



1918

FREEDOM OF THE LAND AND FREEDOM OF THE SEAS

THEODORE SALISBURY WOOLSEY

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

Recommended Citation

THEODORE S. WOOLSEY, *FREEDOM OF THE LAND AND FREEDOM OF THE SEAS*, 28 *Yale L.J.* (1918).
Available at: <http://digitalcommons.law.yale.edu/ylj/vol28/iss2/2>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

FREEDOM OF THE LAND AND FREEDOM OF THE SEAS

THEODORE SALISBURY WOOLSEY

Professor of International Law, Emeritus, Yale University

During the present war at least three separate demands have been made in a public and formal way that peace must bring with it freedom of the seas.

One of these, formulated by President Wilson as one of his fourteen conditions of peace in an address to Congress of January 8, 1918, after we had been nearly a year at war therefore, was as follows:

“Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.”

A year earlier, while still neutral, in the “peace without victory” address to the Senate, Mr. Wilson had voiced the same demand somewhat differently.

“And the paths of the sea must alike in law and in fact be free. The freedom of the seas is the *sine qua non* of peace, equality and co-operation. No doubt a somewhat radical reconsideration of many of the rules of international practice hitherto thought to be established may be necessary in order to make the seas indeed free and common in practically all circumstances for the use of mankind, but the motive for such changes is convincing and compelling. There can be no trust or intimacy between the peoples of the world without them. The free, constant, unthreatened intercourse of nations is an essential part of the process of peace and of development. It need not be difficult either to define or to secure the freedom of the seas if the governments of the world sincerely desire to come to an agreement concerning it.”

Another appeal for the freedom of the seas came from the Pope. Under date of August 1, 1917, he had written in a peace message “First of all the fundamental points must be that for the material force of arms be substituted the moral force of right”—which is expanded to mean diminution of armaments, and substitution of arbitration for force in determining international differences. Then he resumes: “Once the supremacy of right has thus been established all obstacles to the means of communication of the peoples would disappear by assuring, by rules to be fixed later, the true liberty and community of the seas, which would contribute to ending the numerous

causes of conflict and would also open to all, new sources of prosperity and progress."

And lastly frequent official German references have been made to the same subject. These, however, have been so often coupled with demands for coaling stations, naval bases and other naval assets as hardly to conceal the German desire to control the seas rather than to free them.

What does the catching phrase "freedom of the seas" mean? In none of the demands is it defined. In time of peace complete freedom of the seas already exists, construed that is as the unrestricted navigation of waters other than territorial. The reputed division by Pope Alexander VI of the South Atlantic between Spain and Portugal, Great Britain's old claim to suzerainty over the narrow seas, even her claim to search on the high seas for the suppression of the slave trade without treaty permit, all these have long since passed away. In fact most of the straits and navigable rivers of the world have been opened to the free navigation of all. When our own country claimed exclusive jurisdiction over the seals as free swimming animals in the Behring Sea, it was an anachronism and a Court of Arbitration properly found against our claim in 1893. It is in time of war, then, solely that the seas are not now free.

The restrictions upon their freedom are such as century-long controversies and compromises between neutral and belligerent, have gradually brought about: blockade, capture of contraband, seizure of ships engaged in unneutral service and of enemy's trade, and, as developed in the present war out of the slight precedent of the Russo-Japanese war, the war-zone theory, in accordance with which one state warns others that great tracts of sea are appropriated for war purposes and that the neutral must keep out. It must be these then or some of these which all the demands referred to desire to abolish, for otherwise the seas are already free and "freedom of the seas" is a meaningless phrase.

As to blockade, the seizure of contraband, the prevention of unneutral services like carrying dispatches or troops by the neutral, unless war at sea is abolished altogether, there seems to the writer no question of their fundamental justice.

By blockade the superior naval power cuts off his enemy's resources for carrying on war, as the North did to the Confederacy in our Civil War—without which measure the result of that war might have been quite different. By the search for and seizure of contraband, that is, of military *materia*, largely interpreted, the same superior naval power prevents his enemy from helping himself to such necessities in the markets of the neutral world. This is the advantage which his superiority gives him.

As to the capture or destruction of an enemy's merchant ships and trade, however, there may be two opinions, and our own consistent

political attitude, neutral as we usually are, has been in opposition to it. When at war this attitude cuts no figure and as in the contest with Spain we follow the prevalent usage. Moreover we have clung to the right of privateering which is aimed at enemy's private property on the sea, and by refusing to accede to the Declaration of Paris we have retained the right to capture enemy's goods under a neutral flag, except by treaty with a few powers. And it is to be said in favor of this form of war that it weakens an enemy's resources in a manner neither cruel nor unreasonable if conducted in accordance with the rules of cruiser warfare, that is, with due regard to the safety of those on board.

And lastly as to war zones, great tracts of sea wherein a belligerent claims special interest and jurisdiction for war purposes to the exclusion of the neutral therein, or at least warning him away from waters which he enters at his own risk: this had been done to a limited extent in the Gulf of Pechili by the Japanese in the Russian war. The Germans began sowing mines in the North Sea in 1914 to bar neutrals from its passage. The practice grew until the whole North Sea was declared a war zone on Nov. 4, 1914, by Great Britain, while Germany three months later applied the same principle to the high seas surrounding her enemies' territory, vastly extending this subsequently in her U-boat effort to starve England. The British penalty for entering a war zone might be a warning or capture; the German penalty was death or a fair chance of it. But the respective methods of penalizing entrance into war zones is quite apart from the war zone theory itself as a limitation upon the freedom of the seas, to the detriment of the neutral. And as to this growing and dangerous practice there is room for reform if not for abolition. Dr. Baty, a well known British publicist, says of the usage: "This was virtually to declare a paper blockade enforced not by capture but by sudden destruction."

But it is not my purpose to argue the justice or desirability of a freedom of the seas thus interpreted in time of war, merely saying that if the laws of naval capture as enforced before the war had been adhered to, neutral complaint would have been negligible and the course of history perhaps quite different.

I desire to urge that war by sea and by land is one, that the two cannot be treated and considered as separable. Otherwise, if you by restrictive legislation draw the teeth of the strong naval power, while the strong land power is not correspondingly limited in its control of occupied territory, in its treatment of non-combatant enemies' property and person, in its use of the labor of prisoners, in its employment of fines and penalties and terrorism and destruction, you merely prefer the interests of the one kind of power to those of the other.

A moment's glance at the events of the war now in progress will

illustrate my meaning. Complete freedom of the seas would have given Germany unrestricted trade in her own ships in all commodities. No wonder that she acclaims its desirability. While on the contrary her methods in land war foreshadowed in her General Staff code of the laws of war, are unrestricted, and no limitation has been demanded by Pope or President.

The British navy, operating under accepted rules, has prevented the subjugation of Europe by the Hohenzollerns as it prevented the subjugation of Europe by Napoleon a century earlier.

Now one may truthfully say that a navy is a defensive rather than an offensive weapon. It cannot overrun a continent. The primary object of the British navy is to protect the British Isles from invasion and to ensure their food supply. There is more reason therefore for weakening the efficiency of land power by legislation than for lessening the effectiveness of the naval arm. This thought is confirmed by the fact that the seizures of an army are subject to its own law, while the captures of a navy are reviewed by a court of civilians; at least this is the general usage. There was a time rather early in the war when one was inclined to ask if British navalism, so-called, like German militarism, was not dominated by the law of expediency, of necessity. Then came the judgment of the highest Court of Admiralty in England, the Judicial Committee of the Privy Council in the *Zamora* case, on appeal.¹

This Court declined to be bound by an Order in Council which was in conflict with International Law. I extract from a long judgment which in many a line asserts the Court's independence of the Executive, a brief paragraph:

"If the court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a prize court, and justify the confidence which other nations have hitherto placed in its decisions."

This epoch making decision shows the gulf which lies between German *Kriegsrecht* and British law regnant. Contrast with it decisions of German courts as in the cases of Capt. Fryatt judicially murdered by command, and of Miss Cavell.

And so one concludes that if the efficiency and severity of naval power need to be curbed in the interest of civilization, much more does land power need like restriction in a dozen different particulars. Take

¹ *The Zamora* (P. C.) [1916] 2 A. C. 77.

a single instance. The Hague Convention, IV, 1907, Respecting the Laws and Customs of War on Land, Art. 46 reads as follows: "Family honor and rights, the lives of persons and private property as well as religious convictions and practice, must be respected. Private property cannot be confiscated." This was ratified by Germany Nov. 27, 1909, and yet we see her officers violating family rights by deportations, wounding family honor by threats and violence, wantonly taking the lives of hundreds of non-combatants, looting and destroying private property and defiling churches. Militarism tore up this treaty as it tore up others which limited the power of force. Is not a freedom of the land which shall check such abuses the first requisite?

The spokesmen of France and of England in the light of such war crimes have repeatedly declared that German militarism must be overthrown and that war must continue until this end is reached, but have never indicated the way except vaguely, by territorial loss and the discredit and failure of the Prussian military caste.

What is the key of militarism? What is the one factor above all others which dominates the nation possessed by militarism, which compels its neighbors to the best of their ability to do likewise in self defense? It is the principle of conscription, of universal military service, whereby two or more years in the life of each available youth are spent under the rigid discipline of the drill master. This trains a whole nation to arms, rears an officer caste and places in the foreground of the national life and consciousness the possibility of instant mobilization. This was the secret of Prussia's success in her three wars against Denmark, Austria and France. In 1872 France was compelled to adopt universal service also or be hopelessly outclassed. Austria and Russia followed, and now even England, Canada and the United States must imitate for war purposes, with the probability that the system will be fastened upon them for national defense if maintained elsewhere. That is the way the practice grows. Those who are answerable for the security of a state must envisage the temper and the strength of its probable rivals. No state can hope to be as strong as the rest of the civilized world in combination. But every state has neighbors and shifting rivals, even enemies, and it necessarily, according to its capacity, tries to make itself as strong as they because force is still the mechanism of political change the world over. When one state introduces armaments or a system for the exercise of military power, it is studied and if found good adopted by all other states which can afford to do so. Hence the race in armaments. Hence also the general employment of universal military service, if any single powerful state begins it. And it is all done in the name of national defense. No modern state avows that it is beginning a war of aggression when it takes up arms, save perhaps in a moment of popular delirium, as a drunken man blurts out truth. Now what a

statesman desires is equality in power with a rival or a probable group of rivals. But there are two ways of bringing about equality, by levelling up or by levelling down. You may try to secure for your own people such military numbers, material, training and their concomitants as will place the state for which you are responsible on an equality with some other state in the capacity to use force. Or, if conditions favor, you may bring about the same equality by depriving your rival of part of his military power and thus reduce him to your own lower level. The resultant equality as between the two states in question is the same, whether that equality is on a high or a low scale of military and naval establishment. But of course to be effective as a world policy it must apply to all peoples. A single large exception destroys the world equilibrium. Equally of course, it is probably chimerical to suppose that all war can be done away with. What you bring about is merely the necessity of arming and training forces in the sight of all the world for a year or so before you can make war, during which preparation the influences making for peace may be operative. This disarming of a state must be thorough-going. Its government may retain no arsenals, no store of weapons. Its army is merely sufficient for the preservation of order. Navies also must be laid up when no longer defensively needed.

But from the standpoint of national economies the difference between the high and low scales of military establishment is as wide as the poles.

Besides the saving in the budget of a state through the abolition of the universal service principle, there is another result which should logically follow, the automatic extinction of the officer class. In a country like Prussia, where class distinctions are all powerful, where land is held in large ownerships and the relation between owner and worker is almost feudal, the males of a landed family follow a military career as a matter of course. There results a large body of men, socially dominant, exempt in part from the restraints of the civil law as the Zabern case proved, extremely influential in the direction of national policy, committed by its studies and its aspirations to a desire for war. An intelligent Japanese told me that this peril affected his own country.

And in line with this sinister influence is the self interest of the great munition plants whose prosperity depends upon war somewhere.

Now a large body of officers without men to command is ridiculous and therefore improbable. If the military career is closed to the youth of the Junker class it is automatically forced into other pursuits, the professions, civil service, commercial life. Peaceful pursuits mean peaceful ideals.

Such an idealistic program as the abolition of the conscriptive principle must depend for success upon two uncertain factors. (1) Can

Germany be so beaten and humbled as to force her acceptance?*(2) Is there without force of a military kind any international sanction to guarantee the future permanence of such an agreement?

As to the first point time alone can show whether the Entente can venture to demand and Germany be made to yield so humiliating a concession. This we may say, however, that if there really is a less autocratic government in Germany, if the popular will has a real influence upon national policies, the abolition of universal service would not be difficult, because it is hated. The answer to our second question depends upon the feasibility of creating some kind of a league of states which for lack of national armies would be relatively strong with its internationalized police, which could also effectively use the non-intercourse weapon against a recalcitrant state, a state attempting to violate this very compact to abolish conscription; for instance. Upon this international boycott I lay great stress without disguising the fact that it would demand a high degree of state altruism.

The further doubt arises whether the whole system outlined does not perpetuate the *status quo* as this war may create it and leave a world hide-bound. And the solution might be some kind of a plebiscite principle to which a province or a people dissatisfied with its political connection could appeal and thus shift its allegiance.

This sketch of a world disarmed and untrained for war has its alternative, a world straining its every resource to possess the latest most terrible weapon for warfare by land and by sea, and by air—explosives, poisons, air ships, U-boats, with compulsory training for every youth and a staggering cost of upkeep. To avoid such alternative is to my thinking a main reason on our part for entering the war, the only reason in fact which appeals to national self interest.

I have gone rather far afield from my original topic, but the connection is easy to see. Our President advocates a program which is apparently aimed at the British naval power. I say in reply that our own practice as to freedom of the seas is as reprehensible as any one's. Moreover, that if antecedent rules are observed there is singularly little that is objectionable in naval war. That to reform naval warfare without reforming land warfare is to take sides, is barking up the wrong tree. That land warfare needs reformation badly but is so dependent for its methods upon the will of a military caste as to be difficult of reform save by the abolition of that caste in all countries. Finally that the best way, in fact so far as my imagination and vision go the only way, to abolish the military caste is to surrender the universal service principle which gave rise to it.

* [This article was written before the signing of the Armistice of November 11, 1918.—Ed.]