### PART I

**INTERNATIONAL LAW SITUATION**

**SITUATION I. NEUTRAL DUTIES, THE PASSAGE OF BELLIGERENT WARSHIPS IN NEUTRAL TERRITORIAL WATERS, AND THE RIGHT OF BELLIGERENTS TO USE FORCE TO REMEDY VIOLATION OF NEUTRALITY**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Situation</td>
<td>5</td>
</tr>
<tr>
<td>Problem</td>
<td>6</td>
</tr>
<tr>
<td>Solution</td>
<td>6</td>
</tr>
<tr>
<td>Notes:</td>
<td></td>
</tr>
<tr>
<td>The <em>Altmark</em> Case</td>
<td>6</td>
</tr>
<tr>
<td>Comparison of Facts in Situation and <em>Altmark</em> Case</td>
<td>8</td>
</tr>
<tr>
<td>Opinions of Writers on <em>Altmark</em> Case</td>
<td>8</td>
</tr>
<tr>
<td>Provisions of Hague Convention XIII—Other Texts</td>
<td>10</td>
</tr>
<tr>
<td>“Mere Passage”</td>
<td>14</td>
</tr>
<tr>
<td>Application to the Present Situation</td>
<td>20</td>
</tr>
<tr>
<td>Application to <em>Altmark</em> Case</td>
<td>21</td>
</tr>
<tr>
<td>Right of Search</td>
<td>21</td>
</tr>
<tr>
<td>State U as a Neutral Member of the United Nations</td>
<td>22</td>
</tr>
<tr>
<td>Use of Force by a Belligerent to Redress Abuse of Neutrality</td>
<td>23</td>
</tr>
<tr>
<td>Application to Present Situation</td>
<td>26</td>
</tr>
<tr>
<td>Application to <em>Altmark</em> Case</td>
<td>26</td>
</tr>
<tr>
<td>Student Comments</td>
<td>27</td>
</tr>
<tr>
<td>Adequacy of Convention XIII</td>
<td>27</td>
</tr>
<tr>
<td>Summary Conclusions</td>
<td>29</td>
</tr>
<tr>
<td>Solution</td>
<td>30</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
</table>
GRANADA

It Normal Ship Route, 700 Nautical Miles

Route of Lost Charm
1500 Nautical Miles

Amphibious Assault Force from State A
and other defense pact nations.

HYPOTHETICAL SITUATION

- Defense Pact Nations
- Aggressor Nations
- Neutral Nations

Figure 1.
Situation I. Neutral Duties, the Passage of Belligerent Warships in Neutral Territorial Waters, and the Right of Belligerents to Use Force to Remedy Violation of Neutrality.

The following hypothetical International Law Situation was presented to the students of the Naval War College as a part of one of their Operational Problems. See figure 1 for illustration of the Situation.

THE SITUATION

State A and thirteen other states are members of the United Nations and of a Defense Pact organized under Article 51 of the Charter. States X, Y and Z, also members of the United Nations, commenced without warning an armed attack on a member of the Defense Pact. In the Security Council, the Defense Pact States thereupon charged States X, Y and Z with aggression, but X, a permanent member thereof, "vetoed" the resolution condemning X, Y and Z as aggressors and calling for sanctions. The General Assembly was then convened under the Uniting For Peace Resolution and passed, with a two-thirds majority, a resolution condemning the aggression and calling upon United Nations members for voluntary assistance to the victims of the aggression. State U, although a member of the United Nations, announced that she would maintain a position of neutrality. Despite the General Assembly resolution, X, Y and Z launched a major offensive. Fighting had been in progress for some months and nuclear weapons had been used, for tactical purposes, on both sides.

J, a member State of the Defense Pact, had been occupied by X, Y and Z in its northwest and northeast regions. The Defense Pact States commenced an amphibious attack on the northwest coast of J. X had assembled, in its port of Granada, some 700 miles from J, special weapons personnel and equipment for use in the northwestern part of J. The personnel and equipment were embarked on the “Lost Charm” for New Paris, a northwestern J port now in the hands of X. New Paris is near the area of amphibious operations, and one of the objectives of the operations. Instead of taking the usual and most direct route, X directed the commander of the “Lost Charm,” an auxiliary of X flying X's service flag, to proceed through the X-coalition territorial waters
and thence through U’s territorial waters, to arrive at J’s border at nightfall, and thence to New Paris under cover of darkness. This route was eight hundred miles longer than the direct route from X’s port of Granada to New Paris in J. The estimated time required for the “Lost Charm” to traverse U’s territorial waters was 50 hours, in addition to the time required to transit the X coalition’s territorial waters. The excess time over the direct route may be estimated at 80 hours.

The mission and location of the “Lost Charm” were discovered by the Defense Pact’s intelligence just after that ship had entered the territorial waters of U. A’s ambassador to U, on behalf of the Defense Pact, immediately informed U’s Foreign Office of these facts and demanded that U either intern the “Lost Charm” or order the “Lost Charm” out of U’s territorial waters. U, relying on the Altmark precedent in World War II, replied that it would not comply with either request.

Problem:

a. Has U violated its duties as a neutral in refusing to comply with A’s demand on behalf of the Defense Pact?

b. Are the Defense Pact States entitled to use force against the “Lost Charm” in U’s territorial waters, if U is unable or unwilling to comply with A’s demand, and should have done so?

Solution:

a. U has violated its duties as a neutral in permitting an abusive use of its territorial waters that was not for bona fide purposes of navigation and was prejudicial to the security interests of the coastal state and to the interests of the Defense Pact as opposing belligerents. Such use is not the “mere passage” authorized by Article X of Hague Convention XIII.

b. While every breach of neutral duties does not authorize forceful counteraction by an aggrieved belligerent, in the case of such a grave violation as the instant Situation presents, the Defense Pact States were legally entitled to use force to prevent irremediable injury arising from U’s breach of neutrality.

NOTES

The Altmark Case

The hypothetical situation is of course essentially similar to the Altmark case which took place in Norwegian territorial waters in 1940. A general and readable account of the incident is The
Altmark Affair, by Frischauer and Jackson (The Macmillan Company, New York, 1955). The essential facts of that case were briefly summarized in Hackworth, Digest of International Law, Vol. VII, pp. 568-69, (1943), as follows:

“The German steamer, Altmark, previously a merchant tanker but at the time in question a naval auxiliary, armed with anti-aircraft guns and flying the German official service flag as a vessel used for public purposes, entered Norwegian territorial waters on February 14, 1940 with the intention of skirting the Norwegian and Swedish coasts until she reached a German port. She brought from the South Atlantic as prisoners 299 British seamen who had been taken from vessels sunk by the German cruiser Admiral Graf Spee. Shortly after entering Norwegian waters she was hailed by a Norwegian naval vessel which inspected her papers. At that time the captain of the Altmark said that the ship was on her way from Port Arthur, Texas, to Germany. The next day another Norwegian naval vessel sought to inspect her but was refused the right. Among other questions, the captain of the Altmark was then asked whether there were on board any persons belonging to the armed forces of another belligerent or seamen resident in or nationals of another belligerent country, and to these he answered ‘No’. At this time it was learned that the Altmark had been using her wireless transmitter within Norwegian waters, but the captain said that he was unaware of any prohibition against this and thereupon ceased doing so. A Norwegian torpedo boat was escorting the Altmark, and a second joined them February 16. That day British naval and air forces approached, and the British commanding officer suggested that the Altmark be taken under joint British and Norwegian escort to Bergen for full examination, but the Norwegian commander refused. The Norwegian authorities apparently remained unaware that prisoners were aboard the Altmark. British destroyers which had entered Norwegian territorial waters retired upon the protest of Norwegian officials but that night they forced the Altmark into Joesing Fjord. While the Norwegian torpedo boats stood by, forces from the British destroyer Cossack boarded the Altmark, which had gone aground in the fjord. Fighting ensued in which seven Germans were
killed or died of wounds and one British national was wounded. The prisoners were rescued and taken aboard the Cossack, and the British forces departed from Norwegian waters with the prisoners.”

Comparison of Facts in Situation and Altmark Case

There are certain important differences between the facts of the hypothetical situation and the Altmark incident. The transport of special weapons personnel and equipment is undoubtedly of a less “innocent” character, and more likely to provoke belligerent counter-action than the transport of prisoners. Moreover, with reference to question (b), the justification for the use of force has a stronger factual foundation in this Situation. Furthermore, there is no question involved in the Situation as to the legal status of captured merchant seamen. However, the avoidance by the Altmark, en route from the South Atlantic to Germany, of the English Channel and the British Isles by going via Icelandic waters and then passing through Norwegian territorial waters for over two days and more than 400 miles before the British attack, and contemplating a further passage of 200 miles in those waters was equally abnormal in route and duration. The basic legal question as to the legality of the passage is, therefore, essentially unaffected by the factual differences.

Opinions of Writers on Altmark Case

The Altmark incident aroused controversy at the time, and discussion of it has continued among writers on international law. Shortly after the incident occurred, the following opinion was expressed in the Naval War College International Law Situations, 1939, pp. 14-15:

“The British Government and some international lawyers charged that Norway had failed in its duties and that it should not have allowed the Altmark to transport prisoners along its coast. More careful examination of the situation, however, indicates that Norway had no obligation to halt the Altmark, to force it to leave, to intern it, or to release the prisoners.”

Following this opinion, there appeared an extensive quotation from the similar opinion of the late Professor Borchard of Yale University which had appeared in full in 34 American Journal of International Law at pages 289-294 (1940). The late Professor Hyde, in the Second Revised Edition (1945) of his International Law, chiefly as interpreted and applied by the United States,

British writers, on the other hand, have come to the defense of the British position, particularly after the end of the war and in light of the published views of the American writers noted above. Dr. W. R. Bisschof, however, discussed the question before the Grotius Society in 1940, and first raised in the literature the issue of whether the Altmark's circuitous route and extended trip through the Norwegian territorial waters was not an abuse of neutrality and therefore not the “mere passage” permitted by Article X of Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (1907). ((1940) 26 Grotius Society Transactions, p. 67 et seq.) In Oppenheim, International Law, Vol. II (7th Ed., 1952, by Lauterpacht), the position is taken that prolonged use by a belligerent of neutral territorial waters for passage not dictated by the requirements of navigation and intended to escape capture is an illicit use of neutral territory which the neutral is under a duty to prevent (pp. 692–695).

Without discussing the Altmark case in detail, Professor H. A. Smith in The Law and Custom of the Sea (2nd Ed., 1950), reached the same conclusion as a matter of general principle (pp. 148–153, esp. p. 152, n. 5). Colombos, in The International Law of the Sea (3rd Rev. Ed., 1954) reaches the same conclusion in a summary manner (pp. 510–511). The most extensive discussion of the Altmark case and the most thorough exploration of the legal issues involved is in Waldock, “The Release of the Altmark’s Prisoners,” (1947), 24 British Year Book of International Law, pp. 216–238. Professor Waldock, Chichele Professor of International Law and Diplomacy at Oxford, concludes that the Altmark’s passage was unlawful. The details of his argument will be examined at a later stage. Professor Stone of Australia in his Legal Controls of International Conflict (1954) expresses a similar opinion although differing somewhat in the details of his argument (pp. 394–5).

Professor Telders of Leyden, The Netherlands, in “L’Incident de l’Altmark” (Revue Générale de droit international public, Vol. 48 (1941–5), pp. 90–100) reaches the same general conclusion but his arguments differ substantially from those previously referred
to. Starting with the view that the Altmark could not claim the status of a warship but that Norway could have treated her as such for neutrality purposes, Telders argues that there was no time limit on passage in Norway’s regulations and that Norway, not having forbidden passage as it could have, had impliedly permitted it. He contends, further, that Article XII of Hague Convention XIII imposed no time limit, and that Article X authorized passage for purposes of transit, which is not restricted to necessary transit. Such passage is, moreover, not deprived of its innocent character by the sole fact that a warship is using the passage as an asylum as well. But he nonetheless concludes that the legality of the Altmark’s position does not turn on the “passage” question because he argues that auxiliaries have no right to transport prisoners. Furthermore, whatever the immunity of warships from search, he asserts that auxiliaries have no such immunity. Therefore, he believes that Norway had a duty to search the Altmark; that its failure to do so was a breach of neutral duty; and that the British were justified on the basis of self-protection in their exceptional intervention which did not exceed the limits of necessity.

In addition to “The Altmark Affair,” referred to previously as a good general account of the incident, the early official statements made by the British, German, and Norwegian Governments may be found in Documents on International Affairs, “Norway and the War” (Royal Institute of International Affairs, 1941, pp. 33–38). In Norway, No. 1 (1950), Cmd. 8012, reprinted, infra, as Appendix I to this Situation, a White Paper issued by the British Foreign Office on August 15, 1950, the text of the final British Note of 15 March 1940, which reached Oslo shortly before the German invasion, was made available. This Note was the first time that the British raised the question of the compatibility of the passage with the privilege given by Article X of Hague Convention XIII. Cmd. 8012 includes the texts of other correspondence between the two governments in the period between 17 February and 15 March 1940. In the recently published International Law Studies, 1955 (U.S. Naval War College, Vol. L, 1957), Professor Tucker discusses the Altmark case in some detail and, in general, agrees with the British position (221n, 236–239, 262n).

Provisions of Hague Convention XIII—Other Texts

Hague Convention XIII of 1907, Convention Concerning the Rights and Duties of Neutral Powers in Naval War, is printed in full in Naval War College, International Law Situations, 1908, at pp. 213–222, and in Appendix B to the Law of Naval Warfare
11
(Navy Department, 1955). The text may also be conveniently found in 36 Stat. 2415, U.S.T.S. 545, and Malloy’s Treaties, Vol. II, p. 2352. The status of the Convention as of 31 October 1955 is given in State Department Publication No. 6346, page 203. Provisions particularly relevant to the discussion of the Situation are the following:

ARTICLE I. “Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral Powers, which knowingly permitted them, a non-fulfillment of their neutrality.

ARTICLE II. “All acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent vessels of war in the territorial waters of a neutral Power, constitute a violation of neutrality and are strictly forbidden.

ARTICLE V. “Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraph stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.

ARTICLE X. “The neutrality of a Power is not affected by the mere passage through its territorial waters of ships of war or prizes belonging to belligerents.

ARTICLE XII. “In the absence of special provisions to the contrary in the legislation of the neutral Power, belligerent ships of war are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

ARTICLE XIII. “If a Power which has been informed of the outbreak of hostilities learns that a belligerent ship of war is in one of its ports or roadsteads, or in its territorial waters it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local regulations.

ARTICLE XXV. “A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles in its ports or roadsteads, or in its waters.”

Although the Convention was not technically in force in World War II because certain of the belligerents, including the United
Kingdom, were not parties (see Article XXVIII), it has been generally recognized that the provisions of the Convention as a whole constituted an expression of binding customary international law on the subject. II Oppenheim, supra, pp. 234–236, 694 n. 1; Law of Naval Warfare, supra, Ch. 2, n. 7, and Ch. 4, n. 18; Stone, supra, p. 391, n. 62. Before discussing the critical questions of interpretation that arise out of the ambiguities of the relevant provisions of the Convention, reference may be made to comparable statements of the applicable law. The Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War provides in Article 25 as follows:

“A neutral State has no duty to prevent the passage of a belligerent warship through its territorial waters.” (American Journal of International Law, Vol. XXXIII, Supplement, Part II, p. 179, and Comment, p. 421 (1939)). [Quoted with the permission of the Harvard Law School.]

In the Comment that follows at page 422, citation above, this wording is said to embody the substance of Article X of Hague Convention XIII and it is asserted to be a statement of the international law on the subject in force at that time.

Law of Naval Warfare (Department of the Navy, 1955), provides as follows in Section 443a:

“a. Passage Through Territorial Sea. A neutral state may allow the mere passage of warships, or prizes, of belligerents through its territorial sea.”

Interpretative Footnote 22 to Section 443 reads in part as follows:

“* * * Thus, the ‘mere passage’ that may be granted to belligerent warships through neutral territorial waters must be of an innocent nature, in the sense that it must be incidental to the normal requirements of navigation and not intended in any way to turn neutral waters into a base of operations. In particular, the prolonged use of neutral waters by a belligerent warship either for the purpose of avoiding combat with the enemy or for the purpose of evading capture, would appear to fall within the prohibition against using neutral waters as a base of operations. * * *”

The International Law Commission’s final Report on the Law of the Sea, adopted at its Eighth Session (1956), deals with the
right of Innocent Passage in Part I, Section III. The Report is reprinted in full, *infra*, Part II, Section 11,A,2. Although the International Law Commission's work is devoted to the law of the sea in time of peace, their formulations on this subject are valuable for the wartime situation as well, in view of the close connection between the wartime rules and the rules in peacetime, and the relevance of the peacetime standard to the interpretation of Article X, discussed, *infra*.

Article 15, paragraph 3, defines innocent passage as follows:

"3. Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law."

Article 16, paragraph 1, in defining the duties of the coastal State, states that it "must not allow the said sea to be used for acts contrary to the rights of other States." In Article 17, defining the rights of protection of the coastal State, paragraph 1 authorizes said State "to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law." Paragraph 3 authorizes the coastal State to suspend passage temporarily in definite areas if essential for protection of the rights in paragraph 1. Paragraph 4 forbids suspension of passage through straits "normally used for international navigation between two parts of the high seas." Article 18 defines the duties of foreign ships during their passage. Articles 15, 16, 17, and 18 apply to ALL vessels.

Articles 24 and 25 are applicable to warships. Article 24 reads as follows:

"1. The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18."

Article 25 authorizes the coastal State to require warships, not observing its regulations after request to do so, to leave the territorial sea.

In addition to the various texts referred to above, a high judicial interpretation of the meaning of innocent passage in a different context is of interest as a basis for comparison.

In the *Corfu Channel* case (Merits) (*International Court of Justice Reports*, 1949, pp. 4-38), the Court held that warships
have a right of "innocent passage" in time of peace through straits used for international navigation (p. 28). The Court was also of the opinion that the straits did not have to be a necessary route but merely one used for international navigation. Although the passage of British warships through the Corfu Channel was also designed to test the Albanian attitude in view of a previous illegal firing by Albania, and to demonstrate force, the Court held that, under all the circumstances, the "mission," and the manner of carrying it out did not deprive the passage of its innocent character (pp. 30-32). (The Judgment of the Court is reprinted in Naval War College, International Law Documents, 1948-49, pp. 108-156. The points discussed are to be found at pages 142-148).

"Mere Passage"

The principal legal issue that arises in question (a) of the Situation is whether the duration, route and mission of the "Lost Charm" can be considered "mere passage" through U's territorial waters, or an abuse of this privilege. This inquiry in turn requires the interpretation of Hague Convention XIII, and particularly Article X thereof. In the Altmark case, the early discussion by the Governments involved and the writers as well, was largely directed to the right to search the Altmark and the lawfulness of transporting the prisoners. The British Note of 15 March 1940, reprinted in Appendix I, infra, first published in 1950, and the British writers previously referred to, emphasized the "mere passage" question. Consequently, the discussion of the Situation will necessarily consider the arguments advanced on this aspect of the Altmark case.

Article X taken alone is ambiguous. It becomes even more so when read in the light of the Hague Convention XIII as a whole. On the one hand, the Convention is designed to prohibit belligerent activities of a hostile nature in neutral ports and waters. On the other hand, there are numerous exceptions which permit belligerents to use neutral ports and waters as an asylum. Furthermore, several of the provisions give the neutral great discretion in defining its obligations under the Convention.

The general principle is clear: that belligerents are bound to refrain from acts of hostility in neutral territory. What has been persistently troublesome, however, is the precise scope of the subsidiary principle expressed in Article V that neutral ports and waters shall not be used as a base of naval operations. Practice in the nineteenth century never resolved this problem and the provisions of Hague Convention XIII did not succeed in formulat-
ing an agreed and authoritative interpretation of this principle. See, for discussion, Hyde, supra, Vol. III, pp. 2249–2253; Stone, supra, pp. 392–395.

Neutrals are obligated to deny any privilege of passage to belligerents over the land territory or through the airspace of a neutral. It is now generally agreed that a neutral may, if it chooses, forbid passage through its territorial waters as well. See Jessup, The Law of Territorial Waters and Maritime Jurisdiction, pages 120–121; Law of Naval Warfare, supra, Ch. 4, n. 22; Stone, supra, p. 395; II Oppenheim, supra, p. 693. When Hague Convention XIII was drafted, however, there was no such general agreement that a neutral could forbid passage through territorial waters. Many States argued that there was such a rule. The British insisted that there was a RIGHT of innocent passage. The British Delegation to the 1907 Hague Conference was the original proposer of the substance of Article X, and seemed to view “mere passage” as meaning innocent or inoffensive passage in the interests of normal navigation as in peacetime. Article X, as adopted, was in essence a formula for leaving this controversy in an unsettled status. By not adopting the rule of complete exclusion, the neutral was given the option of permitting “mere passage” in the interests of navigation rather than enforcing strict neutrality as neutrals are obligated to do under the land and air rules. See A. P. Higgins, The Hague Peace Conferences (1909), pp. 467–468.

It is assumed for present purposes that State U has made no regulations on the subject with respect to either Article X or XII. The most reasonable interpretation of the Hague Convention as a statement of customary international law is thus the principal issue. Although, as stated, Article X is ambiguous in itself, it is first necessary to discuss the ambiguities in the relation of Article X to other Articles of the Convention. Article V forbids the use of neutral ports and waters as a base of naval operations by belligerents against their adversaries. Article XII provides that in the absence of special legislation by the neutral, as assumed in this Situation, belligerent warships are not permitted “to remain in” the ports, roadsteads, or territorial waters for more than twenty-four hours, “except in the cases covered by the present Convention.” What is the relation of these Articles to Article X, which, in substance, states that a Power’s neutrality is not compromised by the “mere passage” (“simple passage” in the French Text) of warships through its territorial waters?

Waldock, supra, at page 235, argues that “passage” is covered by the twenty-four hour rule of Article XII; that a circuitous route to evade attack was not “mere passage” within Article X
but the use of the neutral waters for naval operations contrary to Article V, or alternatively, if Article V was not violated, use for refuge was not "mere passage" within Article X, and therefore passage is restricted to twenty-four hours by Article XII.

These summarized conclusions of Professor Waldock do not do justice to his detailed argument, which may be briefly stated as follows: The Norwegian Neutrality Rules of 1938 (Vol. 32, American Journal of International Law, Supplement, 1938, pp. 154-158) purport to restate the Hague rules. Although they do not refer specifically to the duration of passage, they could not enlarge Article X which is customary international law. Article X, being silent, leaves the time question open. The question under Article XII is whether "remain" confines the twenty-four hour rule to stops or applies to every entry. Article XIII strengthens the argument for the twenty-four hour rule. There is no support for more than twenty-four hours in Norway's regulations, nor for Norway's distinction between passage after a stop and passage without a stop. The Pan-American General Declaration of Neutrality of 1939 said that belligerent warships may remain no more than twenty-four hours in ports and waters with no mention of passage (34 American Journal of International Law, Supplement, 1940, p. 10). The United States Proclamation of 5 September 1939 (Naval War College, International Law Situations, 1939, p. 123) made no exception for passage and the special rules for the Canal Zone (Ibid., p. 139) make this position even clearer. Despite British championship of innocent passage, her 1912 regulations adopted the twenty-four hour rule with no mention of passage. Therefore, Norway's contention of no time limit is doubtful and contrary to the natural meaning of the Convention and the regulations and interpretations of states.

Moreover, Waldock's argument continues, whatever the time limit, passage is restricted to "mere passage," which means liberty of transit incident to normal navigation, and for that purpose and not to gain an advantage. Any other view invites abuse and provokes hostilities. An abnormal course of extended duration is not "innocent." The use of Norway's waters as a protected corridor is the use as a base of operations contrary to Article V. Article XII admittedly permits asylum under the twenty-four hour rule but is inconsistent with modern standards of neutral duty, and the trend in the practice of states is to restrict asylum, citing Naval War College, International Law Situations, 1939, p. 44, on treatment of warships AFTER entry. Even though Article XII was still valid in 1940 as a statement of customary law, it is not the same as indefinite passage through territorial waters, and
abnormal passage is not permitted by Article X. The use of Norway's territorial waters as a protected corridor was an issue in World War I. Norway closed her waters to submarines in 1916. Both Great Britain and the United States protested alleged violations of this prohibition and urged Norway to mine her waters, which she did in 1918. Therefore, Norway knew of these views concerning the use of her territorial waters as a protected corridor. Professor Waldock then concludes as summarized, *supra*.

Lauterpacht's *Oppenheim, supra*, pp. 694-5 and 694, footnote 1, argues that the permission of passage is limited by the overriding principle of preventing neutral waters from becoming a base for belligerents, and that a circuitous route not required by normal navigation and used as a means of escape is illicit. It is asserted that the provisions under reference can be reconciled by treating Article X as permitting passage beyond the twenty-four hours of Article XII, so long as the passage does not contravene Article V by turning the waters into a base of operations. Bisschof, *supra*, on the other hand, like Waldock, regards Article XII as setting a twenty-four hour limit to any passage under Article X. Professor Stone, *supra*, pp. 394-5, follows Lauterpacht's *Oppenheim* on this question but would require more in the way of circuity and degree of abuse. Neither Hyde nor Borchard, *supra*, really discuss this issue. Smith, *supra*, p. 152, Note 5, regards the question of whether passage under Article X is subject to the twenty-four hour rule of Article XII as debatable, and believes it is probably up to the neutral to define the time limit under its power to do so granted in Article XII. Castrén, *supra*, recognizes the question of interpretation as doubtful but is inclined to regard Article XII as imposing no time limit on passage under Article X.

Telders, *supra*, considers that neither Article XII nor the Convention as a whole impose any time limit on passage but does not discuss the bearing of Article V on the question. The British Note of 15 March 1940, Appendix I, *infra*, takes the position that Article X does not incorporate the 24-hour limit of Article XII but that Article X governs the time limit indirectly by the nature of the innocent passage which it permits. Furthermore, the Note contends that, although Article XII is not controlling as to time, it serves to refute any contention that no time limit exists since it applies also to territorial waters subject to the innocent passage permitted by Article X. Finally, as noted *supra*, the *Law of Naval Warfare* in its interpretative footnote 22 treats Article X as modified by the prohibition of Article V. Interpretative footnote 23 treats the question of whether the 24-hour rule of Article XII limits the duration of passage under Article X as unsettled but
expresses the opinion that, if it does not, then passage under Article X must be limited to the normal requirements of navigation.

While, admittedly, the interpretation of the relationship between Articles V, X and XII in the light of the Convention as a whole is controversial, it is believed that the most reasonable interpretation is to regard “mere passage” under Article X as not limited by the 24-hour rule of Article XII. However, the presence and wording of Article XII help to give meaning to the privilege of “mere passage” in Article X, as discussed hereafter. Furthermore, the most probable interpretation of Article X, suggested infra, qualifies the privilege of passage given thereby. Finally, “mere passage” in Article X must also be restricted by the prohibitions of Article V against using territorial waters as a base of naval operations and by the generalized restrictions of Articles I and II and the Convention as a whole against using neutral territory for hostilities.

With this interpretation of the relationship between the Articles, we now turn to a more detailed discussion of the meaning of “mere passage” in Article X. What has been said so far suggests that Article X can only be considered in the context of the Convention as a whole. It has already been indicated that Article X was a formula that left previous differences of opinion unsettled. It was a compromise in that sense between the view that neutrals could exclude passage altogether, and the British view that there was a right of innocent passage for warships in wartime similar to the peacetime right of merchant vessels.

“Mere passage” in Article X can not be given a precise textual meaning. The legislative history provides no conclusive interpretation. The use of the qualifying word “mere” indicates some limitation on passage was intended. The British who introduced the phrase into their draft of the Article indicated that innocent passage in the peacetime sense was what they had in mind. Any meaning given to the phrase is necessarily an interpretation. What is the most reasonable one in the light of its history and the purpose it was intended to serve? Treating the question as one of defining what is meant by “innocent passage” in the peacetime sense is a step in the interpretation of “mere passage.”

The introduction of “innocent passage” in the peacetime sense as an analogy for use in interpretation is fundamentally ambiguous. It can not be transferred literally into the wartime situation. The wartime trilateral relations between opposing belligerents and a neutral coastal state are essentially different in kind and degree from the bilateral relations of a flag-state
and a coastal state in peacetime. Nevertheless, the peacetime analogy serves to indicate the type of passage that belligerents were willing to allow neutrals to grant. The type of passage contemplated is limited by two basic criteria. It must be an innocent passage for bona fide purposes of navigation rather than for escape or asylum. The passage must also be innocent in the sense that it does not prejudice either the security interests of the coastal state, or the interests of the opposing belligerent in preventing passage beyond the type agreed to in Article X. A passage that increased the burden of surveillance or the likelihood of embroiling the neutral in hostilities would certainly prejudice the security interests of the neutral coastal state. Any passage that was prejudicial to other legitimate interests of the coastal state would warrant action by the coastal state but the coastal state would be under no duty since the additional interest of the opposing belligerent would not be involved. By virtue of these suggested requirements, the belligerents are entitled to have passage so confined, and the neutral is under a duty to so limit the privilege.


The first of these criteria, that of passage for bona fide navigational purposes, presents difficulties in itself. Suggestions that it means “normal” navigation practices raise problems as to the sense in which “normal” is used. Abnormal routes may still be bona fide ones. Nevertheless, extremely circuitous routes suggest possible bad faith. Moreover, motivations of escape or asylum make clear the purpose is not for navigation.

With respect to the second criterion, it is believed that a passage by a belligerent that imposes special burdens of surveillance on the neutral and increases the likelihood of involving the neutral in hostilities with the opposing belligerent could not be “innocent” because it is prejudicial both to the security interests of the coastal state and to the interests of the opposing belligerent. This criterion would certainly encompass the use of neutral territorial waters as a protected corridor for purposes of avoiding capture or attack. Such a use might not reach the extent of employing such waters as a base for naval operations within the meaning of Article V, which certainly provides the outer limit to the reasonableness of the passage. In view of the ambiguity of Article V’s prohibition against use as a base of naval operations referred to, supra, and the consequent doubt whether use as an asylum is
included in that prohibition, the interpretation suggested for “mere passage” in Article X gives it a meaning consistent with the Convention as a whole. Article XII permits a twenty-four hour “stay,” including use as an asylum, but, as previously indicated, it imposes no direct time limit on passage. Article X, while having no time limit, confers a special but limited privilege of passage by confining it to a passage for bona fide navigational purposes and one that is also innocent in not being prejudicial to the security interests of the coastal state or the interests of the opposing belligerent. Article V applies to both “stay” and “passage” and prohibits either if it reaches the point of use as a base for naval operations.

It seems most likely, therefore, that “innocent passage” in peacetime of territorial waters as an international highway was intended as a standard in the sense indicated above. What effect does the duration of the passage have on its legality? It has already been stated that the twenty-four hour rule of Article XII is not believed to be a direct legal limitation. There would seem to be no maximum time limit provided that the passage itself is “innocent.” Duration beyond twenty-four hours is relevant only in its bearing on the question of whether the passage is “innocent.”

In the light of this interpretation of “passage” in Article X, does the “mission” of the ship furnish a further qualification of this limited privilege? It was strongly argued in the Altmark case that there was nothing wrongful per se in transporting prisoners. Whatever the merit of this contention, it would be unwarranted to claim that the nature of the “mission” has no bearing on the innocence of the passage. If the “mission” by its nature is prejudicial to the security interests of the coastal state or the interests of the opposing belligerent, either by increasing the burden of surveillance or by increasing the likelihood of hostilities, it would be another relevant factor in making that determination. A fortiori, if the “mission” by its nature makes use of the waters as a base of naval operations, it would be a violation of Article V as well as Article X.

Application to the Present Situation

The route, purpose, and mission of the “Lost Charm” were not for purposes of bona fide navigation and were clearly prejudicial to the security interests of U, the neutral and coastal state, and to the interests of the Defense Pact as opposing belligerents. The longer duration of the voyage, and the abnormality of the route, while neither would be decisive in itself, were relevant to the total assessment of the character of the passage. The “mission”
was so clearly provocative and so obviously a military function that it constituted by itself a violation of Article V, and therefore exceeded without question the limited privilege of "innocent" passage given by Article V. The passage was designed to make use of U's territorial waters as a shelter for naval operations. Passage in circumstances so overwhelming in their impact as these are should not be considered as the "mere passage" permitted by Article X. Such a passage is a flagrant abuse of U's neutrality. By permitting such a passage, U violated its duties as a neutral.

Application to the *Altmark* Case

The factual differences in the *Altmark* case have been noted, *supra*. Admittedly, the "mission" was less provocative. The abnormal route and the duration of the use of Norwegian territorial waters would not in themselves be decisive. It is debatable whether the total circumstances can be regarded as the use of the waters as a base for naval operations within Article V, in the light of the ambiguous history of that provision. It was, however, the use of Norway's territorial waters as a means of escape and protection. The passage, considered in its entirety, constituted an employment of the neutral's territorial waters in a manner that was prejudicial to the security interests of the coastal state and the interests of the opposing belligerent. It increased the burden of surveillance and the likelihood of counteraction. Such a passage must be regarded as an abuse of Norway's neutrality, and can not be justified by the limited privilege of "mere passage" given by Article X of Hague Convention XIII.

Right of Search

The present Situation does not require a discussion of the prisoner question which was an issue in the *Altmark* case and which was thoroughly debated by many of the writers cited previously. Although the search issue is not directly raised by the facts given in question (a) of the Situation, the right of the neutral to make a search was also thoroughly argued in the *Altmark* case, and is implicit in the Situation. Both Borchard and Hyde, *supra*, argued that there was no right to search a public ship such as the *Altmark*, except possibly to see if there was compliance with Norway's neutrality regulations (Borchard). Telders, *supra*, on the other hand, argued that an auxiliary such as the *Altmark* was not immune from search. Assuming, *arguendo*, that there is normally immunity from search, the position of Waldock (*supra*, pp. 221-222), that the neutral's duty to enforce its obligations under the Convention consitutes an exception to this im-
munity, is more consistent with the spirit of the Convention, and a more workable rule if neutrality is preserved. Lauterpacht's Oppenheim, supra, (p. 730, n. 4), concedes that Norway had no duty to search for the prisoners in order to release them, but argues that search would be relevant in determining whether the passage was "innocent," and therefore impliedly supports Waldock's position. The British Government Note of 15 March 1940, reprinted, infra, Appendix I, argued vigorously that Norway had an obligation to determine whether the passage was lawful, and that failure to make a search for this purpose was a violation of neutrality.

State U as a Neutral Member of the United Nations

U, although a Member of the United Nations, declared her intention to be neutral. Despite the inconsistency between the collective security scheme of the Charter and traditional neutrality, it has been asserted that a status of neutrality for a Member on the facts of this Situation is technically possible. It has been factually possible, as Korea demonstrated. It is debatable whether it is legally possible in view of the obligation of Members under Article 2 (5) that:

"All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

The "veto" prevented the United Nations from taking "action" in accordance with the original Charter scheme, and the recommendations of the General Assembly, although morally persuasive, cannot be deemed legally binding even on Members. Consequently, it is permissible to contend that U was legally free to take the position she did. It is believed, however, that she would have been also legally justified if she had complied voluntarily with the recommendations. She had an imperfect right under Article 2 (5) to assist the collective action as well as the obligation not to give assistance to the States opposing the collective action. The right was "imperfect" in the sense that U and the Defense Pact's resort to force had not been authoritatively determined to be lawful by competent international authority.

The writers generally are in accord with this position. The Law of Naval Warfare, supra, in Section 232, deals with the question and reads in part as follows:

"Section 232. * * * * These obligations of the mem-
ber states, incompatible with the status of neutrality and with the principle of impartiality, come into existence only if the Security Council fulfills the functions delegated to it by the Charter. If the Security Council is unable to fulfill its assigned functions, the members may, in case of a war, remain neutral and observe an attitude of strict impartiality. 19"

In footnote 19, the opinion is expressed that the recommendations of the General Assembly are not legally binding and therefore "neutrality and complete impartiality both remain distinct possibilities."

Stone in Legal Controls of International Conflict, supra, passim, reaches this conclusion and asserts that the non-participating Members in the Korean situation were neutrals (p. 382, n. 14). Lauterpacht's Oppenheim, supra, pp. 647-652, reaches the same general conclusion, although believing that a member in U's position would have the right to discriminate against the aggressor. Lalive in "International Organization and Neutrality", (1947), 24 British Year Book of International Law 72 at 77-84, discusses this possibility in a number of situations under the Charter, and concurs in the position taken above. Compare Taubenfeld in "International Actions and Neutrality" (1953), 47 American Journal of International Law 377-396, where the Korean situation is discussed, and the conclusion reached that neutrality is not legally tenable for a Member in a "true" United Nations action (pp. 390-395). Castrén, supra, pp. 433-5, believes that a status of neutrality for a Member is possible despite Section 2 (5) of the Charter.

Use of Force by a Belligerent to Redress Abuse of Neutrality

It will now be assumed that the X-coalition's employment of the "Lost Charm" was a violation of U's neutrality and that U was obligated to either intern the "Lost Charm" or order it out of her territorial waters. Question (b) of the Situation raises the issue of whether the Defense Pact was entitled to use force in U's territorial waters to redress the breach of neutrality if U was unable or unwilling to do so. Since the facts of the Situation show that U, relying on the Altmark precedent, refused to comply with the Defense Pact's request, the question of the Defense Pact's right to employ force against the "Lost Charm" is directly raised.

Article XXV of the Hague Convention, quoted supra, provides that a neutral is bound to exercise such surveillance "as the means at its disposal allow" to prevent violations of the Convention in
its waters. Articles III, VIII, and XXI, in referring to neutral duties of enforcement, also use the phrase “as the means at its disposal allow” in defining the obligation.

The facts stated in the Situation show a refusal to act, and do not therefore pose directly the issue of the use of force by a belligerent when the neutral is willing but unable to act for lack of adequate means at its disposal. Under these latter circumstances, there is no violation of neutral duty. Nevertheless, despite that fact and the quoted language of the Convention, the writers generally take the view that the injured belligerent, under sufficiently extreme circumstances, is authorized to use force to prevent irremediable injury to itself. The belligerent’s obligation not to take hostile measures in neutral waters is inapplicable in extreme cases not only when the neutral is unwilling to act but also when it is unable to do so.

When, however, as in the Situation, the neutral is unwilling to act even though able to do so, the neutral has breached its duty both under the Convention and under the general principles of customary international law. Here, too, under sufficiently extreme circumstances, the injured belligerent is authorized to use force to prevent irremediable injury to itself. The injured belligerent’s normal remedy for such a breach of duty is to claim reparation through diplomatic channels. For anything less than a grave breach of duty, this is the only authorized remedy. The writers also agree, however, that the belligerent is justified in resorting to self-help under sufficiently extreme circumstances in which immediate cessation of the violation would be the only adequate remedy. Whether the resort to self-help was justified will depend both on the importance of the interests involved and the factual necessity for immediate action if irreparable injury is to be avoided.

The Law of Naval Warfare, supra, after referring to the prohibition of acts of hostility in neutral jurisdiction, goes on to provide as follows:

“Section 441. * * * However, a belligerent is not forbidden to resort to acts of hostility in neutral jurisdiction against enemy troops, vessels, or aircraft making illegal use of neutral territory, waters, or air space, if a neutral state will not or cannot effectively enforce its rights against such offending belligerent forces.”

In footnote 21, the opinion is expressed that, despite the language of Article XXV of the Hague Convention, it is recognized that a belligerent has the right, as an extreme measure, to use
force against an enemy making illegal use of neutral territory, when the neutral is unable or unwilling to do so.

Hyde, supra, although believing that the British were not justified in using force in the *Altmark* case, affirms that in extraordinary circumstances the belligerent is justified in using force when the neutral is unable or unwilling to do so (Vol. III, pp. 2337-2340). Waldock, supra, in defending the British action in the *Altmark* case, takes the position that any breach materially threatening the injured belligerent’s interest is by its nature so serious that the principle of self-preservation justifies intervention in neutral waters, and that such right of intervention is now generally recognized, citing Hyde, supra. This right only accrues when the neutral is unable or unwilling to prevent the violation, citing Article XXV, supra.

Lauterpacht’s *Oppenheim*, supra, in supporting the British action in the *Altmark* case, argues that in circumstances where reparation would be inadequate, resort to self-help is justified (Vol. II, p. 695, n. 1). Stone, supra, (p. 401 and note 117, p. 401) differs from Lauterpacht and Waldock. He argues that only in case of self-preservation would self-help be justified, and does not believe that self-preservation was involved in the *Altmark* case, citing the opinion of the International Court of Justice in the *Corfu Channel* case. In the *Corfu Channel* case (Merits), (1949), *International Court of Justice Reports*, pp. 34-5, the Court held that intervention for the purpose of procuring evidence of violation of duty was an illegal use of force and that self-protection or self-help did not justify the action of the British Navy in the circumstances (Naval War College, *International Law Documents, 1948-49*, pp. 151-152). Castrén, supra, affirms the right of the injured belligerent to resort to self-help when the situation is serious, and the neutral is unable or unwilling to act (p. 442). Telders, supra, argues that the British, not exceeding the limits of necessity, were fully justified in the *Altmark* case under international law, and supported not only by writers in general but by German doctrine as well (pp. 98-99).


The question should be noted whether self-help in this Situation by the injured belligerents, being Members of the United Nations, would constitute a violation of the Charter in view of Article 2,
paragraphs 3 and 4, and Article 51, which preserves the "inherent" right of self-defense. Paragraph 3 requires Members to settle their disputes by peaceful means in such a manner that international peace is not endangered. Paragraph 4 reads as follows:

"All Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Full discussion of this important issue will not be attempted here. In brief, it is believed that the use of force in the extreme circumstances of the Situation would still be justified as a measure of self-defense. In borderline situations, however, such as the Altmark, if the Charter had thus been applicable, the use of force might be prohibited by the mandate of Article 2, paragraph 4. Consequently, to some extent, the neutral's territory in a future war may theoretically receive additional protection from this Charter provision. For further discussion, see Waldock, "The Regulation of the Use of Force by Individual States in International Law," Recueil des Cours, 1952, Vol. II, pp. 455–517, in which he considers the impact of the Corfu Channel case as well as the provisions of the U. N. Charter on the lawful use of force by individual states in international law.

Application to Present Situation

It has been seen that there is a general consensus that an injured belligerent has the right to resort to self-help if the circumstances are sufficiently serious and the neutral is unable or unwilling to intervene to redress the breach of neutrality. The presence of special weapons personnel and equipment on the "Lost Charm" with their proximity to an area of operations made immediate action imperative, and the normal diplomatic remedies useless. Since U had refused to act, the Defense Pact forces would be fully justified under international law and under the Charter in using force to stop the X-coalition's abuse of U's neutrality. The fact that the Defense Pact States were acting under a General Assembly Resolution, even though not legally binding, provides additional support.

Application to Altmark Case

On the facts of the Altmark case, the right of self-help presents a debatable question. As indicated previously, the writers have divided on the merits of the British intervention. Assuming
for the purpose of this aspect of the case that Norway had violated its duties as a neutral, the legality of the British intervention turns on whether the breach of neutrality was sufficiently serious to justify this extreme measure. Diplomatic redress would certainly have been inadequate under the circumstances. If Stone is correct that self-preservation is required, then intervention would not be justified. In view of the weaknesses of international society in providing adequate means for redressing wrongs, a rule permitting intervention on the ground of self-help on the facts in the Altmark case might be justified. Such a rule would be more in accord with the realities and more likely to insure the survival of the rules of neutrality. On the other hand, resort to self-help should be confined to the gravest circumstances. On moral and humanitarian grounds, the British intervention can be understood and defended. It is difficult to say dogmatically that their intervention violated the law in force at the time. The thrust of the Charter provisions and the Corfu Channel case, however, suggest that the use of force under such circumstances would now be illegal. In view of the weaknesses of international institutions previously mentioned, it may still be questioned whether such a conclusion is desirable.

Student Comments

The small student staff assigned to study and comment on the Situation concluded that the passage of the “Lost Charm” was not innocent and that self-preservation and self-help justified the use of force to end the violation of U’s neutrality. The warlike nature of the “mission” was emphasized. The view was expressed that Hague Convention XIII needs reexamination in the light of modern weapons systems, which make necessary stricter measures to curb the advantages which may accrue to a belligerent in neutral waters. The right of self-preservation is more immediately involved. The passage of warships carrying materiel and personnel to a combat zone cannot be “innocent” and the neutral should be obligated to prohibit such transit if neutrality is to be preserved.

Adequacy of Convention XIII

As suggested by the student staff comments, the Situation raises the question of the adequacy of Hague Convention XIII. Drawn up as it was in a period of comparative calm, and before the widespread violations of neutrality in the last two World Wars, it is inevitable that its provisions are no longer adequate for the conditions of modern warfare. Stone, supra, has dealt at
length with the contemporary crisis of neutrality and has stressed, *inter alia*, the effect of the inability of neutrals to live up to their duties (*Passim*, and especially on Hague Convention XIII, pp. 391–396, and Discourse 23, pp. 402–407). Professor Hyde argued convincingly the inadequacy of proclaiming the inviolability of neutral territory and then permitting belligerent uses thereof which inevitably inspired warlike activities therein. He suggested, therefore, that passage through neutral coastal waters “should, by general agreement, be greatly restricted, if not entirely forbidden” (Vol. III, p. 2312).

Professor H. A. Smith, *supra*, suggests in general terms that neutrality as presently constituted is unlikely to survive in any great conflict involving most of the world but that it may continue to serve its traditional purpose in small wars (pp. 75–76). He points out that the survival of neutrality even under these circumstances will depend on the strictness with which it is observed. He argues that the chances of such survival would be greatly enhanced if a general policy of exclusion by neutrals of belligerent warships from their territorial waters were followed, as the Netherlands did in World War I. Consequently, sound policy should restrict as much as possible the facilities which belligerents can claim in neutral ports and waters. The right of “innocent passage” in this context is anomalous. He concludes that exclusion would be acceptable to belligerents, if territorial waters are restricted to the traditional three miles (pp. 160–161).

This last proviso of Professor Smith requires a brief discussion of the effect that the decision by the International Court of Justice in the *Fisheries* case, reprinted, *infra*, in this volume, and other current developments in national claims to more extensive internal and territorial waters, documented, *infra*, in this volume, will have on the problem raised by the Situation. The *Fisheries* decision, by expanding the area of internal waters in which it has been customarily understood no right of innocent passage exists, and the similar effect of certain national claims, will restrict the sea space available to belligerent operations. It should be noted that the International Law Commission in its final Report on the Law of the Sea provided in Article 5, paragraph 3, that, where straight base lines, newly established, enclose as internal waters areas previously considered high or territorial seas, a right of innocent passage through such waters should be preserved whenever such waters have normally been used for international traffic. Whether such an exception could now be implied through such waters for the “mere passage” provided by Article X of Hague Convention XIII (1907) is very doubtful.
To the degree the decision and other recent claims have the consequence of extending the width of the territorial water belt itself, it will both restrict the sea space available to belligerent operations and broaden the area in which "innocent passage" is permitted. Such an expansion will markedly increase the neutral's task of surveillance and similarly enhance the probabilities of belligerent abuse of the "mere passage" privilege. These considerations, in turn, accentuate the danger of counteraction by an aggrieved belligerent.

In view of these probable consequences, an extensive broadening of the territorial sea will probably prove unacceptable to belligerents and should give pause to neutrals themselves. It could lead, on the one hand, to the increased insistence of belligerents on the right of passage despite the greater difficulties, and, on the other hand, to greater likelihood that neutrals would follow a policy of restricting or prohibiting innocent passage entirely. Such a policy of exclusion, suggested previously, would only be acceptable to belligerents if the traditional limits of territorial waters are maintained, as Professor Smith has indicated.

Summary Conclusions

The Problem Situation and the Altmark case both suggest the need for a more intensive study of the privilege of innocent passage through neutral territorial waters by belligerent warships. Whatever the differences of writers on the Altmark facts, it is clear that the provisions permitting "mere passage" are ambiguous and permit abuse, which in turn encourages the taking of forceful counteraction by an aggrieved belligerent. This can only lead to a breakdown in the maintenance of the rules of neutrality. To preserve the institution of neutrality, a tightening of the rule, or, preferably, a rule of complete exclusion, (if present territorial water limits are maintained), would be desirable. The recent tendency to make claims to more extended internal and territorial waters makes the problem more urgent. Similarly, the development of the means of modern warfare requires greater strictness in the rule. Even under the existing rule, the use of an abnormal route of long duration for a warlike "mission" is not for bona fide purposes of navigation and is prejudicial to the security interests of the coastal state and to the interests of the opposing belligerent. Such use must therefore be regarded as a violation of the rule. While the legality of the use of force in extreme situations must be admitted, a strengthening of the rule would serve to lessen, and, if possible, prohibit resort to such measures.
Solution

(a) U has violated its duties as a neutral in permitting an abusive use of its territorial waters that was not for bona fide purposes of navigation and was prejudicial to the security interests of the coastal state and to the interests of the Defense Pact as opposing belligerents. Such use is not the "mere passage" authorized by Article X of Hague Convention XIII.

(b) While every breach of neutral duties does not authorize forceful counteraction by an aggrieved belligerent, in the case of such a grave violation as the instant Situation presents, the Defense Pact States were legally entitled to use force to prevent irremediable injury arising from U's breach of neutrality.

APPENDIX I TO SITUATION I


NOTE. This correspondence, taken from British Command Paper No. 8012, printed in 1950, is reprinted below for convenient reference. The Document (Cmd. 8012) is British Crown copyright, and permission to reprint in this volume has been obtained from the Controller of Her Britannic Majesty's Stationery Office through the courtesy of the British Foreign Office by a letter to the Editor dated 26 September 1956. The early official statements by the British, German, and Norwegian Governments have been available since 1941. See Documents on International Affairs, Norway and the War (Royal Institute of International Affairs, (1941), pp. 33–38).

CORRESPONDENCE BETWEEN HIS MAJESTY’S GOVERNMENT IN THE UNITED KINGDOM AND THE NORWEGIAN GOVERNMENT RESPECTING THE GERMAN STEAMER "ALTMARK"

London, 17th February–15th March, 1940

FOREWORD

The Altmark was, from the point of view of international law and practice, of considerable importance as a legal precedent. The incident has been dealt with by various distinguished publicists on international law but because the full correspondence has never been published they have not had all the necessary information before them in order fully to appreciate it from the legal point of view. Consequently, it is thought to be desirable, after consultation with the Norwegian Government, to publish the texts of the exchanges of notes which took place between the two Governments between 17th February and 15th March 1940.
Important

I asked the Norwegian Minister to call this afternoon and in­formed him that I thought his Government should be placed in possession of certain facts already known to us in connection with the liberation of the prisoners from the steamship Altmark.

2. The British authorities had been in touch with this ship for some time. It was notorious that she had participated in the depredations of the Graf Spee, to which she had been acting as auxiliary. We had the best of reasons, confirmed by the British subjects taken off the Graf Spee and previously imprisoned in the Altmark, to believe that there were some three or four hundred British subjects aboard who had been living for weeks under in­toler­able conditions. The Altmark was also credibly believed to possess offensive armaments. The record of this ship must have been well known to the Norwegian Government and in the view of His Majesty's Government it was incumbent on the Norwegian authorities, when she entered Bergen and requested passage through Norwegian territorial waters, to subject her to a most careful search.

3. His Majesty's Government would be grateful for full par­ticulars as to how this search was conducted and what facts were discovered. Reports received by His Majesty's Government in­dicated that the examination had been perfunctory, and in any case prisoners had not been discovered. On evidence received hitherto, it appeared to His Majesty's Government that the Nor­wegian Government had failed in their duties as neutrals. It had been suggested to me that the result of the examination would have been such that the Norwegian Government would have felt obliged to release the prisoners. His Majesty's Government would be glad to know what action the Norwegian authorities would have taken if the prisoners had been found. Surely they would either have released them or at any rate held them pending a full examination of the position.

4. In brief, if no prisoners had been found when the ship was boarded, the Norwegian Government would have had an excellent ground for complaint. The prisoners, however, having been found, His Majesty's Government considered that they had every right to complain that the search carried out had been perfunctory.

5. The legal question, however, appeared to me of less im­
portance than the fact that three or four hundred British subjects had been kept for many weeks in conditions in which no decent person would have kept a dog. The fact that the Norwegian Government did not find a pretext to detain the ship or even to take off the sick among the prisoners appeared to His Majesty’s Government to give them good cause for complaint against the Norwegian Government. In reply to an enquiry, I informed the Minister that the action taken had been with the full assent of His Majesty’s Government. In view of the urgency, prior notification to the Norwegian Government had not been possible. His Majesty’s Government did not deny that Norwegian territorial waters had technically been infringed. They felt, however, that the case against the German authorities was so overwhelming that they were justified in pressing that the ship should be interned.

6. The Norwegian Minister stated that he had no information regarding the search at Bergen, but that he would inform his Government at once of what I had said and invite replies to the various questions asked.

7. I then turned to the note which the Minister had handed to me. I observed that I took note of his Government’s protest and their reservation of rights, and would furnish a detailed reply as soon as possible. I observed, however, that the Norwegian Government would surely not seriously expect His Majesty’s Government to return the prisoners; to which the Minister replied that this was indeed their intention, as the only means of restoring the case to a legal basis.

*Foreign Office,*
*17th February, 1940.*

---

**No. 2**

**Monsieur Colban to Viscount Halifax**

Royal Norwegian Legation, London, 17th February, 1940.

My Lord,

On the 16th February, 1940, in the afternoon the German steamer *Altmark* was in Norwegian territorial waters, escorted by a Norwegian torpedo-boat. At 4:30 p.m. two British destroyers fired shots of warning to stop the *Altmark* in the neighborhood of the Foksteinene. The Norwegian torpedo-boat protested against

---

1 Document No. 2.
this. The Altmark went in the Jössingfjord, and the destroyers followed and remained at the entrance of the Fjord. The Norwegian torpedo-boat once more protested, and the English force, which was then increased to one cruiser and five destroyers moved outside the three nautical miles limit.² Some time later a destroyer again entered Norwegian territorial waters and went close by land and used searchlight. At 11 p.m. the English cruiser moved into the Fjord and boarded the Altmark. A struggle followed, and it is reported that several Germans were killed and wounded. It is stated that about 400 British subjects on the Altmark were taken on board the British ship which thereafter went out.

The Norwegian guard-ships consisted of two small torpedo-boats, and they could in face of the overwhelming British force do nothing but protest with energy.

I have been instructed immediately to bring this to the British Government's notice and to lodge a serious protest against this grave violation of Norwegian territorial waters, which has caused strong indignation, as it took place in the interior of a Norwegian Fjord, and thus cannot be due to any mistake or difference of opinion with regard to the limit of the territorial waters.

The Norwegian Government must demand that the British Navy be instructed in future to respect Norwegian Sovereignty.

² The following is a translation of a note regarding Norwegian neutrality which was addressed to His Majesty's Minister at Oslo by the Royal Norwegian Ministry for Foreign Affairs on 4th September, 1939.

"Sir,

I have the honour to send you herewith a copy of the Royal Proclamation of the 3rd inst. on Norway's neutrality in the war between Great Britain and France on the one side, and Germany on the other.

I have also the honour to inform you that it has been laid down by Royal Resolution of the 3rd inst. that—

'(1) In the war which has broken out between foreign Powers, Norway will maintain complete neutrality. The rules and regulations concerning neutrality which are in force (see the Royal Proclamation of 13th May, 1938) will not be applied outside a distance of three nautical miles from the coast.

(2) In every other respect the regulations regarding territorial waters, hitherto in force, remain valid.'

This decision has been taken in order to avoid the difficulties which might arise in consequence of doubt as to the extent of territorial waters. The decision is in conformity with the practice followed in the Great European War, 1914-18.

In requesting you to inform your Government of the above, I beg you to accept the assurance of my highest consideration.

(Sd.) HALVDAN KOHT."
The Norwegian Government expect of the British Government that they will hand the prisoners over to the Norwegian Government and make due compensation and reparation.

I have, &c.
(Sd.) Erik Colban.

---

No. 3

Monsieur Colban to Viscount Halifax

Royal Norwegian Legation, London, 24th February, 1940.

My Lord,

I have had the honour to give you to-day verbal information in answer to certain questions raised by you in the Altmark case, and my Government hope thereby to have contributed to the establishment of the real facts of the case and to have made clear the view of the Norwegian Government on the matter.

My Government hope that the British Government, after what has thus been stated, will feel themselves convinced that the Norwegian Government have acted in this case in strict accordance with International Law.

If, however, the British Government should maintain their view, the Norwegian Government would propose that the difference of opinion between the two governments be submitted to arbitration, in such a manner as might be laid down in a special agreement.

I have, &c.
(Sd.) Erik Colban

---

No. 4

Aide-Mémoire

(Left with Viscount Halifax by Monsieur Colban on 24 February 1940)

Royal Norwegian Legation.

The Altmark was visited by a Norwegian torpedo-boat in Norwegian territorial waters off Kristiansund the 14th February last. It was then declared that the ship was on her way from an American port (Port Arthur, Texas), to Germany and armed with small anti-aircraft guns for her own defence, which guns

---

3 Document No. 4
had been dismantled before arrival in the territorial waters. She carried “Reichsdienstflagge” as a sign of her belonging to the German State. In Sognesjøen the vessel was hailed by a torpedo-boat and questions were asked, amongst these, whether persons were on board, who belonged to the armed forces of a belligerent country, or sailors domiciliated in or citizens of a belligerent country. The answer was that no such person was on board. When the Altmark was later on hailed by another Norwegian naval vessel north of Bergen, the captain of the Altmark refused his ship to be searched. As the ship was an auxiliary naval vessel and thus assimilated to a war vessel in respect of immunity, the Norwegian authorities had, in International Law, no power to proceed to further inquires, nor to prevent the continuation of the voyage in Norwegian territorial waters.

The Altmark did not call at Bergen or at any other Norwegian port or anchorage, as seems to have been, erroneously, supposed. No question of a 24 hours limit thus arises. Neither The Hague Convention nor the Norwegian Neutrality Rules prescribe any limited time in case of passage.

As the Altmark did not call at a Norwegian port, the Norwegian Government had not had to decide what ought to have been done with the ship or the prisoners, if that had been the case. Generally, it can only be said that the Norwegian Government would also in such a case have done their best to fulfill all their international obligations.

The British Government have themselves emphasized the right of vessels of war to passage in neutral territorial waters. Reference to this right was made in the memorandum presented to the Norwegian Foreign Minister by the British Minister in Oslo on the 23rd of May, 1939, to which memorandum the Norwegian Foreign Minister replied on the 2nd September, 1939.

The Norwegian Government are desirous to underline that it was their duty in this case correctly to observe the rules of International Law to both sides. And the Norwegian Government do not have any doubt as to the meaning of these rules.

As to the assertion that the British prisoners have been badly treated, and that Norway ought to have considered the situation from the humanitarian point of view, the Norwegian Government would like to say that they can understand the feelings of the British Government at the thought that British prisoners were on board the Altmark. The Norwegian Government, however, consider that a neutral state cannot interfere between Belligerent
Powers or in their disputes without definite authority for so doing in a treaty or in some recognised rule of International Law.

---

No. 5

“Oral Communication” Made by Monsieur Colban on 8th March 1940

At the enquiry which has been made in Norway in the Altmark case, the following has been established:—

On the 16th of February at 5 o’clock p.m., the Commander of the Cossack informed the Commander of the Norwegian torpedo-boat Kjell that he was instructed by the British Admiralty to liberate 400 British prisoners on board the Altmark. The Commander of the Kjell declared that he had no knowledge of the presence of prisoners on board, and that his instructions were to the effect that he should prevent violation of Norway’s neutrality. The Commander of the Cossack proposed inspection on the spot. The Commander of the Kjell declined this and asked the British Commander to leave Norwegian territorial waters at once.

At 11 p.m. on the same day, when the Cossack entered the Jössingfjord, her Commander replied to the Norwegian protest that he had instructions from the British Government to liberate the prisoners he had mentioned in the afternoon.

Apart from what is stated above, no request for joint Norwegian-British inspection was made, and no other declaration was made on the Norwegian side as to the presence of prisoners on board.

The Altmark used her wireless station illegally on the 15th February at 1:23 p.m. in a telegram to the German Legation in Oslo. The telegram was stopped by the Norwegian authorities, and the captain of the Altmark was at once informed that he had violated the regulations in force. He apologised.

---

No. 6

Viscount Halifax to Monsieur Colban

Your Excellency,

On the 17th February last, I requested your Excellency to call upon me in order that I might give the Norwegian Government

---

4 This note reached Oslo shortly before the German invasion of Norway and, in that circumstance, the Norwegian Government were not in a position to send a reply.
certain facts which had already come to the knowledge of His Majesty’s Government in the United Kingdom in connexion with the liberation of the British prisoners from the German naval auxiliary vessel Altmark.

At that interview I explained the general attitude of His Majesty’s Government to the case as then known to them, and I requested certain information as to the action taken by the Norwegian Government and the results of that action. Your Excellency was good enough to undertake to obtain replies to the various questions which I had put to you, and at the same time handed me your note of the 17th February, in which the Norwegian Government lodged a serious protest against the grave violation of Norwegian territorial waters which they considered to have occurred, and stated that they expected His Majesty’s Government to hand the British prisoners over to the Norwegian Government and make due compensation and reparation.

On the 24th February I had the honour to have a further interview with you, at which you were so good as to convey to me the replies of your Government to the questions which I had put to you on the 17th and handed to me your note No. 79 of the 24th February, which stated that, in the light of the information given in reply to my questions, the Norwegian Government hoped that His Majesty’s Government would feel convinced that the Norwegian Government had acted in this case in strict accordance with international law, but that if His Majesty’s Government should maintain their view, the Norwegian Government would propose that the difference of opinion between the two Governments should be submitted to arbitration. I now desire to make the following observations on your Excellency’s notes and on the case in general.

2. The facts of the case as now known to His Majesty’s Government, both from their own information and from the various statements made by the Norwegian Government, are as follows. The Altmark, a ship of about 18,000 tons gross, with a speed of approximately 25 knots, is a German naval auxiliary vessel. She appears in the 1939, official list of “Die Schiffe der deutschen Kriegsmarine,” where she is described as a supply ship (“Trosschiff”). There is no doubt that she should be treated in the same manner as a warship, and indeed the German official wireless, despite the fact that it at first described her as an “innocent merchant vessel,” subsequently admitted that she was being used as a naval auxiliary vessel.

3. The Altmark had been for a period of many weeks in attendance on the German armoured ship Admiral Graf Spee
during the later's operations in the Atlantic and elsewhere, and is known to have fuelled her at various times during that period. In particular, the crews of a considerable number of British merchant ships sunk by the Admiral Graf Spee were placed by her Commanding Officer on board the Altmark, and at the time of the destruction of the Admiral Graf Spee the number of these prisoners amounted to about 300. After the destruction of the Admiral Graf Spee, the Altmark left the South Atlantic and endeavoured to return to Germany, the object of her voyage being clearly to complete the operation, which began with the capture of the prisoners in question, by their removal to Germany as prisoners of war. The prisoners were in charge of an armed guard composed of seamen from the Admiral Graf Spee. The British naval authorities, who were aware of the Altmark's intended return to Germany, had made the necessary dispositions to intercept her if she came through the North Sea.

4. The Altmark, however, did not adopt this, the natural and ordinary route for a ship returning to a German port from the Atlantic. She entered Norwegian territorial waters on the 14th February at some point off the Trondhjem Fjord, and proceeded through those waters in a southerly direction. A little further south she was stopped by a Norwegian torpedo-boat, whose Commander made a request to inspect the ship. It appears that as the Altmark was regarded as a warship and carried the German State flag, the Norwegian officers considered that the only thing he was entitled to do was to ascertain that the ship really was what she purported to be. He examined her papers, which are stated to have been in order, and was informed that the ship was on her way from Port Arthur, Texas, to Germany and that she carried anti-aircraft guns for her own defence.

The Altmark proceeded on her way, but further south at Sognesjøen she was hailed by another Norwegian torpedo-boat and was asked whether there were any persons on board who belonged to the armed forces of a belligerent country, or sailors domiciled in, or citizens of, a belligerent country. The answer was that no such person was on board. The ship was again allowed to proceed, but it appears that the Admiral Commanding at Bergen was not satisfied about her, and on the 15th February, when the Altmark was about 100 miles from Bergen, a Norwegian guard ship stopped her and asked to inspect her. This the Altmark's captain refused to allow, and the request was dropped. It was then discovered that the Altmark had been using her wireless in Norwegian territorial waters in contravention of the Norwegian neutrality regulations, and a complaint of this was made by the
Norwegian authorities; the captain made an apology, declaring that he was unacquainted with this prohibition, and the matter was apparently not pursued further.

5. The Norwegian Government state that the Altmark did not call at Bergen or any other Norwegian port, and His Majesty's Government naturally accept this statement. There is, however, no doubt that she passed through the "Bergen defended area," a zone about 20 miles long from north to south, which constitutes one of the Norwegian "ports et espaces maritimes qui auront été déclarés ports de guerre" which belligerent warships are forbidden to enter under Article 2 of the Norwegian Neutrality Regulations. Inasmuch as such a violation of their Regulations obviously could not have escaped the vigilance of the Norwegian authorities, His Majesty's Government assume that special permission was given by them to the Altmark to pass through the area in question, although the Regulations make no provision for any exceptions to this prohibition. As to the grounds on which such permission was requested and the reasons which led the Norwegian Government to grant it, His Majesty's Government have no information; but they have no doubt as to the motives which led the ship to desire to pass through the area, and I shall return to this point later.

6. The Altmark continued on her voyage south through Norwegian territorial waters, apparently escorted by a Norwegian torpedo-boat, and on the 16th February she was finally encountered by H.M.S. Cossack in the Jössingfjord in the circumstances with which the Norwegian Government are acquainted. The Commanding Officer of H.M.S. Cossack had been instructed by the British Admiralty to propose to the Commander of the Norwegian torpedo-boat that a joint Anglo-Norwegian guard should be placed on board the Altmark and a joint Anglo-Norwegian escort provided to accompany her to Bergen in order that the matter might be properly investigated there by the Norwegian authorities. The Commanding Officer of H.M.S. Cossack has reported that he carried out these instructions, but that his proposal was declined by the Norwegian Commander in accordance, as he stated, with the instructions of his Government. The Commanding Officer of H.M.S. Cossack then invited the Norwegian Commander to accompany the British boarding party during their impending search of the Altmark, but he declined to do so.

Your Excellency has informed me that, according to the information in possession of your Government, the Commanding Officer of H.M.S. Cossack proposed inspection on the spot but that, apart from this, no request for joint Norwegian-British inspection was made. It is possible that some confusion may have arisen be-
tween inspection at Bergen and inspection on the spot, but His Majesty's Government have no doubt, in view of the specific instructions which they had issued, and the reports which they had received, that both proposals were, in fact, made by the Commanding Officer of H.M.S. *Cossack*. It is in any case clear, on your Excellency's statement, that an offer of joint inspection was made and was declined by the Norwegian Commander.

The *Altmark* was then boarded and the British prisoners released and taken on board H.M.S. *Cossack*. The *Altmark* had previously attempted to ram H.M.S. *Cossack* and drive her ashore and resistance was offered to the boarding party by the German armed guard, the first shot being fired at a British warrant officer, who was wounded by it. There was some loss of life on the German side, but no injury to Norwegian life or property took place. I desire to add that at that point the *Altmark* had passed through some 400 miles of Norwegian territorial waters from the point at which she entered them, and the total length of those waters which she would in all probability have traversed if her voyage had not been interrupted is over 600 miles.

7. Such being the circumstances of the case, His Majesty's Government consider that it was the duty of the Norwegian Government, before allowing the *Altmark* to continue her voyage through Norwegian territorial waters, and particularly before granting her permission to pass through the "Bergen defended area," to ascertain by means of a proper investigation not only the status of the ship but also the nature and object of her voyage and of the use to which she was putting those waters. It is clear that the Norwegian Government failed to do so. On at least three occasions the *Altmark* was stopped by a Norwegian warship and there was ample opportunity for such an investigation, but none was made, and the proposals for investigation made by H.M.S. *Cossack* were refused. In consequence, the Norwegian Government were, according to their own statement, unaware throughout of the material fact that the *Altmark* had about 300 British prisoners on board.

In this connexion His Majesty's Government attach particular importance to the incident at Sognesjöen, when a Norwegian torpedo-boat specifically enquired whether the *Altmark* had on board any sailors who were citizens of a belligerent country, and was answered in the negative. This indicates that the Commander of the Norwegian torpedo-boat had some suspicions as to the true position; but the really important consideration is that the fact of the Commander of the *Altmark* having found it necessary to reply to the enquiry by a barefaced lie shows that he at any rate considered the presence of the British prisoners on board to be so
material a circumstance that it was essential to keep it from coming to the knowledge of the Norwegian authorities, even at the sacrifice of his personal honour. He obviously felt that if this circumstance came to the knowledge of the Norwegian authorities, his purpose in using the protection of hundreds of miles of Norwegian territorial waters to ensure the safe conveyance of the prisoners to Germany would be frustrated. It is, in fact, clear that both the Norwegian Commander and the German Commander regarded the presence or absence of prisoners as a relevant circumstance. The fact that the question was asked and that it was untruthfully answered seems to indicate that both Commanders took the same view as His Majesty's Government, indicated in paragraphs 14 to 16 of this note, of the application of Article 10 of The Hague Convention No. XIII, to the use being made by the Altmark of Norwegian territorial waters.

The attempts of the Norwegian officers to make a proper investigation of the case were met by refusals to allow the ship to be examined, backed by a deliberate lie, and no proper investigation, which would have immediately revealed the true situation, took place at all.

8. The Norwegian Government seem to regard this result as inevitable. They appear to take the view that once the Altmark had been acknowledged as bearing the character of a warship, they had no right to make any investigation of the nature and object of her voyage and use of Norwegian waters, and were only entitled to look at her papers. His Majesty's Government cannot accept any such view. If a belligerent warship proposes to make use of neutral ports or territorial waters, the neutral Government has not only the right but a definite obligation to make such investigation as may be required in order to satisfy itself that the use in question is proper and permissible under international law; and if the warship declines to submit to such investigation, such a refusal (which inevitably suggests that the vessel's proceedings and purpose would not stand investigation) should be met by at least a refusal to allow her to continue to use the shelter of neutrality for her purpose. Any other view would open the door to wholesale infractions of neutral rights and obligations. While a neutral State cannot be expected to do more than employ the means at its disposal for the purpose of such investigation, in this case, those means, although amply sufficient, were not in fact employed. His Majesty's Government cannot but conclude that the action of the Norwegian Government in allowing their attempts at investiga-

---

5 "Miscellaneous No. 6 (1908)," Col. 4175.
tion to be frustrated as they were, and permitting the Altmark to proceed as she did, constituted a failure to comply with the obligations of neutrality.

9. There are, moreover, two particular incidents to which His Majesty's Government feel bound to call attention. The first is the discovery that the Altmark had been violating the Norwegian Regulations by using her wireless in Norwegian waters. His Majesty's Government consider that when this discovery had been made, it was incumbent upon the Norwegian authorities at least to ascertain the nature of the use which the Altmark had been making of her wireless, since the nature of the communications might well have been such as to constitute not merely a breach of the Norwegian Regulations forbidding any transmission at all, but a serious infringement of neutrality which would have called for appropriate action by the Norwegian Government. But no such investigation was made, and the matter was regarded as disposed of by the apology made by the Altmark's Commander.

10. The second incident is the permission which must be presumed to have been given to the Altmark to pass through the "Bergen defended area." There can be no doubt that the request was made because, while it is possible to avoid the area without leaving territorial waters, the passage in question is, in certain conditions, a dangerous one, and the Altmark might have been obliged to leave territorial waters and enter the open sea, in which case she would have been exposed to attack by British forces. It was in order to avoid any such possibility that the Altmark desired to pass through an area which is prohibited by the Norwegian Regulations to belligerent warships, and His

6 It has since been learned that the telegram addressed to the German Legation in Oslo was at once intercepted by the Norwegian authorities, who therefore knew its contents. It was worded as follows:

"Werde soeben 1300 Uhr zum zweiten Male vom Norwegischen Zerstörer (n) zum Stoppen aufgefordert, nachdem bereits in drei Fällen Norwegischen Offizieren alle erbetene Auskunft erteilt worden ist. Muss gegen diese meines Erachtens neutralitätswidrige wiederholte Verzögerung energischen Protest erheben."

[Translation]

"Have just been ordered to stop for the second time, at 1300 hours, by a Norwegian destroyer, after Norwegian officers already on three occasions have been given all the information they requested. Must protest energetically against this repeated delay which in my opinion is a breach of neutrality."

This is the telegram which was intercepted by the Norwegian authorities—see last paragraph of Document No. 5.
Majesty's Government cannot but regard the action of the Norwegian Government in granting permission as singularly difficult to justify in the circumstances.

11. For the above reasons His Majesty's Government consider that, irrespective of the question whether the nature and object of the Altmark's voyage through Norwegian territorial waters were permissible, the fact that the Norwegian authorities permitted, and, indeed, went out of their way to facilitate, that voyage without making any proper enquiry into its nature and object constituted a definite failure on their part to comply with the obligations of neutrality. It had become plain that, so far as the Norwegian Government were concerned, the Altmark would be allowed to effect her object of conveying the British prisoners to Germany through the shelter of Norwegian territorial waters, and His Majesty's Government consider, therefore, that in the circumstances they were fully justified in taking action to prevent that result being achieved, and that they would, indeed, have failed in their duty if they had not done so. I desire to emphasize that the action of His Majesty's ships was confined to the minimum necessary to secure the release of the prisoners; despite the resistance offered, no attempt was made to capture or destroy the Altmark, or to make prisoners of the armed guard or crew.

12. Quite apart from the questions whether the Norwegian Government exercised toward the Altmark the vigilance which was properly required of them as neutrals, His Majesty's Government desire to deal fully with other aspects of the case. It will be recalled that His Excellency the Norwegian Minister for Foreign Affairs explained in the Storting on the 19th February that, in the view of the Norwegian Government, the Altmark in any case had the right to pass through Norwegian territorial waters; and he also stated that "there is nothing in international law prohibiting a belligerent from conveying prisoners through neutral territory if the passage itself is legal"; and I assume, therefore, that this represents the attitude of the Norwegian Government on the question of international law involved.

13. To take the latter statement first, and assuming that the word "territory" is to be regarded as meaning "territorial waters" and not as including land, His Majesty's Government have never contended, and do not now contend, that in all circumstances the presence of prisoners on board a belligerent warship, which is legitimately visiting neutral jurisdiction, imposes on the neutral the duty of taking action such as the release of the prisoners. If a belligerent warship, paying a legitimate visit of not more than 24 hours to a neutral port, has prisoners on board, this does not
in itself impose any obligation upon the neutral Government. If, however, the warship requires special facilities in the neutral port, such as repairs which cannot be executed within 24 hours, different considerations arise, as is shown by the fact that, after the arrival of the *Admiral Graf Spee*, at Montevideo, the Uruguayan Government effected the release of the prisoners (shipmates of those in the *Altmark*) who were on board her. The question is one which must depend on the facts of the particular case, or, in the words of Professor Koht, on the question whether "the passage itself is legal."

14. The Norwegian Government contend that the passage of the *Altmark*, in the circumstances stated above, through hundreds of miles of Norwegian territorial waters was a legitimate operation which they were bound to allow. They consider, in fact, that it was an instance of "the mere passage" ("le simple passage") through neutral territorial waters which, under Article 10 of The Hague Convention XIII, does not compromise the neutrality of the country concerned. From this view His Majesty's Government must emphatically dissent. They have frequently in the past insisted on the "right of innocent passage," and they were themselves the authors, at The Hague Conference of 1907, of the proposal which ultimately took the form of Article 10. But it is an essential element of innocent passage that it should be innocent, and their attitude on this point was expressed by Sir Ernest Satow, the first British delegate at The Hague Conference, when he spoke of "la liberté de traverser en temps de guerre comme en temps de paix les eaux territoriales." "Innocent passage," which it was the object of Article 10 to allow, means passage through such territorial waters as would form part of a ship's normal course from the point of departure to her destination, and in particular through such territorial waters as form part of straits which provide access from one area of the sea to another. It is in this sense that His Majesty's Government have always understood and upheld the "right of innocent passage," and it is in this sense that it is recognised in international law. To regard it otherwise would clearly be to encourage the abuse of neutral jurisdiction. His Majesty's Government accordingly consider that for the reasons given in paragraph 8 above, it is the duty of a neutral, before exercising the liberty which Article 10 allows to permit "le simple passage," to satisfy itself that the passage is in fact of such a nature as to be permissible under that Article.

15. But what was the nature and object of the *Altmark*'s passage through Norwegian territorial waters? She was on her way from the South Atlantic to Germany by the north-about
route, and the object of her journey and of her passage through Norwegian waters was to complete with impunity the belligerent operation, which began with the capture of the British seamen and was continued with their conveyance across the Atlantic, by depositing them in Germany as prisoners of war. She had entered Norwegian territorial waters on the 14th February at a point off the Trondhjem Fjord, and on the 16th February she had proceeded through those waters for about 400 miles, and was in all probability proposing to continue her passage through those waters until she reached their southerly limit, more than 200 miles further on. The Norwegian Government will not suggest that the circuitous route taken by the Altmark bears any relation whatever to the course normally adopted by shipping proceeding from the Atlantic north-about to Germany. The sole and the admitted object with which the Altmark took this highly remarkable course was to conclude her warlike operations under the protection of Norwegian neutrality for a distance of several hundred miles and a period of more than three days, so as to escape the fate which awaited her on the high seas at the hands of the British Fleet; and the importance which she attached to not leaving for one moment the shelter of those waters is illustrated by the incident of her passage through the Bergen defended area.

16. His Majesty's Government most emphatically insist that such a voyage cannot be regarded as one which the Altmark was entitled to make, or the Norwegian Government bound to permit, as being an instance of the right of innocent passage which is recognised by international law and permitted under the title of "le simple passage" by Article 10 of The Hague Convention XIII. It could not even be accurately described as an abuse of that right to which it bears no relation whatever. It involves a claim by Germany (who has not scrupled to violate Norwegian neutrality when it suited her purpose to do so) to utilise the entire length of Norwegian territorial waters as and when she pleases, not in the ordinary course of navigation, but as a sort of protected corridor within the shelter of which her warships can complete, under the protection of Norwegian neutrality, the military operations in which they may have been engaged. This is not a claim which Germany is entitled to make or Norway to concede.

17. Your Excellency stated to me that as the Altmark did not call at Bergen or at any other Norwegian port or anchorage, no question of a 24 hours' limit arises. This as it stands cannot be regarded as a correct statement of the law, since Article 12 of The Hague Convention XIII expressly forbids belligerent warships "de demeurer dans les ports et rades ou dans les eaux territoriales"
of a neutral Power for more than 24 hours. His Majesty's Government regard the question of passage through territorial waters as governed by Article 10 of the Convention and not by Article 12, and, in their view, the time limit of passage is not the fixed one of 24 hours prescribed by the latter Article but that which results from the very nature of "innocent passage" which I have described in paragraph 14 of the present Note; but Article 12 is at any rate a refutation of the contention that no time limit exists if the ship does not enter a port or anchorage, and the existence of this general prohibition, applicable to both ports and territorial waters, reinforces the view which His Majesty's Government hold as to the nature of the passage which is permitted by Article 10.

18. In this connexion there is one point to which I feel it necessary to refer. On the 19th February His Excellency the Norwegian Minister for Foreign Affairs made a statement in the course of which he said that in the summer of 1939 His Majesty's Government, in making certain enquiries of the Norwegian Government as to the Neutrality Regulations which they had adopted, had emphasized "that warships must have the right to sail in Norwegian territorial waters as long as they desired and without regard to the twenty-four hours' limit." His Majesty's Government are constrained to observe that there is no foundation for this statement. What His Majesty's Government did say, in their memorandum of 23rd May, 1939, was that "they have always maintained, and must continue to maintain, the existence of such a right of entry (i.e., into neutral territorial waters) for purposes of innocent passage." The object of this observation (which was correctly quoted in the statement issued by the Norwegian Foreign Department on the 21st February) was, of course, to maintain the principle of the right of innocent passage to which His Majesty's Government have always attached importance, and on which His Majesty's Government felt that some doubt might possibly be cast by certain provisions of the Norwegian Regulations. I readily accept the statement which your Excellency made to me on the 24th February, that Professor Koht's statement was due to his having relied upon his recollection of the contents of His Majesty's Government's memorandum; but as the statement, which was publicly attributed to His Majesty's Government, was never made by them, and never could have been made by them, since it would have been in direct contradiction of their views as to the right of innocent passage, I think it desirable that the true facts should be placed on record.

19. His Majesty's Government must, therefore, conclude that the use made by the Altmark of Norwegian territorial waters was
not a legitimate exercise of the right of innocent passage, and ought not to have been permitted by the Norwegian Government; and that the action of the Norwegian Government in permitting, and, indeed, facilitating, the Altmark's operations, and in making no proper enquiry as to the nature and object of those operations, constituted a failure to observe the obligations of neutrality. In the light of the facts and the above considerations, His Majesty's Government feel that they were fully justified in taking the action which in the circumstances they felt compelled to take. I desire to add that while in the above observations I have made no reference to the considerations arising from Norway's membership of the League of Nations, His Majesty's Government reserve their position in this respect.

20. But I do not wish, particularly in view of the friendly relations which have existed for so long between our two seafaring nations, to conclude upon this note. In your communication of the 24th February your Excellency suggested that the difference of opinion between the two Governments might be submitted to arbitration. Should the Norwegian Government feel it necessary to persist in this suggestion, His Majesty's Government would have several observations to make which appear to them to be extremely pertinent. But I venture to hope that, in view of the very full explanation which I have now given of the attitude of His Majesty's Government, the Norwegian Government will not find it necessary to press this suggestion further. I have thought it only proper to state the reasons which lead His Majesty's Government to consider that they have just cause of complaint against the Norwegian Government; but I fully recognise that your Excellency's Government found themselves in a difficult position, and I readily acknowledge, in particular, that they could not have been expected to assume that legitimate enquiries made on their behalf would have been met by shameless mendacity on the part of the German officer concerned. His Majesty's Government have warmly appreciated the fact that the Norwegian Government should have expressed understanding of the feelings of His Majesty's Government at the thought that British prisoners were on board the Altmark; and His Majesty's Government for their part are very willing to place on record their regret that they should have had no option but to adopt a course which, although in their opinion fully justified by the circumstances, admittedly involved taking action in Norwegian territorial waters.

21. This being so, I venture to hope that the Norwegian Government, even if they are unable to accept all the contentions which I have put forward, will at any rate be not unwilling to recognise
that this case constitutes a clash not of right and wrong but of two rights; and that they will feel able to agree that, each party having now expressed its point of view, the matter can be allowed to rest where it is without disturbing the traditionally friendly relations between our two countries.

I have, &c.

(Sd.) HALIFAX