (General Order No. 100), now in force, will in all probability be incorporated or amalgamated, where possible, with The Hague Regulations.¹

The Geneva-Hague additional articles for the amelioration of warfare at sea, on the lines of the Geneva Convention, have been incorporated in the Naval Code, with the exception of Article 3, which is omitted, and of Article 6, which is modified. The presence of these two articles prevented the adoption of the additional articles, as a whole, by the representatives of the United States. It is believed that the possibilities of the South African war have justified Captain Mahan's views as to Article 3.² If it had been a maritime war we might have seen sympathetic neutral hospital ships of different countries arrayed on opposite sides, and even hospital ships of the same neutral country so opposed, in accordance with the sympathies of the contributors. Probably from the United States would have come two or more antagonistic hospital ships, fitted out by sympathizers having opposing opinions as to the merits of the war. It can readily be imagined what confusion and complications might follow—all the articles would have been discredited.

It is believed also, by the proposed modification of Article 6, that the danger of a repetition of the *Deerhound* affair, in the *Kearsarge-Alabama* fight, would be avoided in the future. The phraseology of these articles given in the two official translations (English and American) is retained wherever the translations do not conflict.

In addition to the manifest advantages of a formulation and crystallization of the laws and usages of naval war (a work that has never before been attempted, it is believed, by any other nation), it is also hoped that this code will tend toward the amelioration of the hardships of naval warfare in general, and more particularly in the following respects:

1. By the adoption of all that is of practical value to be found in the additional articles proposed at The Hague to extend the articles of the Geneva Convention to maritime warfare.
2. By restricting to narrow limits the bombardment of unfortified and undefended towns.
3. By forbidding bombardment as a means of levying a ransom upon undefended towns.
4. By forbidding the use of false colors.
5. By forbidding reprisals in excess of the offense calling for them.
6. By exempting coast fishing vessels from capture, where innocently employed.
7. By incorporating the liberal allowances for vessels of the enemy at the outbreak of war, and for blockaded vessels, given in the General Order No. 492, of 1898, of the Navy Department.
8. By providing definitely that free ships make free goods.
9. By giving all the exemption possible to mail steamers in time of war.

¹ Laws and Customs of War on Land proclaimed by President, April 11, 1902.

² Holls, "Peace Conference at The Hague," p. 498.

10. By exempting neutral convoys from the right of search.

11. By promulgating the general classification of contraband of war in such a manner as to make an international adoption of the general principles possible.

12. By authorizing the use of the regulations for land warfare, whenever applicable, to the naval service of the United States. This has not been officially done heretofore.

I am, very respectfully,

C. H. STOCKTON,
Captain, U. S. Navy,
President Naval War College.

These points and many others were considered and several tentative drafts of the code were made. These were subjected to the criticism of various officers of the Navy and to several other persons outside the Navy. Captain Stockton's untiring labor in the preparation of this valuable compilation deserves high recognition.

The code was finally issued in accord with General Orders No. 551, Navy Department, Washington, June 27, 1900, which states:

"The following code of naval warfare, prepared for the guidance and use of the naval service by Capt. Charles H. Stockton, United States Navy, under direction of the Secretary of the Navy, having been approved by the President of the United States, is published for the use of the Navy and for the information of all concerned.

"JOHN D. LONG, Secretary."

OPINIONS UPON THE CODE.

The issue of the code very quickly called forth expressions of opinion from foreign sources, though not especially widely mentioned in the United States. It has been translated several times and has been made the subject of both practical and academic discussion. The following are examples of expression of opinion from English sources:

(From London Times, Friday, April 5, 1901.)

A NAVAL WAR CODE.

From a Naval Correspondent.

There has been recently issued to the officers of the United States Navy a compact handbook of twenty-seven pages and fifty-five articles comprising laws and usages of war at sea. As the work is quite unknown in England, and as it includes a great deal of matter that must affect the policy of other nations, it is proposed to summarize briefly in this article some of its most salient features. In the first place, we are concerned as to the official sanction to laws given in the general order prefacing the handbook, informing us that it is "Prepared for the guidance and use of the naval service, by Capt. Charles H. Stockton, under the direction of the Secretary of the Navy, having been approved by the President of the United States."

There has of late been some discussion as to the measures that may be adopted in dealing with an opponent under the assumption, recognized in this handbook, that the object of war is to procure complete submission at the earliest possible period, with the least expenditure of life and property. The proceedings of General Sheridan and others in the civil war have been frequently referred

to; and it may be of interest if we quote from this handbook a few passages dealing with this question. Articles 3, 4, 8, and 12 set forth that:

Military necessity permits measures that are indispensable for securing the ends of the war and that are in accordance with modern laws and usages of war.

It does not permit wanton devastation, use of poison, or the doing of any hostile act that would make the return of peace unnecessarily difficult.

Noncombatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such noncombatants will permit. * * *

The bombardment by a naval force of unfortified and undefended towns, villages, or buildings is forbidden, except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies, essential at the time to such naval vessel, or vessels, are forcibly withheld, in which case due notice of bombardment shall be given.

The bombardment of unfortified or undefended towns and places for the nonpayment of ransom is forbidden.

In the event of an enemy failing to observe the laws and usages of war, if the offender is beyond reach, resort may be had to reprisals if such action should be considered a necessity; but due regard must always be had to the duties of humanity. Reprisals should not exceed in severity the offense committed, and must not be resorted to when the injury complained of has been repaired.

If the offender is within the power of the United States he can be punished, after due trial, by a properly constituted military or naval tribunal. Such offenders are liable to the punishments specified by the criminal law.

The United States of America acknowledge and protect, in hostile countries occupied by their forces, religion and morality; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

In the columns of the Times during the Spanish-American War, there occurred an interesting controversy concerning the position of submarine cables in war. Professor Holland's views that a cable going from a belligerent's territory to a neutral was only liable under international usage to be cut within the belligerent's territorial waters, were regarded at the time as rather academic. They are reenforced by Article 5 of the American War Code, which lays down that—

The following rules are to be followed with regard to submarine telegraphic cables in time of war, irrespective of their ownership:

(a) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(b) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(c) Submarine telegraphic cables between two neutral territories shall be inviolable and free from interruption.

There is a point of controversy as to what is contraband of war. The Naval War Code divides contraband of war into what is absolutely contraband and what is conditionally contraband. The first class includes the general kinds of war equipments all set forth at length; but as these are generally recognized as contraband there is

no use in repeating the list. The "conditionally contraband" includes:

(a) Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy.

(b) Materials for the construction of railways or telegraph.

(c) Money, when such material or money are destined for the enemy's forces.

(d) Provisions, when actually destined for the enemy's military or naval forces.

It is interesting to note that the inoffensive mule, which has proved so useful to us in South Africa, figures last of the long list of "absolutely contraband," and that the list is binding on American naval officers "until otherwise announced." In another paragraph we are informed that "in case of war, the articles that are conditionally and unconditionally contraband, when not specifically mentioned in treaties previously made and in force, will be duly announced in a public manner."

A number of minor points are dealt with, such as use of false colors being forbidden and the rule that national colors must be displayed before firing a gun. Article 14 lays down that "all merchant vessels of the enemy, except coast-fishing vessels innocently employed, are subject to capture, unless exempt by previous stipulations." The merchant vessels may be destroyed if thought fit, the passengers being landed at a convenient port at the first opportunity. It is curious to note that, though constant reference is made to neutral vessels, the code gives no index as to how the United States is prepared to recognize transfers of shipping to neutral flags.

Section V deals with the exercise of the right of search, which is confined to properly commissioned and authorized vessels of war, convoys of neutrals being exempt on the commander of the convoys being able to give proper assurances. The right of search is universally recognized as necessary to a belligerent to enable it to ascertain the nationality of a vessel for the purpose of preventing breaches of blockade, and in other circumstances to seize vessels employed in any capacity for the enemy except that of carrying goods which are not contraband of war.

Further actions justifying seizure are:

1. Attempt to avoid search by escape; but this must be clearly evident.

2. Resisting search with violence.

3. Presenting fraudulent papers.

4. Vessels not being supplied with the necessary papers to establish the object of search.

5. If papers are destroyed, defaced, or concealed.

How far our own naval officers or the foreign office could justify the seizure of the German ships for which we had to pay compensation, under any of the above heads, is a matter of pure conjecture. It may, however, be confidently predicted that their task is not rendered easier by leaving so much to common sense which it is unwise to assume too confidently will be found in the right place at the right time. In the absence of any teaching on international law, except for a few lectures to some fortunate captains and commanders at the Royal Naval College, the least that might be done is to afford them such aid as the American Navy Department does to its own officers. This little code of laws deserves to be noted as another product of the United States Naval War College, to which we owe Captain Mahan's work on sea power; while in comparison Great Britain is content to spend £200 per annum on a naval strategy course, which includes a lecture on naval history, fee of £5 a lecture. Small wonder that in such circumstances the field produces so little,

and the official representative of the Admiralty informs the House that his sympathies are with the hostile critics of the naval educational system on this question of the higher training of the Navy.

A few days later there appeared from the distinguished British authority on international law, Professor Holland, the following letter:

(From London Times, Wednesday, April 10, 1901.)

THE UNITED STATES NAVAL WAR CODE.

To the EDITOR OF THE TIMES:

SIR: The "Naval War Code" of the United States, upon which an interesting article appeared in the Times of Friday last, is so well deserving of attention in this country that I may perhaps be allowed to supplement the remarks of your correspondent from the results of a somewhat minute examination of the code made shortly after its publication.

One notes, in the first place, that the Government of the United States does not shirk responsibility. It puts the code into the hands of its officers "for the government of all persons attached to the naval service," and is doubtless prepared to stand by the rules contained in it, as being in accordance with international law. These rules deal boldly with even so disagreeable a topic as "Reprisals" (Art. 8), upon which the Brussels, and after it The Hague, Conference preferred to keep silence; and they take a definite line on many questions upon which there are wide differences of opinion. On most debatable points the rules are in accordance with the views of this country, e. g., as to the right of search (Art. 22), as to the twofold list of contraband (Art. 34-36), as the moment at which the liability of a blockade runner commences (Art. 44), and as to the capture of private property (Art. 14), although the prohibition of such capture has long been favored by the Executive of the United States, and was advocated by the American delegates at The Hague Conference. So also Articles 34-36, by apparently taking for granted the correctness of the rulings of the Supreme Court in the civil-war cases of the *Springbok* and the *Peterhoff* with reference to what may be described as "continuous carriage," are in harmony with the views which Lord Salisbury recently had occasion to express as to the trade of the *Bundesrath* and other German vessels with Lourenço Marques. It must be observed, on the other hand, that Article 30 flatly contradicts the British rule as to convoy; while Article 3 sets out The Hague Declaration as to projectiles dropped from balloons, to which this country is not a party. Article 7 departs from received views by prohibiting altogether the use of false colors, and Article 14 (doubtless in pursuance of the recent decision of the Supreme Court in the *Paquete Habana*) by affirming the absolute immunity of coast fishing vessels, as such, from capture.

On novel questions the code is equally ready with a solution. It speaks with no uncertain voice on the treatment of mail steamers and mail bags (Art. 20). On cable-cutting it adopts in Article 5, as your correspondent points out, the views which I ventured to maintain in your columns when the question was raised during the war of 1898. I may also, by the way, claim the support of the code for the view taken by me, in a correspondence also carried on in your columns during the naval maneuvers of 1888, of the bombardment of open coast towns. Article 4 sets out substantially the rules upon this subject, for which I secured the imprimatur of the Institut de Droit International in 1896.

Secondly, the code is so well brought up to date as to incorporate (Articles 21 to 29) the substance of The Hague Convention, ratified

only in September last, for applying to maritime warfare the principles of the Convention of Geneva. Article 10 of The Hague Convention has been reproduced in the code in forgetfulness, perhaps, of the fact that that article has not been ratified.

Thirdly, the code contains very properly some general provisions applicable equally to warfare upon land (Arts. 1, 3, 8, 12, and 54).

Fourthly, it is clearly expressed, and it is brief, consisting of only 54 articles, occupying 22 pages.

Fifthly, it deals with two very distinct topics, viz, the mode of conducting hostilities against the forces of the enemy, and the principles applicable to the making prize of merchant vessels, which as often as not may be the property of neutrals. These topics are by no means kept apart as they might be, articles on prize appearing unexpectedly in the section avowedly devoted to hostilities.

It is worth considering whether something resembling the United States Code would not be found useful in the British Navy. Our code might be better arranged than its predecessor, and would differ from it on certain questions, but should resemble it in clearness of expression, in brevity, and, above all things, in frank acceptance of responsibility. What naval men most want is definite guidance, in categorical language, upon those points of maritime international law upon which the government has made up its own mind.

I am, sir, your obedient servant,

T. E. HOLLAND.

OXFORD, *April 8.*

NATURE OF THE DISCUSSIONS FOR 1903.

While it is true that the Naval War Code of the United States was issued only three years ago, yet the nature of the subject and the development of maritime international law and practice make it a topic worthy of the most careful consideration at the present time, when so much thought is given to naval affairs in their international relations. It has been considered advisable that the Naval War Code of 1900 be made the basis of the conferences in international law for the session of the United States Naval War College for the summer of 1903.

In the original preparation of the code, certain debatable points were submitted and opinions upon them asked. These were as follows:

1. Prohibition of bombardment of open or unfortified towns on seacoast.

2. Adoption of additional articles of Geneva Convention as formulated at The Hague, with the exception of Article 6 and the addition of a proviso to No. 3, that all neutral hospital ships shall, before and during action, attach themselves to one belligerent or the other and be subject to its regulations and fly its flag at the main, with red cross underneath.

3. Prohibition of use of false colors by men-of-war at any time.

4. The abolition of the *jus angariæ* or seizure of neutral vessels or property for war purposes, except in the case of overpowering military necessity.

5. Exemption of fishing boats and fishermen: fish to be paid for if seized as a military necessity.

6. The exercise of the right of inquiry upon neutral men-of-war approaching a blockade or investment. If false colors were universally prohibited this would not be necessary.

7. Ransom of unfortified towns: If refused, the penalty. Should it be forbidden?

8. Should such a status as war rebel be further recognized? Vide Lieber's G. O. 100, Inst. to Armies, etc.

9. Is a collier attending a fleet of an enemy guilty of unneutral service or only of carriage of contraband of war? Should vessel and cargo be both seized?

10. Should a continuous-voyage liability be applied to vessels carrying goods that are contraband or presumably for the violation of blockade?

11. Should multiplied retaliation be severely prohibited, i. e., the shooting or hanging of more than one for one, etc.?

The code has not been tested by actual war; therefore, precedents which it might be desirable to maintain for the sake of strengthening the code itself have not been established. The code can therefore be considered without prejudice which might be favorable to a rule that had already become strengthened through action in accordance with it, or found unsatisfactory or insufficient when tried in action.

The points for discussion which have been raised are based upon material furnished by officers of the Navy, by students of international law, by critics and writers who have given attention to the code in America and in Europe.

The English, French, and Italians have thus far paid most attention to the code. So far as possible their queries and criticisms are embodied in the discussions. The changes which may be desirable in consequence of development and changes naturally coming with the passage of time are also to be considered.

The points proposed for discussion seem in some instances trivial, but all are based on criticisms or questions that have come from persons or from other sources of sufficient weight to deserve consideration. It was also judged expedient to introduce so many as possible of these points upon which questions had been raised, in order that the code might be viewed as widely as the time limits of the discussions would permit.