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Amos S. Hershey

*Indiana University School of Law*

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SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM  
THE RUSSO-JAPANESE WAR.

V.

War Correspondents, Wireless Telegraphy and Submarine Mines.

BY AMOS S. HERSHEY,

Associate Professor of European History and Politics, Indiana University.

THE Russo-Japanese War has given rise to several interesting and important questions bearing upon the rights and privileges of neutrals in warfare which are wholly new and unprecedented in the history of International Law. In dealing with these questions it may be well to call attention to the fact that the discussion of such topics must necessarily be more or less tentative in its nature, inasmuch as we cannot appeal, in support of our views, to the authority of eminent publicists or jurists or to the force of precedents in international practice. In the absence of such guides we must fall back upon the general or fundamental principles of our science or seek for analogous cases in the history of International Law.

The first of these questions relates to the rights of war correspondents and the use of wireless telegraphy in neutral waters.

The head of our State Department must have been considerably surprised to receive the following note from Count Cassini, the Russian ambassador at Washington, on April 15, 1904. "I am instructed by my Government, in order that there may be no misunderstanding, to inform your Excellency that the Lieutenant of his Imperial Majesty in the Far East<sup>1</sup> has just made the following declaration:—In case neutral vessels, having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwan-tung, or within the zone of operations

of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes."<sup>2</sup> It is believed that a similar, if not identical, note was communicated to the other Powers,<sup>3</sup> which was thus in the nature of a general notification to the whole world. After a careful consideration of this announcement on the part of the Russian Government that it proposes to treat as spies any newspaper correspondents falling into its hands who have been engaged in the collection or transmission of news on the high seas by means of wireless telegraphy, our Government appears to have wisely decided to defer action or formal protest until a case

<sup>2</sup> For the text of this note see the *London Times* (weekly ed.) for April 22, 1904. Cf. *N. Y. Times* for April 16th. The two versions differ slightly in phraseology, but not in purport.

<sup>3</sup> This is true, at least in the case of the British Government. The British note does not seem to have been given to the Press, but on April 22d, Earl Percy, Under-Secretary of State for Foreign Affairs, gave an account of Admiral Alexieff's order in the House of Commons which differed from the American version in a very important respect. He spoke of "correspondents who are communicating information to the enemy," instead of "who may communicate, etc." "There is," as Lawrence (*War and Neutrality in the Far East*, p. 85) says in commenting upon this apparent discrepancy, "all the difference in the world between being in a position to do an act and actually doing it." In the latter case, *i. e.*, if the war correspondent on board the *Haimun* had actually communicated news to the Japanese, he would have been guilty of having performed an unneutral service for which he would have rendered himself liable by way of penalty to the loss of his ship and apparatus, although even in this case, he would not have been subject to the treatment of a spy. We have accepted the American version and assumed throughout our discussion that there is no question of unneutral service.

<sup>1</sup> Admiral Alexieff

of violation of neutral or American rights had actually arisen.<sup>1</sup>

The Russian note to the Powers appears to have been provoked by the presence in the Yellow Sea and adjacent waters of a British war correspondent equipped with a De Forest wireless telegraph apparatus<sup>2</sup> on board the Chinese dispatch boat *Haimun*. This vessel, which is in the joint service of the London and New York *Times* and which flies the British flag, had been cruising about the Gulf of Pe-Chi-li and adjacent waters as near to Port Arthur as practicable and was sending its dispatches by means of wireless telegraphy to a neutral station at the British port of Wei-hai-Wei whence they were transmitted to London and thence to New York. The *Times'* correspondent declared that his messages, being in cipher, could not be recorded either by Russian or Japanese instruments, that they all went to a neutral cable office, that he had never been in Russian waters, and that all of his dispatches had been sent either in neutral waters or on the high seas.<sup>3</sup>

<sup>1</sup> The Russian Foreign Office was notified, however, that "the United States reserves all the rights she may have under International Law in the event of any American citizen being affected." This notification did not involve a protest on the part of our Government against the Russian proclamation. The United States Government is said to have been the only one to reply to the Russian note, although this can, of course, not be a matter of definite knowledge. Russia appears to have given assurances to the British and American Governments that she did not contemplate any immediate action in respect to the execution of her threat. It is not definitely known whether the British Government has made any representations to Russia in regard to this matter, but Lord Lansdowne is reported to have expressed the opinion that the attitude of Russia is "unjustifiable and altogether absurd." See N. Y. *Times* for April 22, 1904.

<sup>2</sup> Several of the operators are said to have been Americans.

<sup>3</sup> See his letter in the N. Y. *Times* for April 19, 1904. It is worth noting that the Japanese have also attempted to control, or at least influence the movements of the *Haimun*. In a communication printed in the N. Y. *Times* for May 16th, the *Times'* correspondent says that on April 17th he

War is now regarded as an abnormal or exceptional relation between States, and the presumption, even in time of warfare, is always in favor of the laws of peace and therefore of the rights and privileges of neutrals in their peaceful relations with each other and with belligerents. "Unless proof to the contrary is shown, neutral States and their subjects are free to do in time of war between other States what they were free to do in time of universal peace."<sup>4</sup>

If we apply this fundamental principle of the Law of Neutrality to the subject under discussion, it will at once be seen that not a word can be said in favor of this absurd and monstrous innovation upon the rights of neutrals. The Russians appear to have defended Admiral Alexieff's order on the ground that "the correspondent on board the *Haimun* regularly transmitted to Che-Foo intelligence of all the outgoing and ingoings of the Russian fleet at Port Arthur" and that "the information thus conveyed might obviously have been of the highest value to the Japanese."<sup>5</sup> It also appears from Count Cassini's note that the fact that the use of

received a communication from the British Minister at Tokio to the effect that he was requested by the Japanese military authorities not to proceed north of the Che-Foo—Che-mul-po line until further notice. He remarks that his position is difficult in the extreme. He is threatened with capital punishment by one belligerent and warned off the high seas and neutral waters by the other. He chose, however, to submit to the wishes of Japan out of deference to former courtesies on the part of the Japanese. These restrictions on the movements of the *Haimun* appear subsequently to have been at least partially removed by Japan.

<sup>4</sup> Lawrence, *Principles*, p. 474. It is unnecessary to multiply references upon this general and fundamental principle of the Law of Neutrality, which may be regarded as fully established since the close of the eighteenth century. "Till then belligerents were, on the whole, more powerful than neutrals, and were able to carry on their wars with slight regard to the sanctity of neutral territory or the convenience of neutral commerce." Lawrence, p. 475. For the earlier practice and theory, see especially Hall, Pt. IV., c. 2.

<sup>5</sup> From the *Novoe Vremya*, quoted in the N. Y. *Times* for June 8, 1904.

wireless telegraphy had not been "foreseen by existing conventions" seemed to the Russian Government to afford ample justification for such an unwarranted attack upon the rights of neutral individuals. In other words the presumption is assumed to be in favor of the rights of belligerents and against the rights of neutrals—a total misconception and reversal of one of the fundamental principles of modern International Law. Under existing law it would as a matter of fact require an International Convention to prohibit, or even to restrict, the use of wireless telegraphy on the high seas or in neutral territory.

In view of their ever-growing importance, it is somewhat surprising to note that the status of war correspondents is one which is seldom even touched upon by publicists on International Law.<sup>1</sup> The "Instructions for the Armies of the Government of the United States in the Field," prepared by Dr. Francis Lieber and issued by the Secretary of War in April, 1863, declare that "citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be

<sup>1</sup> The only publicists amongst those consulted by the writer who even refer to the status of war correspondents are Bluntschli (§§594-96 and notes), Hall (note on p. 404 of 3d ed.), and Lawrence (p. 336). Bluntschli says that a military occupant (or invader) has the "right to detain persons, who, without belonging to the army and exercising pacific functions, are dangerous to the army of occupation," amongst whom he includes journalists whose opinions are hostile. He is also of the opinion that non-combatants, *e. g.*, newspaper correspondents, contractors, etc., attached to an army which has surrendered or to troops which have been captured, may be made prisoners at least provisionally, but he thinks they ought not to be retained as prisoners of war unless "their presence in the camp of the enemy constitutes a support to the latter or a danger to the Power which has captured them." Hall seems to think that newspaper correspondents should only be detained for special reasons. Lawrence suggests that "probably the worst that could happen to them if captured in civilized warfare would be expulsion from the lines of the captors."

made prisoners of war, and be detained as such."<sup>2</sup> This provision was incorporated into the "Rules of Military Warfare" adopted by the Brussels Conference of 1874.<sup>3</sup> The Code adopted by the Institute of International Law at its Oxford session in 1880 merely declares in favor of detention in case of necessity. It provides that "persons who follow an army without forming part of it, such as correspondents of newspapers, sutlers, contractors, *etc.*, on falling into the power of the enemy, can only be detained for so long a time as may be required by strict military necessity."<sup>4</sup> The "Regulations Respecting the Laws and Customs of War on Land" adopted by the Hague Conference in 1899, declare that "individuals which follow an army without directly belonging to it—such as newspaper correspondents and reporters, sutlers and contractors—who fall into the enemy's hands, and whom the latter see fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army which they were accompanying."<sup>5</sup>

It will thus be seen that, according to existing international practice, the severest treatment which can possibly be meted out to a war correspondent captured on belligerent

<sup>2</sup> Section III., §50 of the "Instructions." For the text of these Instructions, see *e. g.*, the Appendices to Tucker and Wilson's *International Law and Snow's Cases*.

<sup>3</sup> "Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, *vivandiers*, contractors, *etc.*, may also be made prisoners of war. These persons should, however, be furnished with a permit, issued by a competent authority, as well as with a certificate of identity." Art. 34 of the Rules of the Brussels Conference. For the English text, see App. III. to Tucker and Wilson.

<sup>4</sup> Pt. II., §22, of Hall's translation of the Oxford Code. For text, see App. II. in Wilson and Tucker. Cf. §21, of translation in App. to Snow's *Cases*. For the French text of the Oxford Code, see *Tableau Générale de l'Institut de Droit Int.*, pp. 173-190.

<sup>5</sup> Art. 13. See Holls *Peace Conference*, 148.

territory, who conducts himself properly and who has been furnished with the proper credentials, is that to which prisoners of war are entitled. In no case can he possibly be treated as a spy. "An individual can only be considered a spy if, acting clandestinely, or under false pretences, he obtains, or seems to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."<sup>1</sup> The business of a newspaper correspondent, at least as usually conducted, answers none of these requirements. In fact this definition of a spy adopted by the Hague Conference—expressly, or at least impliedly, excludes them from this category.

But it may be said that the use of wireless telegraphy introduces a new factor into this problem. War correspondents have hitherto been more or less subject to control, and it is clearly within the right of a belligerent either to exclude them altogether from belligerent territory or to place them under such supervision as may be necessary in order to control their actions. But the invention of wireless telegraphy has made it possible for them, under certain circumstances, to operate either on the high seas or on neutral territory<sup>2</sup> to an extent which was impossible before. If the use of wireless telegraphy on the high seas may be injurious to belligerent interests, might we not also conceive cases in which it would be equally injurious if operated

<sup>1</sup> Art. 29 of the "Regulations Respecting the Laws and Customs of War on Land," adopted by The Hague Conference. See Holls *op. cit.*, p. 153. Cf. the definitions of a spy contained in the American Instructions (§88), and the Rules of the Brussels Conference (§19). They are couched in terms almost identical with those employed by The Hague Conference.

<sup>2</sup> It has been reported on newspaper authority that the Russians have been trying to use the Chinese port of Che-Foo for the transmission of wireless messages from Port Arthur. See *e. g.* New York Times for June 9 and 11, 1904. This is a case of the use of neutral territory by a belligerent for a military purpose, but newspaper correspondents might conceivably make similar use of a neutral station.

on neutral soil? Now would any one go so far as to maintain that a war correspondent, operating either by means of wireless telegraphy or any other system on neutral territory, could be seized and treated as a spy, or even held as a prisoner of war? A belligerent has undoubtedly the right to prohibit or prevent the transmission of cable messages (and wireless telegraphy is only a means of accelerating the transmission of messages) on belligerent territory (including the three mile limit). So he would also probably have the right to interrupt submarine telegraphic cables extending between enemy and neutral territory at any point within his own territorial jurisdiction or within that of the enemy. But he would have no right to interfere with submarine telegraphic communication between two neutral territories.<sup>3</sup>

But in view of the possible injury which may result to belligerents from the use of wireless telegraphy on the high seas or on neutral territory, some concessions should perhaps be made to military necessity provided neutral rights and interests are not seriously impaired. Interference with wireless messages on the high seas might under certain circumstances be permitted to belligerents, as also the seizure and confiscation of wireless telegraphy apparatus as contraband of war,<sup>4</sup> and neutrals should, certainly refuse

<sup>3</sup> See Art. 5 of the Naval War Code, prepared by Captain Stockton of the United States Navy, and issued as General Orders No. 551 on June 27, 1900. For text, see App. VI. in Wilson and Tucker. Cf. the rules on submarine cables adopted by the Institute of International Law in *Annuaire*, XIX., p. 331.

<sup>4</sup> It may be noted that M. Pillet, Professor of International Law at the University of Paris, is quoted as having expressed a similar opinion in respect to the liability to seizure and confiscation of wireless telegraphy apparatus as contraband of war. See *Army and Navy Journal* for June 4, 1904. The same opinion is expressed in the *Saturday Review* for April 23, 1904. It is worthy of especial notice in this connection that Russia has placed telephone and telegraph material in her list of contraband of war.

Lawrence (*War and Neutrality in the Far East*, p. 92) suggests that "power should be given by

to permit the use of their territory for military purposes.<sup>1</sup>

The second question relates to the menace to neutral rights and the danger to the safety of neutral persons and property which, it is feared, exists from the placing of submarine mines in Eastern waters.

In the latter part of May it was reported that the Russians at Port Arthur had sown the whole strait of Pe-chi-li with floating blockade mines. "Not only have these diabolical machines been placed off their own shores and in their own waters, but it is reported that launches and junks have been sent out to drop mines at night or in fogs in

international convention to exclude the vessels of correspondents for a time from any zone of sea in which important warlike operations were in process of development." "Each belligerent," he says, "should have a right to place an officer on board a newspaper steamer to act as censor of its messages, and the penalty for persistent obstruction and refusal to obey signals should be capture and confiscation." We do not see the necessity for such an extension of the rights of belligerents and encroachment upon the rights and privileges of neutrals. The phrase, "zone of warlike operations," is very vague, and the penalty appears to us to be unduly severe. Why punish an act which is harmless and innocent in itself by means of a penalty which is usually reserved for those engaging in unneutral service?

<sup>1</sup> Lawrence (*op. cit.*, p. 200) also properly suggests that neutral Powers ought to prevent the receipt of messages on their territory from a blockaded garrison, as in the case of the alleged Russian communication between Che-Foo and Port Arthur. He cites the refusal of the British authorities of a request by the United States for permission to land a cable at Hong Kong from Manilla during the Spanish-American War in 1898, on the ground that "to grant such facilities would be a breach of neutrality." But it may be well to call attention to the fact that this refusal to permit the use of neutral territory for military purpose rests upon a well-established principle of International Law, and would not apply to the use of neutral cable stations by war correspondents.

For useful or suggestive discussions or editorials on "War Correspondents and Wireless Telegraphy," see especially *Harper's Weekly* for April 30, 1904; *Army and Navy Journal* for May 21; *New York Times* for April 16-19; *London Times* (weekly ed.) for April 22d; A. Maurice Low in *The Forum* for July-September, and Sir John Macdonnell in *Nineteenth Century* for July, 1904. See also Lawrence, *War and Neutrality in the Far East*, pp. 83-93 and pp. 199-202.

waters likely to be used by the Japanese war ships and transports. These mines have drifted into the high seas and Chinese waters where they constitute the gravest danger to neutral shipping."<sup>2</sup> It is feared by experts<sup>3</sup> that these mines may be a menace to the lives and property of neutrals for some time to come, and that they may get out into the great ocean currents and drift into all or any portions of the Pacific Ocean.

These charges against the Russians cannot be said to be fully proven, but there is certainly a strong presumption of carelessness in the laying of these mines or of negligence in controlling them after they were laid. It is true that our information is unofficial, but there appears to be sufficient evidence of the existence of such mines in the open sea.<sup>4</sup>

<sup>2</sup> Special cablegram to the London and New York *Times*, published on May 23, 1904.

<sup>3</sup> See, e. g., *The Scientific American* for June 4, 1904, and the *Army and Navy Journal* of the same date.

<sup>4</sup> The *Haimun* claimed to have passed two of these mines within two miles of Wei-hai-Wei, *i. e.*, nearly one hundred miles from Port Arthur, on May 22d. Twenty-one similar mines are said to have been discovered by vessels in various parts of the Gulf of Pe-chi-li and the Yellow Sea. The correspondent of the *London Express* at Wei-hai-Wei estimated in the latter part of May that there were some four hundred mines floating in or near the Gulf of Pe-Chi-li. The Japanese, judging from newspaper reports, seem to have been kept busy for some weeks in removing Russian mines from these waters, but the correspondent of the *Chicago Daily News* reported the discovery of a freshly-painted contact mine in the Gulf of Liaotung as late as June 20th. Insurance rates in London are said to have risen in consequence of the increased risks resulting from the fear of these mines. See *New York Times* for May 26, 1904.

The Japanese battleship *Hatsuse* is generally supposed to have been blown up by such a mine on May 15th, at a distance of ten miles from Port Arthur, although it has also been suggested that this vessel may possibly have been destroyed by a Japanese mine or by a mine accidentally adrift. It has been pointed out that such a disaster might equally have happened to a neutral trading vessel cruising in those waters. The Russian battleship *Petrovovlovsk* had been destroyed by a Japanese mine on April 13th, but this occurred on the outer roadstead of Port Arthur, *i. e.*, in territorial waters.

Either these mines were deliberately laid or set adrift on the high seas, or they were insecurely fastened in territorial waters and drifted from their anchorage out into the open sea.<sup>1</sup>

There appears to have been no official or semi-official denial of these charges on the part of the Russian Government, although they cannot be said to be fully established. Russians are said to justify such action on the ground that everything is permissible in war except those things which are specifically forbidden by convention or International Law.<sup>2</sup> It has also been suggested that,

<sup>1</sup> It may be that the Japanese, too, are not wholly free from guilt in this matter of laying mines on the high seas or of negligence in securely fastening them in territorial waters; for it is known that they have been laying mines for the Russian fleet at several points outside Port Arthur (whether inside or outside the three-mile limit is not clearly stated), some of which are said to have been improperly anchored and found adrift in April and May. See *New York Times* for April 17th and May 20th. But it would be absurd to suppose that the Japanese would have filled the Gulf of Pe-chi-li and adjacent waters with mines to their own great danger and inconvenience. Indeed, they seem to have been put to no small expense and effort in freeing these waters from these obstacles to the freedom of their movements.

It appears that our State and Navy Departments have instituted an investigation in order to ascertain whether and to what extent it is true that these mines constitute a menace to neutral navigation. Our ministers at St. Petersburg and Tokio have been instructed to look into the matter, and our naval attaches are supposed to be engaged in finding out what truth there is in these reports. This information, it is said, is to be placed in the hands of the General Naval Board, which is then to submit its views to the President, who will, if deemed advisable, make the proper representations to the belligerents. See *New York Sun* for May 25, 1904

<sup>2</sup> This is according to the St. Petersburg correspondent of the *London Express*. See *Chicago Tribune* for May 25, 1904. It appears, however, that M. de Plehve, the late Russian Minister of the Interior, in an official communication issued privately, protested vigorously against the alleged action of the Japanese in laying floating mines in the roadstead of Port Arthur, on the ground that "the wholesale scattering of these engines of destruction at points where they may easily drift into the path of the marine commerce of the world, to the common danger, can in no wise be regarded as admissible." St. Petersburg

because of the immensely increased range of modern guns, it is necessary to enlarge the three mile limit for purposes of defence. It is argued that "if ships can now lie eight or ten miles away and yet reach the coast with their projectiles, the defenders have a perfect right to take such military measures as they choose within the range of the enemy's guns."<sup>3</sup>

In reply to the Russian argument that everything is permissible in war except those things specifically forbidden by International Law or Convention, it is sufficient to repeat that, as in the case of the proposal to prohibit or punish the use of wireless telegraphy on the high seas or of any other new and unauthorized interference with the rights of neutrals, the presumption should always be in favor of neutral rights and privileges or of the laws of peace. In order to render such acts unlawful, it is not necessary that they be specifically forbidden; for their *prima facie* illegality may be deduced from general and fundamental principles. The sea is the common property and highway of all nations. It is open to belligerents and neutrals alike; but, in cases in which there is a conflict of rights or interests between the two, the presumption ought always to be in favor of neutrals.

All authorities on International Law<sup>4</sup> who dispatch to the *St. James Gazette*, published in the *New York Times* for May 26, 1900.

<sup>3</sup> St. Petersburg dispatch in *Indianapolis Journal* for May 27, 1904.

<sup>4</sup> The following is a list, as complete as we have been able to make it, of those who are reported as having expressed opinions on this subject: Admiral Horsey, Sir William Walrond, M. P., Professor Moore of Columbia, Professor Woolsey of Yale, Professor T. E. Holland of Oxford, Dr. Arnold Jarvis, Sir John Macdonnell, Sir Frederick Pollock, Bart. Rev. T. J. Lawrence, and M. Pillet of the University of Paris. See *London and New York Times* for May 24-28, 1904. For the opinion of M. Pillet, see the *Army and Navy Journal* for June 4th.

For useful editorials or newspaper discussions, see *London and New York Times* for May 24-31, 1904; *New York Evening Post* for May 24th, or *New York Nation* for May 26th; *New York Sun*

have thus far been quoted on this subject are, so far as we are aware, unanimously of the opinion that if either or both of the belligerents in this war have been guilty of deliberately sowing any portion of the high seas with floating mines, they have, to put it mildly, been guilty of a gross violation of the laws of civilized warfare and of International Law. The majority of these authorities seem to be of the opinion that this is the case whether the mines were anchored or intentionally set adrift outside of the three mile limit. If neutrals were to suffer injury from mines which are accidentally adrift or which

for May 26th; *Indianapolis Journal* for May 27th; *London Spectator* and *Saturday News* for May 28th; *Army and Navy Journal* for May 28th and June 4th; *Scientific American* for June 4th; *Brad-streets* for May 28th; *Public Opinion* for June 2d; *Berliner Nachricht* for May 29th, and *Die Woche* for June 4th.

"If these mines were deliberately floated into waters where they would be liable to endanger neutral ships, the act was undoubtedly inadmissible." Professor Moore in *New York Times* for May 25th. "Mines, whether anchored or intentionally set adrift in the Strait or Gulf of Pechili, beyond the coast sea limit, constitute an indiscriminating attack upon neutral and belligerent alike, and are, therefore, illegitimate." Professor Woolsey in the *New York Times* of the same date.

"The laying of mines in the open sea beyond the territorial waters would seem, not only inhuman, but a breach of International Law and practice. . . . If it should prove true that the destruction of the *Hatsuse* was effected by a mine wilfully placed in the open sea, ten miles from land, the act appears to me one of wholesale murder, and its perpetrator *hostis humani generis*." Admiral Horsey in *London* and *New York Times* for May 24th.

"It is certain that no international usage sanctions the employment by one belligerent against another, of mines or other secret contrivances which would, without notice, render dangerous the navigation of the high seas." Professor Holland in *London* and *New York Times* for May 25, 1904.

"Every belligerent is free, I take it, to destroy his opponent's vessels in territorial waters or on the high seas by all customary means, including the use of mines. If, in an attempt to sink an enemy's ship, he accidentally destroys neutral property, there would be an unanswerable claim for damages done on the high seas. . . . If, on the other hand, and I hesitate to believe it, mines are scattered broadcast in waterways outside territorial limits, neutrals who suffered would have just cause to complain. Such conduct, if per-

have floated out into the open sea in consequence of having been insecurely fastened in territorial waters, there would seem to be good ground for a claim to damages; if, on the other hand, it should be proved that the mines had been deliberately placed there, severe measures should be taken by neutral Powers.

There can, of course, be no question, in the present state of license in the use of submarine mines and torpedo boats<sup>1</sup> and other highly destructive weapons of modern warfare but that states have a right to employ these devices in their own harbors and territorial waters (as also in those of the enemy) within the three mile limit, provided that the life and property of neutrals and non-combatants be not carelessly or wantonly jeopardized.<sup>2</sup> It is also probable that they have the

sisted in, would afford ground for remonstrance, and, it might be, extreme measures." Sir John Macdonnell in *London* and *New York Times* for May 25th.

"If a mine-field was deliberately created out in the open ocean by the Russians, in such a position that it was as likely to destroy a peaceful neutral as an enemy's warship, words fail to express the reprobation with which the act must be regarded. It is not only illegal, but cruel to the highest degree." Lawrence, *War and Neutrality in the Far East*, p. 107.

The only discordant note which we have detected in this general chorus of denunciation, at least on the part of British and American authorities, is that voiced by Admiral Sir Cyprian Bridge of the British Navy. See *London* and *New York Times* for May 31st. Officers of the British Navy are said to be opposed to any limitations upon the rights of naval warfare. Officials of our own War and Naval Departments do not seem to entertain such fears or prejudices. See *New York Times* for May 25th.

<sup>1</sup> Count Mouravieff's proposal to "prohibit the use, in naval warfare, of submarine torpedo-boats or plungers, or other similar engines of destruction," and of "new explosives, or any powders more powerful than those now in use," did not meet with the approval of the majority of the States represented at The Hague Conference. See Holls, *Peace Conference*, p. 26 and pp. 94-95. This does not, however, affect neutral rights, as the *New York Nation* (May 26th) seems to think.

<sup>2</sup> Neutrals using or approaching these ports or waters are entitled to notice or warning. Whether such notice or warning should be general or specific would probably depend upon circumstances.



right to use these weapons outside of territorial waters, *i.e.*, on the high seas, with the specific aim of injuring or destroying, or of obstructing and impeding, the movements of an enemy fleet, provided no injury which can possibly be avoided result to neutrals.<sup>1</sup>

Centuries of practice show that belligerents have an undoubted right to engage in battle on the high seas. Neutrals must take cognizance of this right and keep out of the range of the guns, as well as abstain from impeding or obstructing the movements of the vessels of either belligerent. Belligerents cannot be held responsible for injury to a neutral resulting from the latter's own carelessness or intrepidity. On the other hand the belligerent should be held to strict account for any injury to neutrals which has resulted from his (the belligerent's) own carelessness or negligence, or from the use of weapons, such as sub-marine mines, the existence of which, in that particular locality the neutral had no knowledge. Even if notified, neutrals could hardly be expected to take cognizance of the existence of mines on the high seas within what has loosely been termed the "theatre or zone of warlike operations." This would be a new and hitherto unheard of restriction on the rights of neutrals which could not be imposed without an international agreement, the enactment of which should be resisted to the utmost by all seafaring nations.<sup>2</sup>

In respect to the argument that, owing to the increased range of modern artillery, the three mile limit ought to be increased for pur-

<sup>1</sup> Such injury, if not due to the fault of the neutral, would undoubtedly justify a claim for damages. There is, I think, this difference between the rights and privileges of neutrals on the high seas and in territorial waters. On the high seas it is a right, and the presumption is in favor of the neutral; in territorial waters, it is a privilege, and the presumption is in favor of the belligerent.

<sup>2</sup> It may be that there are exceptions to the principles enunciated above. For example, a belligerent would probably have the right to defend the anchorage of its vessels or to block up the ships of the enemy by the use of mines.

poses of defence, it may be admitted that there is much force in this contention. For the protection of besieged fortresses like Port Arthur, it would certainly seem only fair to the besieged that the three mile limit be extended in their behalf and that they be allowed every means of defence (and these include mines) permitted by the laws of warfare at any point within the range of modern guns. Such is not the law<sup>3</sup> however, and a change in the law would require an international agreement or a complete change in international practice.<sup>4</sup>

The three mile limit or the marine league was originally based upon the principle first clearly enunciated by the Dutch jurist Bynkershoek<sup>5</sup> in the early part of the eighteenth century to the effect that the sovereignty or jurisdiction of a State over the seas extends no farther than its power to defend the sea coast by force of arms extends—*terrae dominum finitur ubi finitur armorum vis, i. e. quousque tormenta exploduntur*. The range of the cannon of that day seems to have been about a marine league or three geographical miles and this distance became the generally, if not universally, recognized limit of territorial waters in the course of the eighteenth

<sup>3</sup> But even if this were the law, it would not justify the placing of mines in the open sea, *e. g.*, in the neighborhood of Wei-hai-Wei, or such acts as the blowing up of the *Hatsuse* ten miles southeast of Port Arthur.

<sup>4</sup> "The United States cannot admit that Spain, without a formal concurrence of other nations, can exercise exclusive sovereignty upon the open sea beyond a line of three miles from the coast. . . . It cannot be admitted that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. This right to a jurisdiction of three miles is derived, not from his own decree, but from the law of nations." Sec. Seward to M. Tessara, Dec. 16, 1862, and Aug. 10, 1863. See Wharton's Dig. I., §32, pp. 102-103.

<sup>5</sup> De Domino Maris, c. 2. This work was published in 1702 or 1703. Cf. the vaguer statements of Grotius (Lib. II, c. 3, §§ 13, 14) and Vattel (Liv. I, c. 23, §289).

century. In the course of the nineteenth century the rule of the marine league appears to have completely supplanted the principle upon which it was originally based and, instead of being extended to meet the demands of new modern guns of ever-increasing range, it remained always the same until it is now as fixed and unalterable as the laws of the Medes and the Persians in spite of the protests of publicists and the efforts of statesmen.<sup>1</sup> There can be no doubt but that an extension of the three mile limit for all territorial purposes would be highly desirable. The marine league no longer satisfies the demands of modern requirements of defense. An extension to meet these requirements is certainly favored by an ever-increasing majority of modern publicists and has been strongly recommended by the Institute of International Law.<sup>2</sup>

<sup>1</sup> The majority of modern publicists appear to favor an extension of the three-mile limit, but some of them do not seem clearly to distinguish between the present three-mile rule and the principle upon which it was originally based. Amongst those who may be cited as favoring an extension of the present rule or as holding that Bynkershoek's principle is, or ought to be, the rule of International Law, are Beuntschli, §302; Fiore, §788; Calvo, I., §356; P. Fodere, II., §§630ff; Hautefouille, I., 89, 239; Ortolan, I., c. 8; Heffter, §75; Rivier, I., Liv. III., c. 1, §10; Phillimore, Pt. III., c. 8; Hall, §41; Taylor, §247.

In 1806 the American Government attempted to obtain a recognition of a six-mile limit from England, but refused to acknowledge the validity of a claim of six miles made by Spain to the coast of Cuba in 1863. But in the following year (1864) Sec. Seward proposed a zone of five miles to the British Legation at Washington. The British Government has, however, always insisted upon the three-mile limit.

The three-mile limit has the sanction of a considerable number of State and International Acts or Conventions, *e. g.*, the Russian Prize Rules of 1869, the British Territorial Waters Jurisdiction Act of 1878, the North Sea Fisheries Convention of 1882, the Convention of Constantinople relating to the Suez Canal of 1889. For list of treaties, see Calvo, I., p. 479.

<sup>2</sup> The Institute of International Law, at its Paris session in 1894, after an exhaustive discussion of this question, gave a decisive majority (there was no division of opinion as to the desirability of extending the three-mile limit) in

It is highly desirable that these questions and many others, more particularly those relating to neutrality, contraband, and naval warfare, be discussed and, if possible, settled, by an International Congress or Conference before or soon after the close of the present war while the interest in such questions is still keen and the memory of its events fresh and vivid. In respect to the questions immediately under discussion in this paper, it may be said that any claims for damages which may arise should be referred to arbitration, preferably to the Hague Tribunal;<sup>3</sup> but to wait until injury has actually resulted to neutral individuals or to neutral property before laying down the rule to be followed in such cases would not seem to be the part of wisdom or sound policy. Precautions should be taken in time and any evil consequences which might follow upon uncertainty as to the rule ought to be averted, if possible. In respect to the laying of submarine mines, the very least that neutral States have a right to demand is that these highly dangerous explosives be restricted to territorial or belligerent waters; or if they are placed upon the high seas for any purpose whatsoever, that they be anchored in such a way that they can not possibly become a menace to neutral vessels. In all such cases neutrals should receive due notice and the mines should be carefully removed after the special purpose for which they have been placed there has been fulfilled.

favor of a zone of six marine miles for all territorial purposes and of permitting neutral States to extend it still farther in time of war for the purpose of defending its neutrality against a belligerent Power, provided the range of cannon was not exceeded. The maritime Powers were recommended to hold an International Congress for the purpose of adopting these and other rules, but no such Congress has ever been held. See *Annuaire de l'Institut de Droit International* for 1894-95, pp. 281-331.

<sup>3</sup> The Hague Tribunal is an international court for the decision of actual disputes between nations. It has power to declare law, but not to legislate in the ordinary sense.