2018

H-Diplo

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Article Review
No. 736
10 January 2018

Article Review Editors: Thomas Maddux and Diane Labrosse
Web and Production Editor: George Fujii

H-Diplo Article Review of Jan Martin Lemnitzer. "Woodrow Wilson's Neutrality, the Freedom of the Seas, and the Myth of the 'Civil War Precedents.'" *Diplomacy & Statecraft* 27:4 (2016): 615-638. DOI: https://doi.org/10.1080/09592296.2016.1238693.

URL: http://tiny.cc/AR736

Review by **Isabel V. Hull**, Cornell University

The laws of naval warfare are notorious for their complexity and uncertainty. While the Hague and Geneva Conventions provide good guidance to what is allowed in land warfare, no such conventions exist for the sea.[1] Most historians, including this reviewer, have maintained that the legal underpinning of British economic warfare in 1914 (the 'blockade') included United States' precedents from the Civil War.[2] Jan Martin Lemnitzer calls this connection a 'myth' and argues that President Woodrow Wilson and British leaders used it disingenuously for their own political and military purposes.

The precedents were two famous U.S. Supreme Court decisions of 1866, the *Springbok* and the *Peterhoff*.[3] Both involved British merchantmen seeking to evade the Northern blockade of the Confederacy by off-loading cargo destined for the South in nearby neutral ports for later transshipment. The Supreme Court held that it was not the destination of the *ships* that mattered, but the destination of the *cargo*—thus upholding a British doctrine known as 'continuous voyage.' Furthermore, the Supreme Court recognized as contraband not just military equipment, but also dual-use items (like food) that could be used for military purposes. Belligerents were thus permitted to seize contraband from neutral ships heading toward neutral ports, if the cargo were in fact destined for the enemy.

[1] Like the London Declaration of 1909, the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea has never been ratified by states. Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2004), 573-606.

[2] Britain never formally declared a blockade, but most people then and now conventionally use that term to describe British economic measures.

[3] 72 U.S. 1-28, and 72 U.S. 28-62, resp.

German Chief of Staff General Helmuth von Moltke had planned to use neutral Dutch ports to refuel the German war effort. The Rhine Convention of 1868 (which Lemnitzer does not mention) permitted cargo off-loaded in Rotterdam to be transshipped to Germany without customs oversight or duties. Rotterdam thus functioned exactly like a German port, but, being neutral, was immune to blockade, a weapon which may be used only against enemy belligerents. 'Continuous voyage' offered Britain a way to overcome this legal difficulty.

Lemnitzer suggests different reasons why the U.S. precedents were irrelevant in 1914, but he argues none clearly or completely. Yes, British leaders protested the *Springbok* and *Peterhoff* decisions at the time, but in 1900 they used continuous voyage doctrine in the Boer War. The abortive Declaration of London of 1909 contained a compromise restricting the application of continuous voyage to absolute contraband (goods obviously and exclusively for military use), but no state had ratified the Declaration by 1914; the compromise therefore was not law. Lemnitzer argues that the U.S. precedents happened *after* the North had established a real blockade, "whereas Britain now wished to control all regular transatlantic trade—including food imports—from the moment war had broken out without actually declaring Germany's coast blockaded" (622). But the Supreme Court had held that contraband may be seized in the absence of blockade, if the ultimate cargo destination was for a belligerent.[4] This is one reason that Britain, whose prewar planning had focused on blockade, shifted to seizure of contraband instead. [5] Finally, there is the problem of burden of proof. Neutrals felt that their ships were being detained purely on suspicion. Lemnitzer's argument is probably on stronger ground here, but nevertheless, in 1914 at least, Britain stopped goods registered as 'in transit' or 'to order,' which strongly suggested planned transshipment. Foreign Office and Admiralty records show considerable interest in fulfilling the burden of proof, not least because the British Prize Court would demand it. An adequate discussion of proof and the enormous extension of the contraband list would have been welcome.

In any event, by 1914, the doctrine of continuous voyage applied to seizure of contraband, however controversial, enjoyed a long pedigree. Every major international law book after 1866 discussed the Supreme Court cases. Opinions differed, but it was not just Anglo-Americans international-legal jurists (like John Westlake, Francis Oppenheim, Henry Wheaton, or W.E. Hall) who accepted it, but also continental legal writers like Pasquale Fiore, Henri Bonfils, Johann C. Bluntschli, and at least three German jurists.[6] Bonfils, writing in 1912 (three years after the Declaration of London), claimed that "almost all authors apply the

[4] "And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea." *Peterhoff* decision: 72 U.S. 59.

[5] Prewar planning: Nicholas A. Lambert, *Planning Armageddon: British Economic Warfare and the First World War* (Cambridge: Harvard University Press, 2012), 19-181. On the decision for seizure of contraband, instead, ibid., 185-231, and Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War* (Ithaca: Cornell University Press, 2014), 147-163.

[6] John Westlake, *International Law: Part II: War* (Cambridge: Cambridge University Press, 1907), 294-298; Lassa Oppenheim, *International Law: A Treatise*, 1st ed. (London: Longmans, Green & Co., 1905), 2:433-440.

theory of continuous voyage to contraband of war." [7] France used the theory in the Crimean War, Italy in the Abyssinian war, Britain in the Boer War, and it was contained in the naval war manuals of Prussia and Sweden. In short, it was a legitimate legal argument available for use by belligerents.

Lemnitzer writes that neither Wilson nor British leaders were much interested in law anyway. The President tossed aside the traditional, strong American championing of neutral trading rights for other reasons. Those reasons were not, he writes, "simple preference for the Allied cause," or economic motives, or Wilson's "customary disdain for legal detail" (629-630). Instead, Wilson sought to make the world safe for the stringent economic sanctions that the League of Nations might wield against covenant-breakers (630-631). This interpretation credits Wilson with considerable prescience, since he first announced the idea of the League in January 1918, it took shape only in 1919, yet the President set the United States' response to Britain's naval policy in 1914 and 1915.

'Continuous voyage' was especially pertinent in the first months of the war. The legal landscape changed sharply in March 1915 when Britain issued its retaliatory Order-in-Council strongly intensifying economic warfare. Lemnitzer does not discuss this shift, because he believes that the October 1914 Order-in-Council had already done "away with neutral rights entirely" (623). The March Order was so radical that British leaders originally justified it as reprisal, which permits illegal acts if they are meant to force the enemy to abandon his own (in this case, unrestricted submarine warfare). Lemnitzer is highly critical of Wilson's restrained response. The United States' protest note warned Foreign Minister Sir Edward Grey from using reprisal as justification.[8] Lemnitzer interprets Grey's reply as asserting a "right to re-interpret belligerent rights at the beginning of each war and 'adjust' them for changed circumstances" (628). What Grey actually wrote was that "adaptations of the old rules should not be made unless they are consistent with the general principles upon which an admitted belligerent right is based." [9] Grey noted that in the Civil War, the United States had "developed" "old principles;" he ended by claiming that Britain's actions "can be defended as in accordance with general principles" accepted by both countries. Grey's complex note (for example, he uses the word "blockade" throughout, even though Britain did not claim it had established a blockade) calls out for fine-grained interpretation, but it surely did not mean, as Lemnitzer writes, "the right to stop any supplies from reaching one's enemy by any means necessary" (628).

International law is "a process and a language by which many conflicting international claims are defined and argued."[10] Governments search for legal arguments to explain or justify their actions to the community of states and international opinion. Instead of claiming that using the U.S. precedents were designed to be

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[7] Henry Bonfils, *Manuel de droit international public (droit des gens) aux étudiants des facultés de droit et aux aspirants aux fonctions diplomatiques et consulaires.* (Paris: A Rousseau, 1912), 1011.

[8] Secretary of State William J. Bryan to Ambassador Page, 30 March 1915, *Foreign Relations of the United States, 1915 Supplement, The World War [FRUS]* (Washington, D.C.: U.S. Government Printing Office, 1928), 152-56.

[9] Grey to U.S. Ambassador Page, 23 July 1915, *FRUS*, 170. The 1920 Statute of the Permanent Court of International Justice later listed "The general principles of law recognized by civilized nations" as one of the four sources of international law (Art. 38.3), http://www.worldcourts.com/pcij/eng/documents/1920.12.16_statute.htm.

[10] Anthony A. D'Amato, *The Concept of Custom in International Law*, foreword by Richard A. Falk (Ithaca: Cornell University Press, 1971), xiii.

"deliberately misleading [to] the American public" (626), one might better ask why the public found that legal argument so convincing? What makes some arguments more persuasive or decisive (to whom? when?) than others? How do the rules governing legitimate argumentative procedures help (or hinder) international law to adapt to new conditions? British wartime measures and the U.S. response raise these complex questions, and we should expect the answers to be equally complex.

Isabel V. Hull (Ph.D. Yale 1978) is the John Stambaugh Professor of History at Cornell University. A German historian, she is the author of *The Entourage of Kaiser Wilhelm II* (Cambridge: Cambridge University Press 1982), *Sexuality, State and Civil Society in Germany, 1700-1815* (Ithaca: Cornell University Press, 1996); *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2004), and most recently *A Scrap of Paper: Breaking and Making International Law in the First World War* (Ithaca: Cornell University Press, 2014). Her current research project examines how statesmen understood aggressive war in the long nineteenth century.