



## Perspective

## Expert Analysis

# The Lusitania and the Law

BY TIMOTHY G. NELSON

One hundred years ago, the R.M.S. Lusitania, a Cunard liner en route from New York to Liverpool was sunk by a German U-Boat. It was attacked off the south coast of Ireland in the afternoon of May 7, 1915; a victim of Germany's policy of attacking British-bound commerce without warning. Of the 1,962 passengers, 1,201 were killed. One hundred twenty eight were American.<sup>1</sup>

This did not instantly draw the U.S. into World War I. It remained neutral until April 6, 1917. The actual trigger was the leaked "Zimmerman Telegram"—exposing Germany's bizarre bid to ally with Mexico and attack Texas, Arizona and New Mexico<sup>2</sup>—but the sinking loomed large: when seeking a declaration of war, President Woodrow Wilson decried the "reckless and lawless submarine warfare adopted now without disguise by the Imperial German Government," as well as the "American lives taken" by it.<sup>3</sup>

Historians have debated the legality of Germany's actions. It turns out that

there was weapons ordinance aboard the Lusitania, including rifle bullets, shrapnel shells and fuses—thus lending some credence to Germany's initial claim that it was entitled to confront the vessel. The traditional view is that regardless of whether "contraband" was aboard, the sinking was still illegal because, under the so-called "cruiser rules," the U-boat could only have "stopp[ed] and search[ed]" the vessel, "impounding her cargo, and seizing

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[her] as a prize or destroying her after making proper provision for the safety of the crew and passengers. It did not justify a 'sink on sight' policy."<sup>4</sup> Still, controversy lingers, particularly given the widespread use of submarine war-

fare by both sides during World War II.<sup>5</sup>

At the time, the still-neutral United States was adamant that the sinking violated international law.<sup>6</sup> In 1916, it extracted a diplomatic note from Germany that, while denying illegality, expressed regret for the sinking and accepted liability for it.

In 1923, a three-member "mixed claims commission" adjudicated claims of U.S. nationals for damage arising out of the sinking. Because liability had been admitted, its sole task was to enunciate the relevant damages principles and then make individual awards.

The commission held that "[t]he fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."<sup>7</sup> This was not "punishment" for the wrongdoer, but rather a sum that would "insure to the individual full, adequate, and complete compensation for a wrong inflicted to his detriment."

Moreover:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated.<sup>8</sup>

*Lusitania*'s general pronouncements on personal injury damages have been cited widely, including in numerous international law claims involving injury to individuals. Lately, attention has focused upon its specific holdings concerning non-economic ("moral") damages. They were cited in the 1992 compensation recommendations relating to the assassination of Chilean dissident Orlando Letelier.<sup>9</sup> In 2012, the World Court cited *Lusitania* in awarding \$85,000 in "non-material" damages against a state engaging in human rights violations.<sup>10</sup>

*Lusitania* has also been cited in investor-state arbitration—the process by which businesses can seek compensation for expropriation or mistreatment of foreign investments. Although investment damages are often economic, the 2009 Desert Line decision, arising under the Yemen-Oman Bilateral Investment Treaty, shows that a "moral" component may be awarded.

In that case, the Yemeni government had coerced a contractor (DLP) to surrender its rights under a \$20 million private arbitration award. Besides restoring the full value of the award, the investor-state tribunal, citing *Lusitania*, awarded \$1 million in moral damages for the "threats and attacks on the physical integrity of [the] investment," as well as the impact on the physical health of DLP's employees, reputation, prestige and credit.<sup>11</sup>

Subsequent claims for moral damages claims have not fared as well: recently an investment tribunal stated that such damages are reserved for "exceptional cases, provided that the state's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act."<sup>12</sup>

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1. See Diana Preston, *Lusitania: An Epic Tragedy* 303 (2002).

2. See Barbara Tuchman, *The Zimmerman Telegram* (1958).

3. 55 Cong. Rec. 305, 103, 104 (1917).

4. Preston, note 1, at 390.

5. The Soviet Navy undertook submarine attacks on German shipping, sinking the M.V. Wilhelm Gustloff in January 1945—history's largest loss of life through one sinking (9,400 deaths). See Cathryn J. Prince, *Death in the Baltic: The World War II Sinking of the Wilhelm Gustloff* (2013). The U.S. Navy engaged in successful submarine warfare against Japan, but this was "justified as a reprisal for Japanese breach of the law." See D.P. O'Connell, *The Influence of Law on Sea Power* 44 (1975).

6. See also *The Lusitania*, 251 F. 715, 728-32, 736 (S.D.N.Y. 1918) (dismissing a claim against the shipowners, holding fault "must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as the moral sense"; i.e., "the illegal act of the Imperial German government," breaching "a cherished and humane rule observed, until this war, by even the bitterest antagonists").

7. *Lusitania Cases (U.S. v. Ger.)*, 7 R.I.A.A. 32, 39 (Mixed Claims Comm'n 1923).

8. *Id.* at 40.

9. Decision *re Letelier & Moffitt*, (U.S.-Chile), 31 I.L.M. 1 ¶¶ 31, 35, 43 (1992).

10. *Case of Diallo (Guinea v. Democratic Republic of Congo)*, I.C.J. Rep. 2012 at 324 ¶¶ 18, 24-25.

11. *Desert Line Projects LLC v. Yemen*, No. ARB/05/17, Award ¶¶ 185, 290, 298 (ICSID 2008).

12. *Lemire v. Ukraine*, No. ARB/06/18, Award ¶ 333 (ICSID 2011)

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