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EDITORIAL COMMENT

**THE REGULATIONS GOVERNING THE USE OF THE PANAMA CANAL BY
BELLIGERENTS**

On November 13, 1914, the President of the United States issued a proclamation ¹ containing Rules and Regulations Governing the Use of the Panama Canal by Vessels of Belligerents and the Maintenance of Neutrality by the United States in the Canal Zone. These rules are of much interest from two points of view, as indicating the attitude of the United States toward the use of the Canal by belligerents and as a practical construction of what the United States Government conceives to be its rights and duties with respect to the Canal in a war, to which it is not a party, under the Hay-Pauncefote Treaty and the treaty of

¹ The proclamation is printed in full in the SUPPLEMENT, p. 126.

1904 with Panama. The rules are intended to maintain both the neutrality of the Canal and that of the United States holding and operating it as a government enterprise. It is understood that they are the result of the joint efforts of representatives of the Departments of State, Justice, War and Navy. The framers, for the most part, have based the provisions of the rules upon the Hay-Pauncefote Treaty, which prescribed the conditions under which the Canal was to be constructed and operated; the Convention Respecting the Free Navigation of the Suez Maritime Canal of October 29, 1888, and the Rules issued thereunder on February 10, 1904, covering the use of that canal by belligerent warships in the Russo-Japanese War;² and the treaty between the United States and Panama of February 26, 1904, by which the United States obtained the right to construct the canal. Where it was necessary to make rules which could not be obtained from any of the foregoing sources, the framers have followed the rules agreed upon by the nations in conference at The Hague. The Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers in Naval War (No. 13) is liberally drawn upon for guidance.

Rule 1 defines the meaning of a vessel of war. It may seem superfluous that such a definition should be made, since modern warships are so easily distinguished by their build, armament and crew from vessels used for peaceful purposes; but the practice of some Powers in recent years of converting certain merchant vessels, made adaptable in their construction for use as warships, into an auxiliary fleet in time of war adds to belligerent naval forces a type of vessels not easily distinguished from vessels of the same type which retain their private and commercial character. The laying down at the outset of the exact characteristics which the Government of the United States regards as appertaining to a vessel of war will obviate the probability of dispute over vessels whose character might otherwise be questionable. It is believed that this is the first time the term "vessel of war" has received such formal and official definition. According to Rule 1, such a vessel must be (a) a public armed vessel, (b) commanded by a duly commissioned officer, (c) whose name appears on the official list of officers of the military fleet, (d) the crew of which is under regular naval discipline, and (e) which is qualified by its armament and personnel to act offensively against the enemy's public or private ships. Requirements (a), (b), (c), and (d) conform to and seem to be based upon the articles of the Hague

² Printed in British and Foreign State Papers, Vol. 102, p. 591.

Convention of 1907 Relative to the Conversion of Merchant Ships into Warships, which fix the conditions to be complied with in order that such merchant ships may have the rights and duties accruing to warships. The last requirement, (e), draws a line between ships armed for offensive purposes and those armed for defensive purposes. The evident intention in making this distinction is to exclude from the application of the rules merchant vessels of belligerent nationality which carry armament for the sole purpose of defense which the Department of State held, in a circular issued on September 19, 1914, would not acquire the character of ships of war.³

Rule 2 accords the same treatment as that given to belligerent vessels of war to every vessel not falling within the definition of Rule 1 which is employed in belligerent service as a transport or fleet auxiliary, or otherwise to aid in hostilities either on land or sea, whether such vessel be belligerent or neutral, armed or unarmed, hospital ships excepted. The rule follows Section 8 of the Suez Canal Rules of 1904.

Rule 3 requires the commanding officer of a warship, before it is permitted to pass through the Canal, to give a written assurance that the rules and regulations covering the use of the Canal will be observed. The reason for this rule is obvious. A public ship of a foreign nation is regarded either as a part of its territory or as a governmental agency, and as such it is not subject to local jurisdiction. The local authorities at Panama would therefore be unable to punish, according to the laws of the United States relating to the Canal and the rules and regulations issued thereunder, persons aboard such ships who may be guilty of infractions of the rules. By taking the assurance provided for in Rule 3 from the commanding officer of such a ship, it is made his duty to see to it that the rules and regulations are complied with, and a violation committed after such an assurance would be a just cause for complaint to his government and demand for reparation and, if the infraction were serious and no other remedy seemed adequate, the United States would be justified in barring the ship under his command from the further use of the Canal. See the first rule of Article 3 of the Hay-Pauncefote Treaty and Article 9 of Hague Convention No. 13.

This jurisdictional difference is further illustrated by the same rule in its provisions concerning transports, auxiliaries and other vessels referred to in Rule 2. Such vessels, it has been observed, may or may

³ For the criteria by which the offensive or defensive purpose of the armament may be determined, see text of the circular printed in the SUPPLEMENT, p. 121.

not be public vessels. If the vessel has the character of a public ship by being in command of an officer of the military fleet, the same written assurance is taken from him as that required from the commanding officer of a vessel of war: but, if such an officer is not in command, the authorities of the Panama Canal are authorized to take such steps as may be requisite to insure the observance of the rules and regulations.

Rule 4 restricts the revictualing and taking on of stores by war vessels, transports, and auxiliaries to what is strictly necessary and requires their transit through the Canal with the least possible delay. This rule is taken literally from the third rule of Article 3 of the Hay-Pauncefote Treaty, which in turn followed Article 4, par. 2, of the Suez Canal Convention. The rule provides further that prizes shall be subject to the same rules as belligerent warships. This provision is also taken literally from the Hay-Pauncefote Treaty and the Suez Canal Convention (Article 3, Rule 3, and Article 6, respectively).

Rules 5 and 6 prohibit, within the territorial waters of the Canal Zone, the receipt of fuel or lubricants by vessels of war, transports and auxiliaries, except on the written authorization of the Canal authorities specifying the amount of such supplies which may be furnished, and provides that, before such authorization is given, the commanding officer shall declare in writing the amount of fuel and lubricants already on board his ship. Similar provisions relating to the supply of coal are found in Sections 1 and 2 of the Suez Canal Rules of 1904. The American rule, it will be noted, includes not only coal, but any article which might be used for fuel, and adds lubricants, which are almost as necessary for the operation of the complicated and delicate machinery of modern warships as the means of propulsion.

Rule 7 recognizes the difference in international law between the furnishing of supplies to a belligerent by a neutral government, which is prohibited, and by a neutral private individual, which is not prohibited. See Articles 6 and 7 of Hague Convention No. 13. By Section 6 of the Panama Canal Act of August 24, 1912, the President is authorized, through the government-owned Panama Canal Railroad Company, or otherwise, to establish and maintain facilities to provide "coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, *for supplying such at reasonable prices to passing vessels.*" In order to avoid a violation of its neutrality in the exercise of its functions under this law, Rule 7 declares that

belligerent vessels will not be furnished with supplies at the Canal, either directly by the Government of the United States or indirectly by it through the intervention of a corporation or otherwise. The right of private individuals to furnish supplies to belligerents is not impaired, but the rule places the limitations upon it required by the laws of neutrality. After compliance with Rules 5 and 6, private contractors may, under Rule 7, supply belligerent vessels with fuel and lubricants in such amount as will enable them, with the supplies already on board, to reach the nearest accessible port, not an enemy port, at which they can obtain the supplies necessary for the continuation of the voyage. A similar rule covering coal is contained in Section 3 of the Suez Canal Rules of 1904, except that the reference to an enemy port is omitted, for the reason, probably, that an enemy port is not to be considered as accessible for the purpose of taking on supplies. Hague Convention No. 13 differs from both the Panama Canal Rules and the Suez Canal Rules in this respect. It provides in Article 19 that belligerent warships may take on sufficient fuel to enable them to reach the nearest port in their own country.

The fuel and lubricants received in accordance with the foregoing stipulations will be deducted from the amounts otherwise allowed in United States ports within three months thereafter. In so providing, Rule 7 carries out the intention of Article 20 of Hague Convention No. 13, which forbids belligerent warships which have received fuel in a neutral port from replenishing its supply within the succeeding three months in a port of the same Power.

This rule contains a further provision which has probably been inserted because of the peculiar circumstances existing at the Panama Canal. It allows belligerent warships within the territorial waters of the Canal Zone to take supplies of fuel and lubricants from vessels under belligerent control on the same terms as such supplies may be furnished by private contractors. It is not unlikely that this concession to belligerents is due to the inability of their ships to replenish their fuel and lubricants from the principal, or at least the only reliable, supplies of such articles at the Canal, namely, those owned by the Government of the United States. Provisions other than fuel and lubricants may be furnished by contractors to belligerent ships only upon permission of the Canal authorities and then in such amount as to bring the ship's supplies up to the peace standard. The measure of these provisions is taken from Article 19 of Hague Convention No. 13.

Rule 8 prohibits belligerents from embarking or disembarking troops, munitions of war or warlike materials in the Canal, except in case of necessity, due to the accidental hindrance of the transit, of which necessity the Canal authorities shall be the judge, and the transit shall be resumed with all possible dispatch. This is an enactment of the fourth rule of Article 3 of the Hay-Pauncefote Treaty, with an interpretation which allows the embarkment or disembarkment only when the Canal authorities consider that the accidental hindrance of the transit makes such action necessary. A provision to the same effect, but dissimilar in detail, is found in Article 5 of the Suez Canal Convention, and Section 7 of the rules issued thereunder in 1904.

The stay of belligerent vessels in the territorial waters of the Canal Zone is limited by Rule 9 to twenty-four hours, except in case of distress, when they must leave as soon as possible, and a vessel of war of one belligerent may not depart within twenty-four hours from the departure of a vessel of an opposing belligerent. This is the fifth rule of Article 3 of the Hay-Pauncefote Treaty and it conforms to the third paragraph of Article 4 of the Suez Canal Convention and Sections 5 and 6 of the Suez Canal Rules. It is also in accordance with Hague Convention No. 13. A reasonable construction is placed upon the twenty-four hours referred to, by not including in them the time necessarily occupied in passing through the Canal.

In order to be sure that the Canal shall be kept free and open on terms of entire equality, Rule 10 forbids at any one time, except by special arrangement, more than three warships of a belligerent, including those of its allies, in either terminal port or its adjacent waters or in transit through the Canal, and limits to six the total number of such vessels at any one time in all the territorial waters of the Canal Zone. The reason given for the promulgation of the rule seems to indicate that it was feared if the use of the Canal was not restricted it might become blocked to commercial vessels, at least for a time, through its use by belligerent ships. The proclamation states that the rule is issued in the exercise of the exclusive right of the United States to regulate and manage the Canal. This right is granted to it by Article 2 of the Hay-Pauncefote Treaty; but the rule is also justified by Article 15 of Hague Convention No. 13, which restricts to three the number of belligerent ships which may be simultaneously in a neutral port.

Rule 11 regulates the departure of vessels of the opposing belligerents when they happen to be present simultaneously in the waters of the

Canal Zone. Following the Hague Convention No. 13, it provides that a period of not less than twenty-four hours must elapse between the departure of a vessel of war or vessel falling under Rule 2 of one belligerent and a similar vessel of its adversary. The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible. A belligerent vessel of war or ship falling under Rule 2 may not depart until twenty-four hours have elapsed since the departure of a private vessel of his adversary.

Rule 12 contains provisions which appear to be intended to discourage the hovering of belligerent ships in or near the waters of the Canal Zone which might tend unduly to interfere with the use of the Canal by other belligerents or by neutral vessels. It provides that a belligerent warship or vessel falling under Rule 2 shall, if it returns to Canal waters within a week after departure therefrom, lose its privilege of precedence in departure over vessels flying a hostile flag which may enter those waters after its return and within one week from its previous departure. This rule applies whether the belligerent vessel has passed through the Canal or not.

The prohibition contained in Rule 7 against the furnishing of supplies to belligerent vessels at the Canal by the Government of the United States is extended by Rule 13 to the use of the repair facilities and docks belonging to the United States, except in cases of actual distress. In these exceptional cases, the repairs may only be made upon order of the Canal authorities, to the degree necessary to render the vessel seaworthy, and they must be made with the least possible delay. The maintenance at the Canal by the Government of the United States of facilities for the repair of ships operates against the establishment of such facilities by private enterprise, and vessels in need of assistance will necessarily be obliged either to go without repairs or be allowed the use of the government-owned plants. Under these circumstances, the granting of this accommodation by the United States Government to the vessels of all belligerents on equal terms would seem to be a justifiable relaxation of the rule which forbids the supplying of war materials by a neutral government to a belligerent Power. In all other respects, the rule conforms literally to the requirements of Article 17 of Hague Convention No. 13.

By Rule 14 the use of radio installation on all vessels of belligerents, whether public or private, and on all vessels coming within Rule 2, is

restricted to Canal business. This is designed to prevent the transmission of communications from vessels in the Canal Zone to belligerents outside of that jurisdiction. It conforms to the inhibition in Article 5 of Hague Convention No. 13.

Rule 15 is a new provision. It forbids belligerent air craft, public or private, not only to descend or ascend within the jurisdiction of the United States in the Canal Zone, but to pass through the air spaces above the lands and waters within that jurisdiction. The right of the United States to forbid the use of its territory for the landing and ascent of air craft is clear; but, in view of the unsettled state of the law as to the jurisdiction in the air space above national territory, the assumption of such jurisdiction by the United States at Panama is interesting and important, and may be regarded as a definite indication of the attitude of the Federal Government toward the subject. The prohibition may be easily defended as a necessary safeguard to protect the valuable property in the Canal from the danger of injury involved in the passage of air craft over it, and as a means of preventing belligerents from spying upon enemy vessels using the Canal.

Finally, Rule 16 includes within the Canal Zone, for the purposes of the rules, the cities of Panama and Colon and the harbors adjacent thereto. The proclamation states that the United States has authority to do this under its treaty with Panama of February 26, 1904. The specific articles of the treaty granting this authority are not mentioned, but it is no doubt included in the right and duty of the United States to maintain the neutrality of the Canal and to preserve the independence of the Republic of Panama. If such authority were not exercised by the United States, the proximity of the cities of Colon and Panama to the Canal under a separate jurisdiction would make it difficult, if not impossible, for either the United States or the Republic of Panama to apply and enforce the ordinary rules of neutrality upon the Isthmus. In view of the close association of the interests of the United States and Panama, a protocol was signed by the two Governments on October 10, 1914, to facilitate the maintenance of their neutral obligations. This protocol is referred to in the President's proclamation and is annexed to it. It provides "That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent power as a transport or fleet auxiliary, or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or

sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and *vice versa*."

SECRETARY BRYAN'S PEACE PLAN

Previous editorials in the Journal have reported the progress made from time to time by Secretary of State Bryan in the negotiation of treaties for the advancement of peace in the form devised by him, namely, by providing for commissions of inquiry to pass upon international disputes to which arbitration treaties do not or are not applied or upon any other difference which can not be adjusted by diplomatic methods. For the convenience of our readers, the present editorial will give a brief résumé of what has so far been accomplished.

Up to the present time, 35 nations have accepted the plan in principle, namely, Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Chile, China, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Haiti, Honduras, Italy, the Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Persia, Portugal, Russia, Salvador, Spain, Sweden, Switzerland, Uruguay, Venezuela. A comparison of this list with the nations invited to the Second Hague Peace Conference shows that only 10 have failed to accept the plan in substance and among these one first-class power only will be found, namely, Japan. It is not likely that Japan was omitted from the list of nations which were invited to adhere to the plan, and the absence of its name from the list of acceptances is no doubt due to the unsettled state of certain well-known questions outstanding between the two governments. Among the remaining 9 nations which have not accepted are found four Balkan States, Bulgaria, Montenegro, Roumania, and Servia, which appear to have been too much occupied with warlike affairs to give serious consideration to other matters. Turkey has also failed to accept, probably for the same reason, and Luxembourg and Siam likewise do not appear on the list of acceptances. All of the American republics are included in the list of acceptances except two, namely, Colombia and Mexico. In the case of the latter country, the absence of a government recognized by the United States is obviously the reason for the failure of that nation to be included in the plan at the present time, and the outstanding dispute between Colombia and the United States growing out of the separation of Panama is probably the reason for Colombia's non-appearance on the list.