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Belligerent Interference with Mails

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BELLIGERENT INTERFERENCE WITH MAILS.

THE doctrine of the inviolability of the mails is a distinctly modern tenet. During the Napoleonic wars, the English authorities regularly exercised a general supervision over all correspondence that fell into their hands.¹ The carriage of official documents for the enemy was regarded as a particularly reprehensible act which might subject the neutral vessel to condemnation.² With the growth of international communication, the practice gradually arose of exempting mails on neu-

1. The writer is indebted to Professor W. E. Lingelbach for the following reference:

“American Consulate, London.

February 14, 1812.

“The enclosed letter was on board the Ship Vigilant (Joshua Coombs, Master) bound from Amsterdam to Boston, which vessel having been sent into Yarmouth by a British Ship of War, for adjudication, all the Letters on board were opened and examined under the authority of the Court of Admiralty, as is usual in such case. The Vigilant being now released, the Letters have been returned to me; and I have deemed it my duty to enclose them to Persons to whom they are addressed.

“I am,

“Your most obedient and humble servant,

(Signed) “R. G. Beasley.”

2. *The Atalanta*, (1808) 6 C. Rob. 440, 1 Roscoe, Prize Cases 607; *The Rapid*, (1810) Edw. 228, 2 Roscoe, Prize Cases 45.

tral merchant ships from visitation or detention.³ The United States set an excellent example in this respect during the Mexican War⁴ and pursued a like liberal policy during the Civil⁵ and Spanish-American wars.⁶

This question was the occasion of an interesting correspondence between the United States Secretary of State and the British government during the Civil War.⁷ The British Ambassador at Washington endeavored to induce the United States to concede that "Her Majesty's mail on board a private vessel should be exempt from visitation or detention." Mr. Seward took the position that "the public mails of any friendly or neutral power, duly certified or authenticated as such, shall not be searched or opened, but be put as speedily as may be convenient on the way to their designated destinations." He added, however, that this concession was not to protect "simulated mails verified by forged certificates or counterfeited seals." This opinion was duly communicated to the British Ambassador at Washington with the full approval of the President. But Mr. Welles, Secretary of the Navy, paid no attention to this communication. The dispute was brought to a head over the disposition of the mails which were found on the *Peterhoff*. The court directed that the mails should be opened in the presence of the British consul who should "select such letters as seemed to him to relate to the culpability of the cargo" and reserve the remainder to be forwarded to their destination. But the British consul refused to act and Lord Lyons appealed to the Secretary of State for the protection of the mail. The President thereupon directed that the mails should not be opened but forwarded at once to their original destination. Instructions to this effect were subsequently issued to the United States naval officers.

3. Oppenheim, *Int. Law*, II, p. 453. Lawrence, *Law and Neutrality in the Far East*, p. 185.

The Postal Treaty of 1848 between the United States and Great Britain provided that in case of war between the two nations, the mail packets should be unmolested for six weeks after notice by either government that the mail service was to be discontinued, in which case the packets should have safe conduct to return.

4. During the Mexican War, the United States forces permitted British mail steamers to pass in and out of Vera Cruz without molestation. Wheaton, *Int. Law* (Dana Ed.) p. 504, note 228, p. 659. Moore, *Dig. Int. Law*, VII, p. 479.

5. Moore, *Dig. Int. Law*, VII, pp. 481-84.

6. Naval War College, *Int. Law Topics*, 1906, p. 91.

7. Moore, *Dig. Int. Law*, VII, p. 481.

On the outbreak of the war with Spain the United States government issued the following proclamation:⁸

“The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.”

This proclamation, it will be observed, did not grant complete immunity to mail ships. In the case of *The Panama*,⁹ a vessel belonging to the Spanish naval reserve, the Supreme Court held that “the mere fact that the Panama was a mail steamer or that she carried mail of the United States . . . does not afford any ground for exempting her from capture.”

The instructions of the Spanish Admiralty provided that a ship might be captured:¹⁰

“If she carries letters and communications of the enemy, unless she belong to a marine mail service, and these letters or communications are in bags, boxes or parcels, with the public correspondence, so that the captain may be ignorant of their contents.”

The United States Naval War Code is much more generous in its treatment of mail steamers and mail matter. It provides:

“That mail steamers under a neutral flag carrying hostile despatches in the regular and customary manner, either as a part of their mail in their mail bags or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken.”¹¹

But the exemption so granted has not been recognized by any nation as absolute or obligatory: it has existed of grace rather than as of right and has been subject to such limitations as the belligerent might lay down.¹² During the Franco-Prussian War, for example, the French government exempted the mail bags of neutral vessels from search in case there was an

8. Naval War College, *Int. Law Topics*, 1906, p. 91.

9. (1899) 176 U. S. 535, 20 S. C. R. 480, 44 L. Ed. 577.

10. Naval War College, *Int. Law Topics*, 1906, p. 91.

11. The United States Naval War Code, 1900, Article 20.

12. Moore, *Dig. Int. Law*, VII, p. 482; Lawrence, *War and Neutrality in the Far East*, p. 189.

agent of the neutral state on board who was prepared to declare that there were no dispatches of the enemy among the correspondence.¹³ In subsequent wars, the belligerents have shown a decided tendency to exercise their full legal rights over mail ships and correspondence. During the blockade of Venezuela in 1902,¹⁴ the British and German fleets stopped all neutral mail ships and after overhauling the correspondence and detaining what seemed noxious sent the rest ashore in boats belonging to the blockading squadron." This action was perfectly justifiable according to the British Manual of Naval Prize Law which provides that: "The mail bags carried by mail steamers will not, in the absence of special instructions, be exempt from search for enemy dispatches."¹⁵ The regulation of the Japanese government on the outbreak of war in 1904, expressly authorized its naval officers to examine all enemy correspondence in case of suspicion of the carriage of contraband papers.¹⁶ The Russian instructions went even further and directed its officers to "search for the correspondence of the hostile government and generally speaking all packages addressed to the enemy's ports."¹⁷ This order was carried out by Russian cruisers on several occasions in respect to both English and German mail steamers.¹⁸ In the case of *The Calchas*, the prize court of Vladivostock asserted its right to examine the contents of the mail bags found on board that ship.¹⁹ The United States government entered a

13. Oppenheim, Int. Law, II, p. 453.

14. Lawrence, War and Neutrality in the Far East, p. 191.

15. Manual of Naval Prize Law, Article 102.

16. Article 34. "In visiting or searching a neutral mail ship, if the mail officer of the neutral country on board the ship swears in a written document that there are no contraband papers in certain mail bags, those mail bags shall not be searched. In case of grave suspicion, however, this rule does not apply."

Article 68. "When a mail steamer is captured, mail bags considered to be harmless shall be taken out of the ship without breaking the seal, and steps shall be taken quickly to send them to their destination at the earliest date." Naval War-College, Int. Law Topics, 1906, p. 92.

17. Ibid.

18. Oppenheim, Int. Law, II, p. 454; Lawrence, War and Neutrality in the Far East, p. 185.

19. Hurst and Bray, Russian and Japanese Prize Cases, I, p. 138.

The instructions issued to the naval officers of the United States during the Civil War, likewise provided "That to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried or parcels under official seals, you will in the words of the law 'preserve all the papers and writings found on

protest in that case against the seizure and detention of United States mail as opposed to the more "liberal tendency of recent international usage,"²⁰ but it did not venture to declare that the act itself was expressly illegal. The rules of the Japanese prize court likewise recognized the right of a belligerent court to examine any letters and correspondence which might be brought before it in the course of prize proceedings.²¹

In short, it may safely be said that up to the time of the Hague Convention there was no principle of international law, prohibiting the search and even confiscation if need be, of postal correspondence carried by sea in time of war.²² "The utmost that we can venture to assert," says Lawrence,²³ "is that such a usage is in process of formation and is in itself so convenient that it ought to become permanent and obligatory, due security being taken against its abuse."²⁴

The resolutions of the second Hague Conference on the subject of postal correspondence mark a decided step in advance. The resolutions run as follows:²⁵

"Article I. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

"The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

board and transmit the whole of the originals unmolested to the judge of the district to which such prize is ordered to proceed."

20. United States Foreign Relations, 1904, p. 772.

21. Takahashi, International Law applied to Russo-Japanese War, p. 568.

It is interesting to observe that Secretary Seward recommended in the case of the *Peterhoff* that if "the district attorney has any evidence to show that the mails are simulated and not genuine, it shall be submitted to the court. If there be no reasonable grounds for that belief, then that they be put on their way to their original destination." Moore, *Dig. Int. Law*, VII, p. 482.

22. Oppenheim, *Int. Law*, II, 454; Hershey, *Essentials of International Public Law*, note 423.

23. Lawrence, *War and Neutrality in the Far East*, p. 185.

24. Dr. Lushington declared that "to give up altogether the right to search mail steamers and bags when destined to a hostile port is a sacrifice which can hardly be expected from belligerents." *Naval Prize Law*, Introduction, p. XII.

25. Scott, *Hague Conventions and Declarations of 1899 and 1907*, p. 182.

"Article II. The inviolability of postal correspondence does not exempt a neutral mail-ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible."

The object of the resolutions, as set forth by Herr Kriege,²⁶ the German delegate, was to promote the interests of innocent commerce.

"Postal relations have at our epoch such importance—there are so many interests commercial or other, based on the regular service of the mail—that it is highly desirable to shelter it from the perturbations which might be caused by maritime war. On the other hand, it is highly improbable that the belligerents who control means of telegraphic and radio-telegraphic communication would have recourse to the ordinary use of the mail for official communications as to military operations. The advantage to be drawn by belligerents from the control of the postal service therefore bears no prejudicial effect of that control on legitimate commerce."

It was the general opinion of the Convention that the rapid extension of telegraphic communication had practically eliminated any danger of the surreptitious use of the mails for the carriage of contraband papers.²⁷ Only the ordinary correspondence, it was thought, would be entrusted to the slow and somewhat precarious conveyance by mail: all important political or military information would be transmitted by a safer and more expeditious method. The result, however, has turned out to be quite otherwise than was anticipated by the conference of international jurists.²⁸ The argument of the German delegation bears little relation to the existing state of international commerce during war.²⁹ In view of the surprising change of conditions, both the neutral and belligerent governments have found it necessary or expedient to readjust their

26. Hershey, *The so-called Inviolability of Mails*. 10 *Am. J. Int. Law*, p. 580.

27. A similar view was expressed in the discussion at the United States Naval War College in 1906. *Naval War College, International Law Topics, 1906*, p. 93.

28. Commander von Usler, *Maritime Responsibility in Time of War*. 181 *N. Am. Rev.*, p. 186; *Naval War College, International Law Topics, 1906*, p. 93.

29. For a statement of the amount of contraband carried through the mails on various steamers, see Allied memorandum relative to postal correspondence on the High Seas, Feb. 15, 1916. 10 *Am. J. Int. Law*, (Special Supplement) 406.

postal theories of inviolability to the new commercial facts and to place a more restrictive interpretation upon the generality of the language of the postal convention than had originally been intended or anticipated.

This convention, it should be stated at the very outset, is of doubtful applicability to the controversy now going on between the United States government on the one hand and the French and English on the other, over the so-called inviolability of mails.³⁰ The Hague resolutions are binding only as between the contracting parties and when all the belligerents are parties to the convention; and it so happens in this case that several of the belligerent nations have failed to ratify the convention.³¹ Fortunately the Allied Governments have not attempted as yet to take advantage of this omission. They are, however, fully alive to their own special rights and interests in the matter and have expressly reserved the right to repudiate its provisions "in case enemy abuses and frauds, dissimulations and deceits should make such a measure necessary."³²

It is equally fortunate that the Allied Governments have not seen fit to raise the questions of blockade or continuous voyage.³³ It might have been expected that the Allies would attempt to justify their interference with neutral mails on the ground that the mail matter in question "was destined for or proceeding from a blockaded port."³⁴ But no such attempt has been made to confuse the issue. Throughout the correspondence between the Allied Governments and the United States there has been a marked effort to discuss the various points at issue in a liberal and fairminded spirit with a view to the determination of true legal principles; and it is a tribute to the sense of justice and moderation of both parties that they have

30. Hershey, *The so-called Inviolability of Mails*, 10 *Am. J. Int. Law* 580.

31. Bulgaria, Italy, Montenegro, Russia, Serbia and Turkey have not yet ratified the convention. Many neutral countries are in the same position.

32. Memorandum of the British Ambassador to the Secretary of State, Oct. 12, 1916. 10 *Am. J. Int. Law*, (Special Supplement) 421.

33. Memorandum of the Secretary of State to the British Ambassador, May 24, 1916. *Ibid.* 413.

34. Professor Hershey expresses the opinion that this plea might have been entered "with entire justice and propriety." 10 *Am. J. Int. Law* 581.

been able to arrive at the same general conclusions so far at least as the fundamental principles of law are concerned.

The correspondence between the United States and the Allied Powers raises a number of important legal questions.³⁵ First, what is the nature of post parcels? Are they mail or merchandise? Upon this point the respective governments are in agreement; and there can be no doubt as to the correctness of their decision that parcels post should properly be treated as merchandise and as such are subject to the general exercise of belligerent rights as recognized by international law.³⁶ To place any other interpretation upon the words "postal correspondence" would not only transform their original meaning but would also be equivalent in effect to a material modification of the general principles of law in respect to the carriage of contraband. Under the guise of "postal correspondence" the neutral would be free to carry on an unlimited trade in contraband articles. It was certainly not the intention of the delegates at the Hague to revolutionize the generally accepted rules of maritime law by means of a postal joker. The same observation may be made in regard to "merchandise hidden in the wrappers, envelopes or letters contained in mail bags." Inasmuch as the United States government does not contest the validity of the English contention on this matter it is safe to conclude that as between the United States and the Allied Governments at least, the principle is clearly established that the provisions of the Hague Convention were intended to cover genuine correspondence only and not articles of trade which may be consigned through the mails. The English prize court had already laid down in the case of *The Simla*,³⁷ that the provisions of the Hague Convention in respect to the immunity

35. Copies of the correspondence in convenient form may be found in 10 Am. J. Int. Law (Special Supplement, Oct. 1916) 404-26.

36. The United States government, however, was not willing to admit the English claim that such parcels are subject to "the exercise of the rights of police supervision, visitation and eventual seizure which belong to belligerents as to *all* cargoes on the high seas." Ibid. p. 413.

It is interesting to observe in this connection that the Swedish government detained all parcels post from England in transit across Sweden as a measure of reprisal against Great Britain for removing from neutral ships bags of parcels mail bound to and from Sweden. The Swedish government later released the detained parcels upon the understanding that the dispute should be submitted to arbitration. 11 Am. J. Int. Law, Supplement, 22-54.

37. 1 Trehern, British and Colonial Prize Cases 281.

of postal correspondence did not apply to parcels sent by parcel post. The correspondence of the two governments merely lends political sanction to that decision.

The Allied Governments also concur with the United States in recognizing the inviolability of "genuine correspondence," by which they mean "despatches or missive letters," but they contend that this immunity does not extend to any other form or kind of mail matter.³⁸ The United States, however, looks upon this suggested limitation with considerable suspicion as affording a possible ground for unwarrantable interference with the mails. This government is not prepared "to admit that belligerents may search other private sea-borne mails for any other purpose than to discover whether they contain articles of enemy ownership carried on belligerent vessels or articles of contraband transmitted under sealed cover as letter mail" except in case of blockade.³⁹ The official declarations of both parties upon the question of what constitutes "genuine correspondence" are exceedingly hazy. Nor are the governments any more clear or definite as to the specific methods by which the authenticity of innocent correspondence may be determined. Both parties are apparently anxious to avoid a breach or afraid to commit themselves to any distinct proposition which might later prove embarrassing in case of a conflict with other powers. All that can be asserted at present is that the respective governments are in "substantial agreement" upon the general principle of the immunity of innocent correspondence. "The method of applying the principle" is, in the opinion of the United States "the chief cause of difference."

The real struggle between the two parties centers about the "mode in which the Allied Governments exercise the right of visitation and search," particularly in respect to the improper assumption of jurisdiction over vessels and cargoes which are carried into or are found in Allied ports. The United States government most strongly objects to the unjustifiable practice of the Allies in bringing neutral vessels into Allied ports for the purpose of exerting a more effective supervision over their mails and cargo than is possible on the high seas. Economic or political pressure is employed in order to secure jurisdiction

38. 10 Am. J. Int. Law (Special Supplement) 409.

39. *Ibid.* 413.

over neutral ships. In the words of the United States memorandum:

"They [the Allies] compel neutral ships without just cause to enter their own ports or they induce shipping lines, through some form of duress, to send their mail ships via British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. Acting upon this enforced jurisdiction, the authorities remove all mails, genuine correspondence as well as post parcels, take them to London, where every piece, even though of neutral origin and destination, is opened, and critically examined to determine the 'sincerity of their character', in accordance with the interpretation given that undefined phrase by the British and French censors. Finally the expurgated remainder is forwarded, frequently after irreparable delay, to its destination. Ships are detained en route to or from the United States, or to or from other neutral countries and mails are held and delayed for several days and in some cases, for weeks and even months, even though routed to parts of North Europe via British ports. . . . The British and French practice amounts to an unwarranted limitation on the use by neutrals of the world's highway for the transmission of correspondence."⁴⁰

To the first of these indictments the Allies enter a plea of not guilty. They emphatically declare that they "have never subjected mails to a different treatment according as they were found on a neutral vessel on the high seas or on neutral vessels compelled to proceed to an Allied port." The same general principles of visit and search they admit are equally applicable in both cases and it would not be possible to extend the legal authority of the belligerent by bringing a neutral ship within the local jurisdiction. The Allies, however, fail to meet the specific criticisms of the United States in respect to the mode in which the right of visit and search has been exercised. They endeavor to justify their action first by an appeal to the practise of other nations in previous wars and second, by resorting to the familiar device of condemning the much more reprehensible conduct of the Central Powers in destroying neutral mails. The precedents cited,⁴¹ however, are concerned almost entirely with the general principle of the validity of the examination of mails; they throw little light upon the real question at issue, viz., the legitimacy of the methods employed by the Allies. The principle may be fully admitted but that admis-

40. *Ibid.* 413-14.

41. *Ibid.* 422-25.

sion does not lend any justification to the arbitrary methods employed in exercising the right of search.⁴² Upon this point, at least, the United States government has decidedly the better of the argument.

This phase of the controversy, upon its face, resolves itself into a pure question of fact as to the methods employed by the belligerents, but in reality there is an important legal principle at stake. In theory, the Allies admit the inviolability of innocent correspondence, but in practice they examine all correspondence on suspicion to determine the genuineness of its private character. The fact that contraband articles have been found in what appeared to be personal communications has been considered sufficient warrant for subjecting all doubtful mail matter to examination. Mere "suspicion" has been substituted for the sounder test of "reasonable ground for belief."⁴³ In the case of the Bundesrath during the Boer War, the English government issued an order that mail steamers should not be stopped and searched on suspicion only.⁴⁴ But this precedent has now been thrown to the winds and the Allied governments are applying to mail ships and mail matter the same general principle that they have laid down for merchant ships in general, viz., that "neutrals may be held up in cases where there are good grounds to suspect that their ostensible destination is not the genuine destination."⁴⁵ In short, the presumption of innocence has been materially modified. The postal authorities proceed to examine the whole correspondence in case they come across anything that appears to them to be suspicious. The neutral may now find himself called upon to

42. The United States gives specific instances of the seizure both of parcels post and "of entire mails including sealed mails and presumably the American diplomatic and consular pouches." It is almost needless to say that any interference with the diplomatic and consular mails of neutral states, with the correspondence of belligerent governments with their diplomatic and consular officers in neutral states or of the latter with the home state, would be a flagrant violation of international law. *The Caroline*, (1808) 6 C. Rob. 461, 1 Roscoe, Prize Cases 615; *The Madison*, (1810) Edw. 224, 2 Roscoe, Prize Cases 42; Lawrence, *War and Neutrality in the Far East*, p. 198.

43. Despatch of Mr. Seward, Secretary of State, to Mr. Welles, Secretary of the Navy, April 15, 1863. Moore, *Dig. Int. Law*, VII, p. 482.

44. Stowell and Munro, *International Cases, War and Neutrality*, p. 413.

45. *The Wico*, *Ibid.* 499.

prove the legitimate character of his correspondence and trade.⁴⁶

A recent case, *Rex. v. Garret—ex parte Scharfe*,⁴⁷ throws an interesting side-light upon the general attitude of the English courts towards the question of visit and search. This case arose out of the arrest of certain Russian subjects who were forcibly removed from a Danish ship in a British port for a violation of the Defence of the Realm regulations. The captain had brought his ship into Kirkwall under the terms of an international arrangement by which neutral ships were to call at that port for examination in order to avoid the danger and delay of a visit and search at sea. It was contended on behalf of the defendants that since the ship had come into port as a mere act of international courtesy, the English government ought not to take advantage of that fact to assert an authority over the prisoners which it could not have legally exercised on the high seas. So far at least as the prisoners were concerned, the ship ought properly to be considered as still upon the high seas. But the court quickly brushed aside the objection. The defendants, it declared, "had utterly failed to bring the case within any principle of law."

The court in this case laid considerable emphasis upon the fact that neither the Danish nor the Russian governments had entered a complaint against the action of the local authorities. It is exceedingly doubtful, however, if a protest on the part of a foreign government would have affected the ruling of the court in any way. Such a protest would have been a diplomatic matter with which the court would have had no concern. The court had only to look to the immediate facts. A foreign ship had come into a British port of its own free will to be examined. The court would not go back of that fact to inquire into the naval, political or economic considerations which had induced or compelled the Danish authorities to enter into the convention.

The Allies are able to present a much stronger case in respect to their treatment of neutral merchant ships which "voluntarily" enter belligerent ports.⁴⁸ In actual practice, it is

46. The London Times, Dec. 12, 1916, gives an interesting description of the working of the censorship in England. See also a memorandum, "The Mails as a German War Weapon," 1916.

47. The London Times, Feb. 2, 1917.

48. 10 Am. J. Int. Law (Special Supplement) 420.

exceedingly difficult to draw the line in the present war between the voluntary and involuntary entrance of merchant vessels, but the difference, nevertheless, is clearly recognized in law. Both the English and American courts have freely exercised jurisdiction over foreign vessels in the case of a voluntary entrance, whereas in the latter class of cases, they have regularly exempted such ships from the operation of the local law.⁴⁹ In *United States v. Diekelman*,⁵⁰ the Supreme Court laid down that ships which voluntarily enter a foreign port "thereby place themselves under the laws of that port whether in time of war or of peace." In the light of this important precedent, the Allies contend it is perfectly legitimate for the belligerent governments "to make sure" that any merchant vessel entering an Allied port "carried nothing inimical to their national defence before granting its clearance."⁵¹

The validity of the Allied contention upon this point can scarcely be gainsaid. The English government has always been jealous of its authority over all persons and things voluntarily within the local jurisdiction. The English courts have uniformly maintained their jurisdiction over criminal offences committed on foreign vessels in British ports.⁵² The courts

49. *The Industria*, Forsyth, *Cases and Opinions on Constitutional Law*, p. 399; *The Fortuna*, (1803) 5 C. Rob. 27, 1 Roscoe, *Prize Cases*, 417; *The Brig Short Staple v. U. S.*, (1815) 9 Cranch 55, 3 L. Ed. 655; *The Brig Concord*, (1815) 9 Cranch 387, 3 L. Ed. 768; *The Diana*, (1868) 7 Wall. 354, 19 L. Ed. 165; *The Comet*, *Enconium*, *Enterprise*, *Hermosa* and *Creole*, Moore, *Dig. Int. Law*, II, Sec. 208.

The Merchant Shipping Acts furnish an excellent illustration of the tendency of the English government to extend its jurisdiction to foreign vessels in English ports. See also *The British Territorial Waters Act of 1878*. Westlake, *International Law*, Part I, Peace, pp. 259-62.

50. (1875) 92 U. S. 520, 23 L. Ed. 742.

51. 10 Am. J. Int. Law (Special Supplement) 420.

52. *Regina v. Cunningham*, (1858) 8 Cox C. C. 104, Bell C. C. 72, 7 W. R. 179, 5 Jur. (N. S.) 202; *Regina v. Anderson*, (1868) 11 Cox C. C. 198, 204.

"So complete is the authority of the *lex loci* over all persons and property on board of private vessels, that if a vessel under the British Mercantile Flag were to enter the port of Charleston, having free negro sailors amongst her crew, the mercantile flag will not protect those sailors from the operation of the territorial law of the state of South Carolina, which forbids a free negro to be at large within the limits of that state. It has thus frequently happened that negroes, or persons of color, though free subjects of her Britannic Majesty, and duly entered on the muster roll of the crew of a British merchant vessel, have, on such vessel entering the port of Charleston, been taken out of her by the officers of the port under the authority of the local law, and have been detained in custody until the vessel has

and political department of the United States likewise have not hesitated to assert the doctrine of territorial sovereignty in the most sweeping terms in respect to foreign ships. In the case of *Exchange v. McFadden*⁵³ Chief Justice Marshall declared that the merchant vessels of one country entering the ports of another for the purposes of trade subject themselves to the laws of the port they visit so long as they remain. And in the subsequent case of *United States v. Diekelman*⁵⁴ Chief Justice Waite laid down that a foreign vessel which entered the port of New Orleans, at that time under martial law, was amenable to the law of the port and "voluntarily assumed all the chances of war into whose province she came." Secretary of State Bayard in 1885 declared "that when a merchant vessel of one country visits the ports of another for the purposes of trade, it owes temporary allegiance and is answerable to the jurisdiction of that country . . . unless otherwise provided by treaty."⁵⁵ Many other official declarations might be cited to a like effect.⁵⁶ In view of these precedents, it is submitted that the privileges of neutral mail ships in belligerent ports must be construed in strict subordination to the rights of the sovereign state to take such measures as may be necessary to secure the state against the designs of its enemies. Mails, it has been held, in time of peace, are subject to the quarantine laws of the state for reasons of public safety;⁵⁷ in time of war, when the safety of the state may be in even greater

cleared outwards, when they have been again placed on board of the ship with permission to leave the country. On the other hand, if a merchant ship under the flag of the United States, or under the Palmetto flag of South Carolina, were to enter a British port with one or more negro slaves on board, her mercantile flag would not avail to exclude the jurisdiction of the British Courts, if their territorial authority should be invoked to vindicate the personal liberty of a human being who is within British territory." Twiss, *Law of Nations in Time of Peace*, pp. 229-30.

53. (1812) 7 Cranch 116, 3 L. Ed. 287.

54. (1875) 92 U. S. 520, 23 L. Ed. 742; *The Wildenhuis Case*, (1886) 120 U. S. 1, 7 S. C. R. 385, 30 L. Ed. 565; *The Kestor*, (1901) 110 Fed. 432. In the case of *Patterson v. Bark Eudora*, (1903) 190 U. S. 169, 23 S. C. R. 821, 47 L. Ed. 1002, the Supreme Court laid down that no one within the jurisdiction could escape liability for a violation of the law in respect to the prepayment of wages of seamen "on the plea that he was a foreign citizen or an officer of a foreign merchant vessel." Charles Noble Gregory, *Jurisdiction over Foreign Ships in Territorial Waters*, 2 Mich. Law Rev. 334.

55. Moore, *Dig. Int. Law*, II, p. 278.

56. *Ibid.* 272-86.

57. *Ibid.* 145.

danger from enemy correspondence, it can scarcely be expected that the belligerents will exempt the mails and mail ships from the operation of the laws of contraband and un-neutral service.

To the charge of violating the Hague postal convention, the Allied Governments enter an elaborate rejoinder.⁵⁸ They point out quite correctly that the convention in question deals only with correspondence "found on the high seas" and has no application whatever to mail which may be found on board ships within the local jurisdiction. And even this exemption of mails "found on the high seas" rests, as we have seen, on a precarious foundation since the Allied Powers are under no legal obligation to carry out the provisions of the convention in the absence of express ratification. In short, so far as the positive provisions or prohibitions of international law are concerned, they are free to repudiate the convention and to revive the former arbitrary rights of search and seizure as they have threatened to do.⁵⁹

As a strict matter of law, it must again be admitted that the Allies' argument is probably correct. But notwithstanding this admission, the neutral nations would nevertheless be justified in considering any attempted enforcement of the allied threat as a grave breach of the comity of nations. Under modern social and economic conditions it would be manifestly unjust to subject "genuine correspondence" to the same belligerent restrictions that are placed on ordinary merchandise.⁶⁰ The two things cannot properly be assimilated. Any arbitrary interference with the mails could only be justified as a measure of reprisal.⁶¹ It is sincerely to be hoped that the Allies may not find occasion to put this dangerous obsolescent war power into practical use. In such an eventuality the United States government would have special ground of complaint in view of its own liberal policy in the past toward neutral and even belligerent mail.

Even more interesting from the standpoint of international law and commerce is the discussion of the specific articles of

58. 10 Am. J. Int. Law (Special Supplement) 420.

59. Hershey, *The so-called Inviolability of Mails*, 10 Am. J. Int. Law, 581.

60. Lawrence, *War and Neutrality in the Far East*, p. 198.

61. The critical question may easily arise as to whether Great Britain would be justified in detaining all mails to and from Germany by way of retaliation for the German destruction of British mails.

international exchange which can or cannot be recognized as possessing the character of postal correspondence. The two parties are agreed in recognizing that stocks "bonds, coupons and similar securities" together with money orders, checks, drafts, notes and other negotiable instruments which may pass as the equivalent of money "may be considered as of the same nature as merchandise or other articles of property and subject to the same exercise of belligerent rights."⁶² The United States insists, however, that "correspondence, including shipping documents, money order lists and papers of that character even though relating to enemy supplies or exports unless carried on the same ship as the property referred to" should be regarded as general correspondence and entitled to unmolested passage.⁶³ The Allies declare that they do not intend to stop "shipping documents and commercial correspondence found on neutral vessels, even in an allied port and offering no interest of consequence as affecting the war," but would see to it that such mail matter is forwarded to its destination with as little delay as possible.⁶⁴ But they take decided objection to the United States classification of lists of money orders as ordinary mail. These lists, they point out, are for all practical purposes "actual money orders transmitted in lump in favor of several addressees" and as such are a most effective means of strengthening the financial resources of the enemy.

The position of the Allied Governments, it is submitted, is the stronger and more reasonable in the matter of the money order lists. In form these lists may appear as "innocent correspondence" but in fact they are an instrument of international exchange. The Allies cannot overlook the fact that in modern war financial credit is almost as important a factor as men or munitions. It is interesting to observe in this connection that the British have included "all negotiable instruments and realizable securities" in the list of absolute contraband.⁶⁵ The money order lists have not yet been placed in this forbidden category but it must be recognized that they may be made to serve on a small scale somewhat the same commercial purpose.

62. 10 Am. J. Int. Law (Special Supplement) 417, 425.

63. *Ibid.* 417.

64. *Ibid.* 425.

65. *Ibid.* 52.

A review of the correspondence leads inevitably to the conclusion that the differences between the two parties have been primarily differences of form or method of proceeding rather than fundamental differences of principle. The real crux of the whole controversy has been the question of visit and search. The arbitrary removal and censorship of the mails has been but one phase though the most important one, of the question of the right of the belligerent to bring a neutral ship into a home port for the purpose of making a more careful examination of the mail and cargo. The Allied Governments, in brief, have attempted to give a broad construction to the general right of visit and search. They have sought to exercise the right in a mode most convenient and advantageous to themselves as belligerents and the United States has challenged the legality of the whole procedure. In the language of Professor Hershey:⁶⁶

"It is a question as to whether the right of visit and search must continue to be exercised on the high seas; or whether, under the circumstances of changed methods of transportation, of improved modern devices for evading discovery, and of the dangers from submarines, the rules pertaining to the mode of exercising the right of search must not be modified so as to meet present day conditions. On this point the Allies would seem to have the best of the argument. The attitude of the United States appears to be needlessly obstructive, legalistic and technical. We stand upon the letter rather than the spirit of our rights."

With this conclusion, the writer finds himself in general agreement. During the course of the Civil War, the Supreme Court of the United States found it necessary to modify some of the principles of international law so as to bring them into accord with the changing economic conditions of the time; and time has abundantly justified the justice of these decisions. An examination of the naval records of the Civil War, as A. Maurice Low⁶⁷ has pointed out, will afford numerous precedents for the recent practice of the English naval and judicial authorities. It was the common practice for American naval officers to seize neutral vessels on suspicion or for probable cause and send them in to a prize court in order that they might there have a more thorough examination. In the

66. Hershey, *The so-called Inviolability of Mails*, 10 *Am. J. Int. Law*, 583.

67. Low, *American Precedents for all British dealings with Neutrals at Sea*. 5 *N. Y. Times Current History* 911.

case of the British ship *Adela*, for example, Commander Frailey in reporting the capture to the Secretary of the Navy, wrote:⁶⁸

"I did not examine her hold, being under the impression at that time that I had no authority to open her hatches but having a *suspicion* of her character, I deemed it my duty to send her into port and hand her over to the judicial authority for examination."

And in the subsequent case of the *Olinde Rodrigues*⁶⁹ during the Spanish War, the Supreme Court said:

"Probable cause exists when there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or are not cannot be determined unless the customary proceedings of prize are instituted and enforced. Even if not found sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally, as each case requires. And an order of restitution does not prove lack of probable cause."

In fact, so far as naval measures are concerned, it must be confessed that the methods now employed do not differ materially in principle from those which were successfully used during the Civil War. The Allies have simply developed the system of inquisitorial examination and supervision so as to secure a maximum of belligerent efficiency; and the neutral nations of today as of the time of the Civil War, are naturally kicking hard against the pricks.

If then, the right of the belligerents to examine suspicious correspondence for contraband of war or military despatches be admitted, the question arises as to mode in which this right should be exercised. Only the most general propositions can be laid down upon this point. The power, it will be recognized at the outset, must be exercised in a reasonable manner. The belligerent must show the largest measure of consideration to neutral correspondence that is compatible with the effectual exercise of belligerent rights. As to what is reasonable, the naval and postal authorities must judge in the first instance, but from this decision there will always lie an appeal to the belligerent courts and government for redress. The English courts have held that when a ship has been seized without reasonable cause, she must be restored to the neutral owner

68. *Ibid.* 914.

69. (1898) 174 U. S. 510, 19 S. C. R. 851, 43 L. Ed. 1065.

with compensation.⁷⁰ In the case of *The Wilhelmsberg*,⁷¹ it was laid down that the captor was liable to be condemned in costs and damages for not taking a vessel to a convenient port for adjudication. Any delay on the part of the captor or government to enter an appearance or exercise the right of preemption in respect to captured property, it has been determined, will likewise entitle the neutral claimant to indemnification.⁷² The same principles, it is submitted, are equally applicable to any arbitrary or unreasonable exercise of the right of search and detention of the mails. The neutral claimant should first prosecute his suit for damages before the prize courts of the belligerent, and should he fail to secure justice there, he can then proceed through diplomatic channels.

The right, it is almost needless to add, must be used for belligerent purposes exclusively. It must be confined to the discovery and detention of noxious communications only. To subject innocent correspondence to an examination for commercial purposes with a view to discovering the business secrets of a rival nation would be a grave breach of the principles of international law.⁷³ The distinction is clear in principle even though it may sometimes be difficult to draw the line in practise. This is after all a question of good faith and credit as between nations. It is not primarily a matter of law but of morality.

The right of search, it is further submitted, in the case of mail steamers, should be subject to the limitation suggested by Commander von Usler of the German Navy,⁷⁴ that neutral mail steamers should (a) "be stopped and seized only in the neighborhood of the actual seat of war and only when strong suspicion rests on them; (b) outside the actual seat of war, the mails, including those of the belligerents, ought not to be touched." These limitations have not yet been incorporated

70. *The Triton*, (1801) 4 C. Rob. 78, 1 Roscoe, Prize Cases 352.

71. *The Wilhelmsberg*, (1804) 5 C. Rob. 142, 1 Roscoe, Prize Cases 437.

72. *The Peacock*, (1802) 4 C. Rob. 183, 1 Roscoe, Prize Cases 381; *The Zacheman*, (1804) 5 C. Rob. 152, 1 Roscoe, Prize Cases 439; *The Madonna del Burso*, (1802) 4 C. Rob. 169, 1 Roscoe, Prize Cases 370.

73. There have been numerous complaints from the American press and business men that the British authorities have taken advantage of the right of search to help out English trade at the expense of neutral competitors. *The New York Evening Mail*, July 26, 1916. The English government has replied to these criticisms in a short brochure "Censorship and Trade," setting forth the mode in which the censorship has been exercised.

74. *Maritime Responsibility in Time of War*, 181 N. Am. Rev. 186.

in the law of nations. According to the existing practice, a neutral vessel is liable to search anywhere on the high seas or in belligerent waters;⁷⁵ and no exception is made in the case of mail ships. It would be a great convenience, however, to the neutral world, if an international agreement could be reached which would limit the radius of activity of belligerent warships in respect to mail steamers. During the Boer War the British government entered into an agreement with Germany that neutral vessels should not be examined at Aden or "at any other point at an equal or greater distance from the seat of war."⁷⁶ But great practical difficulties stand in the way of the general acceptance of this salutary principle. Unfortunately, the neutral is unable to guarantee that any such concession will not be put to a fraudulent use. The natural tendency in the circumstances would be for the neutral nation or the weaker belligerent to direct all obnoxious correspondence to a distant neutral port instead of sending it by the war zone route.

In the proposed code of maritime law, the Institut de Droit International recommended the adoption of a rule to the effect that a mail boat should not be visited when an official of the government whose flag she flew declared in writing that she was carrying neither despatches nor troops for the enemy nor contraband of war.⁷⁷ But this last condition, as Lawrence⁷⁸ has pointed out, will be difficult of attainment.

"No government agent on board a mail steamer can be aware of the contents of the letters for which he is responsible. There would be a terrible outcry if he took means to make himself acquainted with them. His assurance, therefore, as to the innocence of the communications in his bags can be worth but little, even though it is given in good faith. States must face the fact that to grant immunity will mean that their adversaries in war will use neutral mail boats for the conveyance of noxious despatches made up to look like private correspondence."

The prophecy of Professor Lawrence has come true. The privilege of the mails was sorely abused by interested parties. The belligerent governments soon discovered the fact and immediately proceeded to act accordingly.

75. *The Resolution*, (1781) 2 Dall. 19, 1 L. Ed. 271; *The Eleanor*, (1817) 2 Wheat. 345, 4 L. Ed. 257; Moore, *Dig. Int. Law*, VII, p. 473; Lawrence, *War and Neutrality in the Far East*, p. 186.

76. *The Bundesrath*, Stowell and Munro, *International Cases, War and Neutrality*, p. 409.

77. Lawrence, *War and Neutrality in the Far East*, p. 195.

78. *Ibid.* 192.

In truth, the situation today is similar to that of the time of the Civil War. There is the same general need that Secretary Seward⁷⁹ pointed out for an international arrangement by which mails on neutral ships may be forwarded to their destination without unnecessary interruption. At the same time, there is the clear recognition that this privilege must be accompanied by adequate assurance to the belligerent that the ships and mails in question shall not be used "as auxiliaries to unlawful designs of irresponsible persons." Until this guarantee is forthcoming, it is safe to conclude that the belligerent nations will decline to forego their existing rights. The experience of the present war does not hold out much hope that the conflicting interests of the neutral and belligerent nations upon this point can be easily reconciled.

In conclusion there is one other aspect of the controversy to which a brief reference should be made. The discussion up to the present has been confined to the United States and the Allied Nations only. The Central Powers have not been drawn into the discussion. Nevertheless they also have been parties to the most unwarranted interference with neutral mails.

The Allied memorandum points out:⁸⁰

"Between Dec. 31, 1914, and Dec. 31, 1915 the German or Austro-Hungarian naval authorities destroyed without previous warning or visitation, thirteen mail ships with their mail bags on board, coming from or going to neutral or Allied Countries, without any more concern about the inviolability of the dispatches and correspondence they carried than about the lives of the inoffensive persons aboard the ships. It has not come to the knowledge of the Allied Governments that any protest touching postal correspondence was ever addressed to the Imperial Governments."

The Allies have neatly turned the tables on the United States. The government of this country is now called upon to offer an explanation of the apparent inconsistency in its policy toward the two belligerent groups. Has not this government, Professor Hershey well asks, "been straining at a gnat and swallowing a camel?"⁸¹

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79. Moore, *Dig. Int. Law*, VII, p. 482.

80. *10 Am. J. Int. Law (Special Supplement)* 408.

81. *10 Am. J. Int. Law* 584.