# A NOTE ON UNNEUTRAL SERVICE

*(BY Edwin Busuttil. B.A.)*

THE term "unneutral service" is the official translation of the heading *"L'assistance hostile"*, which appears in the unratified Declaration of London [1]; and 'hostile assistance" is the more current expression on the Continent. Another term in use before the Declaration was "analogues of contraband" with which it was often confused. But it is now generally recognized that acts of unneautral service are different from the carriage of contraband. For one thing, destination is immaterial in cases of unneutral service. In the carriage of contraband unless a hostile destination is established[2] by the captor. Again, in unneutral service *direct* assistance is given to the enemy and consequently such service assumes a warlike character. Carriage of contraband, on the other hand, is properly a mercantile transaction and is no crime[3] against International Law though such contraband, if captured while the vessel is in *delicto*[4], is liable to confiscation by the Municipal Prize Courts of the captor.

Two different acts which are treated as unneutral are distinguished by the ungratified Declaration. One includes acts which render the vessel liable to the same treatment meted out to a neutral ship seized when carrying contraband; the other comprises acts which render the vessel liable to the same treatment applied to an enemy merchantman. In the *first* group come the following acts"

(1) The transportation of *individual* passengers who are "embodied in the armed forces" *("incorpores dans la force armee")* of the enemy by a neutral vessel when on a voyage undertaken solely for such taransport[5]. by Art.47. moreover, persons incorporated in the armed forces of the enemy found on board neutral merchantmen may be made prisoners of war even though it may be afterwards result that there is no ground for the capture of the vessel. Reservists are not considered as incorporated in the armed forces.

(2) The carriage of a military detachment of the enemy, by a vessel not however appropriated to that special task, if either the owner or the charterer or the matter is *aware* of such carriage[6].

(3) The carriage, to the knowledge of either the owner or the charterer or the master, "of one or more persons who in the course of the voyage directly assist the operations of the enemy" e.g. by signaling or a wireless message.

(4) The transmission of intelligence to the enemy by neutral vessel when of a voyage specially undertaken for such transmission include not only oral transmissions of intelligence but also transmissions of intelligence contained is dispatches.

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1. Chap. III, Arts. 45-47.
2. In theory only, for during the World War it often happened that national prize rules laid down certain presumptions which placed the bonus of contrary proof on the claimant.
3. Pyke (*The Law of Contraband*) and Hyde (*International Law chiefly as interpreted and applied by the United States*) do not accept this view.
4. In unneutral service the same rule applies, i.e. the vessel can be seized only so long as she is *in delicto.*
5. Art. 45 (2)
6. Art. 45 (1)

Falling within the *second* group, that is, that which imputes enemy character to neutral vessels are those cases:

(1) If a vessel takes a direct part in hostilities, for instance, assisting the enemy fleet during a naval engagement or assisting the enemy fleet in laying mine-lanes or signaling to enemy submarines the position of warships.

(2) If a vessel is sailing under the orders or control of an agent placed on board by the enemy Government. Such vessel is rightly regarded as forming part of the enemy's merchant marine.

(3) If a vessel is in the exclusive employment of the enemy Government.

(4) If a vessel is at the time exclusively engaged in the transport of enemy troops or in the transmission of intelligence to the enemy[7]. and here we must distinguish this case from that of a vessel[8] which is on a voyage especially for the transportation of individual passengers incorporated in the armed forces of the enemy or for the transmission of intelligence (oral or in dispatches) to the enemy.

So much for what the Declaration of London has to say on the matter. In effect the Declaration was never ratified and although it was adopted at the outbreak of the 1914-1918 war, it was subsequently abandoned by the Allies in a memorandum of July 7, 1916. The Allied Governments had come to the conclusion that the rules of the Declaration were no longer applicable having regard to the ever-changing conditions of modern warfare; they would thenceforward limit themselves to applying the customary and well-established rules of International Law. We shall now examine what these customary rules were in regard to the question of unneutral service and how far they were in regard to the questions of unneutral service and how far they were applied by the Prize Courts of the various countries before and during the World War.

A belligerent could confiscate a neutral vessel for assisting[9] the enemy in his operations. The most frequent cases that came up before the Prize Courts were those in which neutral ships were engaged in reprovisioning enemy warships. In the case of *La Bella Scutarina* the Italian Prize Commission confiscated on Albanian schooner for supplying enemy submarines with oil-fuel and for transmitting intelligence to the enemy. The French *Conseil des Prises* confiscated a neutral vessel, the *heina*, which was employed in carrying fuel and supplies to German warships operating in the Atlantic. Similar cases were those of the *Thor*, the *Pao-Hingl.i.e*, and the *Adephotis*.

Neutral vessels were liable to condemnation if they transmitted intelligence to the enemy. In the case of the *Iro-Maru* this rule was extended to include allied vessels. The *Iro-Maru* was a Japanese ship which was transporting an enemy agent carrying sealed papers, amongst which there were dispatches from Germany. The French *Conseil de Prises* condemned the vessel and the decision was later confirmed by the *Conseil d'Etat.* One exemption was admitted, however, to the above general rule. A neutral vessel might not be confiscated for carrying dispatches from the enemy Government to its diplomatic representatives in neutral countries, or, contrariwise, from

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7. Art. 46 (4)
8. Art. 46 (1) above, ion this "Note"
9. It is immaterial whether the assistance was rendered gratuitiously for hire

enemy diplomatic agents in, neutral countries to the enemy Government. But, in the cases where the vessel had *actually* transmitted intelligence to the enemy, *bona fide* ignorance on the part of the master of the vessel was considered as no excuse. This view was supported by the Supreme Court of New South Wales in the case of the *Zambesi* following the decision of Sir William Scott in *the Orozembo*

A belligerent could also confiscate a neutral vessel captured for carriage of certain persons on behalf of the enemy[10]. The rules prevailing before the unratified Declaration of London included under the expression" certain persons" not only members of the armed forces but also enemy reservists. In the case of the *Federico* the French *Conseil des Prises* held that even persons who were on their way to join the armies were to be considered as embodied in the armed forces of the enemy. The *Conseil d'Etat* confirmed this decision, but the *Manuel des Lois de la Guerre Maritime* (adopted by the Institute of International Law) and the great majority of writers do not agree with this view.

In the singular case of the *Svithiod* the Privy Counsil refused to condemn a neutral vessel which, while sailing from one neutral port to another, had carried on board a German officer on the score that no adequate evidence was available. Lord Summer's explanation is worth quoting :

"Their Lordships are, of course, very fully impressed with the importance of the subject, with the high obligation service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided, on some proper occasion it might be necessary to define with very great accuracy the way in which well- known principles should be applied under modern conditions; but it is precisely because their Lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty, if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable, to endeavor to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject".

Finally the "topic of unneutral service" as applicable to aircraft. The British Prize Act. 1939 [11], provides that, subject to some slight exceptions[12], the law of prize shall apply in relation to aircraft and goods carried therein, as it applies in relation to ships and goods carried therein, and shall so apply, notwithstanding that the aircraft is on or over land. The Hague Air Warfare therein are subject to prize court proceedings in order that neutral claims may be duly heard and determined. The Italian War Regulations,1938, and the Scandinavian neutrality Rules, 1938, may be usefully examined.

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10. British Prize courts further confiscated that part of the cargo which belonged to the owner of the ship.

11. (2 and 3 geo. 6. cap. 65.s.1)

12. These are exceptions to the provisions of the Naval Prize Acst, 1864, the Prize. Courts (Procedure) Act, 1914, and the Prize Courts act, 1915. They refer to minor matters like joint capture and ransom.