The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
SITUATION III

INSURGENCY AND CIVIL STRIFE—PROTECTION OF SHIPS OF THIRD STATES

There is in state B an armed attempt of party C, the Commoners, to obtain control of the established government of state B and the Commoners have obtained military control of one-half of state B and the ports in that area. Armed vessels of state B and of the Commoners are cruising off the coast. Vessels of war of other states are also cruising off the coast under instructions to maintain the rights of their nationals. Such provisions as those of the Non-Intervention Scheme of Observation, March 8, 1937, bind states D, E, F, and G. Such provisions as those of the Joint Resolution of the United States, May 1, 1937, bind states F, G, H, and I, and states D, E, H, and I were bound by the Nyon Agreement of September 14, 1937. All states were parties to the submarine warfare rules of 1930.

(a) The Feran, a merchant vessel, lawfully flying the flag of state F, bound for port R, which is under the control of state B, with a cargo of unassembled aircraft parts, is met 10 miles off the coast by the Cape, a cruiser flying the flag of the Commoners. The Cape sends a small boat with three men toward the Feran after it had summoned the Feran to come to and to submit to capture on the ground that this action is in accord with the Joint Resolution of May 1, 1937. The Feran asks by radio...
for instructions or aid from the \textit{Fona}, a nearby cruiser of state F. 1. What are the legal rights? 2. Would the rights be the same if the summons had been by a cruiser of state B?

(b) The \textit{Iris}, a merchant vessel lawfully flying the flag of state I, with a cargo of barbed wire, is met by a submarine which does not disclose its identity, but orders the crew to take to the boats and row to fishing vessels which are in the vicinity as the \textit{Iris} will be sunk after ten minutes. The \textit{Iris} asks by radio for instructions or aid from the \textit{Iona}, a nearby cruiser of state I. 1. What are the legal rights? 2. Would the rights be the same if the submarine had been under the flag of the Commoners? 3. Would the rights be the same if the submarine had been under the flag of state D?

(c) The \textit{Gyra}, an oil tanker lawfully flying the flag of state G, armed “for the preservation of discipline,” is met 10 miles off the coast by the \textit{Bain}, a cruiser of state B. The \textit{Bain} summons the \textit{Gyra} to come to for visit and search and as the small boat from the \textit{Bain} comes alongside, the crew of the \textit{Gyra} drive it off with the arms on board. The \textit{Bain} then signals that it is about to sink the \textit{Gyra}. The \textit{Gyra} asks by radio for instructions or aid from the \textit{Geno}, a nearby cruiser of state G. 1. What are the legal rights? 2. Would the rights be the same if the summons was by a cruiser of the Commoners?

In each of the above cases should a nearby cruiser of state H take any action if specially requested by the merchant vessels?

\textbf{SOLUTION}

(a) The \textit{Fona} should notify the \textit{Feron} that it is coming to its aid to protect it against an illegal act.
The Fona also should notify the Cape that the latter has no right to interfere with the Feran and should threaten the use of force against the Cape if it refuses to desist. The rights would be the same if the summons had been by a cruiser of state B.

(b) The Iona should notify the Iris to try to escape and should notify the submarine that it has no rights in this situation and that force will be used against it for the protection of the Iris. If the Iona arrives before the Iris is actually attacked it should drive off the submarine by force, and if it reaches the place of attack too late to save the Iris, it should counter-attack the submarine. The rights would be the same if the submarine had been under the flag of the Commoners or that of state D.

(c) The Geno should notify the Gyra to cease its resistance and should notify the Bain that the latter has no right either to visit and search or to sink the Gyra and should threaten force to compel it to desist. The rights would be same if the summons was by a cruiser of the commoners.

The cruiser of state H should take no action in the case of the Feran. In the case of the Iris it may intervene and may counter-attack and destroy the submarine. In the case of the Gyra, if it witnesses the attack, it may intervene to protect the Gyra but has no authority to counter-attack or destroy the Bain.

The Spanish Civil Strife—General.—The situation in state B where the Commoners are engaged in an attempt to obtain control of the established government is obviously very similar to the legal state of affairs prevailing in Spain from July 1936 to 1939. The regular rules of belliger-
ency do not apply, for no war exists in the legal sense. Technically it is a condition of insurgency only. Third states are not subject to the obligations of neutrality under general international law and the two contestants do not possess belligerent rights. In both the Spanish case and in this Situation III, however, outside powers have adopted special measures which have no precedent in international law. The effect of these acts is to put the two parties upon the same basis, treating them both alike. In operation, therefore, these special provisions, in principle, are akin to neutrality. The result has been highly anomalous, for third states have assumed an attitude of impartiality and have taken upon themselves certain obligations when there was really no war, no call for neutrality, and when under normal circumstances the established, recognized government would be entitled to friendly support as prescribed by the laws of peace. Solution to the problems must be sought upon the basis of the usual rules of insurgency and the particular conventions and regulations adopted for this conflict. The words "civil strife" have been used advisedly since "civil war" would imply the existence of a state of belligerency, a legal condition recognized neither in Spain nor in state B.

Maritime rules during insurgency.—During insurgency neither the government nor the insurgent forces have the right to visit and search ships of third states or to make seizures on the customary grounds of contraband, blockade and unneutral service. Within territorial waters both parties may prevent supplies from reaching their opponent. This right of barring access gives no au-
authority to seize or destroy foreign ships. The insurgent or government cruiser in such cases may direct the ship to a certain port where the supplies may be seized or may remove them from the ship provided compensation is rendered.

This subject of the rights of the parties in insurgency has frequently been discussed in Naval War College Situations, the most famous of these being that of 1902 when the fundamental principles were laid down.

No right of confiscation or destruction of foreign property in such circumstances (in territorial waters) could well be recognized and any act of injury so committed against foreigners would necessarily be at the risk of insurgents * * * their only right being * * * to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. (Naval War College Situation, 1902, p. 80.)

Insurgents actually having before the port of the state against which they are in insurrection, a force sufficient, if belligerency had been recognized, to maintain an international law blockade, may not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas, even though they be approaching the port. Within the territorial limits of the country, their right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy. (Ibid, p. 82.)

So far as territorial waters are concerned, both the de jure and the de facto governments are entitled to take defensive measures within the waters adjoining the coast which they respectively occupy, but any such action is taken entirely under the municipal law and has nothing whatever to do with belligerent rights. (British Yearbook of International Law, 1937, p. 27.)

Position of third states during insurgency.—When legally there is no war, third states are not neutral, and the governments of third states are
governed by the customary laws of peace in their relation with the established government. Foreign governments, therefore, may legally sell arms to the recognized government but may not do so to the insurgents, for such an act would be tantamount to intervention. The existence of insurgency rather than belligerency tends to be more favorable to the constituted authorities than to the revolutionists. This is logical enough considering the fact that peace still prevails. The Havana Convention of 1928 on Rights and Duties of States in Civil Strife formally recognizes this favoring of the regular government.

**Article 1.** The contracting states bind themselves * * * to forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

**Article 3.** The insurgent vessel, whether a warship or a merchantman, equipped by the rebels, which arrives at a foreign country or seeks refuge therein, shall be delivered by the government of the latter to the constituted government of the state in civil strife. (U. S. Treaty Series, No. 814.)

Unless there is a domestic law to the contrary, private persons may sell arms and supplies, at their own risk, to either side in cases of insurgency. The obligations of neutrality come into the picture only when a state like the United States forbids the fitting out and arming of expeditions on behalf of either contestant. (The Three Friends, 166 U. S. 1.) To this limited extent, where expeditions are involved, third states are really neutral.

**Insurgency and blockade.**—It has long been clear that neither the government nor the rebel forces has the right to establish a blockade as long as there is only insurgency. The parent government may
declare certain ports closed but must enforce that order by effective means within the three mile limit. What may look, therefore, like a regular blockade, is legally only an act of enforcement for a domestic decree. The rights of third states upon the high seas are unaffected. It has been held that such closures must be "effective," the criterion of a belligerent blockade thus appearing somewhat paradoxically in what is technically a peacetime situation. (See Oriental Navigation Co. Claim, U. S.-Mexico General Claims Commission, 1928, Opinions of Commissioners, 1929, p. 23.)

This rule that parent state orders of closure must be enforced is a midway measure between two other possibilities. One of these would be that the parent state could close a port by simple decree, just as it could if there were no revolt, without any requirement that the order be supported by effective force. Some who reject this proposition contend that if the parent government wishes to prevent access to ports held by revolutionists, it must recognize the belligerency of the opposition, that is, the peculiar status of a blockade which is not a blockade should be discarded. Practice however, is still along the lines of "effective" closure without belligerency. (For a clear discussion of these matters see H. Briggs, "The Law of Nations," pp. 745-749.)

**Blockade in the Spanish civil strife.**—Early in the conflict, the Spanish "Loyalist" government declared that certain ports in the hands of the rebels constituted a "war zone." In its reply to this announcement the American government stated that it could not admit the legality of such action unless the Spanish government maintained
an "effective" blockade. The legal lines in this situation were not clear. Was the Spanish Government issuing a closure order in the usual sense discussed above? It declared a "war zone" but the United States replied in terms of a blockade. If the government decree was a real blockade order, then it should have been treated as a recognition of belligerency as was Lincoln's blockade measure in 1861. (The Prize Cases, 2 Black 635.) If it was not a blockade order, the United States should have answered in terms of the customary closure rules. The normal legal distinctions were thus blurred, a situation far from unusual in the whole story of the Spanish strife.

Could General Franco, the insurgent, "blockade" Loyalist ports? By their actions outside powers admitted that he could intercept and interfere with the commerce of third states within the 3-mile limit. This was true both at Bilbao and at Barcelona, and his actions there were in conformity with those usually allowed to insurgents, as described in connection with the Naval War College Situation of 1902 above.

On August 21 Mr. Eric C. Wendelin, in charge of the American Embassy in Madrid, received a note verbale, dated August 20, 1936, from the Spanish Foreign Office at Madrid which stated:

"Spanish ports in the power of the rebels as well as those of Ceuta and Melilla and the ports of our proscription zone in Morocco, Balearic and Canary Islands, have all been declared a war zone and therefore it is not possible for the ships of our fleet to permit the entry into them of merchant ships in order in this way to prevent furnishing of provinces of Almería, Murcia, Alicante, and Badajoz and supplies to the rebels."

The Spanish Foreign Office requested that this information be transmitted to the American Government in order that
American merchant ships may be warned and that thus "possible incidents may be avoided."

Mr. Wendelin reported that he believed that the same communication had been sent to all other governments.

The Secretary of State, on August 25, instructed Mr. Wendelin to address the following note to the Minister of State in reply to the Minister's note verbale of August 20:

"Sir:

"I have the honor to acknowledge the receipt of your note of August 20, 1936, requesting me to inform my Government, in order that American merchant ships might be warned and possible incidents thus avoided, that your Government has declared Spanish ports in control of the insurgents, both on the Spanish mainland and in Morocco and the Balearic and Canary Islands, a war zone into which merchant vessels will not be permitted to enter.

"My Government directs me to inform you in reply that, with the friendliest feelings toward the Spanish Government, it cannot admit the legality of any action on the part of the Spanish Government in declaring such ports closed unless that Government declares and maintains an effective blockade of such ports. In taking this position my Government is guided by a long line of precedents in international law with which the Spanish Government is doubtless familiar." (Press Releases, Vol. XV, No. 361.)

November 17, 1936, General Franco announced his intention of stopping the traffic in arms and munitions to Barcelona. His note to the Powers said:

"The scandalous traffic in arms, ammunition, tanks, airplanes, and even toxic gases, which is being carried on through the port of Barcelona is well known. All this material is being transported to this port in ships flying different flags whose real nationality in its greater part is Russian or Spanish.

"The National Government, being resolved to prevent this traffic with every means of war at its disposal will even go so far, if this were necessary, as to destroy that port."
Therefore, it warns all foreign ships anchored in that harbor of the desirability of abandoning it in a very short time to avoid the consequences of damage which, unintentionally, might be caused to them on the occasion of the military action referred to of which no further warning will be given." (London Times, Nov. 20, 1936.)

**Insurgent vessels and piracy.**—Despite the court decision in the famous case of the Ambrose Light (25 F. 408) in the last century, insurgent craft on the high seas or in territorial waters are not pirates.

The declaration of piracy against vessels which have risen in arms, emanating from a government, is not binding upon the other states. (Habana Convention 1928, op. cit., Art. 2.)

An insurgent government is regarded as possessing sufficient responsibility to prevent its naval officers from being pirates when they conform to the laws of war, even though their actions may be illegal because they are not properly qualified to exercise belligerent functions. (British Yearbook of International Law, 1938, pp. 203–204.)

Illegal actions upon the high seas are therefore not synonymous with piracy. A state or a revolutionary group can be held responsible for the unlawful acts of its vessels, and though often the epithet of piracy is hurled at some grossly unlawful act committed by a belligerent or an insurgent at sea, the terminology is moral rather than legal. Piracy in the legal sense is a special form of concurrent jurisdiction under which the warships of all states on the high seas have the authority to seize pirate vessels, piracy consisting of an act of violence for a private end outside the authority of any political group or government.

**Harvard draft code and piracy.**—**ARTICLE 3.** Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state.
1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

(American Journal of International Law, 1932, Supplement, p. 743.)

The Nyon and Geneva arrangements.—Because of the many attacks upon merchant shipping in the Mediterranean by unidentified submarines during the course of the Spanish conflict in 1937, the French and English governments took the initiative in formulating special arrangements for dealing with this situation. At Nyon and at Geneva agreements were framed which gave to the warships of the participating powers special rights not accorded by customary international law. The Nyon arrangement in its preamble stated that these submarine attacks “should be justly treated as acts of piracy.” This statement, however, did not legally confer the status of piracy upon submarines making unlawful attacks. “Illegal” not “piratical” was the proper term to apply to the actions of the undersea craft. These arrangements dealt with the method of coping with a particularly flagrant violation of the rights of innocent ships.

It should be remembered that even a visit and search conducted in the lawful manner would have been illegal since there was no belligerency. What
these arrangements did was to confer upon the warships of the participating states the right to deal drastically with any interference which involved a violation of the legal rules in regard to visit and search. Under the general law warships of third powers may intervene to protect their own vessels from any sort of molestation. By the Nyon and Geneva arrangements any warship could intervene to protect any non-Spanish ship and was empowered even to counter-attack and, if possible, to destroy the submarine. This last grant of authority goes beyond the usual regulations which permit a reasonable use of force to protect a vessel but which do not permit the use of force beyond that required for saving the attacked vessel. These arrangements were designed to handle an illegality within an illegality, that is, they were framed with the aim of preventing an illegal method of conducting what was in any event an illegal operation. Belligerent rights were not granted by these agreements which did not imply that lawful methods would legalize action inconsistent with a condition of insurgency.

The Nyon Arrangement, September 14, 1937

Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy; and

Whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights
or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed and without prejudice to the right of any participating Power to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas or to the possibility of further collective measures being agreed upon subsequently, it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines:

(a) Except as stated in (b) and (c) below, no submarine will be sent to sea within the Mediterranean.

(b) Submarines may proceed on passage after notification to the other participating Powers, provided that they proceed on the surface and are accompanied by a surface ship.

(c) Each participating Power reserves for purposes of exercises certain areas defined in Annex I hereto in which its submarines are exempt from the restrictions mentioned in (a) or (b).

The participating Powers further undertake not to allow the presence in their respective territorial waters of any foreign submarines except in case of urgent distress, or where the conditions prescribed in sub-paragraph (b) above are fulfilled.

VI: The participating Powers also agree that, in order to simplify the problem involved in carrying out the measures above described, they may severally advise their merchant shipping to follow certain main routes in the Mediterranean agreed upon between them and defined in Annex II hereto.

VII. Nothing in the present agreement restricts the right of any participating Power to send its surface vessels to any part of the Mediterranean.

VIII. Nothing in the present agreement in any way prejudices existing international engagements which have been registered with the Secretariat of the League of Nations.

IX. If any of the participating Powers notifies its intention of withdrawing from the present arrangement, the notification will take effect after the expiry of thirty days and any of the other participating Powers may withdraw on the
same date if it communicates its intention to this effect before that date.

Done at Nyon this fourteenth day of September nineteen hundred and thirty seven, in a single copy, in the English and French languages, both texts being equally authentic, and which will be deposited in the archives of the Secretariat of the League of Nations.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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Maxime Litvinoff

YUGOSLAVIA

Bojidar Pouritch

In view thereof the undersigned, being authorized to this effect by their respective Governments, have met in conference at Nyon between the 9th and the 14th September 1937, and have agreed upon the following provisions which shall enter immediately into force:

I. The participating Powers will instruct their naval forces to take the action indicated in paragraphs II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.

II. Any submarine which attacks such a ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22, 1930, and confirmed in the Protocol signed in London on November 6, 1936, shall be counter-attack and, if possible, destroyed.
III. The instruction mentioned in the preceding para-
graph shall extend to any submarine encountered in the
vicinity of a position where a ship not belonging to either
of the conflicting Spanish parties has recently been attacked
in violation of the rules referred to in the preceding para-
graph in circumstances which give valid grounds for the
belief that the submarine was guilty of the attack.

IV. In order to facilitate the putting into force of the
above arrangements in a practical manner, the participating
Powers have agreed upon the following arrangements:

1. In the western Mediterranean and in the Malta Chan-
nel, with the exception of the Tyrrhenian Sea, which may
form the subject of special arrangements, the British and
French fleets will operate both on the high seas and in the
territorial waters of the participating Powers, in accord-
ance with the division of the area agreed upon between the
two Governments.

2. In the eastern Mediterranean,
   (a) Each of the participating Powers will operate in its
       own territorial waters;
   (b) On the high seas, with the exception of the Adriatic
       Sea, the British and French fleets will operate up to the
       entrance to the Dardanelles, in those areas where there is
       reason to apprehend danger to shipping in accordance with
       the division of the area agreed upon between the two Gov-
       ernments. The other participating Governments possessing
       a sea border on the Mediterranean, undertake, within the
       limit of their resources, to furnish these fleets any assistance
       that may be asked for; in particular, they will permit them
to take action in their territorial waters and to use such of
their ports as they shall indicate.

3. It is further understood that the limits of the zones re-
ferred to in subparagraphs 1 and 2 above, and their alloca-
tion shall be subject at any time to revision by the particip-
ating Powers in order to take account of any change in
the situation.

V. The participating Powers agree that, in order to sim-
plify the operation of the above-mentioned measures, they
will for their part restrict the use of their submarines in
the Mediterranean in the following manner:

Agreement Supplementary to the Nyon Arrangement,
Geneva, September 17, 1937

Whereas under the Arrangement signed at Nyon on the
14th September, 1937, whereby certain collective measures
were agreed upon relating to piratical acts by submarines
in the Mediterranean, the participating Powers reserved the
possibility of taking further collective measures; and

Whereas it is now considered expedient that such meas­
ures should be taken against similar acts by surface vessels
and aircraft;

In view thereof, the undersigned, being authorized to this
effect by their respective Governments, have met in confer­
ence at Geneva on the seventeenth day of September and
have agreed upon the following provisions which shall enter
immediately into force:

I. The present Agreement is supplementary to the Nyon
Arrangement and shall be regarded as an integral part
thereof.

II. The present Agreement applies to any attack by a sur­
face vessel or an aircraft upon any merchant vessel in the
Mediterranean not belonging to either of the conflicting
Spanish parties, when such attack is accompanied by a vi­
olation of the humanitarian principles embodied in the rules
of international law with regard to warfare at sea, which
are referred to in Part IV of the Treaty of London of April
22nd, 1930, and confirmed in the Protocol signed in London
on November 6th, 1936.

III. Any surface war vessel, engaged in the protection of
merchant shipping in conformity with the Nyon Arrange­
ment, which witnesses an attack of the kind referred to in
the preceding paragraph shall:

(a) If the attack is committed by an aircraft, open fire on
the aircraft;

(b) If the attack is committed by a surface vessel, inter­
evne to resist it within the limits of its powers, summoning
assistance if such is available and necessary.

In territorial waters each of the participating Powers con­
cerned will give instructions as to the action to be taken by
its own war vessels in the spirit of the present Agreement.
Done at Geneva this seventeenth day of September 1937, in the English and French languages, both texts being equally authentic, in a single copy which will be deposited in the archives of the Secretariat of the League of Nations. (League of Nations Document C.409.M.273.1937.VII.)

The submarine rules.—Submarine warfare and piracy were definitely linked together in the resolutions presented by Mr. Root at the Conference on Limitation of Armaments in Washington in 1922. As presented, Mr. Root’s proposal sought to prohibit all use of submarines against merchant vessels and to attach the penalty of piracy to any such employment. As finally embodied in the unratified Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, the destruction of merchantmen without prior visit, search, and placement of the personnel in safety was declared to be a violation of the laws of war subjecting any person in the service of any Power who should violate such a rule, whether or not such person is under orders of a governmental superior, to trial and punishment as if for an act of piracy. This conclusion was reached in spite of the consensus that it was not competent for the five Powers present at the Conference to establish new rules of international law, including the branding of such action as piracy jure gentium. The decision was also taken in spite of the fact that only one delegate, Mr. Hanihara of Japan, raised a question as to the exact meaning of “punishment as if for an act of piracy,” which was brusquely pushed aside by Mr. Hughes and Mr. Root who made no adequate answer and immediately cut off further debate. While the treaty was not ratified, it may be pertinent to point to the carefully studied observation in the comment on the Draft Convention on Piracy of the Harvard Law School Research in International Law that “properly speaking * * * piracy is not a legal crime or offense under the law of nations.”

Part IV of the London Naval Treaty of 1930 invited states to accede to the proposition that according to international law submarines must conform to the rules of surface craft, and that, except in case of resistance to visit and search, merchant vessels must not be destroyed without first
placing the crew, passengers, and ship's papers in safety. Non-conformity by submarines was not branded an act of piracy, nor was any state authorized to bring to trial or to inflict the punishment for piracy upon the officers or crew of any submarine violating the rules. While nine of the states invited to the Nyon Conference had agreed to abide by the rules of this treaty, the Spanish Government had not done so. (N. J. Padelford, “Foreign Shipping during the Spanish Civil War,” American Journal of International law, 1938, pp. 274-275.)

LONDON, NOVEMBER 6, 1936

Whereas the Treaty for the Limitation and Reduction of Naval Armaments signed in London on the 22nd April, 1930, has not been ratified by all the signatories;

And whereas the said treaty will cease to be in force after the 31st December, 1936, with the exception of Part IV thereof, which sets forth rules as to the action of submarines with regard to merchant ships as being established rules of international law, and remains in force without limit of time;

And whereas the last paragraph of Article 22 in the said Part IV states that the high contracting parties invite all other Powers to express their assent to the said rules;

And whereas the Governments of the French Republic and the Kingdom of Italy have confirmed their acceptance of the said rules resulting from the signature of the said treaty;

And whereas all the signatories of the said treaty desire that as great a number of Powers as possible should accept the rules contained in the said Part IV as established rules of international law;

The undersigned, representatives of their respective governments, bearing in mind the said Article 22 of the treaty, hereby request the Government of the United Kingdom of Great Britain and Northern Ireland forthwith to communicate the said rules, as annexed hereto, to the governments of all the Powers which are not signatories of the said treaty, with an invitation to accede thereto definitely and without limit of time.
RULES

(1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

Signed in London, the 6th day of November, nineteen hundred and thirty-six. (British Treaty Series, No. 29, 1936.)

Non-intervention and the Spanish civil strife.—Soon after the outbreak of the fighting in Spain in July 1936, the European powers instituted the scheme of Non-Intervention. This was undertaken primarily for political reasons, the outside states being desperately anxious to avoid involvement in the struggle. The ideological division between the Fascist powers supporting General Franco and those inclining to favor the established republican government made the crisis acute. It was feared that the rival groups outside might come into direct collision as a result of their efforts to supply their Spanish favorites with the sinews of war. The Non-Intervention scheme took the form not of a comprehensive, binding international treaty, but rather of a series of exchanges of notes and of unilateral domestic acts which frequently varied with one another but were generally pat-
terned along the same lines. The nations participating in the arrangement undertook to forbid the sale of arms and implements of war to either side. The Spanish rebels were thus placed upon the same level as the so-called Loyalists, even though there was no belligerency. The whole scheme was unique, and there has been nothing like it in the history of international law. In undertaking these special obligations, the British and French Governments waived the right to assist the government they recognized in Spain. They did so hoping thereby to prevent Italy and Germany from giving governmental aid to the rebels, a right which those two powers did not possess, at least not until they recognized General Franco as the legitimate ruler of Spain in November 1936 after the Non-Intervention plan had supposedly come into operation.

To implement the Non-Intervention accord, a special Scheme of Observation was adopted in May 1937. By its terms warships of Great Britain, France, Italy, and Germany, were to patrol Spanish marginal seas in a zone extending from the 3-mile limit outward for 7 miles. In addition, elaborate plans were made for observers to travel on the ships of third states going to Spain, the idea of all this being to check up on the supplies reaching Spain and to report any infractions of the Non-Intervention accord to a central committee in London. This patrol by war vessels was not a blockade in any sense of the word. The powers engaged were not at war with Spain and were not taking reprisals. The patrol ships had no right of visit and search, and no right to interfere with the vessels of states not parties to the Non-Intervention
agreement. A right of approach belonged to the patrol ships but they could not employ force to ascertain the true character of a vessel under suspicion which flew the flag of a non-signatory power. This situation presented delicate questions for international law. It was unique and went into effect as a special scheme for a special state of affairs. The terms of the observation plan will be found in the appendix to this volume.

(The non-intervention scheme) owes its inception to M. Blum of France and is founded upon an exchange of notes between Britain and France, August 15th, 1936, these notes, which were substantially identical, contained reference to the establishment of a common attitude toward the Spanish strife, a preamble, and three declarations of policy. The preamble recited that the governments, deploring the events in Spain, had decided to abstain rigorously from all interference (de toute ingérence), direct or indirect, in the internal affairs of Spain, on the basis of the desire to avoid complications prejudicial to the good relations between their “Peoples.” They then “declared”: (1) they would prohibit the direct or indirect exportation or reëxportation of all “arms, munitions and materials of war as well as all airplanes, mounted or dismantled, and all ships of war” from their territory to Spanish territories; (2) the prohibitions would apply to contracts in the process of execution; (3) the governments would keep other governments participating in the mutual understanding (cette entente) informed of the measures taken to carry out the prohibitions. The application of the declaration was made contingent upon the adherence of the other government, plus the governments of Germany, Italy, the Soviet Union, and Portugal.

Twenty-seven governments eventually made similar declarations, in one form or another. However, the composition and contents of the notes varied so much it can hardly be said that all of the states declared their intention of doing identically the same things. Above all, it must be emphasized that there was no one instrument which all signed or adhered
to, in spite of constant employment of the term "agreement." The agreement was merely a concert of policy, and its fulfillment depended entirely upon the initiative of each state.

Analysis of the notes reveals that 15 (aside from those of Britain and France) of the 27 repeated verbatim both the preambulatory reasons for making the declaration and the three basic declarations of policy. Between these states and France and Great Britain then, there was a community of policy on the steps to be taken and on the reasons for taking them.

The notes of six states repeated verbatim the three seriatim declarations but omitted the preamble. By omitting the preamble these states left themselves free to engage in all forms of interference or intervention not specifically set forth in the first two declarations, while the seventeen others noted above agreed to refrain from all interference, direct or indirect. Legally speaking, these six states restricted themselves less than did the others, and they are hardly to be condemned for allowing volunteers, officers, financial, and moral aid passing to Spain, public opinion and newspapers notwithstanding. (N. J. Padelford, "The International Non-Intervention Agreement and the Spanish Civil War," American Journal of International Law, Oct. 1937, pp. 579–580.)

The United States and Spanish civil strife.—The American Government, acting independently, enacted legislation in harmony with the provisions of the European non-intervention scheme. On January 8, 1937 a special law of Congress made unlawful the export of arms, ammunition, or implements of war to Spain during the existence of the state of civil strife. The so-called neutrality law of May 1, 1937, included a provision dealing with civil strife and under that statutory authorization the President proclaimed again an embargo on armed shipments to Spain. The United States thus dealt impartially with both sides, despite the fact that we were not really neutral, a status impossible without the existence of war.
Special act of Congress in regard to Spain.—

JOINT RESOLUTION TO PROHIBIT THE EXPORTATION OF ARMS, AMMUNITION, AND IMPLEMENTS OF WAR FROM THE UNITED STATES TO SPAIN, JANUARY 8, 1937

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That during the existence of the state of civil strife now obtaining in Spain it shall, from and after the approval of this Resolution, be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to Spain or to any other foreign country for transshipment to Spain or for use of either of the opposing forces in Spain. Arms, ammunition, or implements of war, the exportation of which is prohibited by this Resolution, are those enumerated in the President's Proclamation No. 2163 of April 10, 1936.

Licenses heretofore issued under existing law for the exportation of arms, ammunition, or implements of war to Spain shall, as to all future exportations thereunder, ipso facto be deemed to be cancelled.

Whoever in violation of any of the provisions of this Resolution shall export, or attempt to export, or cause to be exported either directly or indirectly, arms, ammunition, or implements of war from the United States or any of its possessions, shall be fined not more than ten thousand dollars or imprisoned not more than five years, or both.

When in the judgment of the President the conditions described in this Resolution have ceased to exist, he shall proclaim such fact, and the provisions hereof shall thereupon cease to apply.

Approved, January 8, 1937, at 12.30 p.m. (Public Resolution, No. 1, 75th Cong.)

Sections of the Act of May 1, 1937.—

Sec. 1. "(c) Whenever the President shall find that a state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign state would threaten or endanger the peace of the United
States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign state, or to any neutral state for transshipment to, or for the use of, such foreign state.”

“Sec. 10. Whenever the President shall have issued a proclamation under the authority of section 1, it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel engaged in commerce with any belligerent state, or any state wherein civil strife exists, named in such proclamation, to be armed or to carry any armament, arms, ammunition, or implements of war, except small arms and ammunition therefor which the President may deem necessary and shall publicly designate for the preservation of discipline aboard such vessels.” (Public Res. No. 27, 75th Cong., ch. 146, 1st sess.)

Proclamation in regard to arms.—

American vessels engaged in commerce with Spain

Section 10 of the joint resolution of Congress approved May 1, 1937, amending the joint resolution approved August 31, 1935, provides as follows:

“Sec. 10. Whenever the President shall have issued a proclamation under the authority of section 1, it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel engaged in commerce with any belligerent state, or any state wherein civil strife exists, named in such proclamation, to be armed or to carry any armament, arms, ammunition, or implements of war, except small arms and ammunition therefor which the President may deem necessary and shall publicly designate for the preservation of discipline aboard such vessels.”

Section 11 of the said joint resolution provides as follows:

“Sec. 11. The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such officer or officers, or agency or agencies, as he shall direct.”
The President’s proclamation of May 1, 1937, issued pursuant to the provisions of section 1 of the above-mentioned joint resolution provides in part as follows:

“And I do hereby delegate to the Secretary of State the power to exercise any power or authority conferred on me by the said joint resolution, as made effective by this my proclamation issued thereunder, and the power to promulgate such rules and regulations not inconsistent with law as may be necessary and proper to carry out any of its provisions.”

In pursuance of those provisions of the law and of the President’s proclamation of May 1, 1937, which are quoted above, the Secretary of State announces that American vessels engaged in commerce with Spain may carry such small arms and ammunition as the masters of these vessels may deem indispensable for the preservation of discipline aboard the vessels. (Press Releases, Vol. 16, No. 396.)

Attacks on foreign ships during Spanish civil strife.—During the Spanish conflict the ships of third states were frequently molested both inside and outside of territorial waters by surface vessels, aircraft and submarines of the insurgent and government forces. These attacks were entirely unlawful and in many cases foreign powers have intervened both to protest sharply and to protect their shipping. Following are some instances of such unlawful attacks:

The Nantucket Chief.—Mr. T. Monroe Fisher, American vice consul at Palma de Mallorca, reported to the Department through the consulate at Marseille that he was informed by local naval authorities of the seizure of the Nantucket Chief on January 18, 1938, by Nationalist naval vessels. The ship is now under the control of a Nationalist naval officer. The manifest indicates that the vessel has a cargo of gasoline and kerosene shipped from a Russian port and destined for Barcelona.

The crew numbers about 30, of whom about 27 are American citizens, 1 a Finnish citizen, and 2 British subjects.

The American oil tanker Nantucket Chief was seized by the naval forces of General Franco on the night of January
17, 1938, in latitude 40° 45' N., longitude 3° 45' E., approximately 48 miles north of the Balearic Islands and 80 miles southeast of the nearest point on the Spanish coast. At the time of seizure the tanker was carrying a cargo of petroleum from the Russian Black Sea port of Tuapse to Barcelona, under charter to the Spanish petroleum monopoly. The vessel was taken to Palma de Mallorca and the Captain, Mr. J. E. Lewis, was taken ashore and imprisoned on January 26 on charges not known to the Department.

The Nantucket Chief is a vessel of American registry, and the captain and most of the crew are of American nationality.

The Nantucket Chief is owned by the Nantucket Chief Steamship Co., a corporation organized under the laws of the State of Delaware.

Representations were made informally to General Franco through the American Ambassador to Spain, temporarily stationed at St. Jean de Luz, France, with a view to the immediate release of this American vessel, of the captain, and of the crew.

The Department is now informed that the Nantucket Chief has left Palma de Mallorca for a mainland port or ports, and that after the discharge of its cargo the vessel and crew will be set at liberty. The Department is further informed that Capt. J. E. Lewis, who is still in prison at Palma, will be released within a few days.

Consul T. Monroe Fisher at Palma has reported (Feb. 10, 1938) to the Department of State that Capt. J. E. Lewis was released and left Wednesday morning by plane for Cádiz en route to Málaga to join the Nantucket Chief. He had been well treated while imprisoned. He had been slightly ill with influenza and was given proper medical attention.

Consul Leo J. Callanan at Málaga reported this afternoon that Captain Lewis arrived at Málaga this morning and has resumed charge of the Nantucket Chief. The Department of State has not yet received word regarding the release of the ship although yesterday it did have a message giving the information that orders had been issued for the release of the ship. (Press Releases, Vol. XVIII, Nos. 436, 437.)
The U. S. S. Kane.—The Secretary of State sent the following telegraphic instruction last night to the American Embassy at Madrid:

"August 30, 1936.

"American Embassy,
"Madrid, Spain.

"The United States Destroyer Kane left Gibraltar at 8:12 a.m. August 30, en route to Bilbao to assist in the work of evacuating American nationals. According to report from her Commanding Officer, at 4:10 p.m., August 30, while the vessel was at 36 degrees, 33 minutes north and 7 degrees, 35 minutes west (approximately 38 miles from the Spanish coast) an unidentified tri-motored, low winged monoplane flew over the Kane and dropped two bombs which exploded near the vessel. The Kane was flying the American flag at her foremast head and in addition had an American ensign horizontal on top of the well deck awning. When this attack was made, the Kane increased her speed to maneuver away from the plane. At 4:25 p.m. the plane again flew over the Kane and dropped a third bomb. At 4:26 p.m. the Kane's anti-aircraft gun fired two rounds in the direction of the plane. At 4:32 p.m. the plane again flew over the Kane and dropped three more bombs, making a total of six. The Kane's antiaircraft gun fired nine rounds in the direction of the plane during its approach and retreat.

The attitude of the American Government in respect to the conflict in Spain is well known. The American Government has stressed the complete impartiality of its attitude and has publicly stated that, in conformity with its well established policy of non-interference with internal affairs in other countries, either in time of peace or in the event of civil strife, it will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation.

"Since the Government forces in Spain have, in the friendliest spirit, made every possible effort to avoid injury to American nationals and American property, it can only be assumed that the attack on the United States Destroyer Kane, if made by a Government plane, was due to her
identity having been mistaken for a vessel of the opposing forces. Because of the friendly attitude of the Spanish Government toward the United States and the absence of any motive whatsoever for an attack upon an American vessel, it is not conceivable that a Government plane would knowingly make such an attack. The American Government feels confident that it is fully understood in every quarter that the sole purpose of the presence of American naval vessels about the shores of Spain is to afford facilities for the removal of American nationals from Spain.

"Since the plane making the attack was unidentified, the President has directed that this incident be brought to the attention of the Spanish Government through you and informally, with no intention as to recognition, to the attention of General Franco through the American Consul at Seville, with the request that both sides issue instructions in the strongest terms, as the American Government feels confident they will desire to do, to prevent another incident of this character.

"Take up this matter immediately with the Spanish Government in the sense of the foregoing, endeavor to obtain a categorical statement as to whether the plane making this attack was a Government plane, and urge and insist upon definite assurance that appropriate instructions will immediately be issued to the Government armed forces. Telegraph immediately and fully results of your representations." (Press Releases, Vol. XV, No. 363.)

**Attack in British waters.**—The British Government protested to General Francisco Franco today against the violation of British territorial waters by Insurgent vessels in their action against the Loyalist destroyer José Luis Diez on Dec. 30. Britain reserves the right to claim compensation for injuries to four British subjects injured by shell splinters and damaged property.

The holding of the destroyer by British authorities at Gibraltar is described here as unusual, although not irregular. The ship is not interned but her crew, having failed to remove her from British territorial waters within the period for which she received permission to stay, has been
repatriated. The ship remains immobilized although presumably she would be immediately handed over if the Spanish Government asked for her and arranged to remove her without violation of territorial waters. Such a possibility, however, seems remote at present. (New York Times, January 12, 1939.)

The Wisconsin.—The American freighter Wisconsin, under command of Captain Hiram Taft, left Barcelona today for an undisclosed port, so it is now permissible to tell you how an armed Rebel trawler fired four shots at her off Gibraltar and tried to capture her.

Captain Taft, who is a Yankee, has been carrying on a dangerous Spanish trade all the year through bombings, mutinies and other dangers. He refused to halt when attacked and pushed straight ahead, for his ship’s American flag was flying and he carried a legal cargo of lentils, rice and other food.

It was a case of fortune favoring the brave, for the Rebel trawler developed engine trouble just at the crucial moment and had to abandon the chase. She signaled ahead to a Rebel cruiser, which, however, did not molest the Wisconsin.

Captain Taft made a full report to the United States Consul at Barcelona, who in turn forwarded the information to the State Department.

As Captain Taft told the writer the story in the relative safety of a Barcelona hotel this is what happened:

FRENCH VESSEL ATTACKED

Eighty miles west of Gibraltar the Wisconsin heard an S O S from a French ship en route to Brest, France, from Oran, Algeria, and in later messages learned that the French ship had been fired on, stopped and boarded by Spanish Rebels, who had started to take her to Ceuta, Spanish Morocco, when a French cruiser came to her aid.

The Rebels then gave up their prey, but Captain Taft was heading for the same spot and foresaw trouble. He radioed to Gibraltar, asking if an American destroyer or cruiser were there, but received a negative reply. This was in the evening on Nov. 16.
At 1 A.M. the next day the radio officer informed Captain Taft that another French vessel had been captured and apparently had not been rescued.

About 5 o'clock the same morning, the captain continued, "when about five and one-half miles south southeast of Gibraltar, an armed trawler proceeded alongside, sweeping the Wisconsin with a searchlight. At that time the American flag was flying from the flagstaff and huge American flags were painted on the vessel's sides. The trawler kept the searchlight on the flagstaff about two minutes and the flag was open to windward.

HALTS IN MIDST OF ATTACK

"The trawler proceeded ahead of the Wisconsin, fired a shot across the bow and ordered me to halt, which I refused to do. Then another shot was fired and this time it was not a blank for shrapnel whistled over me and the chief officer. Two more shots were fired, after which the trawler stopped, evidently because of engine trouble, but it kept flashing its searchlight in the air and then at the Wisconsin.

"About ten minutes later we were swept by two searchlights from a Spanish Rebel cruiser which was lying to the east of the Strait. She kept one searchlight on the American flag about a minute but did not hail and I proceeded out of the Strait of Gibraltar."

This was a typical incident of the Spanish trade. It is a hard, dangerous game but it has its rewards in money and excitement and, in Captain Taft's case, moral satisfaction for the wheat, beans, rice and medical supplies he has brought to Loyalist Spain on repeated trips are desperately needed. (New York Times, December 4, 1938.)

The Palos.—That the Fascist Bloc did not confer belligerent status upon the Spaniards by their (recognition) of the 19th of November, 1936 was clearly manifested by the German treatment of the Loyalist seizure of the steamer Palos, December 24, supposedly en route from Hamburg to Vigo, the German ship was picked up by Basques in * * * the Bay of Biscay and taken in with 1,500 tons of "prohibited freight" and two Spanish insurgent agents on board.
The German Government, in demanding the release of the ship, alleged "the Palos was seized far outside the territorial waters of the Spanish coast, namely 23 miles northeast of Cape Machichaco. The captain of the Palos refused to sign a protocol according to which the Palos supposedly was seized five miles off the coast, although this alleged location of seizure also lies outside the three mile limit and therefore outside the sovereign territory of Spain." The Basques denied that the arrest took place outside of their jurisdiction, but refused to specify exactly where it did occur.

If the incident occurred where the Germans charged it did, it must be said that the vessel was in a strange location for a course Hamburg-Vigo. If the ship was seized five miles from the coast, the Spaniards might maintain that under their historic interpretation of the principle of jurisdiction in marginal waters—that is to say, out to six miles from the coast—they were acting correctly in seizing the German boat.

If freedom of passage through marginal waters were demanded by Germany, it must be admitted that, while many believe there is a right of free passage in time of peace, the law is not entirely certain in this regard, and especially in time of quasi-peace such as prevails in Spain at the moment.

Whatever may have been the locus of the seizure of the Palos, and regardless of whatever merits there may have been in the seizure by the Spaniards in the first instance, Germany demanded the release of the vessel, her cargo, and the Spanish subjects on board. Failing to secure the release of the contraband and the Spanish rebel passengers, the German cruiser Koenigsburg seized the 1,500-ton Spanish steamer Argonne on January 1, attempted to seize the steamer Soton January 2, and seized the steamer Marta Junquera January 4. The government communique justified the action in these words:

"After the Red Rulers in Bilbao refused to surrender to the German cruiser Koenigsburg the passengers and part of the cargo retained from the steamer Palos, the German Government, as previously announced, saw itself compelled to enforce its demands through counter measures. In pursuit of this necessity to defend German sovereign rights
against an act of piracy a Red Spanish steamer has been seized provisionally by the German naval forces in Spanish waters."

The loyalists were warned that if their demands were not met by January 8, "the Spanish steamers and their cargoes will be utilized by the German Government in their account with the Spanish Government recognized by it. In case of repetition of acts of piracy against German merchant vessels, the German Government will be compelled to take further measures." The vessels were turned over to the rebels on the failure of the Basques to hand over the goods and passengers.

The tenor of the German ultimata and the reprisals taken indicate clearly that the Reich did not recognize that the Spaniards possessed belligerent rights. Not enjoying such rights respecting German vessels on the high seas, the Germans were quite within bonds in their demands and, failing to secure them, in taking such reprisals as seemed a _quid proquo_ for the tort committed. (N. J. Padelford, "International Law and the Spanish Civil War," American Journal of International Law, April, 1937, pp. 237-239.)

**British policy in regard to attacks.**—The British Government has made it abundantly clear that it does not regard the existence of civil war in Spain as conferring license upon any Spanish forces to interfere with British shipping on the high seas, and that it will not tolerate even such interference as the visiting of British ships in order to establish their character. Still less, of course, does it tolerate any more violent interference, and the British Navy has orders to afford protection to all British shipping against attack upon unarmed merchantmen provided they are its own. It has persistently advanced the principle that international law no less than the dictates of humanity and civilization forbids such attacks even in time of war * * *.

It is no justification of these crimes to plead that neither Spanish Government has acceded to the _Procès-Verbal_ adopted by the rest of the world; or that since they are not accorded the belligerent right of visit and search of merchant ships at sea, knowing that their enemies' ships are using false
colors, they have no alternative but to attack at sight. A new
government seeking recognition does not recommend itself to
the world by flouting the principles adopted by the world,
even on the plea that its rival has not formally adopted them;
and even the accordance of belligerent rights would not carry
license to subject the ships even of the rival Government in
its own country to the treatment inflicted of late upon all and
sundry *. * *. (London Times, August 18, 1937.)

The observation scheme and visit and search.—
In part (a) of Situation III the cruiser Fona of
state F is functioning in a double capacity: it is
a patrol ship under the Observation scheme and it
is a national warship which has the duty to protect
the commerce of state F. Though the Feran is viol­
ating both the Non-Intervention scheme and the
domestic law of state F, since it is carrying aircraft
to state B, the Cape, the cruiser of the Commoners,
possesses no rights of visit and search. Enforce­
ment of the domestic legislation and of the special
scheme by which the Feran is bound, is not the
function of an insurgent warship whose actions
must be controlled entirely by international law.
As pointed out above, insurgent craft have none of
the rights of belligerents at sea and any interfer­
ence with the Feran is illegal. It is for the Fona
to warn the master of the Feran that the latter is
infringing upon the special rules, and it is the duty
of the Fona to protect the Feran from any inter­
nationally illegal molestation. A cruiser of the gov­
ernment B since it is a warship of a recognized
power, would have the right to approach the Feran
(The Marianna Flora, 11 Wheaton, 1) but it would
have no authority to visit and search, so that its
rights would not differ greatly from those of the
Cape.
In part (c) the Gyra is violating no law, either domestic or international, and is engaged upon a perfectly lawful voyage. Oil is not a commodity which comes under the heading of "Arms, Ammunition and Implements of War" and thus was not prohibited by the Non-Intervention plan or by the domestic law of state G. The carrying of arms by the Gyra for the preservation of discipline was lawful. (See Sec. 10 of the American law above.) Like the Cape in part (a) the Bain had no right to summon the Gyra to come to for visit and search. It is incumbent on the Geno, the cruiser of state G, to come to the Gyra's assistance and to drive off the Bain by force if necessary. The Geno would have no right, if it arrives too late to save the Gyra, to make a counter-attack upon the Bain, either under general international law or the special Geneva Arrangement. Warships summoned to aid merchant vessels are limited to the use of force for "preventive" purposes, not for punitive. Force "can never be exercised with a view to inflicting punishment. Retaliation for acts already committed is not allowable." (United States Navy Regulations, Art. 723.) Where submarines were concerned, the Nyon accord permitted counter-attacks for purposes immediately punitive but ultimately preventive. Under the Geneva accord the cruiser of state H, if it actually witnessed the attack by the Bain, could intervene to protect the merchant vessel to the best of its ability.

Resistance to illegal visit and search.—Even if there had been belligerency the Bain would have had no right to sink the Gyra merely because the latter resisted visit and search. If a summoned
vessel resists or takes to flight it may be pursued and brought to by forcible means if necessary.

The United States regarded resistance or flight as ground for using force sufficient to cause the merchant vessel to lie to * * * but not a ground for sinking the vessel. Of course the * * * vessel might be sunk in the exercise of the right, but the use of force was held to be restricted to that necessary to bring the vessel to, and forcible resistance by the merchant vessel was not in itself a ground for sinking (it) but a just ground for its condemnation. (Naval War College Situations, 1934, p. 50.)

Section 4295 U. S. Revised Statutes: The commander and crew * * * may oppose and defend against any aggression * * * by any armed vessel * * * not being a public armed vessel of some nation in amity with the United States.

As the action of the Bain was entirely illegal, the Gyra had the right to resist, though such action in the face of overwhelming force may have been somewhat quixotic. Orders issued by the United States authorities enjoin resistance to illegal visit and search, even by a recognized government. (Naval War College Situation 1912, p. 27.) It is true that the arms on board the Gyra were there “for the preservation of discipline” and resistance to legal visit and search would have been unjustifiable, for the Gyra would then be an armed merchantman. In the light, however, of the practice and orders concerning illegal interference, it seems reasonable to declare the Gyra’s resistance a legal, though perhaps a foolish, act.

Illegal attacks by submarine.—In part (b) the Iris with its cargo of barbed wire was breaking no domestic or international law. Any possible infraction of the Non-Intervention scheme need not be considered because state I was not a party to
that arrangement. The submarine acted illegally whether it encountered the *Iris* inside or outside the 3-mile limit. Within territorial waters a submarine, disclosing its identity, would have the right to stop the *Iris* and to direct it but in no circumstances to destroy it. Outside the 3-mile limit a properly marked submarine of state B might approach the *Iris* but it could not visit and search it or order its destruction. Visit and search by the established government or by the rebels during insurgency is illegal. (Naval War College Situation, 1912, pp. 21-24; 2 Moore, "International Arbitrations," pp. 1021.)

Even if the situation had been one of belligerency, the *Iris* could not legally have been ordered about in this fashion. The submarine should have shown its flag and should have visited and searched the *Iris* before ordering destruction. According to the London rules of 1930 there could be no destruction of the merchant ship, even if the lives of those on board were saved, unless the ship had been captured, and then it could have been destroyed only if taking it into a port would have involved danger to the submarine and if the ship's papers had been placed in safety. (See also Arts. 49 and 50 of the Declaration of London, 1909.)

Thus on every count the submarine was guilty of unlawful action. The Nyon arrangement was designed to meet just such a situation as this, and though the ship's personnel was given a chance for safety, the submarine was attacking "in a manner contrary to the rules of international law referred to" in the London Treaty of 1930 and the Protocol of 1936. Whereas normally the *Iona*
would have the right to employ only preventive force to protect the *Iris*, as a warship of a state signatory to the Nyon treaty it may use force beyond that which is actually needed to save the *Iris* and may counter-attack the submarine. This was the special grant of authority in the Nyon convention which was drafted with a view to halting attacks made in an illegal manner, attacks performed by legal methods being left subject to the general rules which permit preventive force by the protecting warship of a merchant vessel’s own state. The cruiser of State H likewise should intervene to attack the submarine. A submarine of the Commoners or of state D acting in similar illegal fashion would be subject to the same drastic treatment.

What constitutes an “attack.”—No actual firing of a projectile or sinking of a ship has to take place for an act or a series of acts to constitute an “attack.” In this instance it is not necessary to wait until the torpedo is launched before the submarine can be considered to have attacked the *Iris*. The word “attack” covers more than the mere employment of force. To reason otherwise would be to go counter to all the dictates of law and common sense. A threat can be an attack just as well as the carrying out of that threat, and the notice to the *Iris* in this case may be likened to an “assault” in domestic law.

It is not essential in order to constitute a wrong that the wrongdoer shall have fully carried out his intention nor that any actual damage shall result * * *(he is) liable if his conduct was such as reasonably created in the plaintive the belief that such ability and intent existed. (A. B. Hall, “Elementary Law Manual,” p. 52.)
Résumé.—In times of civil strife when there is no recognition of belligerency, the merchant ships of third states are not subject to visit and search on the high seas and it is the duty of war vessels of those states to protect their nations' merchant shipping from interference. Within territorial waters a parent state, in cases of insurgency, may close a port provided it does so "effectively," and the rebels too within the 3-mile limit may prevent supplies from reaching their domestic adversaries. These are the rules for the usual instances of insurgency. In particular cases, like that of Spain recently, and that of state B in Situation III, foreign powers may adopt special measures like those of Non-Intervention, the American legislation on civil strife, and the Nyon and Geneva arrangements. Such actions, however, are based not upon international law, but upon consideration of politics and expediency at the moment. In this situation, therefore, the cruisers Fona, Iona, and Geno are obligated to employ force against the cruisers and submarines which are making unwarranted attacks upon innocent (at least insofar as international law is concerned) merchant ships. Special rights attach to the cruisers of I and H under the Geneva and Nyon Conventions, and the cruisers of F and G, in addition to protecting ships of their fellow nationals, have special duties under the Non-Intervention scheme of Observation. The rules of the usual law and the stipulations of these new and unique conventions combine to form the basis for the solution.
(a) The Fona should notify the Feran that it is coming to its aid to protect it against an illegal act. The Fona also should notify the Cape that the latter has no right to interfere with the Feran and should threaten the use of force against the Cape if it refuses to desist. The rights would be the same if the summons had been by a cruiser of state B.

(b) The Ionan should notify the Iris to try to escape and should notify the submarine that it has no rights in this situation and that force will be used against it for the protection of the Iris. If the Ionan arrives before the Iris is actually attacked it should drive off the submarine by force, and if it reaches the place of attack too late to save the Iris, it should counter-attack the submarine. The rights would be the same if the submarine had been under the flag of the Commoners or that of state D.

(c) The Geno should notify the Gyra to cease its resistance and should notify the Bain that the latter has no right either to visit and search or to sink the Gyra and should threaten force to compel it to desist. The rights would be the same if the summons was by a cruiser of the Commoners.

The cruiser of state H should take no action in the case of the Feran. In the case of the Iris, it may intervene and may counter-attack and destroy the submarine. In the case of the Gyra, if it witnessed the attack, it may intervene to protect the Gyra but has no authority to counter-attack or destroy the Bain.