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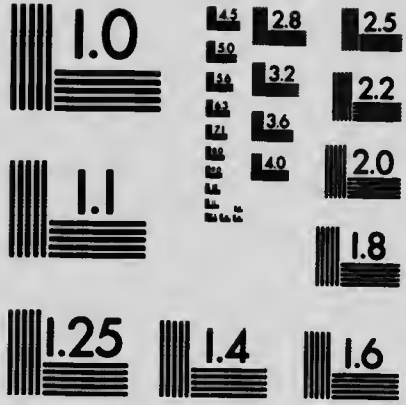

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THE FREEDOM OF THE SEAS

BY

PROFESSOR RAMSAY MUIR

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LONDON NEW YORK TORONTO
MCMXVII

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THE FREEDOM OF THE SEAS

SO much has been, and is being, said and written about the freedom of the seas, especially in Germany and America, that it is worth while to consider what various meanings the phrase may bear and what has already been done or attempted towards establishing and maintaining this freedom for the world.

The freedom of the seas obviously means the right of the peaceful merchant vessels of all nations to go to and fro upon the seas of the world, free from all perils or restrictions save those of the winds and the waves. It rests upon the doctrine of international law which asserts that, outside territorial waters, the seas are the property of no State, but equally open to all. It may be infringed in either of two ways—either by the assertion of monopoly or the imposition of restrictions by a strong naval power, or by the violence and disorder of piracy. In order to ensure it, both of these dangers must be guarded against: naval power must not be allowed to fall into hands that will abuse it; and the seas of the world must be, somehow or other, efficiently policed.

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In times of peace the freedom of the seas has been so long enjoyed by the whole world that men are apt to take it for granted; they do not consider how it came to be established, or what are the conditions necessary for its maintenance. Those who are to-day talking and writing about the freedom of the seas are thinking only of the conditions of war. Yet the freedom of the seas in times of peace is manifestly the more important aspect of the subject; and it is needful to remember how it came to be established, and to realise that it is by no means secure beyond possibility of challenge.

Four centuries ago the doctrine of international law which declares that the high seas are the common property of all nations was not accepted. On the contrary, a Papal award of 1493—at a time when the Papacy was the supreme international arbiter—practically gave a monopoly of most of the world's seas to Spain and Portugal; and for a century thereafter the ships of all nations but these voyaged at their peril in the South Atlantic, Indian and Pacific Oceans. This monopoly was overthrown by the first great victory of the English fleet, the defeat of the Spanish Armada, which threw open these oceans to the mariners not only of England but of all nations. Even then, however, the freedom of the seas was by no means established. The Dutch naval supremacy succeeded to the Spanish, and practically established a Dutch monopoly of all waters east of the straits of Malacca. This restriction upon the free movement of peaceful commerce came to an end with the victories of the English Navy over the Dutch in the seventeenth century. From that date onwards all the open seas of the world have been available for the ships of all nations. The era of freedom of the seas in time of peace is thus coincident with the era of British

naval supremacy. It is a simple and undeniable historical fact that the British Navy has never at any period even attempted to impose a national monopoly of the use of any part of the seas of the world. But it does not follow that if another power succeeded to the British naval supremacy it would never be tempted to misuse its power.

Even when the claim of the Spaniards, and later of the Dutch, to a monopoly of the use of certain seas had been destroyed, there still remained a grave restriction upon the free movement of peaceful commerce so long as piracy was rampant, as it long remained in many parts of the world. The destruction of piracy has been mainly the work of the British Navy. It has been carried out at the expense of Britain, and, of course, primarily in the interests of British trade, but it has been equally to the advantage of other trading nations. Thus in two ways the freedom of the seas in time of peace has been the result of British naval supremacy. This is not a national boast, but a simple statement of historical fact.

Why has the British naval power never been abused to restrict the trading rights of other nations in times of peace? The question is important, because unless the causes which have prevented the abuse of British sea-power would be equally operative to prevent the abuse of sea-power in other hands, the freedom of the seas, even in time of peace, cannot be regarded as impregnably secured.

Part of the explanation is doubtless to be found in the strength of the tradition of liberty and self-government among the British peoples. This is not a uni-

versal characteristic. A still stronger factor, during the nineteenth century, when the British naval supremacy was most unquestioned, has been the prevailing economic doctrine of the British people, according to which all restrictions on the movement of trade are in the long run harmful, and no advantage to national prosperity is to be derived from the ruin of trade-rivals who must also be customers. This economic doctrine is not held by any other nation. It led the British power not merely to abstain from the attempt to enforce a monopoly of any sea; it led it even to throw open every port which it controlled as freely to the traders of other nations as to its own.

But there is a third explanation, yet more important. Though a great naval power, Britain has never attempted, except in moments of crisis, to be a great military power. She has always known that any attempt to restrict the trade of other nations must arouse opposition, which must in the long run be fatal unless she were powerful enough to crush it. Now naval strength, while powerful for defence, is all but powerless for decisive offence, unless it is backed by very great military power. For that reason any attempt on the part of Britain to abuse her naval supremacy must lead to wars in which she would be unable to force a decision, and in which her foes must in time become more and more able to challenge her on the seas. The real safeguard of the freedom of the seas in time of peace has therefore been that naval supremacy has been in the hands of a power which did not possess a great army, and knew that it could never crush any great land-power.

If these conditions were ever reversed, it is safe to

assume that the freedom of the seas, even in time of peace, would be again endangered, as they were when Spain was supreme at once on land and sea. If naval supremacy were to fall into the hands of any State (1) which was so formidable on land as to terrorise other powers, (2) which was not inspired by a dominating tradition of liberty, and (3) which believed in the value of commercial monopoly and the destruction or weakening of trade-rivals, we may be very sure that restrictions would frequently be imposed upon the use of some of the world's sea-going highways. This situation would arise, for example, if Germany should be completely victorious in the present war. It is true that America would remain unconquered. But America would probably not risk the perils of war (for example) to secure the free use of the Eastern Mediterranean or the Suez Canal for all the world.

The freedom of the seas, then, in times of peace, cannot be taken for granted as secure beyond all possibility of challenge. Its maintenance is dependent upon the exercise of supreme naval authority and the duty of sea-police either by a common government of the civilised world (which is still far distant), or by some power which, owing to its own position, traditions and methods, can safely be trusted not to abuse this supremacy. This is by far the most important aspect of the problem of the freedom of the seas. It is to be hoped that the civilised world will not overlook it by concentrating its attention upon the minor question of the free use of the seas in time of war.

In time of war it is, in the nature of things, inevitable that full freedom of movement on the seas should be in some degree qualified, not only for belligerents but

for neutrals. It has been, for three centuries, one of the most vexed and difficult problems of international law to determine the limits within which freedom of movement may be restrained by belligerent action, and it must be recognised that during the course of these long arguments, Britain, as the strongest naval power, has been led to assert belligerent rights which have been widely repudiated by neutrals. But during the eighteenth and nineteenth centuries international law arrived at certain broad principles as to the rights of belligerents in war, and therefore as to the qualifications upon the freedom of the seas which might reasonably be imposed upon neutrals. Without going into technical details, these broad and generally accepted principles may be defined as follows:—

(1) A belligerent may rightfully endeavour to destroy or hamper the sea-going commerce of his enemy by seizing or sinking his ships wherever found. But in doing so he must (a) safeguard the lives of all non-combatants, and (b) respect neutral property carried on the enemy ships.

(2) A belligerent may rightfully seal up a part or the whole of his enemy's coast-line by means of a "blockade," and for this purpose may seize or destroy neutral vessels endeavouring to reach the blockaded ports. But he may only do this legitimately if his "blockade" is effective—that is, if it is carried out by a naval force so powerful as to make access to the blockaded ports manifestly impracticable except by sheer luck. Failing this, all his actions in an incomplete blockade are illegal. He may not, of course, blockade a neutral port or coast-line. But he may prevent the ingress or egress of contraband through neutral

ports by intercepting and searching the neutral vessels which carry them. This principle was established by the United States during the Civil War.

(3) A belligerent may rightfully prevent the access of munitions of war to his enemy, and may seize any neutral ship carrying such supplies (known as "contraband"). A neutral vessel carrying contraband ought, however, always to be brought before a properly constituted prize-court, save in very exceptional circumstances. On the judgment of the prize-court not only the contraband cargo but the ship which carries it may be legally confiscated.

Such are the three main principles of international law affecting the freedom of the seas in time of war, as they have been gradually established during the last three centuries. They involve (1) that a belligerent may be absolutely deprived of the right to use the seas, whether for peaceful commerce or otherwise, if his enemy is strong enough to enforce this; and (2) that the freedom of the seas may be qualified in the case of neutrals in two well-defined ways: (a) their ships may be absolutely excluded from enemy ports on pain of confiscation or destruction, by means of a blockade, provided that the blockade is really effective; and (b) their ships may be confiscated or destroyed if they attempt to carry "contraband" to a belligerent. But these restrictions are subject to two definite provisoes. First, neutral lives must in no case be taken; and secondly, neutral property must be absolutely respected except where it is contraband destined for the enemy, or where it is endeavouring to run an effective blockade.

These restrictions obviously impair in a serious degree the freedom of the seas in time of war, especially during a war between great trading states. Accordingly, during the present century, a serious effort has been made to reduce this restriction, and to increase the freedom of the seas even in time of war. It was at the Hague Conference of 1907 and the subsequent Naval Conference of London in 1909 that these attempts were most systematically developed, mainly on the motion of Britain. The subject was found to be extremely difficult, and a great variety of opinions emerged. But we may broadly distinguish three main points of view in these discussions, the British, the German, and the American. The British aim was to reduce the restrictions upon neutral trade to the maximum possible extent consistent with the maintenance of the chief offensive weapon of a naval power—the weapon of attack against the trade of its enemy. The German aim was, as far as possible, to disarm the stronger naval power while leaving to the weaker naval power every weapon of offence or defence, without regard to the rights of neutrals. The American aim was to abolish all restrictions upon sea-going trade, belligerent and neutral alike, in time of war, save only the carriage of contraband; thus depriving sea-power of its chief weapon of offence. Each of these three programmes was in effect advocated as a means of enlarging the freedom of the seas, and thus this phrase came to bear very different interpretations. It is worth while to consider the rival proposals, and their probable effects; though none of them was completely successful.

One of the reasons for a reconsideration of the rules of naval warfare at this date was the introduction of a new naval weapon, the automatic mine, which ex-

plodes on contact—first used on a larg scale during the Russo-Japanese war. The drawback of the automatic mine is that it cannot (unlike the gun or the torpedo) discriminate between a legitimate or an illegitimate victim, between a belligerent and a neutral. Its introduction, therefore, formed a grave peril to neutrals, and would, if it were employed without restriction, seriously impair such freedom of the seas as remained to them. How did the rival views deal with this question?

Britain proposed that all mines should be illegal; or, if this could not be accepted, that they should never be laid in the open sea, but only in the territorial waters of the belligerents—in home waters for defence, in enemy waters for offence; that they should never be laid except in the waters facing naval ports, so as to leave trading ports open to neutral ships except when formally blockaded; and that they should be so constructed as to become harmless if they were swept from their moorings. Unanchored mines, she proposed, should be entirely prohibited; or, if licensed as a means of defence, to be thrown out by a retreating fleet, they should be so constructed as to become harmless an hour after being released. If these proposals had been accepted, they would have formed a very material safeguard for the freedom of the seas, and neutral ships would have been saved from a deadly peril against which no precautions are possible. Apart from the traditional restrictions of blockade and contraband, the seas would have remained safe and free everywhere except in the neighbourhood of the naval ports of belligerents. But Germany would have none of these restrictions. She insisted upon the right of laying mines in the open sea, though she accepted

the rules (which she has since disregarded) that anchored mines should be constructed so as to become harmless when released, that unanchored mines should have only a short life of mischief, and that minefields should be notified to all trading countries. She thus insisted upon a serious restriction of the freedom of the seas in time of war. Her motive was obvious. She desired to use the mine against the naval and mercantile shipping of the stronger naval power, and she was indifferent as to the effect upon neutrals. In this question America took little interest, but on the whole supported Britain. So far as this question was concerned, Britain was the strongest advocate of the freedom of the seas. It may be said that British interests demanded the maximum degree of freedom for peaceful trade, and no doubt that is so. But a power whose supreme interest it is that other powers should be free to use the seas can scarcely be described as the enemy of the freedom of the seas!

Britain also put forward some further proposals, designed in the interest of neutrals. In the first place she proposed that the destruction of neutral vessels should be absolutely prohibited under all circumstances; even when they were carrying contraband, and their captors were not in a position to bring them into port, they must not be destroyed; if they could not be brought before a properly constituted prize-court, they must be released. This had, in fact, been the British rule for 200 years; a rule enforced by her own prize-courts. How great a safeguard it would have been for neutral freedom to use the seas, the experience of this war may testify. But Germany would have none of this restriction. She insisted upon the right of destruction in the case of neutral ships carrying con-

traband, without waiting for a prize-court to determine the legitimacy of the captor's decision. Here again Britain was the advocate, Germany the enemy, of freedom of the seas for neutrals in time of war.

In the second place Britain proposed the total abolition of contraband, mainly because in modern warfare it is practically impossible to decide what are and what are not munitions of war. The result of this proposal, had it been adopted, would have been that neutral vessels would have been absolutely safe from confiscation, as well as from destruction, in all cases except where they attempted to force an "effective" blockade. Even if they were engaged exclusively in carrying on trade for the enemy, they might lose the enemy cargoes, by the decision of a prize-court, but their ships would be safe. Germany showed herself as hostile to this restriction as to the others. She insisted upon the maintenance of contraband, that is to say, upon the maintenance of a pretext for destroying neutral vessels, and received here the support of America. Once more Britain was the advocate, Germany the enemy, of the removal of restrictions on neutral trade in time of war.

If the British proposals had been accepted (and observed) there can be no doubt that neutrals would have profited enormously. The seas would have been freed of the perils of mines. Neutral ships could have traded uninterruptedly with belligerent ports, except where these were blockaded by an irresistible force. They could have carried on trade for the belligerents without any risk save that of the seizure of the enemy goods they carried. In all cases save blockade their ships would have been exempt from seizure. In all cases whatsoever the lives and property of their crews

and their passengers would have been safeguarded against all risks except the ordinary dangers of the sea. On the other hand the traffic of belligerents would have been liable to seizure or interruption, subject only to the provision of full safeguards for the lives of non-combatants. Such was the British view of the freedom of the seas in time of war. It marked an immense advance on anything earlier proposed.

The German view of freedom of the seas in time of war was that a belligerent should have the right to make the seas dangerous to neutrals and enemies alike by the use of indiscriminating mines; and that neutral vessels should be liable to destruction or seizure without appeal to any judicial tribunal if in the opinion of the commander of a belligerent war-vessel any part of their cargo consisted of contraband. On the other hand, Germany was very ready to place belligerent vessels on the same footing as neutral vessels, and to forbid their seizure or destruction except when they were carrying contraband or endeavouring to force a blockade. In this way she hoped to deprive the stronger naval power of its principal weapon of offence — the attack upon enemy commerce — while preserving for the weaker naval power every possible means of doing harm alike to enemy or neutral ships. At the same time she was anxious to secure to belligerent merchant-ships the right of transforming themselves into war-ships on the high seas. Thus a belligerent merchant-ship might sally forth as a peaceful trader, under the protection of the "freedom of the seas," and, so long as it carried no contraband, be safe from interruption from the enemy; then, picking up guns in a neutral port, it might begin to sink enemy or neutral ships which, according to the judgment of its captain, were

declared to be carrying contraband; and this without reference to any court of law. Such was—and is—the German doctrine of freedom of the seas.

The American doctrine was simpler, bolder and more honest; and it is fair to say that it has been consistently maintained by American publicists ever since 1783. It was that all private property, whether ships or cargoes, and whether enemy or belligerent, should be exempt from seizure or destruction; but that goods destined for a belligerent government should (if contraband, as such goods practically always are) be liable to seizure and confiscation. How governments are to be prevented from importing goods under the names of individuals, we are not told. This is the American doctrine of freedom of the seas, which has been preached so ardently by President Wilson. It is the doctrine of a highly individualistic people, who draw a sharp distinction between the rights of the individual and the rights of the State, whether in peace or war. If it were established and enforced, the result would be to leave neutral shipping, in certain cases, liable to destruction or confiscation, but also to deprive sea-power, in effect, of its principal offensive weapon, the attack upon enemy commerce. On that ground Germany was willing to accept it (for the time being, at any rate), provided that the weaker naval power were at the same time left in possession of every possible means of doing mischief to enemy and neutral shipping, by confiscating or destroying ships, without judicial decision, on the plea that they were carrying contraband, and by making the sea perilous with mines.

Here, then, three sharply contrasted views of the freedom of the seas were presented, in 1907. They still

stood in clear antithesis at the date of the Declaration of London in 1909. Some advance towards the American view was made at that conference; with the result that the British Parliament refused to ratify it, on the ground that it stripped sea-power of an indispensable weapon. An attempt was also made, in the same document, to define "contraband" by making a list of contraband articles. But this was bound to be unsatisfactory under modern conditions, as is shown by the fact that cotton—a principal ingredient in explosives—was actually put upon the non-contraband list.

When the Great War opened, no one of the three rival views had triumphed. Despite the efforts of America and Germany, all belligerent trade was liable to interruption. Despite the efforts of Britain, neutral ships were liable to destruction without a judicial decision, and were exposed to the danger of mines.

During the course of the war the question has been deeply affected by the actions of both sides, and by the way in which neutrals have received these actions. But the greatest innovator has been Germany. (1) By declaring a blockade of the British Islands in spite of the fact that thousands of ships in a week were able to reach British ports she has asserted the right to dispense with "effectiveness" in a blockade, and has therefore enormously increased the risks to which neutrals are exposed. There has been no effective protest against this claim. (2) She has asserted the right to sow unanchored mines indiscriminately over the seas in spite of her own definite pledges. There has been no serious opposition by Neutrals to this claim. (3) She has asserted the right to destroy neutral vessels carrying contraband without judicial decisions not merely as a rare and exceptional

measure, but as a normal measure. No effective protest has been made against this claim. (4) She has claimed that the obligation of safeguarding non-combatant lives is adequately met by leaving men, women and children in open boats, in stormy seas, and far from land; a practice hitherto unknown. Only the feeblest protest has been made against this claim, and it has been allowed to go by default. (5) She has asserted the right to slay enemy non-combatants at sight. Practically no protest has been made against this claim, except on the ground that neutral non-combatants may happen to be among the rest. (6) She has asserted the right to destroy all neutral property in enemy vessels without compensation. No protest has been made against this claim. (7) She has asserted, finally, the right to destroy at sight all shipping, enemy or neutral, which ventures to traverse any areas of the world's seas which she chooses to indicate, including some of the most frequented highways of sea-going trade, and to take the lives of all their crews and passengers. Against this there have been strong verbal protests, and one neutral power has gone so far as to sever diplomatic relations. By these means Germany claims to be establishing the freedom of the seas.

On the other hand, Britain and her allies have also introduced certain innovations. They have introduced what may be described as "blockade-at-a-distance," a thing unknown in earlier usage, but rendered necessary by the submarine. It cannot be denied that this blockade has been "effective." They have asserted the right to bring neutral vessels into harbour to be searched for enemy goods, and against this practice (which does not endanger neutral life or property) there have been strong protests, on the ground of the delay which it causes.

They have also proclaimed the intention of preventing the ingress and egress of all goods to or from enemy countries, whether through enemy or neutral ports, whether in enemy or neutral ships, and whether "contraband" or not. For this the practice of the American Civil War presents an admitted though partial precedent, so far as concerns the interception of contraband consigned to neutral ports but destined for the enemy. But this precedent does not cover the prohibition of the import or export of *all* goods of whatever character. This prohibition amounts to a new definition of contraband, according to which it would be, not the character of the goods, but their source or their destination, which would make them illegal. This, in itself, would prove a very grave interference with the old principle of maritime law. But it ought to be noted that the Allies have not based their action upon a claim of right. Their new method was not adopted until, in the first submarine campaign (February, 1915), Germany had undertaken a campaign of mere ruthless destruction, disregarding every restriction imposed by international law. The new policy of the Allies, announced in March, 1915, was definitely put forward as an act of reprisal for this lawless German policy. On the other hand, the Allies have never taken or endangered the life of any neutral citizen. They have never sown unanchored mines on the high seas. They have never killed belligerent non-combatants at sea. They have never destroyed neutral property, nor confiscated it, except when it was contraband, and then only on the decision of a properly constituted prize-court. They have in no way interfered with the movement of neutral commerce, except with the enemy. There can be little doubt which of these rival extensions of belligerent rights is the more hostile to any

real interpretation of the freedom of the seas. Yet Britain and her allies do not employ this elusive phrase as it is employed by their adversaries.

What will happen to the freedom of the seas after the war? If Germany wins, it may be established in the German sense: that is, belligerent commerce may be made as free as neutral commerce, both being left open to very great restrictions and dangers; but if the German victory is complete, and she becomes supreme on sea as on land, she is not unlikely to forget her interest in this cry, and to use her power to restrain the free movement of commerce in peace as well as in war. Of one thing, however, we may be sure: so long as the military spirit continues to dominate Germany, her action will be governed solely by considerations affecting her own military interests—which are not identical with the interests of neutrals.

If the Allies win, it is likely that what we have called the British interpretation of freedom of the seas will be established; that is to say, neutrals will be safeguarded as far as is possible consistently with the maintenance of the chief weapon of a naval power, the right of attack upon enemy commerce.

As for the American view, which draws no distinction between enemy commerce and neutral commerce, but only between private property and State property, it is unlikely to be adopted unless America is able to dictate the terms of peace. And there are two reasons for hoping that it will not be adopted, in the interest of the freedom of the seas itself—the freedom of the seas in times of peace as well as of war. The first is, that it would lend itself to grave disputes and to graver abuses.

Imagine the controversies that would arise on the question whether cargoes which would be contraband if consigned to a government, are or are not bona fide the property of individuals. On that question wars might easily arise. Imagine, again, the opportunities which would be afforded to an unscrupulous belligerent of sending out swarms of vessels in the guise of trading vessels, and then transforming them into commerce-raiders, preying indifferently on enemy and neutral. A mere prohibition in international law would be quite ineffective to prevent this abuse: it would only prove an additional trap for honourable powers, as so many of the existing provisions have proved to be.

But there is a still stronger reason against the American doctrine. In modern times every threat to the liberty of free nations has come from a great land-power. In every case it has been broken against the resistance of sea-power, which is by itself unable to threaten the existence of any State, but is very strong for defence. To disarm sea-power while leaving land-power in possession of all its weapons of offence, as the American doctrine would do, would not merely be an injustice to the powers which depend upon sea-power, but would be a positive danger to the liberties of the world. Sea-power must not be disarmed unless and until land-power is equally effectually disarmed. And this will not be until the danger of war has been practically brought to an end. Complete freedom of the seas in time of war is therefore an impossible ideal, because it cannot be justly or safely established until the danger of war itself has been conjured away.

R. M.

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