batants were fired upon by Swiss anti-aircraft guns, but they were at such an altitude as to be beyond the range of fire.[5]

The question whether neutrals have an active duty to prevent the passage of belligerent aircraft over their territory is becoming more or less academic. In the present struggle, the European neutrals are supplied with anti-aircraft guns having a much greater range than any known in the last great war. What is more significant is that neutrals now send up their own aircraft to actively contest the passage of belligerent planes. Thus, on November 20, 1939, a German military plane flying along the Roer River near Roermond in The Netherlands, was brought down by pursuit planes of The Netherlands, the pilot being killed in the crash.[6] A similar encounter occurred on the previous day with two German planes, which then headed back toward Germany.[7]

The technical advances made in the art of flying and the increasingly deadly character of bombs and other weapons carried aboard aircraft in war, have made impossible the recognition of any vertical limit to the sovereignty of the subjacent state. This was fully recognized in 1923 by the Report of the Hague Commission of Jurists upon the Revision of the Rules of Warfare. Not only were belligerent military aircraft forbidden to enter the jurisdiction of a neutral state (Art. 40), but it was provided that "a neutral government must use the means at its disposal to prevent the entry within its jurisdiction of military aircraft and to compel them to alight if they have entered such jurisdiction." (Art. 42.) The latter provision was incorporated in substantially identical form in Article 95 of the Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War.[8]

The force of gravity, omnipresent and relentless, makes any vertical limit to sovereignty over the air-space impossible in time of war.

ARTHUR K. KUHN

ARMED MERCHANTMEN

The public press informs us that belligerent merchant ships are entering American harbors armed fore and aft with four six-inch guns. So far as known, no American protest against this practice has been made, but on the contrary it has been said that if armed "for defense" they may be treated as innocent merchantmen both on the high seas and in neutral ports. Moreover, although the Havana Convention of 1928 on Maritime Neutrality had provided that armed belligerent merchantmen were to be treated in port and territorial waters on the same basis as warships,[1] the Panama Declaration of October 3, 1939,[2] provides that the American Republics

[5] Garner, *op. cit.*, p. 473. [6] New York Herald-Tribune, Nov. 21, 1939, p. 2.
[7] *Ibid.* [8] See this JOURNAL, Supp., Vol. 33 (July, 1939), pp. 764–768.

[1] Art. 12, par. 3. The United States, for reasons not known, made a reservation to that paragraph. [2] 1 Bulletin 328 (Oct. 7, 1939).

> shall not assimilate to warships belligerent armed merchant vessels if they do not carry more than four six-inch guns mounted on the stern, and their lateral decks are not reinforced, and if, in the judgment of the local authorities, there do not exist other circumstances which reveal that the merchant vessels can be used for offensive purposes. They may require of the said vessels, in order to enter their ports, to deposit explosives and munitions in such places as the local authorities may determine.

Inasmuch as this question was dealt with by the United States and other neutrals during the last Great War, it seems strange that invalid distinctions between "offensive" and "defensive" armaments, which were then discredited, should now be revived. Mr. Winston Churchill informs us that over 1,000 British merchantmen are already armed and that he expects to have 2,000 ready shortly. Some of them are apparently provided with naval gun crews. The question is likely to assume renewed importance, since some of these vessels are likely to be sunk by submarines or will enter neutral ports. Their legal status ought not, therefore, to be left in doubt.

This precise question confronted the United States in August, 1914, when Great Britain protested under the "Alabama" rules of Washington against German ships leaving American harbors with guns below deck to be mounted at sea and undertaking depredations on British commerce. On the other hand, Germany protested against the admission of armed British merchantmen. But on the British "fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for defense, that they will never fire unless first fired upon," Mr. Lansing framed a circular, September 19, 1914, endeavoring to define the criteria for distinguishing offensive from defensive armament or use.[3] Mr. Lansing sought to make *motive* the test. The fact that armament necessarily invited attack was overlooked. In fairness to Mr. Lansing, it should be said that in 1914 he had in mind only German surface raiders as dangerous to British merchantmen.

The appearance of the submarine in 1915 as a serious menace to commerce caused confusion rather than a clarification of the law. Although British

[3] For. Rel., 1914, Supp., 611–612. Lansing thought that if armed "for the sole purpose of defense," the ship did not acquire "the character of a ship of war," that while the presumption was that any armament was "for offensive purposes," the presumption could be overcome, and he then set out certain criteria of "defensive" armament, including the size of the guns, their limited number, "that no guns are mounted on the forward part of the vessel," that the ammunition is small, that the vessel is manned by its usual crew, that its fuel and supplies are sufficient to carry it only to its port of destination, etc. The New York Times, Dec. 2, 1939, reports that Rumania has forbidden access to its ports or territorial waters to all belligerent ships armed with more than two six-inch guns. The dispatch adds that "the armament . . . must be for defense purposes only, and this fact must be obvious." No test for determining this "obvious" fact is suggested. Belgium, Denmark, Norway, Sweden, and Iceland appear to admit belligerent merchant ships armed for "defense." The uniform Scandinavian laws give no definition. French texts quoted (1939) 15 *Revue des lois* (*Inst. Int. du Commerce*), 213–214.

orders had been issued to armed ships to ram and attack submarines, no change was suggested in the American rules for distinguishing offensive from defensive armament until the end of 1915, when Mr. Lansing informed the British Government that arms had been used "for offensive purposes in attacks upon submarines," and the Italian Ambassador that "the presence of any gun on a merchant ship of a belligerent nationality could well create the presumption that the armament was for offensive purposes, thereby causing this Government to treat the ship as a ship of war." [4] On January 2, 1916, Mr. Lansing pointed out to the President the necessity of reversing the 1914 ruling because of "the impossibility of a submarine's communicating with an armed merchant ship without exposing itself to the gravest danger of being sunk by gunfire because of its weakness defensively [and] the unreasonableness of requiring a submarine to run the danger of being almost certainly destroyed by giving warning to a vessel carrying an armament . . ." [5] He suggested, therefore, that merchant vessels disarm, but if they would not, they were to be classed as "vessels of war and liable to treatment as such by both belligerents and neutrals." The Netherlands had realized this elementary principle as early as 1914,[6] and refused to admit to Dutch ports armed belligerent merchantmen, on the ground that they were capable of committing "acts of war." Moreover, Mr. Lansing pointed out that if some merchant vessels are armed, all expose themselves to the danger of unwarned attack and sinking.[7]

On January 18, 1916, Mr. Lansing made a restatement of the law, pointed out that the reason for defensive armaments was the menace of pirates and privateers, and that with the disappearance of these dangers a gun on a merchant ship today could only be considered as intended for the purpose of conducting hostilities against submarines and preventing visit and search. He said:

> Even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. Any armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.[8]

He therefore proposed "that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatever."

[4] For. Rel., 1915, Supp., 849–850; 1916, Supp., 749.

[5] Savage, The Policy of the United States Toward Maritime Commerce in War, Doc. No. 149, II, 430, 431.

[6] The correspondence between British and Dutch Governments will be found in a British Blue Book, reprinted in this JOURNAL, Supp., Vol. 12 (1918), p. 197 *et seq.*

[7] Savage, *op. cit.*, 431–432.

[8] For. Rel., 1916, Supp., 147.

In advancing this argument, Mr. Lansing announced no new principle of law. The immunity of the merchant ship from unwarned attack was directly associated with its inability to attack or endanger a warship. This disability became marked when armor-plate was introduced on warships. But when merchant ships became speedy, powerful and armed and the vulnerable submarine appeared on the scene, the reason for immunity from unwarned attack disappeared. It is elementary that an armed belligerent merchant ship, especially when under orders to attack submarines at sight, is a fighting ship, subject to all the dangers of the belligerent character, as Marshall remarked in *The Nereide*.[9]

But Mr. Lansing's sound legal view was, for political reasons, not to prevail. Had it been adopted and adhered to, it might have saved the Wilson Administration from the fatal claim that an American citizen had the right to travel unmolested on an armed belligerent ship, which Mr. Wilson considered a matter of "national honor." Mr. Lansing's view, although at first accepted by the President, was later rejected under a barrage of Allied protest. Mr. Lansing, having started out in error, was not permitted to get back on the right track. The Administration then opposed the sensible Gore-McLemore Resolutions, which would have warned American citizens against taking passage on armed belligerent merchantmen except at their own risk.[10] This common law rule really required no statutory codification. A memorandum dated March 4, 1916, was solicited from anonymous "experts," who rationalized the confessed error of September 19, 1914, and in effect maintained the view that passengers could grant immunity from sinking to an armed merchant ship.[11] Then came the humiliating retreat of March 25, 1916, in which Lansing undertook to repudiate his and the

[9] 9 Cranch 388, at 430 (1815). It has been assumed by some defenders of armament on merchant vessels that Marshall did not believe that the armament exposed the vessel and her neutral cargo to the danger of sinking. But this hardly does credit to Marshall's intelligence. After the ship was captured—not sunk—he held, contrary to Stowell's view in *The Fanny* (1814), Dobson, 443, 448, Moore's Dig., VII, 491, that neutral cargo was immune from condemnation, notwithstanding the risks its carrier had run. The court divided 3 to 2 on that issue; but we know that Marshall was anxious to preserve and extend the rights of neutrals. Privateers did not sink prizes unless absolutely necessary, for obvious reasons; and privateers were occasionally themselves captured or sunk by armed merchantmen. All the judges agreed that the *Nereide*, armed with ten guns, could have made lawful captures. Clearly, then, she was subject to the danger of being sunk, even if only while attempting to escape the privateer. Nothing else could have been meant by Marshall when he speaks of the *Nereide* as "an open and declared belligerent, claiming all the rights and subject to all the dangers of the belligerent character." *Cf.* John Bassett Moore, "Fifty Years of International Law," 50 Harv. L. Rev. 395, at 437–442 (1937). Professor Hyde states that Lansing merely applied an old rule to existing conditions. International Law, II, 467. On the history of arming merchantmen, see Vivaud, Jean, *Les navires de commerce armés pour leur défense* (Paris, 1936), p. 15 *et seq.*

[10] The two resolutions differed somewhat. *Cf.* Borchard and Lage, Neutrality for the United States, 113–117.

[11] That memorandum has been criticized in Borchard and Lage, *op. cit.*, 117 *et seq.*

President's view of January 18, 1916, and now maintained that a belligerent must, in the absence of "conclusive evidence of aggressive purpose," act on the presumption that an armed enemy merchantman is of "private and peaceful" character, entitled to all the immunities of an unarmed vessel. Conclusive evidence of a purpose to use the armament for "aggression" was to be deemed essential. The distinction between "offensive" and "defensive" armament, which Lansing had exposed as an illusion, was now revived in the fantastic contrast between merchantmen armed "for aggressive purposes," and "peaceful armed merchantmen." This extraordinary position, repudiated by Congress since 1935 in the general prohibition against traveling on any belligerent vessels, has been severely criticized not only by Mr. Lansing himself in his note of January 18, 1916, but by informed commentators.[12]

Yet there is danger that the unsustainable claim that armed merchant vessels are peaceful if armed for "defensive purposes," a claim directly responsible for American entrance into the war in 1917, is now being again acted upon. Although Mr. Lansing in 1915 protested against the admission of such ships to American ports, they are now apparently freely admitted though armed fore and aft. While the Washington Conference of 1922 condemned the sinking of merchantmen without provision for the safety of noncombatants, it also recognized that submarines are lawful naval vessels, that a merchant vessel must be ordered to submit to visit and search, that it must not be attacked unless it refuses to submit, that it may not be destroyed unless crew and passengers have first been placed in safety, and that submarines are not exempt from these rules. But if merchant vessels may be attacked if they resist visit and search, how can it be maintained that a merchant vessel may carry armament whose sole purpose is to prevent visit and actually to attack the submarines on sight, and yet escape the danger of unwarned sinking? [13] The gun, as Mr. Lansing pointed out, precludes

[12] See Hyde, International Law, II, 469–472. Art. 28 of the Research in International Law (1939) provides:

"A neutral State shall either exclude belligerent armed merchant vessels from its territory or admit such vessels on the same conditions on which it admits belligerent warships." See also Art. 2 and comment. This JOURNAL, Supp., Vol. 33 (July, 1939), pp. 224 *et seq.*, 335 *et seq.*

[13] An officer of the armed Anchor Liner *Cameronia*, remarking on the fact that she had been repainted a buff color to mislead German submarines into thinking her a neutral ship, is reported to have said, "They have to come up to us to make certain, and then we'll let them have it." New York Times, Nov. 15, 1939. Mr. Bryan, on June 2, 1915, then at odds with Mr. Lansing on the armed ship question, advised President Wilson, correctly, that "the character of the vessel is determined, not by whether she resists or not, but by whether she is armed or not . . . the fact that she is armed raising the presumption that she will use her arms." Baker, Woodrow Wilson, Life and Letters, V, 354, quoted in article of J. B. Moore, *loc. cit.*, p. 439.

The 6-inch gun is a heavy gun. At the Washington Conference it was agreed that no warships should be built, other than battleships, with gun caliber over 8 inches. Article

any possibility of visit. This must have been foreseen by Article 22 of the London Naval Treaty of 1930 which prohibits sinking of merchant vessels without provision for the safety of passengers and crew, "except in case of persistent refusal to stop on being duly summoned, or of active resistance to visit and search." [14] As already observed, the 1928 Havana Convention treats armed merchantmen as having the status of warships. The Panama Declaration, to the contrary, is hard to understand on legal grounds, and it will be interesting to observe how neutrals act under it. But whether regarded from the point of view of the "Alabama" principles or from the point of view of protecting goods or passengers on board, neutrals are not justified in treating an armed merchant vessel as an innocent peaceful carrier. By so doing they risk their neutrality.

EDWIN BORCHARD

PROTECTIVE JURISDICTION

The "Declaration of Panama" signed October 3, 1939, by the representatives of the twenty-one American Republics,[1] which proclaimed a non-combat zone of vast extent in the seas adjacent to the Western Hemisphere, is of vast import. It is true that official explanations and interpretations by the Department of State have sought to attenuate the practical effect of this Declaration. Nevertheless, this Declaration raises issues of the deepest significance. It plainly puts fresh vigor into the Monroe Doctrine as a continental policy rather than a unilateral policy on the part of the United States. It confirms the claim made by certain publicists, notably Dr. Alejandro Alvarez of Chile, that there exists a growing body of American continental international law. It asserts a definite limitation on the ancient doctrine of the freedom of the seas. It gives formal and solemn sanction to the doctrine of protective jurisdiction over waters extending beyond the conventional three-mile limit of sovereign territorial jurisdiction.

The text of the Declaration of Panama affirming the neutrality of the American Republics in the present European war, and denying that the interests of belligerents should be permitted to prevail over the rights of neutrals remote from the zone of combat, reads in part as follows:

XII of General Convention, Proceedings, p. 1580. All but the heaviest British cruisers carry a maximum caliber gun of 6 inches. *Cf.* 1935 Naval Conference, Documents, pp. 806, 811, 851. The *Ajax* and the *Achilles*, which placed the *Graf von Spee hors de combat*, carried 6-inch guns as a maximum.

[14] These rules came into force for the United States, Great Britain and Japan. Proceedings of the London Conference, 1930, Conf. Ser., No. 6 (Washington, 1931), Art. 24 (2), p. 219; Hazlett, Submarines and the London Treaty (1936), U. S. Naval Inst., Proc., p. 1691. Even the 1936 Naval Treaty, now subscribed by France and Italy and many other countries, cannot be deemed to have extended these immunities to *armed* merchant vessels. *Cf.* Borchard and Lage, *op. cit.*, pp. 193–196.

[1] Printed in Supplement to this JOURNAL, p. 17.