
Disrupting a Delicate Balance: The Allied Blockade Policy and the Law of Maritime Neutrality during the Great War

Stephen C. Neff*

Abstract

The law of neutrality as it stood in 1914 was a set of compromises that had evolved from past practices, most notably regarding the law of blockade. During World War I, the Allied (predominantly British) economic warfare policy could not comprise classic close blockading as in previous conflicts. As a result, various specific policies were devised that, in combination, were designed to have much the same material impact and, therefore, to operate as a functional equivalent to traditional blockading. The lawfulness of each of these component policies was determined by the law of neutrality as it had evolved up to 1914, as embodied most notably in the (unratified) Declaration of London of 1909. Six major legal strategies were devised. Contraband lists were expanded beyond the limits stated in the Declaration, enabling goods to be captured anywhere on the high seas. There was also a reclaiming of traditional, pre-Declaration rights, amounting effectively to a repudiation of the compromises and concessions that had gone into the making of the Declaration. The use of existing traditional belligerents' rights was extended, most notably in the area of visit and search. Rigorous use was made of the continuous-voyage principle, most notably with the application of the principle to conditional, as well as to absolute, contraband (contrary to the terms of the Declaration of London). The principle of reprisal was invoked to justify measures that were barred by the inherited law of neutrality. Finally, various sovereign-right measures were employed, most notably navicerting and blacklisting. Debates over the lawfulness of these measures occurred during the conflict and continued afterwards. The basic conflict was between a focus on the adherence to specific rules and a focus on the adherence to the deeper principles that arguably underlay the surface rules.

* Professor of War and Peace, University of Edinburgh, United Kingdom. Email address: stephen.neff@ed.ac.uk.

The Great War is well known as an epic duel between the rival alliance groups of major powers. Less well known – but no less epic in its way – was its role as a duel between two distinct juridical outlooks. The one sees law chiefly as a collection of rules, whose general principles are useful, perhaps, as a way of organizing one’s thinking but not as having legal force in their own right. The other sees the general principles as the primary engine of law, with specific rules emanating from them by way of deduction.¹ The contrast between these two rival frames of mind has seldom, if ever, been so vividly demonstrated as they are in the disputes during the Great War over the blockade policies of the Allied powers and their impact on the law of maritime neutrality. The following discussion will elucidate the most salient features of these blockade policies.

1 The Inheritance from the Past

On the eve of the Great War, the law of neutrality had the interesting distinction of being, at the very same time, the richest and most detailed part of international law and the least developed conceptually. There was a reason for this contrast: that neutrality, perhaps more than any other area of international law, had its origin in the ad hoc practices of nations rather than in the more orderly and reflective minds of treatise writers. Beginning in the 17th century, states had begun to make provisions for the treatment of neutral traders during wartime in the network of treaties of friendship, commerce and navigation. These typically provided that, when one of the parties was at war with a third state, merchants of the other could trade freely with that enemy state, subject to two key exceptions: neutral ships could be captured for the carriage of contraband of war and for breaching blockades.²

Not until the middle of the 18th century, however, did serious thought even begin to be given to the question of the conceptual basis of these practices. When it did, a threefold division of scholarly opinion promptly emerged.³ One could be termed the conflict-of-rights, or necessity, approach, which was originally articulated by the renowned Swiss writer Emmerich de Vattel. In his famous treatise of 1758, he posited that the right of belligerents to interfere with the neutral trade of their enemies arises out of necessity. A belligerent has a right to interfere with neutrals trading with their enemies whenever that interference is necessary to bring about victory in the contest, even if the rights of neutrals are adversely affected.⁴ The second approach could be termed the code-of-conduct thesis, first advanced in 1759 by the Danish writer and diplomat Martin Hübner. His idea was that a set of rules, admittedly more or less

¹ For perceptive observations to this effect, see J. Westlake, *International Law*, part 2: *War* (2nd edn, 1913), at 190–198.

² See S.C. Neff, *The Rights and Duties of Neutrals: A General History* (2000), at 27–38.

³ See *ibid.*, at 44–60.

⁴ E. de Vattel, *The Law of Nations, or the Principles of Natural Law*, translated by C.G. Fenwick (1916 [1758]), at 270–271.

arbitrary, should be fixed, with neutrals allowed to do any kind of trading that those rules permitted, while conversely being barred from any trading that the rules did not permit.⁵ On this thesis, the material impact of the neutrals' activity on the outcome of the conflict would be of no relevance. Finally, there was what might be termed the community-interest approach, put forward by the Italian writer Abbé Ferdinando Galiani in his general treatise on neutrality (the first ever written) of 1782.⁶ His idea was that, on the grounds of public policy, the law should explicitly prefer the interests of those at peace to the concerns of those at war, with neutrals having a comprehensive, and non-derogable, freedom to trade with belligerent countries.

In the course of the 19th century, the code-of-conduct school gained the upper hand over its two rivals. It animated the work of the French writer on maritime law, L.-B. Hautefeuille in the mid-century and received its most thorough-going exposition at the end of the century, at the hands of the Swedish writer Richard Kleen.⁷ Ironically, the very completeness of the triumph of the code-of-conduct approach highlighted a disturbing feature of it: the lack of a coherent policy or philosophy underlying this area of the law. There was perpetual jostling for juridical position between the interests of neutrals and belligerents – which, of course, were not fixed sets of states – but no general agreement on which category should be preferred in difficult or doubtful cases. As a result, specific rules governing specific situations arose in a haphazard manner over the course of centuries. No less an authority than Kleen himself pronounced neutrality to be, of all areas of international law, the 'most anarchic'.⁸ John Westlake, the Cambridge professor of international law, was of much the same mind. Establishing some kind of preference or priority between rights asserted by belligerents and those claimed by neutrals, he pointed out, 'supposes some standard by which to judge them, lying deeper than the so-called rights'. In the absence of such a standard, the law in this area could only be 'a working compromise between demands'.⁹

Attempts were made to arrive at a codification of the various 'working compromises' that constituted the law of neutrality. At the Second Hague Conference of 1907, conventions were drafted on neutrality both in land and maritime warfare.¹⁰ Significantly, the prominent French lawyer Louis Renault, much in the spirit of Westlake, stressed that the task at hand was to reach agreement on a host of specific issues rather than to construct a system of deductions from axiomatic general principles. Debates over 'general considerations', he cautioned, 'might give rise to lengthy discussions, inasmuch as neutrality is not viewed in the same light by everybody'. The fruitful way forward

⁵ M. Hübner, *De la saisie des bâtiments neutres; ou Le droit qu'ont les nations belligérantes d'arrêter les navires des peuples amis*, part 2 (1759), at 114–118.

⁶ A.F. Galiani, *De' Doveri de' Principi Neutrali verso I Principi Guerreggianti, e di Questo verso I Neutrali* (1782).

⁷ See L.-B. Hautefeuille, *Les droits et les devoirs des nations neutres en temps de guerre maritime* (3rd edn, 1868); R. Kleen, *Lois et usages de neutralité d'après le droit international conventionnel et coutûmier des États civilisés*, 2 vols (1898–1900).

⁸ Kleen, *supra* note 7, vol. 1, at vii–viii.

⁹ Westlake, *supra* note 1, at 195.

¹⁰ Hague Convention V on the Rights and Duties of Neutrals in Land Warfare 1907, 205 CTS 299; Hague Convention XIII on the Rights and Duties of Neutrals in Maritime Warfare 1907, 205 CTS 299, at 395.

was therefore to deal with ‘particular cases’, which could be ‘presented in concrete and precise shape’.¹¹

The same approach was taken shortly afterwards at the London Naval Conference of 1908–1909, which produced a menu of rules on blockade, contraband, unneutral service, destruction of prizes at sea and sundry other topics.¹² By way of example, attention may be drawn to the Declaration of London’s treatment of the controversial continuous-voyage principle, which allowed contraband goods to be captured and condemned while en route to a neutral port, provided that the eventual or ultimate destination was enemy territory.¹³ (For this reason, it is sometimes called the ‘ultimate destination’ principle.) The idea was much opposed by continental European lawyers. Kleen, for example, denounced it as ‘veritable piracy’.¹⁴ The rule agreed in the Declaration of London was that the continuous-voyage principle could be applied to absolute contraband, but not to conditional contraband or to blockade.¹⁵ (Absolute contraband comprised goods useful solely for war, such as arms and ammunition; while conditional contraband comprised dual-use goods that were useful in both war and peace and treatable as contraband when actually used for war.) It was hard to state a principled reason for allowing the continuous-voyage principle in the one scenario, but not the others. The reality was that it was a working compromise between those who favoured the continuous-voyage concept per se and those who opposed it.

The Declaration of London, however, never entered into force because the foremost naval power – Great Britain – declined to ratify it.¹⁶ The norms of the Declaration nevertheless were drawn upon in the formation of the British Admiralty’s naval instructions.¹⁷ They were also incorporated into the naval instructions of both Germany and France.¹⁸ In the Turkish–Italian war of 1911, the rules of the Declaration were adhered to by both sides.¹⁹ The compromises embodied in the Declaration of London, however, were always liable to be rendered obsolete by developments in the real world. Technological changes, most obviously, posed a constant threat to the stability of the rules. Inventions such as submarines, electric telegraphs and undersea cables, as well as the greater size of merchant ships, made applications of law from the age of wood and sail all the more

¹¹ Quoted in James Brown Scott (ed.), *Proceedings of the Hague Peace Conferences. Part I: The Conference of 1907* (1920), at 278.

¹² Declaration Concerning the Laws of Naval War (Declaration of London) 1909, Cd 4554, reprinted in D. Schindler and J. Toman, *The Laws of Armed Conflicts* (1988), at 845–856. For a comprehensive commentary on the Declaration, see Norman Bentwich, *The Declaration of London* (1911).

¹³ For a thorough treatment of the continuous-voyage principle, see generally H.W. Briggs, *The Doctrine of Continuous Voyage* (1926).

¹⁴ Kleen, *supra* note 7, vol. 1, at 205.

¹⁵ Declaration of London, *supra* note 12, Arts 19, 30, 35.

¹⁶ On the political and strategic debates in Britain over ratification, see B. Semmel, *Liberalism and Naval Strategy: Ideology, Interest, and Sea Power during the Pax Britannica* (1986), at 109–118; J.W. Coogan, *The End of Neutrality: The United States, Britain, and Maritime Rights 1899–1915* (1981), at 125–147.

¹⁷ G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983), at 247–248.

¹⁸ G. Bottié, *Essai sur la genèse et l’évolution de la notion de neutralité* (1937), at 287–288.

¹⁹ H. Reason Pyke, *The Law of Contraband of War* (1915), at 176–177.

difficult to adapt to modern times. Regarding blockades specifically, the obvious problem was that a closed-in blockade of the traditional kind – in which a cordon of ships tightly enveloped a target area with a view to capturing any vessels attempting either to enter or leave the area – was no longer feasible. The patrolling ships would be too vulnerable to mines and to attack by enemy torpedo boats as well as by submarines.

Some writers contended that the rules governing blockades should stay fixed in the face of such changes. The British writer Thomas Baty, for example, a consistent and vocal champion of the rights of neutrals, contended that, if scientific changes worked to make blockading more difficult than it had been in the past, then that was simply bad luck for would-be blockaders. 'If science steps in to render blockades more difficult,' he asserted, 'it might well be argued that it is not the province of law to correct the indiscretions of science.'²⁰ Not surprisingly, the governments of the Allied powers during the Great War took a different view of the matter. They earnestly attempted, throughout the conflict, to make adjustments to past practices so as to render the economic isolation of the enemy feasible even in contemporary conditions.

2 Blockade Modern Style

Even before the Great War broke out, the British government, appreciating the significance of the various technological developments, had revised its traditional blockade policy. In 1911–1912, it devised a new strategy that discarded the practice of close blockading by a dedicated, permanently stationed cordon of ships in favour of frequent sweeps of the high seas by the main British fleet.²¹ One of the consequences of the enforcement of blockades from far at sea was that ships plying their trades between one neutral port and another were much more likely to be encountered by blockading squadrons than in the past when blockades were tightly confined to enemy ports. The potential for belligerent interference with inter-neutral trading therefore became very much greater now than previously.

The legal obstacles to so-called long-range blockading were daunting. But the Allied powers' legal acumen, strongly fortified by a sense of desperation, was mobilized for the task. In the course of the war, the Allied powers adopted six major legal strategies for coping with the challenges: the expansion of contraband lists; the reclaiming of traditional, pre-Declaration of London rights; the extended use of existing traditional belligerents' rights; the rigorous use of the continuous-voyage principle; the

²⁰ Baty, 'Neglected Fundamentals of Prize Law', 30 *Yale Law Journal* (1920) 34, at 45.

²¹ For an extensive account of pre-war planning in the economic sphere, see N.A. Lambert, *Planning Armageddon: British Economic Warfare and the First World War* (2012), at 19–181; see also I.V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 147–153; A.C. Bell, *History of the Blockade of Germany and the Countries Associated with Her in the Great War, Austria-Hungary, Bulgaria, and Turkey, 1914–1918* (1937), at 29–31; M.P.J. Hankey, *The Supreme Command 1914–1918* (1961), at 98; Marsden, 'The Blockade', in F.H. Hinsley (ed.), *British Foreign Policy under Sir Edward Grey* (1977) 488.

invocation of the principle of reprisal and the deployment of certain sovereign-right measures. Each of these will be briefly considered in turn.

Beforehand, however, it is only necessary to note, very briefly, some of the broader legal points about this sixfold programme. The guiding idea behind it, as with traditional blockades, was the economic isolation of the enemy countries from the outside world. That is to say, that the spirit of the traditional law of blockade suffused the Allied policies – as reflected, most notably, in the label ‘Ministry of Blockade’, which was given to the British government’s agency created in early 1916 to oversee the various economic measures. Somewhat paradoxically, however, the British Foreign Office opposed the declaration of a formal blockade during the conflict, contrary to the preference of the French government.²² The reason was that many of the specific rules inherited from the previously existing law of blockade needed to be modified, or even discarded, because of novel modern conditions. For this reason, it is probably best not to employ the term ‘blockade’ to the Allied policy because that expression connotes a close-in operation of the traditional kind.

Instead, the Allies cobbled together a number of ad hoc practices that, in the aggregate, amounted to the functional equivalent of a traditional blockade. To this congeries of practices, the term ‘blockade policy’ will be employed in this discussion. Alternatively, the expression ‘long-range blockade’ is sometimes used, and, today, a more commonly employed term would be ‘economic warfare’. The principal point for present purposes is that the policy was not planned out beforehand in a coherent fashion. Instead, it was improvised gradually under the pressure of events. More specifically, the challenge facing the Allied powers was how to place the greatest possible pressure on its central power foes, without unduly alienating the neutral powers, especially the USA, with its massive economic might. The one factor clearly militated in favour of going beyond the strictures of the traditional law of blockade whenever necessary, while the other required paying attention to the particular rules of that law in the knowledge that neutral governments would insist on their observance. In short, it was dual not only between enemies in war but also between two conceptions of law – that is, between a vision of law as an ever-evolving record of state practice and law as a menu of rules to be adhered to without regard to the prevailing context.

The following discussion does not purport to be anything like a comprehensive account of the Allied blockade policy. Rather, the intention is to identify the principal legal strategies that were employed in the implementation of that policy and to note objections that were made to them on the basis of marked departures from the traditional rules received from the past.

A The Expansion of Contraband Lists

Traditionally, contraband lists, set out in friendship, commerce and navigation treaties, tended to be very short, comprising only materials that had a clear connection

²² Lambert, *supra* note 21, at 364.

to the waging of war, such as arms and ammunition.²³ This was reflected, to a large extent, in the Declaration of London, which contained three lists of goods: absolute and conditional contraband, plus a ‘free list’ of goods that could never, under any circumstances, be treated as contraband.²⁴ The law of contraband had three features that were very attractive to the Allied powers when contrasted to the traditional law of blockade. The first was that the capture of contraband was permitted to be done on a sporadic basis. Blockades, in contrast, had to be effectively maintained, meaning that they had to have at least the potential to capture every would-be violator, therefore requiring the continuous stationing of a cordon of ships around the blockaded area. Second, contraband could be captured on the high seas anywhere in world so long as the enemy destination could be established. Captures for blockade violation could only be made at or near the line of the blockade itself. Finally, the continuous-voyage principle (according to the Declaration of London) could be applied to the capture of absolute contraband, but not to blockade.²⁵

There was, however, a key drawback to the law of contraband: that it only applied to goods that actually qualified as contraband. The solution to this problem of restricted contraband lists was all too simple and obvious: to expand contraband lists beyond the traditional narrow range of items and the further beyond, the better (for the blockaders). This began very early in the conflict and continued throughout it. By the end of 1914, the Allies had extended their contraband lists massively beyond what the Declaration of London had prescribed.²⁶

B Reclaiming Traditional Rights

At the outset of the struggle, efforts were made to ensure that the belligerents adhered de facto to the rules of the Declaration of London, despite the fact that it was not legally in force. The central powers stated at the outset that they would do so.²⁷ The Allies were less cooperative, insisting from the beginning on some modifications. Departures from the contraband provisions of the Declaration have just been mentioned. In addition, contrary to the Declaration, the Allies insisted on applying the continuous-voyage principle to conditional contraband as well as to absolute.²⁸ This policy won the approval of the British prize courts.²⁹ In the leading case, the Court noted that an ‘attempted compromise’ had been agreed at the London Naval Conference, to the effect that the continuous-voyage principle could be applied to absolute contraband but not to conditional contraband. It went on to comment that ‘[a]s is usual in

²³ Neff, *supra* note 2, at 32–34.

²⁴ Declaration of London, *supra* note 12, Arts 22, 24, 28.

²⁵ *Ibid.*, Arts 19, 30, 35.

²⁶ See Proclamation of 4 August 1914; Proclamation of 21 September 1914; Proclamation of 29 October 1914; and Proclamation of 23 December 1914, reprinted in Bell, *supra* note 21, at 722–726.

²⁷ A.S. Link, *Woodrow Wilson and the Progressive Era 1910–1917* (1954), at 153–154.

²⁸ Order in Council of 20 August 1914, reprinted in Bell, *supra* note 21, at 712; Order in Council of 24 October 1914, reprinted in Bell, *supra* note 21, at 713. On this policy, see Briggs, *supra* note 13, at 107–121.

²⁹ *The Kim*, [1915] Prob. Div. 215; *The Louisiana*, [1918] AC 461.

compromises, there seems to be an absence of logical reason for the [distinction]'.³⁰ The Court went on to reason:

If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.³¹

In October 1915, a further element of the Declaration – holding that the national character of vessels was to be determined by the flag flown – was disclaimed as being ‘no longer expedient’.³² More strikingly, in March 1916, the British government announced that the Declaration’s prohibition against applying continuous voyage to blockades, being similarly ‘no longer expedient’, would also no longer be adhered to.³³ Full repudiation of the Declaration by Britain and France came in July 1916, when the British government promulgated what it called the Maritime Rights Order in Council. Here too, expediency was invoked as the basis for the move. Henceforth, the British government announced that the Allied powers would ‘exercise their belligerent rights at sea in strict accordance with the law of nations’ instead of with the terms of the Declaration.³⁴ James Brown Scott, who was a key figure on the American government’s Joint Neutrality Board, later offered the wry observation that the Declaration of London ‘unfortunately has gone down like many a ship it was drafted to preserve’.³⁵

C Expanding the Scope of Existing Belligerents’ Rights

Another means by which the blockade policy was effectuated concerned the exercise of traditional belligerents’ rights in different ways, for which there was no historic precedent. One important change lay in the proceedings of prize courts, which will be discussed below in connection with continuous voyage. Another notable change was the manner in which the traditional belligerent right of visit and search was carried out. The uniform, traditional practice had been that the visit and search of neutral vessels on the high seas was carried out at sea. A detachment of persons from the belligerent naval vessel boarded the neutral ship for an inspection of the ship’s papers in order to determine the nature and destination of the cargo that was being carried. If

³⁰ *The Kim*, *supra* note 29, at 273.

³¹ *Ibid.*, at 273–274.

³² Order in Council of 20 October 1915, reprinted in Bell, *supra* note 21, at 715.

³³ Order in Council of 30 March 1916, reprinted in Bell, *supra* note 21, at 716.

³⁴ Bell, *supra* note 21, at 717–718.

³⁵ Brown Scott, ‘In Memorium: Louis Renault’, 12 *American Journal of International Law (AJIL)* (1918) 606, at 609.

there was no evidence of contraband carriage, then the neutral ship was simply left to continue its voyage.

During the Great War, the British navy instituted an important change. In March 1915, it began to require that neutral vessels interrupt their voyage by sailing to an Allied port for the visit-and-search process.³⁶ The justification given was that the large size, and huge cargo capacities, of modern merchant vessels made the traditional rapid process obsolete.³⁷ To some extent, this was true. But another important reason for the policy (as will be explained below) was that the decision of whether to condemn the cargo was no longer being made simply on the basis of the ship's papers but, rather, on the basis of an elaborate statistical analysis of the overall trading pattern of the neutral state of destination. This determination could not be made rapidly at sea.³⁸

This new practice of diversion for visit and search was greatly to the detriment of neutrals for two reasons. One was the delay (and, hence, the expense) that they incurred. The other was the fact that, once the neutral ship was physically located in an Allied port, it was exposed to the risk of being requisitioned by the Allied government or to becoming subject to an export prohibition under domestic law. This practice won the approval of the British prize courts. Regarding goods that became subject to an export ban when they were in British territory, the Court held that the ban, being a matter of British domestic law, was not subject to challenge under international law. The only issue under international law was the lawfulness of the prior seizure of the ship on the high seas – that is, the reasonableness of the suspicion that the vessel was carrying contraband goods destined ultimately for enemy territory.³⁹

D *Continuous Voyage and the Rationing of Neutral Countries*

As noted above, a key stricture of the Declaration of London from which Britain liberated itself at the beginning of the conflict was the prohibition against applying the continuous-voyage principle to conditional contraband. This became one of the most potent weapons in the juridical arsenal of the Allies since it enabled them to ensure that neutral countries bordering Germany – the Netherlands, Belgium, Denmark and Switzerland – did not function as 'pipelines' through which goods could be imported into the enemy territories. This policy worked in close conjunction with the expansion of contraband lists; the longer the contraband lists, the more goods became subject to being captured on the basis of the continuous-voyage principle.

When applied on a rigorously systematic basis – as it came to be – the continuous-voyage principle became the cornerstone of what became known as a rationing policy

³⁶ On the British policy of requisitioning of neutral vessels, see Order in Council of 23 March 1915, reprinted in S.D. Fess, *The Problems of Neutrality When the World Is at War: A History of Our Relations with Germany and Great Britain As Detailed in the Documents That Passed between the United States and the Two Great Belligerent Powers* (1917), at 30–32.

³⁷ C. Seymour, *American Diplomacy during the World War* (1934), at 35–38.

³⁸ On the formulation of this policy, see Lambert, *supra* note 21, at 361–370.

³⁹ *The Falk*, [1921] 1 AC 787. On this practice, see R.W. Tucker, *The Law of War and Neutrality at Sea* (1955), at 338–344.

imposed upon the neutral countries in the vicinity of Germany. The idea was that the neutral countries in proximity to Germany would be allowed to import sufficient food and other materials for their own domestic usage, but that all attempted imports above that level would be stopped. The determination of what constituted a 'normal' level of imports was made unilaterally by the Allied powers. This was to be on the basis of the average level of imports for the immediate pre-war years (1911–1913), although the Allied powers were not disposed to give the neutral states the benefit of any doubts that might arise. Once the normal import quota for a neutral country of a given type of good was reached, all further cargoes would be presumed to be ultimately destined for the enemy and condemned accordingly.

Changes in prize court procedures (referred to above) were instituted to make this rationing programme operate with the greatest possible effectiveness. Traditionally, neutral exporters were allowed to send goods to other neutral countries without interference, if they themselves had no reason to believe that the goods would later be forwarded to a belligerent. So long as delivery to a bona fide importer in the neutral state of destination could be satisfactorily proved – as it typically could on the basis of the ship's papers – the neutral carrier and exporter would have nothing to fear. The British prize courts, however, ceased to be satisfied with the evidence of the ship's papers and, instead, began to condemn goods on the basis that they were destined in fact for re-export to the enemy, with no regard to the knowledge or intention of the neutral exporter.⁴⁰ Moreover, the statistical information that formed the basis of the condemnation was not available to the neutral carriers. In principle, it was open to the neutrals to present their own evidence as to the likely future travels of the goods that they carried, but, in practice, that was effectively impossible.

With this system in operation, it was virtually impossible for neutral carriers to know beforehand what risk of condemnation they were running at the outset of their voyages. The US government, on behalf of its nationals who were affected by this policy, objected to condemnations based on what it called 'conjectural conclusions to be drawn from trade statistics'. It insisted that the traditional rules be faithfully adhered to: that a given neutral cargo could not lawfully be condemned simply on the basis that previous cargoes of similar goods had been forwarded to the enemy. 'That is a matter,' maintained the USA, 'with which a neutral has no concern and which can in no way affect his rights of trade'. Knowledge or intention of re-export, on the neutral's part, was required, and the bare fact of re-export could not be a basis for condemnation.⁴¹ The British government, not surprisingly, remained unmoved by these protestations.

⁴⁰ *The Norne*, [1921] AC 765.

⁴¹ Secretary of State to Ambassador in Great Britain (Page), 21 October 1915, reprinted in US Department of State, *Papers Relating to the Foreign Relations of the United States (FRUS)*, 1915 Supplement (1915), at 582.

E *Reprisal as a Justification of Policies*

Acts of reprisal are actions that are inherently unlawful but justified as a response to the commission by the other party of a prior unlawful act. Reprisals therefore function, in effect, as a kind of law enforcement measure (of a self-help character). The very nature of reprisal gives a clear indication of its value for the Allied blockade policy – namely, that it could justify the resort to actions that were actually contrary to international law in normal circumstances. The drawback was the absolute necessity of a prior unlawful act on the enemy's part. The key early stages of the Allied blockade policy, instituted in March 1915, were justified on this ground. The precipitating act by the enemy was Germany's declaration, the previous month, of a 'war zone' comprising all of the waters surrounding Great Britain to be enforced by means of submarine warfare. In response, the British government asserted 'an unquestionable right of retaliation'.⁴² This took the form of a prohibition against neutral ships sailing to any German port. Although the key word 'blockade' was scrupulously eschewed, a key feature of the order was a flat prohibition against neutral ships taking cargoes either to or from Germany, meaning that it was effectively a proclamation of a blockade, though without a close investment of the enemy's shoreline by a dedicated blockading squadron.⁴³

Another example of reprisal occurred in February 1917 in response to Germany's adoption of the policy of unrestricted submarine warfare. This led the British to tighten the blockade policy further, by providing that any ship carrying any goods to any neutral port giving access to enemy territory would be presumed to be carrying goods destined to the enemy, unless it first put into an Allied port.⁴⁴ The principal legal issue that arose concerned the permissibility of taking reprisals when the party prejudiced by them would not be the original wrongdoer but, rather, an innocent third party – that is, a neutral rather than the opposing belligerent. In certain contexts, this would pose no problems. For example, medieval reprisals were invariably directed not against a wrongdoing sovereign but, instead, against subjects of that sovereign who happened to be within easy reach – that is, present in the territorial jurisdiction of the ruler who was exercising the reprisals. Similarly, belligerent reprisals in response to enemy war crimes are directed not against the actual war criminal but, instead, against other soldiers belonging to the enemy armed force. These instances, however, were based, at least implicitly, on the existence of a bond between the original wrongdoer and the reprisal victim – common nationality in the case of medieval reprisals and membership of the same armed force in the case of belligerent reprisals. It is a sort of collective-responsibility or common-enterprise thesis. The directing of reprisals against foreign innocent parties, however, was a controversial step.

⁴² Order in Council of 11 March 1915, in Bell, *supra* note 21, at 714–715. See also E.J. Clapp, *Economic Aspects of the War: Neutral Rights, Belligerent Claims and American Commerce in the Years 1914–1915* (1925), at 76–92.

⁴³ On this order, see Hull, *supra* note 21, at 185–194.

⁴⁴ Order in Council of 16 February 1917, reprinted in Bell, *supra* note 21, at 719.

The issue was vigorously contested during the Great War.⁴⁵ In its defence, the British government insisted that a flat rule that reprisals must have no effect on neutrals would give so great an advantage to ‘the determined lawbreaker’ as to be unacceptable ‘to the conscience of mankind’.⁴⁶ The British government went on to posit that ‘the true view’ must be that reprisals are founded on the basic principle:

that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make an attack on the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent.⁴⁷

The British prize courts broadly supported this stance. The leading case on the subject, concerning the measures of March 1915, rejected the contention that neutrals have a right ‘to be saved harmless’ from any measure of reprisal taken by one belligerent against another. The true question to be answered, it held, is whether a given reprisal act ‘subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances’.⁴⁸ Even though the measures in question were directed proximately against neutral traders (or would be traders), the longer-term goal was to injure the enemy for its prior unlawful act. In other words, it was held permissible for Britain, in effect, to use restrictions on neutral trade instrumentally as a means towards achieving a longer-term goal of injuring the enemy powers, provided only that a less drastic means of action was not available under the circumstances.

F *Sovereign-right Measures*

The final category of actions comprises sovereign-right measures, meaning conduct that falls within the sovereign prerogatives of the belligerent states and, hence, at least on their face, is unconstrained by the international law of neutrality. Most obviously, a belligerent country could unilaterally decide, as a matter of its own will, to reduce its own trading with neutral countries that failed to adopt ‘cooperative’ policies, such as taking rigorous steps to prevent the re-exporting of materials to the enemy states. The material effect would be the exertion of economic pressure against the targeted neutral states. The two most important sovereign-right measures, though, were navicerting and blacklisting.

Navicerting was the practice of unilaterally refraining from exercising traditional belligerents’ rights under certain circumstances. To be exact, the British government determined that, if neutral carriers were to give adequate assurance prior to sailing that they were not carrying goods that would ultimately find their way to the enemy (however indirectly), then the British government would refrain from engaging in visit

⁴⁵ See, e.g., Yntema, ‘Retaliation and Neutral Rights’, 17 *Michigan Law Review* (1919) 564.

⁴⁶ British Ambassador (Spring-Rice) to Secretary of State, 24 April 1916, reprinted in *FRUS*, 1916 Supplement (1916), at 377.

⁴⁷ *Ibid.*, at 378.

⁴⁸ *The Stigstad*, [1919] AC 279, at 286; see also Pearce Higgins, ‘Retaliation in Naval Warfare’, 8 *British Yearbook of International Law (BYIL)* (1927) 129.

and search and diversion at sea. Navicerts were the certificates that were issued to confirm that this assurance had been given. Strictly speaking, no compulsion was employed. Carriers were perfectly free to sail without navicerts, but, if they did, then the normal practice of visit and search, together with the not-so-normal practice of diversion to Allied ports, would be employed.

The navicerting programme began in 1916. Navicerts issued by the British government to neutral carriers – and also, incidentally, to Allied carriers – related to a particular cargo, confirming that ‘there would be no objection on the part of the British Government to this consignment’.⁴⁹ They therefore functioned, in essence, as pre-voyage clearances. A key feature of the system was that a ship was exempt from visit and search only if its entire cargo was navicerted. The effect, of course, was to give a large disincentive to carriers to carry any non-navicerted goods at all. Moreover, the system was self-policing to a large extent. Exporters, anxious that their trade not be disrupted, were expected to loudly insist that carriers not commingle their cargoes with any material that was not navicerted.⁵⁰ It has been estimated that considerably more than 50,000 navicerts were issued in the course of the Great War.⁵¹

Opponents of the navicert system objected to it on several grounds. One was that it had the effect of taking the determination of ultimate destinations of goods out of the hands of the prize courts and placing it instead in the hands of the administrators who issued the navicerts.⁵² In addition, it could be contended that neutrals who availed themselves of the navicerts thereby became active participants in the Allied blockade programme, contrary to the fundamental duty of neutrals to abstain from participation in the hostilities. This was all the more clearly the case in light of the fact that the granting of navicerts corresponded very closely with Britain’s own export controls over its own nationals.⁵³ Moreover, the navicerting process took place in the territories of the neutral countries and, therefore, could be argued to amount, on the part of the Allied states, to engaging in belligerent activity in neutral countries, which was in breach of another fundamental principle – that belligerent operations must not take place on neutral territory.

The British government saw the matter in a different light. From its standpoint, the holders of navicerts were simply persons, of their own free will, who had provided the British government with relevant information about their intended trading voyages. The British government, in turn, was responding to this information by refraining, as a matter of unilateral practice, from exercising its various blockade-related rights against the holder. No one could doubt that it was the sovereign prerogative of a state to refrain from fully exercising rights that it possessed. It was also pointed out that

⁴⁹ H. Ritchie, *The ‘Navicert’ System during the World War* (1938), at 9.

⁵⁰ For an excellent brief description of the system, see Fitzmaurice, ‘Some Aspects of Modern Contraband Control and the Law of Prize’, 22 *BYIL* (1945) 73, at 83–85.

⁵¹ Ritchie, *supra* note 49, at 15.

⁵² Brown, Jr., ‘The World War Prize Law Applied in a Limited War Situation: Egyptian Restrictions on Neutral Shipping with Israel’, 50 *Minnesota Law Review* (1966) 849, at 854–855.

⁵³ Ritchie, *supra* note 49, at 14, 18.

navicerting involved no element of coercion or violence exercised on the neutral parties or any operation of Allied armed forces in neutral territory.⁵⁴

The other notable sovereign-right measure – and the one that caused the most concern and outrage in the USA – was blacklisting. The policy was first applied in China in 1915 and then in South America. But the dramatic extension was to the USA in July 1916.⁵⁵ The first published list contained the names of 85 American firms and caused consternation in business circles. Fears were expressed that the blacklist would be extended by ‘secondary blacklisting’ – that is, blacklisting firms that traded with any firm on the primary blacklist or that assisted another firm in evading the British restrictions. The American government lodged a formal protest against the practice. Its principal objection was to the unilateral and *ex parte* character of the blacklisting policy. Neutrals who were accused of carrying contraband or violating blockades had a right to defend themselves in prize court proceedings and to have a judicial pronouncement made on their alleged wrongdoing. Victims of blacklisting, in contrast, had no such opportunity. Blacklisting, the US government objected, ‘condemns without hearing, without notice, and in advance’.⁵⁶

At the same time, though, there were doubts in the American government as to whether blacklisting could actually be said to violate international law. The American ambassador in Britain admitted (to his government) that the policy ‘may possibly be legal’.⁵⁷ The USA, however, did enact legislation authorizing the government to refuse clearance from American ports to vessels that refused to carry cargoes from blacklisted firms.⁵⁸

3 Post-mortems

In the aftermath of the conflict, various figures commented on the significance of the Great War for the law of maritime neutrality. In Britain, Hersch Lauterpacht lamented that the law of neutrality had been rendered so uncertain as to be, in effect, non-justiciable by tribunals.⁵⁹ Others were less gloomy. Daniel Chauncey Brewer, an American lawyer, for example, writing about the law of neutrality during the war, saw the conflict as ‘a cleansing fan’ that would sweep away the ‘arbitrary creations’

⁵⁴ On the navicert system, see generally Ritchie, *supra* note 49.

⁵⁵ The legal basis for the policy was given by the British Trading with Enemy (Extension of Powers) Act 1915, 5 & 6 Geo 5, c. 98.

⁵⁶ Acting Secretary of State to Ambassador in Great Britain (Page), 26 July 1916, reprinted in *FRUS*, 1916 Supplement (1916), at 422; see also Dehne, ‘The Ministry of Blockade during the First World War and the Demise of Free Trade’, 27 *Twentieth Century British History* (2016) 333, at 337–338; E.R. May, *The World War and American Isolation 1914–1917* (1959), at 329–334; Brown Scott, ‘The Black List of Great Britain and Her Allies’, 10 *AJIL* (1916) 832; Bailey, ‘The United States and the Blacklist during the Great War’, 6 *Journal of Modern History* (1934) 14.

⁵⁷ Ambassador in Great Britain (Page) to Secretary of State, 22 July 1916, reprinted in *FRUS*, 1916 Supplement (1916), at 413.

⁵⁸ Shipping Act, 7 September 1916, 39 Stat 738, ch. 451, s. 36.

⁵⁹ H. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*, edited by E. Lauterpacht (1975), vol. 2, at 41.

of the prior law of neutrality and replace them with ‘something stable and permanent’ founded upon ‘eternal principles’.⁶⁰ To Maurice Hankey, who served as secretary to the Imperial War Cabinet in Britain, the war had provided the salutary lesson of exposing ‘the folly of attempting, in times of peace, to draw up rules for the conduct of war in matters where there is known to be a fundamental difference of opinion and outlook between the various nations concerned’. Such futile attempts at agreement, he maintained, only had the effect of bringing international law into disrepute.⁶¹

Within the British government, there was some sense of relief that the blockade policy had worked as well as it had, coupled with fears that future wars might go less well. In particular, there was some stock-taking as to the relative merits of relying on reprisal as a justification for actions taken as opposed to reliance on the traditional law of blockade, which, of course, was suitably adapted to modern conditions. During the conflict, the matter had been considered by an International Law Committee formed by the British government in 1917 to consider various war-related issues. It reported its relief that reprisal had been available for use as a justification of the various blockade policy measures.⁶² But it was aware too of the weakness of reprisal because of its critical dependence on the occurrence of a prior unlawful act by the enemy. In future conflicts, it was feared, the opposing belligerent might not prove so obliging in that regard as Germany had during the Great War. In addition, there were worries about the lawfulness of reprisal measures that were directed proximately against neutral parties, with a view to injury being eventually visited upon the enemy.

Worries on this second point were proved by events to be well founded. In 1930, an arbitration between Portugal and Germany considered a German contraband measure affecting Portugal that had been instituted as a reprisal against the Allied departures from the contraband rules of the Declaration of London. The arbitral panel ruled, contrary to the British prize courts, that while it is permissible for reprisal acts to have collateral or incidental effects on third parties, it is not lawful for the acts to be ‘directly and wilfully’ pointed against the third parties – that is, that a belligerent is not entitled to retaliate against its enemies through neutral powers.⁶³ This has been confirmed as the correct rule for countermeasures by the International Law Commission’s 2001 Articles on State Responsibility.⁶⁴

Prudence dictated, therefore, that, in the defence of British actions during the Great War, reliance should be placed on the law of blockade per se rather than on reprisal. Perhaps the most articulate defence of the British blockade policy on this basis in the wake of the conflict was by H.W. Malkin, the legal adviser to the British Foreign

⁶⁰ D. Chauncey Brewer, *Rights and Duties of Neutrals: A Discussion of Principles and Practices* (1916), at 243–247.

⁶¹ M. Hankey, *The Supreme Command, 1914–1918* (1961), at 101.

⁶² Memorandum of the International Law Committee, ‘The Freedom of the Seas,’ BR 7, file CAB 21/307 (1918), at 1, British Archives.

⁶³ *The Cysne*, reprinted in 2 UNRIAA (1930) 1052, at 1056–1057.

⁶⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement no. 10, Doc. A/56/10, November 2001, at 75–76; see also *The Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, para. 83.

Office.⁶⁵ He maintained that the British measures actually were consistent with the law of blockade – or at least with that law as suitably updated and adapted to modern conditions. Specifically, he argued that extending the continuous-voyage principle to blockade as well as to contraband was entirely consistent with the underlying purpose and principles of blockading.⁶⁶ The fact that the Declaration of London contained a rule disallowing it could therefore be regarded, on this thesis, as a mere historical anomaly, a compromise hammered out at the London Naval Conference, reflecting misgivings from the previous century about that extension by the US government during the American Civil War.

At the same time, Malkin readily conceded that the new style of blockading has ‘travelled a long way from the original idea of the naval investment of a particular port, corresponding to a close siege by land’. He contended, however, that it was more important to look not at particular, specific rules inherited from the past but, rather, to ‘[t]he underlying principles’. In this vein, he in effect advanced the suggestion that the principle of effectiveness was the true foundation on which the law of blockade rested. He posited that:

the extent of a belligerent’s right to interfere with sea-borne commerce is conditioned by the extent of his command of the sea, and that the real principle underlying the idea of blockade is the right of a belligerent to deny to the commerce of his enemy the use of areas of the sea which he is in a position effectively to control. In other words, if a belligerent has a sufficient force at his command to enforce his being able to examine practically every ship which crosses a certain area of sea, he is entitled to say that his enemy’s commerce shall not be carried on across that area.⁶⁷

This may appear to be essentially an endorsement of the Vattel view of necessity as the foundation of the rights of belligerents *vis-à-vis* neutrals. But Malkin did not actually go that far. Instead, he conceded the existence of an underlying body of principles in the spirit of Hübner’s code-of-conduct approach – a set of principles, moreover, that lies deeper than specific rules. In his view, the specific rules must be seen to be alterable with the passage of time and the onset of new conditions:

There is a considerable tendency [he noted with regret] to hold that when a thing is done for the first time it must be illegal because it has not been done before, but if it is done again to accept it on the ground that there is a precedent for it. This, however, is an unscientific method of procedure, and the true test surely is whether the new development is consistent with the main underlying principles of law and is necessitated by the changed circumstances in which it is applied.⁶⁸

The problem, of course, lies in discerning what these much-vaunted ‘main underlying principles’ actually are. Suspicious minds will readily note that the proposition of effectiveness advanced by Malkin amounts, in effect, to guaranteeing to belligerents the fullest possible benefit of their actual strength. This is clearly a policy tailor-made for

⁶⁵ Malkin, ‘Blockade in Modern Conditions’, 3 *BYIL* (1922–1923) 87.

⁶⁶ *Ibid.*, at 92–95.

⁶⁷ *Ibid.*, at 96–97.

⁶⁸ *Ibid.*, at 97–98.

major maritime powers – coincidentally, the very state that Malkin advised. It is evident, then, that there is room for worry that a reliance on general principles and the spirit – as opposed to the letter – of traditional rules, coupled with high sensitivity to changed circumstances, carries at least some risk of making law subservient to power. However, it is arguable too that a stubborn and dogmatic insistence on adherence to the letter of traditional rules – an insistence that law is, so to speak, all rules and no spirit – runs the risk of preventing the development of law in accordance with the ever-changing exigencies of international life.

This contest between these two basic mentalities did not arise in the Great War. Nor was it resolved by that conflict. Nowhere in the Treaty of Versailles is there even a hint of the resolution of this particular aspect of that momentous contest. The tension between fundamental principles, on the one hand, and specific rules, on the other, may therefore be said to be, in a manner of speaking, greater than the Great War itself. It continues to haunt international lawyers and probably always will.