International Law Studies – Volume 22

International Law Decisions and Notes

U.S. Naval War College (Editor)

neutrals just as justiciable in a court of prize as is breach of blockade or the carriage of contraband of war," page 189.

The neutrals in the World War were in many cases weak or timid and belligerent disregard of neutral rights was the natural consequence. This has not been the case in wars of the later nineteenth century, and if wars subsequently occur it may not then be the case. It seems to be evident that the area of war is not limited nor its end hastened by meek submission on the part of neutrals to disregard of those rights which have been obtained after long years of struggle.

THE "BERLIN."[1]

HIGH COURT OF JUSTICE.
PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

[In Prize.]

October 7. 26, 29, 1914.

[1914] P. 265.

October 29. Sir Samuel Evans, president. In this case the Crown asks for the condemnation of the sailing ship, the *Berlin*, and her cargo as enemy property. No claim has been made in respect thereof; but it is, nevertheless, necessary to investigate the facts, and particularly to ascertain whether by international law the ship is immune from capture as a fishing vessel.

Statement of the case.

The *Berlin*, as appeared from the ship's papers, was a German fishing cutter of 110 metric tons, built in 1892, and manned by a crew of 15 hands. She belonged to the port of Emden, and was owned by the Emden Herring Fishing Co. She had on board 350 empty barrels, 100 barrels of salt, 50 barrels of cured herrings, and ship's stores in 15 barrels. She carried one boat and had two drifts of nets, consisting of 42 and 43 nets each drift, 2 bush ropes, and a small steam boiler and capstan. The vessel, as appeared from her log, had been on a fishing

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[1] *Note as to sources of decisions.*—The single American decision, the *Appam*, involving American, British, and German rights, is from the Supreme Court Reports of the United States. The British decisions are from different sources as indicated in each case. The French decisions are from the Decisions du Conseil des Prises. The German decisions are translated from the Entscheidungen des Oberprisengerichts in Berlin.

The decisions are arranged in chronological order as in the volume published by the Naval War College in 1904, Recent Supreme Court Decisions and Other Opinions and Precedents.

voyage in the North Sea for a considerable time. From July 27 onward she had been catching herrings, fishing in latitudes between 55° and 58° 30′ N., and in longitudes between 1° E. or W., and in depths of from 66 to 148 meters. Her position on August 1–2, as given in her log, was latitude 55° 35′ and longitude 0° 32′, and on August 4–5, latitude 58° 28′ and longitude 0° 33′. She was at these times, therefore, far out in the North Sea, at distances 100 miles, more or less, from the nearest coast, namely, Great Britain, and 500 miles, more or less, from her home port, and from the German coast. She was brought into the port of Wick in the early morning of August 6 by the steamship *Ailsa,* and given into the possession of the chief officer of customs, who detained her as prize captured at sea.

Capture.

There was no direct evidence in the legal sense, as used in our municipal courts of law, of her capture by one of His Majesty's ships or of the place or time of her capture. It was reported to the officer of the *Ailsa* that she had been captured by H. M. S. *Princess Royal,* and by him that she was handed over by the commander to the *Ailsa* to be taken into Wick Harbor. I saw a confidential report made in the course of his official duty by the commander of H. M. S. *Princess Royal* of the capture, and it appeared that the exigencies of war rendered it necessary for him to request the *Ailsa* to take the captured vessel to Wick Harbor on his behalf. It appeared also that the capture took place at 11.30 a. m. on August 5. I should, apart from this, have presumed that the capture was not made until after war was declared on August 4 (11 p. m.). When the capture took place the vessel was in the North Sea in the position which I have approximately stated.

Evidence.

It would have been advisable, inasmuch as His Majesty's ship was unable to take the captured vessel to port, or to put a prize crew on board for the purpose, for the commander of the *Princess Royal* to enter the time and place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But fortunately, in this court, I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom, upon which the court may think it safe and just to act. Eminent judges (among them Lord Russell of Killowen) have commented upon the strict

technicalities of some of the rules of evidence in our courts of law; and admirable and wholesome as they are in the main, it would appear that some of them tend to shut out facts which might with advantage to the course of justice be made known to the court. However this may be, the prize court is not bound by such confining fetters as our municipal courts. Upon this subject Doctor Lushington laid down the practice as follows:

"With regard to the evidence to be produced in the Admiralty courts with respect to blockades, and, indeed, I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the license of evidence of every kind and description which could well be offered to the consideration of the court.

"I apprehend that this, so far as I know, the universal practice of the court, was adopted for several reasons. First, because the prize court being, not a municipal court but a court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

"Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence, because this court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognized by themselves.

"Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

"Fourthly, because, though the court may receive all, it will form its own judgment, according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence merely because it does not exclude it": The *Franciska*.[2]

I have stated the conclusions of fact to which I have come in the present case.

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[2] (1855) Spinks 287; 2 Eng. P. C. 346.

The question now remains whether this vessel, the *Berlin*, is immune from capture as a coast fishing vessel.

Immunity of fishing vessels.

The history of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing up to the year 1899 has been given in the Supreme Court of the United States of America in the case of the *Paquete Habana* and the *Lola*.[3] The judgment of the court was delivered by Gray, J. It is full of research, learning, and historical interest.

As such an elaborate and complete résumé is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar task.

The conclusions stated by Gray, J., and which form the judgment of the majority of the Supreme Court, were as follows:

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod, or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own Government in relation to the matter."

Japanese regulations.

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its prize regu-

[3] 175 U. S. 677.

lations, and in some of its prize court decisions, and it forms also the subject of an article in one of The Hague conventions of 1907.

Article 35 of the Japanese regulations governing captures at sea, which came into force on March 15, 1904, provides as follows:

"All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:

"(1) Vessels employed for coast fishery.

"(2) Vessels making voyages for scientific, philanthropic, or religious purposes.

"(3) Lighthouse vessels and tenders.

"(4) Vessels employed for exchange of prisoners."

In the case of the *Michael*,[4] heard in the Japanese Prize Court in 1905, which related to what was alleged to be a deep-sea fishing vessel, it was claimed that—

Japanese decisions.

"The vessel, though a deep-sea fishing vessel, was not engaged in traffic forbidden in time of war, nor was she carrying contraband of war, and consequently being harmless should be released, in accordance with the intention which underlies the exemption from capture of small coastal fishing boats." Upon this the decision of the court ran as follows: "The claimants also argued that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing boats; but the usage of international law by which small coastal fishing boats are not captured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle can not be extended to a vessel like the *Michael*, which was the property of a company and engaged in deep-sea fishing."

The point was not raised in the higher prize (appeal) court. Similarly, in the case of the *Alexander*,[5] the same court pronounced as follows:

"It is also argued by the claimants that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing vessels, but the usage of international law by

[4] Russian and Japanese Prize Cases (1913), vol. 2, p. 80.

[5] Russian and Japanese Prize Cases, vol. 2, p. 86.

which small coastal fishing vessels are not captured arises mainly from the desire not to inflict distress on poor people who are not connected with the war, and clearly can not be extended to a vessel like the *Alexander*, the property of a company, and, moreover, engaged in deep-sea fishing."

Upon appeal one of the grounds of appeal was:

"Again, the reasoning in the decision appealed from, that as the exemption from capture of small coastal fishing vessels chiefly arose from a desire not to inflict distress upon poor people unconnected with the war, it could not therefore be extended to a vessel like the *Alexander*, which was engaged in deep-sea fishing, shows that the claimants' point had not been understood. What the claimants desired was that the imperial prize court should, in the light of recent developments in international law, not adhere to old usages, but create new precedents."

Upon which the court adjudged in somewhat quaint fashion as follows:

"The appellants also desired that a new precedent should be established in the light of recent developments of international law by the exemption from capture of a vessel which, as in the present case, was engaged in deep-sea fishing. * * * The appellants' request that a new precedent should be created by the exemption from capture of a deep-sea fishing vessel is nothing more than the simple expression of their hopes, and this ground of the appeal is therefore also devoid of substance."

Hague Convention, IX.

I do not propose to make any pronouncement in the case now before the court as to whether the German Empire or its citizens have in the circumstances of this war the right to claim the benefit of The Hague convention. But in order to show how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to article 3 of The Hague convention, XI, 1907, which is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations: vide the *Young Jacob and Johanna*[6] and the *Liesbet van den Toll.*[7]

British doctrine.

But after the lapse of a century, I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves.

The foundation of the doctrine is stated by Hall[8] as follows:

"It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardships on their owners, is as a measure of general application wholly ineffective against the hostile State."

The rule is formulated by Westlake (International Law, Part II, War, p. 133) in these terms:

"Coast fisheries: Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats, and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as, in the opinion of the hostile Government or its naval commanders concerned, they are not likely to be engaged in any warlike employment"—and he adds: "If the opinion here referred to is only that of the naval commanders concerned, the prize court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a Government order, the prize court, in the absence of anything to the contrary in the constitution of the country, will

[6] 1 C. Rob. 20. [7] (1804) 5 C. Rob. 283. [8] International Law (6th ed.), p. 446.

be bound by such an order as emanating from the authority under which it sits."

It is obvious that in the process of naval warfare in the present day such vessels may without difficulty and with great secrecy be used in various ways to help the enemy. If they are, their immunity would disappear; and it would be open to the naval authorities under the Crown to exclude from such immunity all similar vessels if there was reason for believing that some of them were utilized for aiding the enemy. And this seems to be the sense in which the second paragraph of article 3 of The Hague convention referred to should be regarded.

Decision.

As to the *Berlin*, I am of opinion that she is not within the category of coast fishing vessels entitled to freedom from capture; on the contrary, I hold that, by reason of her size, equipment, and voyage, she was a deep-sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country, and, as such, could be and was properly captured as prize of war.

I therefore decree the condemnation of the vessel and cargo, and order the sale thereof.

THE "MIRAMICHI."

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

[In Prize.]

November 23, 1914.

[1914] P. 71.

Statement of the case.

The subject matter of the claim in this case is a part cargo of 16,000 bushels of wheat carried on the steamship *Miramichi*, which was seized or captured as enemy property on September 1, 1914, in the circumstances hereinafter mentioned.

The steamship *Miramichi* was a British ship. The cargo of wheat to which the claim relates was shipped at Galveston, Tex., and was stowed, with other wheat, in holds 1, 4, and 6 of the vessel. It was shipped in the month of July, 1914, before the commencement of the war, and without any anticipation of war. It was destined for the port of Rotterdam, and was intended to