

BRITISH ARMS SALES AND INTERNATIONAL LAW
DURING THE FRANCO-PRUSSIAN WAR

At the very beginning of the Franco-Prussian War rapid-fire arms were scarce in the French army. The Comte de Palikao, Minister of War from 10 August to the fall of the Second Empire on 4 September, began importing arms in late August; by the time of the Battle of Sedan he had acquired 38,432 rapid-fire Chassepot, Remington, and Snider rifles from abroad, at least 11,000 from England. With the great loss of men and materiel captured by the Germans at Sedan, the arms situation grew critical. The Government of National Defense, formed on 4 September, bought large quantities of weapons, especially from Great Britain and the United States. By 31 October Minister of War Léon Gambetta could report to Jules Favre, Minister of Foreign Affairs, that 950,000 rifles had been purchased, although some had not been delivered.¹

German newspapers severely criticized the British Government for permitting

¹Michael Howard, The Franco-Prussian War (New York: The Macmillan Company, 1962), 246-47; Charles Cousin de Montauban, Comte de Palikao, Un Ministère de la Guerre de vingt-quatre jours, du 10 août au 4 septembre 1870 (Paris: Henri Plon, 1871), 80-85; Léon Gambetta, Dépêches, circulaires, décrets, proclamations et discours de Léon Gambetta, ed. Joseph Reinach, Vol. 1 (Paris: G. Charpentier et E. Fasquelle, 1886, 1891), 83.

For British policy during this war see John Morley, The Life of William Ewart Gladstone (New York: The Macmillan Company, 1932), and especially Lord Edmond Fitzmaurice, The Life of Granville George Leveson-Gower, Second Earl Granville, K. G., Vol. 2 (New York: Longmans Greene and Co., 1905). For the complete diplomatic history of the war see Albert Sorel, Histoire diplomatique de la Guerre Franco-Allemande (Paris: E. Plon et Cie, 1875). British public opinion is studied in Dora Raymond, British Policy and Opinion During the Franco-Prussian War, Columbia University Studies in History, Economics and Public Law (New York: Columbia University Press, 1921).

the export of arms to France, and North German Ambassador Count Albrecht von Bernstorff lodged a series of protests which culminated in an extended diplomatic argument with British Foreign Secretary Earl Granville over several points of international law. This paper attempts to define the German and British views of international law as related to arms sales by citizens of a neutral state to a belligerent government, and to evaluate the opposing arguments in the light of subsequent decisions on the disputed questions.

In reply to German complaints of British arms shipments to France, Lord Granville defended British policy in a circular of 11 August 1870 on the ground that, during the Crimean War, Prussia had exported weapons to Russia and had permitted Belgian arms to pass through Prussia on the way to Russia. But Count Bernstorff argued in a memorandum of 1 September that Prussia's circumstances in the Crimean War differed radically from the British situation in the present war. In the former case the Prussian Government had been acting in accord with public opinion, whereas presently the British Government was not. Unlike the Crimean War, waged in remote areas for remote interests by four states against one, the present war was a life or death struggle between two equally matched nations. Certainly, if British complaints against Prussian arms sales at that time had been justified, German complaints against British arms shipments were at least equally justified.²

Because Germany had been the victim of aggression and British public opinion favored Germany, Bernstorff reasoned, the German Government had a right to expect

²Bernstorff, London, to Granville, 1 September 1870, U. K., Foreign Office, British and Foreign State Papers, 1870-1871, Vol. 61 (London: William Ridgway, 1877), 714-17.

British neutrality to be benevolent toward Germany; but in fact, he said, British neutrality favored France, the aggressor. The ambassador could see no excuse for present British neutrality policy except retaliation for an alleged previous wrong under vastly different conditions. This Granville emphatically denied.

Lord Granville insisted that present British neutrality was analogous to Prussian neutrality during the Crimean War. The Prussian Government had not justified its policy in the Crimean War by any principle of benevolent neutrality, he pointed out, but had stated that it could not interfere with the course of trade, thus apparently basing its policy upon the principle of the primacy of self-interest. When, Granville asked, had Prussia abandoned the principle of the Crimean War (self-interest) for the principle of benevolent neutrality? Benevolent neutrality, said the Foreign Secretary, was an entirely new principle which, if extended to general practice, would mean that any government at the outbreak of war would adopt policies beneficial to the belligerent favored by its public opinion. Such deviation from strict neutrality would amount to the nullification of neutrality.³

British policy, Granville argued, agreed completely with usual practices of international law previously accepted by other states, including Prussia. In the Crimean War the Law Officers of the Crown had ruled that British protests of Prussian arms shipments by private individuals must be based upon violations of Prussian municipal law, which, fortunately for the British, went beyond international law to the

³Granville, London, to Bernstorff, 15 September 1870, State Papers, 759-66. The opinion on benevolent neutrality, obtained from the Law Officers on 5 September, is still valid, according to C. John Colombos, The International Law of the Sea, 5th ed., rev. (London: Longmans Green and Co., Ltd., 1962), 589.

extent of prohibiting the transit arms trade. Consistent with this principle, the British Government now admitted the justification of any protest based upon violations of British municipal law.⁴

Bernstorff denied that a belligerent's complaint must be based upon violations of the neutral's municipal law. Neutrals, he contended, were obliged to make their municipal law conform to international law, upon which belligerents could justify their complaints. And according to existing international law, the German ambassador argued, arms and ammunition led the list of contraband, the sale of which did most to prolong a war. Therefore, the British refusal to prohibit the export of arms to France lengthened the war and violated international law.⁵

The Foreign Secretary admitted that his government possessed discretionary authority to prohibit export of arms and coal to France. But in British practice, Granville explained, this authority had been invoked only when it was in the interest of Great Britain as, for example, in cases of self-defense. Even in some of these cases, notably in the Crimean War, there had been reason to doubt that the benefits of enforcement outweighed the trouble and inconvenience.⁶

⁴Granville, London, to Bernstorff, 15 September 1870, State Papers, 759-66; Colombos, Law of the Sea, 619, states that no complaint is justified if a neutral declines to enforce its municipal law that is more stringent than international law.

⁵Bernstorff, London, to Granville, 8 October 1870, State Papers, 824-35; Colombos, Law of the Sea, 609, mentions that the Alabama arbitration of 1872 established the rule that a state must cause its municipal law to conform to international law. See also Joseph L. Kunz, The Changing Law of Nations (Toledo: ,1968), 83-91).

⁶Granville, London, to Bernstorff, 15 September 1870, State Papers, 759-66. The British view that prohibition of arms exports to belligerents is optional is embodied in Article 9 of Hague Convention V of 1907, according to Morris Greenspan, The Modern Law of Land Warfare (Berkeley: University of California Press, 1959), 552.

In connection with his complaint on 1 September about Britain's failure to extend benevolent neutrality, Bernstorff had proposed a ban on coal exports, noting that France needed coal more than Germany. Granville replied that this raised the very difficult problem of deciding which items, not contraband of war but useful to a belligerent, should be prohibited. Articles invaluable to a belligerent at one point in a war might be quite worthless at another. Should a neutral be expected to watch the progress of a war and alter its laws according to changing circumstances?⁷ No, thought the Foreign Secretary.

On 8 October Bernstorff backed away from the doctrine of benevolent neutrality, denying that he had asked Britain to conduct such a policy toward Germany. He had merely reflected upon the difficulty of reconciling the faith in the practical value of public opinion with the British neutrality policy; he desired only that the British abandon their policy of benevolence toward France in favor of strict neutrality. But he could not admit, he declared, that the practice of allowing French agents to buy up huge quantities of arms under the very nose of the government was compatible with strict neutrality. Bernstorff also reasoned that the new Foreign Enlistment Act, passed since the beginning of the war and not intended by Parliament as an anti-German measure, had become precisely that in practice. He reached this conclusion because the Foreign Enlistment Act prevented Germany from acquiring urgently needed ships

⁷Bernstorff, London, to Granville, 1 September 1870, State Papers, 714-17; Granville, London, to Bernstorff, 15 September 1870, State Papers, 759-66. The Declaration of London of 1909 established three categories of articles: absolute contraband (articles used only for war), conditional contraband (articles needed by military forces but not for direct military use), and non-contraband (articles that cannot be used for war). See Greenspan, Modern Law of Land Warfare, n., 548.

while, at the same time, the government refused to apply the old laws for the prohibition of the export of arms to belligerents.⁸

Bernstorff also complained on 8 October that the British position in regard to arms shipments had materially changed since his memorandum of 1 September. At that time none of his remonstrances concerning supply of coal, arms, and ammunition to France had achieved any practical result, he remarked, and none of the notes from Granville in reply to his protests had stated that the sale of these items to a belligerent was compatible with British neutrality. Only after his notes of the first nine days of September had presented a series of irrefutable facts to Granville had the Foreign Secretary indicated that the export of arms was quite legitimate. If the British Government had taken this position from the beginning, there would have been no necessity for his providing specific information regarding the export of arms and no necessity for investigations to determine the accuracy of his reports; both would have been irrelevant.⁹

Granville denied there had been any change in British policy since the beginning of the war. The investigations of Bernstorff's reports had been conducted as a matter of courtesy to the ambassador, to dispel wild rumors in regard to arms

⁸Colombus, Law of the Sea, 609, says changes in neutral policy after the start of war are permissible if taken because of the necessities of the neutral and not to aid a belligerent. Bernstorff, in his note to Granville on 8 October, State Papers, 824-35, perhaps passed up an opportunity by not charging that the Foreign Enlistment Act had been intended as an anti-German measure. A distinction is made between the fitting out of a war vessel for use by a belligerent and the sale of arms to a belligerent, the former being considered equivalent to fitting out an armed expedition and, therefore, forbidden. This results from the Alabama arbitration of 1872, based upon the three rules of the Treaty of Washington of 8 May 1871, according to Colombos, Law of the Sea, 606. See also Greenspan, Modern Law of Land Warfare, 549.

⁹Bernstorff, London, to Granville, 8 October 1870, State Papers, 824-35.

shipments, and to determine whether any of these shipments involved violations of the Foreign Enlistment Act. Granville contradicted Bernstorff's claim to have presented a series of irrefutable facts, reminding him that the majority of his reports had been found by three separate governmental investigating agencies to be without basis.¹⁰

Study of the exchanges of notes between Bernstorff and Granville in regard to German reports of neutrality violations supports the ambassador's contention that he was not informed until 15 September that the British regarded private arms shipments to belligerents as legal. It may well be, however, that the British assumed that, on the basis of experience in previous wars, Bernstorff would know the usual British policy, particularly since, as Granville carefully asserted, this had also been Prussian policy.¹¹

In both the short and the long view Granville won the argument. Private arms exports to France continued, and in December, the Germans admitted their legality. But as late as 1873 German resentment of British neutrality policy continued to trouble Anglo-German relations.¹²

In summary, it appears that Bernstorff's argument that complaints should be based upon violations of international law, with which municipal law must conform, has been generally accepted; it is apparent that Granville did not clearly state British

¹⁰Granville, London, to Bernstorff, 21 October 1870, State Papers, 870-77.

¹¹For Bernstorff's reports of arms shipments and Granville's replies, see State Papers, 718-24, 732-37, 771-72, 823-24.

¹²Sir Edward Thornton, Washington, to Granville, 3 December 1870, State Papers, 974-75; William E. Gladstone, Hawardin Castle, to Granville, 11 January 1873, The Political Correspondence of Mr. Gladstone and Lord Granville, 1868-1876, ed. Agatha Ramm, Vol. 2 (London: Royal Historical Society, 1952), n. 812, p. 372; Jan Helenus Ferguson, Manual of International Law for the Use of Navies, Colonies and Consulates, Vol. 2 (London: W. B. Whittingham & Co., 1884), 589-90.

policy to Bernstorff until 15 September, although the ambassador probably should have been aware of its nature. The question of the definition of contraband was partially resolved by the Declaration of London of 1909. Finally, the British were correct in their views on the nature of neutrality, the optional prohibition of private arms exports to belligerents, and the distinction between sale of arms and sale of war vessels to belligerents.

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