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.

> The nature of the present conflagration, in spite of its already lamentable proportions, would not justify any obstruction to inter-American communications, which, engendered by important interests, call for adequate protection. This fact requires the demarcation of a zone of security including all the normal maritime routes of communication and trade between the countries of America.
>
> . . . . . .
>
> There is no doubt that the Governments of the American Republics must foresee these dangers and as a measure of self-protection insist that the waters to a reasonable distance from their coasts shall remain free from the commission of hostile acts or from the undertaking of belligerent activities by nations engaged in a war in which the said governments are not involved.
>
> For these reasons the Governments of the American Republics resolve and hereby declare:
>
> 1. As a measure of continental self-protection the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard of primary concern and direct utility in their relations, free from the commission of any hostile acts by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.

The Declaration goes on to define in precise terms of longitude and latitude the extent of these "waters adjacent to the American continent," embracing in some instances a zone more than three hundred miles from the coasts. It was further agreed that these waters should be patrolled, and that the signatory Powers should consult in an emergency concerning the "measures which they may individually or collectively undertake in order to secure the observance of the provisions of this Declaration."

While it may be reasonably demanded that, if American neutral nations are willing to accept severe restrictions on their rights within the European zone of combat, the belligerent Powers should in all fairness respect this neutral non-combat zone, these latter Powers, in certain unforeseen contingencies, might resent any patrol of the character contemplated by the Declaration. The United States would obviously be presented with a most embarrassing problem should Germany repeat the operations of the submarine U-53, when, in October, 1916, it sunk two British and two neutral merchant ships in the neighborhood of the Nantucket lightship, about twelve miles from land.

It is quite possible that serious incidents and complications may arise in the practical application of the Declaration of Panama. We are not concerned, however, with speculations concerning methods and consequences of the enforcement of the principle of international law enunciated by the Declaration. We are concerned solely with the question of the validity of that principle. The validity of a rule of law is not to be determined arbitrarily by law-breakers. Most laws encounter difficulties in enforcement,

and redress for violations not infrequently is long delayed. But the principle itself, unless generally repudiated or specifically denied, remains intact.

We may confidently assert that the principle of protective jurisdiction enunciated in the Declaration of Panama has never been repudiated in international law and practice. On the contrary, the consensus of opinion, as well as of practice, overwhelmingly sustains the right of every nation to defend its laws and security from threatened violations, under varying circumstances, in the waters contiguous to the conventional three-mile limit, within which municipal law is supreme. In spite of legalistic arguments of a technical nature and contradictory claims of an opportunistic character made by statesmen and diplomats in special disputes, the right of protective jurisdiction has been generally conceded. These special disputes concerning the protection of valuable fisheries, the suppression of smuggling, the prevention of filibustering, and the enforcement of neutrality inevitably have created serious difficulties. The United States Government, in order to minimize the difficulties in the enforcement of its laws against rum-running, preferred to obtain by treaty the implied recognition of the principle of protective jurisdiction. When Great Britain and other Powers acknowledged the right of the United States to capture rum-runners within an hour's sailing distance of its coasts they were merely recognizing the basic sovereign right of every nation to protect itself over an undefinable zone outside conventional territorial waters. Any attempt to define this zone in terms of geographical or marine miles to cover all contingencies is obviously as futile as it is illogical. Distance does not determine the principle, though the principle may determine the distance. Questions concerning the extent of the zone of protective jurisdiction and the methods to be employed can only be answered by the rule of reason in each individual case. And it also follows that any abuse of the exercise of this right calls for proper reparation.

Recent comprehensive surveys of precedents and the opinions of publicists, jurists and statesmen, which have been made by such competent authorities as Professor Philip C. Jessup, Professor Gilbert Gidel, and William E. Masterson, prove conclusively that the principle of protective jurisdiction has become firmly established in international law and practice. They also show that the three-mile limit of territorial jurisdiction has never been accepted as a universal limitation, and that it should be regarded as a minimum, and not as a maximum restriction. It must suffice for the purpose of the present comment to cite a few leading declarations on the subject.

The *Institut de Droit International* declared in 1894 that there was no reason "to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war." [2] And the *Institut* at its session in Stockholm in 1928 further declared in Article 12 of the *projet—La Mer Territoriale en temps de Paix:*

[2] See James Brown Scott, Resolutions of the Institute of International Law, p. 113.

> Dans une zone supplémentaire contiguë à la Mer Territoriale, l'Etat côtier peut prendre les mesures nécessaires à sa sécurité, au respect de sa neutralité, à la police sanitaire, douanière, et de la pêche. Il est compétent pour connaître, dans cette zone supplémentaire, des infractions aux lois et règlements concernant ces matières.
>
> L'étendue de la zone supplémentaire ne peut depasser neuf milles marins.[3]

The Committee of Experts for the Progressive Codification of International Law, appointed by the League of Nations, recommended that:

> The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from the low-water mark along the whole of the coast. Beyond the zone of sovereignty, States may exercise administrative rights on the ground of custom or of vital interest. There are included the rights of jurisdiction necessary for their protection.[4]

The American Institute of International Law declared in its Draft Convention of 1926, Article 12:

> The American Republics may extend their jurisdiction beyond the territorial sea . . . for a supplementary distance of . . . marine miles, for reasons of security and in order to ensure the enforcement of sanitary and customs regulations.[5]

The Harvard Research in International Law in Article 2 of its Draft Convention on Territorial Waters recommended that "On the high sea adjacent to the marginal sea . . . a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection."[6] The accompanying comment on this article states:

> It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles, as the powers described in this article are not dependent upon sovereignty over the *locus* and are not limited to a geographical area which can be thus defined. The distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high sea.[7]

The principle of protective jurisdiction was expressly embodied in the Draft Convention on Territorial Waters presented by the Preparatory Commission for the Conference on the Codification of International Law held at The Hague in 1930. Professor Jesse S. Reeves, who served as technical adviser to the American delegation to this conference, makes the following comment:

> The states which did not express a desire for a contiguous zone for one purpose or another formed a small minority. The purposes for which

[3] See *Annuaire* of the Institute for 1928.

[4] This JOURNAL, Special Supplement, Vol. 20 (1926), p. 141.

[5] *Ibid.*, p. 324. [6] *Ibid.*, Vol. 23 (1929), p. 333. [7] *Ibid.*, p. 334.

> a zone should be recognized, and the measures of jurisdiction over such a zone to be exercised by the littoral state involved great divergencies. Enforcement of customs legislation, supervision and even control over fisheries, and security to the littoral state were the main foundation for the theory of the contiguous zone, insistence upon one or another depending upon the policy or point of view of particular states.[8]

In the light of this formidable consensus of opinion in favor of the principle of protective jurisdiction, the Declaration of Panama deserves most serious attention and consideration. It may be argued that it has unwarrantably extended the right claimed by the American Republics to safeguard themselves from the dangers of the present war in Europe. The Declaration may never be applied effectively. Nevertheless, it has enunciated and given weighty sanction to a basic right under international law which may not lightly be denied or infringed.

PHILIP MARSHALL BROWN

THE DECLARATION OF PANAMA

Serious misgivings appear to have arisen among a number of international lawyers as to the legal merits of the provisions of the Declaration of Panama.[1] They seem to feel that in drawing up the Declaration the American Republics over-stepped themselves; that they asserted rights for which there is no foundation at international law; that they put unwarranted restraints upon belligerent rights; that they were even guilty of encroaching upon the "freedom of the seas," which is held to be as sacred for those who want to use the seas for belligerent operations as for those who want to use them for peaceful commerce. More fatal even than the legal defects of the Declaration is said to be the fact that it cannot be enforced; and being unenforceable, the Declaration can only serve to weaken what little respect is left for the true rights of neutrals.

The objections are not all of equal weight, and some of them are based upon a misconception of the terms of the Declaration. The assertion that it is not permissible to change the rules of neutrality in time of war and that, however good a case the American Republics may have for insisting upon a change, they must wait until the war is over and then proceed to revise the rules of neutrality to be applied in the next war, hardly deserves notice. For if anything is clear from the history of international relations, it is that belligerents are constantly introducing new instruments and new methods of warfare during the progress of the war, many of which bear heavily upon neutrals and restrict more and more their normal relations of social and commercial intercourse, not only with the opposing belligerent, but with neutral states as well. With equal justification may neutral states seek by individual and by collective action to protect themselves against the impending ravages of a war while it is still in progress.

[8] "The Codification of International Law," this JOURNAL, Vol. 24 (1930), p. 494.

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