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International Law Situations

With Solutions and Notes

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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 II

FORCE SHORT OF WAR: BLOCKADE AND OCCUPATION IN TIME OF PEACE

There are strained relations between states M and N. Armed land and naval forces of state N enter the jurisdiction of state M without declaration of war and there claim the rights to which a military occupant would be entitled. In state M, states S and T, by virtue of treaty agreement with state M, have special rights in respect to exemption of persons and property from local jurisdiction. State N announces a pacific blockade of the coasts and ports of state M.

(a) In its regular voyage the Safa, a freighter lawfully flying the flag of state S, with a cargo of munitions, is about to enter port O of state M when summoned by radio from an aircraft to lie to for 24 hours or until a cruiser of state N arrives to visit and search the Safa. The Safa asks aid and instructions from the Sogu, a vessel of war of state S which is in port. What action should the commander of the Sogu take?

(b) A commercial aircraft, the T-21, registered in state T, is on the following day, when entering port O, ordered by the Noan, a cruiser of state N, to land at a nearby airport, which is in the control of forces of N, in order that its identity and right to pass may be established. The T-21 continues its flight toward port O and is fired upon by the Noan and damaged so that it is obliged to land on
the beach near the Tafu, a cruiser of state T. The Noan continues to fire upon the T-21. What action should the commander of the Tafu take?

(c) Under the treaty, the consul of state T has complete jurisdiction over nationals of state T at Mount, a city of state M up a river and 150 miles from the coast. Later the Tafu anchors off Mount. The land and air forces of state N seize the city and order two nationals of state T, accused of a crime against citizens of state M to be turned over to authorities of N for trial. The consul of state T demands that they be turned over to him, and when the authorities of N demand the two nationals from state M, the consul requests the aid of the commander of the Tafu in obtaining and trying the accused. What action should the commander of the Tafu take?

SOLUTION

(a) If the airplane is still with the Safa, the commander of the Sogu should direct the Safa to lie to, should proceed to the Safa to protect it, and should notify the commander of the N forces that the Safa is a vessel of state S and is not to be molested, identification being all that the Safa is legally required to furnish the airplane. If the airplane has left the Safa, the Sogu should direct the latter to proceed into the port, and, if deemed essential for the protection of the Safa, the Sogu should accompany it into the port.

(b) The commander of the Tafu should warn the Noan that if the latter continues to fire upon the T-21, he will fire upon the Noan to force it to desist. He should attempt to interpose the Tafu between the Noan and the airplane with the object
of halting the firing and should send out a small boat to rescue the survivors of the T-21.

(c) The commander of the Tafu should consult with the consul of state T at Mount and should report the incident to his superiors in the Navy Department. A demand for the return of the nationals of state T or a threat of the use of force on the part of the commander of the Tafu would not be warranted by the facts of this situation. As long as no immediate threat to the lives and property of state T nationals is involved, the matter is one for diplomatic negotiation between states T and N.

NOTES

"Strained relations."—The strained relations between states M and N do not constitute a state of war. War in the legal sense depends for its existence not merely upon the presence of an armed clash (the objective criterion of war) but also upon the intent either of one of the parties to the clash or upon the intent of a third party or parties (the subjective criterion). In the past, at least, war in the legal sense has been a status resulting from some sort of a blend of these two criteria, although it is to be remembered that legal war may exist without the use of force and that all use of force is not war. The anomalies of this situation have been so great and definition of war has become so elusive, that strong suggestions are being made either to eliminate war entirely from the vocabulary of international law, or to make war in the legal sense practically synonymous with the use of force. In the present situation, however, it is plain that though there is an armed clash between states
M and N there is no war. There is no question, therefore, of belligerent rights or of neutral rights in the strict legal sense. The situation is obviously analogous to the Sino-Japanese conflict which began in 1937.

**Nature of the Sino-Japanese clash.**—

May the present extensive military operations of Japanese forces on Chinese soil be explained on the ground of war?

No declaration of war has been made by either side in the conflict, although the Hague Convention of 1907, to which China and Japan are parties, provides that hostilities should not commence without previous and explicit warning to the other party and notice to neutral Powers. The exercise of belligerent rights of blockade, visit, search and capture have not been resorted to by either side. Diplomatic relations have not been broken off although the heads of missions retired after the fall of Nanking. Consuls generally remain at their posts and commercial intercourse has continued, although naturally on a much reduced scale. On the other hand, extensive military operations have been in progress between the Japanese and Chinese armies since early July, 1937. Something like a million troops are said to be engaged on both sides, and something over thirty-five warships have taken part in the operations. Bombardments by warships, heavy artillery and war planes have been extensive and destructive to life and property. As early as August 25 Admiral Hasegawa declared a blockade of certain Chinese coasts against Chinese vessels, and Chinese vessels running the blockade have been captured and sunk. Provisional governments in the nature of military governments supported by armed forces have been set up by Japan in the conquered territory. Neutrals have been warned to withdraw from areas of hostilities, and encroachments have been made by Japanese forces upon the foreign settlement areas. (L. H. Woolsey, American Journal of International Law, Vol. 32, p. 317.)

**Report of the Nine Power Brussels Conference.**—Following is the text of the report adopted
on November 24, 1937, by the Nine Power Conference at Brussels, Belgium:

"The Conference at Brussels was assembled pursuant to an invitation extended by the Belgian Government at the request of His Majesty's Government in the United Kingdom with the approval of the American Government. It held its opening session on November 3, 1937. The Conference has now reached a point at which it appears desirable to record the essential phases of its work.

"In the winter of 1921–22 there were signed at Washington a group of interrelated treaties and agreements of which the Nine Power Treaty regarding principles and policies to be followed in matters concerning China constituted one of the most important units. These treaties and agreements were the result of careful deliberation and were entered into freely. They were designed primarily to bring about conditions of stability and security in the Pacific area.

"The Nine Power Treaty stipulates in Article one that—

"'The Contracting Powers, other than China agree:

"'(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;

"'(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;

"'(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;

"'(4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States.'

"Under and in the light of these undertakings and of the provisions contained in the other treaties, the situation in the Pacific area was for a decade characterized by a substantial measure of stability, with considerable progress towards the other objectives envisaged in the treaties. In recent years there have come a series of conflicts between
Japan and China, and these conflicts have culminated in the hostilities now in progress.

"The Conference at Brussels was called for the purpose, as set forth in the terms of the invitation 'of examining in conformity with Article seven of that treaty, the situation in the Far East and of studying peaceable means of hastening an end of the regrettable conflict which prevails there.' With the exception of Japan, all of the signatories and adherents to the Nine Power Treaty of February 6, 1922 accepted the invitation and sent representatives to Brussels for the purpose stated in the invitation.

"The Chinese Government, attending the Conference and participating in its deliberations, has communicated with the other parties to the Nine Power Treaty in conformity with Article 7 of that treaty. It has stated here that its present military operations are purely in resistance to armed invasion of China by Japan. It has declared its willingness to accept a peace based upon the principles of the Nine Power Treaty and to collaborate wholeheartedly with the other powers in support of the principle of the sanctity of treaties.

"The Japanese Government in replying with regret that it was not able to accept the invitation to the Conference affirmed that 'the action of Japan in China is a measure of self defense which she has been compelled to take in the face of China's fierce anti Japanese policy and practice and especially by her provocative action in resorting to force of arms; and consequently it lies, as has been declared already by the Imperial Government, outside the purview of the Nine Power Treaty'; and advanced the view that an attempt to seek a solution at a gathering of so many powers 'would only serve to complicate the situation still further and to put serious obstacles in the path of a just and proper solution'.

"On November 7, 1937 the Conference sent through the Belgian Government to the Japanese Government a communication in the course of which the Conference inquired whether the Japanese Government would be willing to depute a representative or representatives to exchange views with representatives of a small number of powers to be chosen for that purpose, the exchange of views to take place
within the framework of the Nine Power Treaty and in conformity with the provisions of that treaty, toward throwing further light on points of difference and facilitating a settlement of the Sino-Japanese conflict. In that communication the representatives of the states met at Brussels, expressed their earnest desire that peaceful settlement be achieved.

"To that communication the Japanese Government replied in a communication of November 12, 1937 stating that it could not do otherwise than maintain its previously expressed point of view that the present action of Japan in her relations with China was a measure of self defense and did not come within the scope of the Nine Power Treaty; that only an effort between the two parties would constitute a means of securing the most just and the most equitable settlement, and that the intervention of a collective organ such as the Conference would merely excite public opinion in the two countries and make it more difficult to reach a solution satisfactory to all.

"On November 15 the Conference adopted a declaration in the course of which it affirmed that the representatives of the Union of South Africa, the United States of America, Australia, Belgium, Bolivia, Canada, China, France, the United Kingdom, India, Mexico, Netherlands, New Zealand, Portugal, and the Union of Soviet Socialist Republics consider this conflict of concern in fact to all countries party to the Nine Power Treaty of Washington of 1922 and to all countries party to the Pact of Paris of 1928 and of concern in fact to all countries members of the family of nations."

"In the presence of this difference between the views of the Conference and of the Japanese Government there now appears to be no opportunity at this time for the Conference to carry out its terms of reference insofar as they relate to entering into discussions with Japan towards bringing about peace by agreement. The Conference therefore is concluding this phase of its work and at this moment of going into recess adopts a further declaration of its views.

"The text of the communication sent to the Japanese Government on November 7, 1937 reads as follows:

"The representatives of the states met in Brussels on November 3, last, have taken cognizance of the reply which
the Japanese Government sent in of October 27 to the invitation of the Belgian Government, and the statement which accompanied this reply.

"In these documents the Imperial Government states that it cherishes no territorial ambitions in respect of China and that on the contrary it sincerely desires "to assist in the material and moral development of the Chinese nation", that it also desires "to promote cultural and economic cooperation" with the foreign powers in China and that it intends furthermore scrupulously "to respect foreign rights and interest in that country."

"The points referred to in this declaration are among the fundamental principles of the Treaty of Washington of February 6, 1922 (The Nine Power Treaty). The representatives of the states parties to this treaty have taken note of the declarations of the Imperial Government in this respect.

"The Imperial Government moreover denies that there can be any question of a violation of the Nine Power Treaty by Japan and it formulates a number of complaints against the Chinese Government. The Chinese Government for its part contends that there has been violation, denies the charges of the Japanese Government and, in turn, makes complaint against Japan.

"The treaty has made provision for just such a situation. It should be borne in mind that the exchange of views taking place in Brussels is based essentially on these provisions and constitutes "full and frank communication" as envisaged in Article VII. This Conference is being held with a view to assisting in the resolving by peaceful means of a conflict between parties to the treaty.

"One of the parties to the present conflict, China, is represented at the Conference and has affirmed its willingness fully to cooperate in its work.

"The Conference regrets the absence of the other party, Japan, whose cooperation is most desirable.

"The Imperial Government states that it is "firmly convinced that an attempt to seek a solution at a gathering of so many powers whose interests in East Asia are of varying degree, or who have practically no interests there at all, will only serve to complicate the situation still further and
to put serious obstacles in the path of a just and proper solution."

"It should be pointed out that all of these powers which are parties to the treaty are, under the terms of this instrument, entitled to exercise the rights which the treaty confers upon them; that all powers which have interests in the Far East are concerned regarding the present hostilities; and that the whole world is solicitous with regard to the effect of these hostilities on the peace and security of the members of the family of nations.

"However, the representatives of the states met at Brussels believe that it may be possible to allay Japan's misgivings referred to above; they would be glad to know whether the Imperial Government would be disposed to depute a representative or representatives to exchange views with representatives of a small number of powers to be chosen for that purpose. Such an exchange of views would take place within the framework of the Nine Power Treaty and in conformity with the provisions of that treaty. Its aims would be to throw further light on the various points referred to above and to facilitate a settlement of the conflict. Regretting the continuation of hostilities, being firmly convinced that a peaceful settlement is alone capable of insuring a lasting and constructive solution of the present conflict, and having confidence in the efficacy of methods of conciliation, the representatives of the states met at Brussels earnestly desire that such a settlement may be achieved.

"The states represented at the Conference would be very glad to know as soon as possible the attitude of the Imperial Government towards this proposal."

"The text of the declaration adopted by the Conference November 24, 1937 reads as follows:

"The Nine Power Treaty is a conspicuous example of numerous international instruments by which the nations of the world enunciate certain principles and accept certain self denunciatory rules in their conduct with each other solemnly undertaking to respect the sovereignty of other nations, to refrain from seeking political or economic domination of other nations, and to abstain from interference in their internal affairs."
"These international instruments constitute a framework within which international security and international peace are intended to be safeguarded without resort to arms and within which international relationships should subsist on the basis of mutual trust, good will and beneficial trade and financial relations.

"It must be recognized that whenever armed force is employed in disregard of these principles the whole structure of international relations based upon the safeguards provided by treaties is disturbed. Nations are then compelled to seek security in ever increasing armaments. There is created everywhere a feeling of uncertainty and insecurity. The validity of these principles cannot be destroyed by force, their universal applicability cannot be denied and indispensability to civilization and progress cannot be gainsaid.

"It was in accordance with these principles that this Conference was called in Brussels for the purpose, as set forth in the terms of the invitation issued by the Belgian Government "of examining in conformity with article seven of the Nine Power Treaty, the situation in the Far East and of studying peaceable means of hastening an end of the regrettable conflict which prevails there".

"Since its opening session on November 3rd the Conference has continuously striven to promote conciliation and has endeavored to secure the cooperation of the Japanese Government in the hope of arresting hostilities and bringing about a settlement.

"The Conference is convinced that force cannot provide just and lasting solution for disputes between nations. It continues to believe that it would be to the immediate and the ultimate interest of both parties to the present dispute to avail themselves of the assistance of others in an effort to bring hostilities to an early end as a necessary preliminary to the achievement of a general and lasting settlement. It further believes that a satisfactory settlement cannot be achieved by direct negotiation between the parties to the conflict alone and that only by consultation with other powers principally concerned can there be achieved an agreement the terms of which will be just, generally acceptable and likely to endure.
"This Conference strongly reaffirms the principles of the Nine Power Treaty as being among the basic principles which are essential to world peace and orderly progressive development of national and international life.

"The Conference believes that a prompt suspension of hostilities in the Far East would be in the best interests not only of China and Japan but of all nations. With each day's continuance of the conflict the loss in lives and property increases and the ultimate solution of the conflict becomes more difficult.

"The Conference therefore strongly urges that hostilities be suspended and resort be had to peaceful processes.

"The Conference believes that no possible step to bring about by peaceful processes a just settlement of the conflict should be overlooked or omitted.

"In order to allow time for participating governments to exchange views and further explore all peaceful methods by which a just settlement of the dispute may be attained consistently with the principles of the Nine Power Treaty and in conformity with the objectives of that treaty the Conference deems it advisable temporarily to suspend its sittings. The conflict in the Far East remains, however, a matter of concern to all the powers assembled at Brussels—by virtue of commitments in the Nine Power Treaty or of special interest in the Far East—and especially to those most immediately and directly affected by conditions and events in the Far East. Those of them that are parties to the Nine Power Treaty have expressly adopted a policy designed to stabilize conditions in the Far East and, to that end, are bound by the provisions of that treaty, outstanding among which are those of articles 1 and 7.

"The Conference will be called together again whenever its chairman or any two of its members shall have reported that they consider that its deliberations can be advantageously resumed.'"

Both China and Italy requested that statements of position they made should be considered as integral parts of the report. (Press Releases, Vol. XVII, No. 426.)
Policy of the United States—General.—

At his press conference on August 17, 1937 the Secretary of State announced that (1) legislative action to make available funds for purposes of emergency relief necessitated by the situation in the Far East had been asked and that (2) this Government had given orders for a regiment of marines to prepare to proceed to Shanghai. The Secretary then discussed at some length the principles of policy on which this Government was proceeding.

The situation in Shanghai is in many respects unique. Shanghai is a great cosmopolitan center, with a population of over three million, a port which has been developed by the nationals of many countries, at which there have prevailed mutually advantageous contacts of all types and varieties between and among the Chinese and people of almost all other countries of the world. At Shanghai there exists a multiplicity of rights and interests which are of inevitable concern to many countries, including the United States.

In the present situation, the American Government is engaged in facilitating in every way possible an orderly and safe removal of American citizens from areas where there is special danger. Further, it is the policy of the American Government to afford its nationals appropriate protection, primarily against mobs or other uncontrolled elements. For that purpose it has for many years maintained small detachments of armed forces in China, and for that purpose it is sending the present small reinforcement. These armed forces there have no mission of aggression. It is their function to be of assistance toward maintenance of order and security. It has been the desire and the intention of the American Government to remove these forces when performance of their function of protection is no longer called for, and such remains its desire and expectation.

The issues and problems which are of concern to this Government in the present situation in the Pacific area go far beyond merely the immediate question of protection of the nationals and interests of the United States. The conditions which prevail in that area are intimately connected with and have a direct and fundamental relationship to the
general principles of policy to which attention was called in the statement of July 16, which statement has evoked expressions of approval from more than 50 governments. This Government is firmly of the opinion that the principle summarized in that statement should effectively govern international relationships.

When there unfortunately arises in any part of the world the threat or the existence of serious hostilities, the matter is of concern to all nations. Without attempting to pass judgment regarding the merits of the controversy, we appeal to the parties to refrain from resort to war. We urge that they settle their differences in accordance with principles which, in the opinion not alone of our people but of most peoples of the world, should govern in international relationships. We consider applicable throughout the world, in the Pacific area as elsewhere, the principles set forth in the statement of July 16. That statement of principles is comprehensive and basic. It embraces the principles embodied in many treaties, including the Washington Conference treaties and the Kellogg-Briand Pact of Paris.

From the beginning of the present controversy in the Far East, we have been urging upon both the Chinese and the Japanese Governments the importance of refraining from hostilities and of maintaining peace. We have been participating constantly in consultation with interested governments directed toward peaceful adjustment. This Government does not believe in political alliances or entanglements, nor does it believe in extreme isolation. It does believe in international cooperation for the purpose of seeking through pacific methods the achievement of those objectives set forth in the statement of July 16. In the light of our well-defined attitude and policies, and within the range thereof, this Government is giving most solicitous attention to every phase of the Far Eastern situation, toward safeguarding the lives or welfare of our people and making effective the policies—especially the policy of peace—in which this country believes and to which it is committed.

This Government is endeavoring to see kept alive, strengthened, and revitalized, in reference to the Pacific area and to all the world, these fundamental principles. (Press Releases, Vol. XVII, No. 413.)
Self-help and strained relations—Reprisals.—
The use of force without war is legal but few crystallized rules exist to govern the relations of the combatants and the relations between these and third states. In theory, due to the absence of an organized international government with the power to enforce law, states have been legally justified in taking the law into their own hands and employing force for the defense of their rights. This is the system (or lack of system) known as Self-Help. According to the theory there is a well defined set of rights and duties belonging to the members of the international community; these members, in the absence of international agencies, are to decide what their rights and duties are and are authorized to apply measures of coercion in the execution of the law. If all states were more or less equal, this system might operate in line with the theory, but in practice, because of the vast inequalities between the strengths of various nations, it has led to grave abuses, and what should have been legal measures of law enforcement turn out to be in fact means for political domination and control by the stronger against the weaker. The virtual collapse of the theory in operation is due not only to state inequality but also to the fact that each state has been its own prosecutor, judge and enforcing agent.

The law on this subject of Self-Help is therefore woefully deficient. It has had to trail along after the practice of the great powers tidying up in haphazard fashion the actions of strong states which have claimed to be enforcing their legal rights and which have not been called to account except belatedly by relatively few publicists and students. Judges and law interpretators for the most part
have accepted the fact of the use of force because of necessity and have thus built up a certain amount of pragmatic law based mainly on the de facto use of power and not on the basis of the genuine mutual self-interest of states in general.

Probably the most common and general term for these measures of Self-Help which do not involve war, is that of reprisal, though it is to be remembered that war itself is often justified as the ultimate reprisal. Theoretically, a reprisal is a legal act of redress performed by a state to obtain satisfaction for an injury received. Force is not justified legally unless there has been a refusal to make redress after due notice. As above indicated, however, these allegedly legal measures are usually highly colored by political motives and objectives, so that while a great state has "justified" a reprisal upon the grounds of self-help, actually the venture has most often been of very dubious legality, the law serving chiefly as a thin veneer to cover what in essence was an illegal act.

Reprisals may take several forms, such as military occupation, naval bombardment, attacks upon commerce, embargo, boycott, and pacific blockade. The history of reprisals and an analysis of their employment are admirably described in Hindmarsh, A. E. "Force in Peace." The sanctions outlined in Article 16 of the League of Nations Covenant are designed to be collective reprisals, and to be of a legal rather than a political nature, in that they were to be employed by a community agency after a careful study. Some of these problems were thoroughly studied in the Naval War College Situations in 1932, pages 89 to 135.
Pacific blockade.—The United States has consistently denied the legality of interference with vessels of third states by a squadron applying a pacific blockade. As there is no war and therefore no belligerent rights, legally there can be no visit and search, but a blockading vessel has the right to identify ships attempting to pass the blockade.

It may be necessary that the blockading forces approach, within the specific area of effective maintenance of the blockade, vessels of third states, for the purpose of verification of their right to fly the flag. (Naval War College Situations, 1932, p. 95.)

Pacific blockade in the Sino-Japanese conflict.—

More important than these subsidiary operations was the navy's part in hindering the replenishment from abroad of Chinese stocks of military equipment. A “pacific blockade”—proclaimed on August 25 by the commander of the Japanese China fleet—for territory between the mouth of the Yangtze and Swatow was extended on September 5 to include virtually the entire Chinese coast, from the Manchurian border to Pakhoi in the south. Since Japan, not being legally at war, did not possess the right of a belligerent to intercept shipments of contraband in neutral ships, the blockade was directed against Chinese vessels alone. While a naval spokesman at Shanghai threatened to preempt such cargoes if carried in non-Chinese craft, Tokyo declared that the “peaceful commerce” of third powers would not be molested. This term, however, was not construed to cover foreign vessels specifically employed for the purpose of carrying war supplies to the Chinese. Apparently reluctant to challenge the doubtful legality of this exception, both the United States and Great Britain took measures to avoid incidents in the blockaded zone. British shipping was advised that, in the absence of a British warship, Japanese naval officers should be permitted to board ship and verify certificates of registry—a procedure which would tend to prevent use of the British flag as a ruse by Chinese vessels. Once foreign countries had acquiesced to
this extent in the Japanese procedure, Tokyo authorities let it be known that “for the present” there would be no interference with any foreign shipping. This course was probably adopted because it was believed that the volume of military supplies shipped by sea to China, after these government warnings, would be too small to warrant the risk of foreign complications over their seizure. (Foreign Policy Reports, May 15, 1938, p. 55.)

Following a conference with the Secretary of State and the Chairman of the United States Maritime Commission, the President today, September 14, 1937, issued the following statement:

“Merchant vessels owned by the Government of the United States will not hereafter, until further notice, be permitted to transport to China or Japan any of the arms, ammunition, or implements of war which were listed in the President’s proclamation of May 1, 1937.

“Any other merchant vessels, flying the American flag, which attempt to transport any of the listed articles to China or Japan will, until further notice, do so at their own risk.

“The question of applying the Neutrality Act remains in statu quo, the Government policy remaining on a 24-hour basis.”

ANNOUNCEMENT

The conflict in the Far East has resulted in the creation of a danger zone along the coast of China which makes it dangerous for American merchant vessels to operate in the adjacent waters.

The Japanese authorities have announced a blockade of the entire coast from Chinwangtiao to Pakhoi against the entrance or egress of Chinese shipping.

The Chinese authorities have announced their intention, in view of the blockade, to take appropriate action against all Japanese naval vessels along the Chinese coast and have requested that naval and merchant vessels of third powers avoid proximity to Japanese naval vessels and mili-
tary transports and have their respective national colors painted on their top decks in a conspicuous manner.

The Chinese authorities have also announced the following:

(a) The mouth of Min Kiang River in Fukien Province has been closed to navigation, and all shipping through that place has been suspended as of September 4.

(b) Beginning September 9 no foreign merchant vessels will be permitted to navigate at night in waters between Bocca Tigris forts and Canton. (Press Releases, Vol. XVII, No. 416.)

The international law governing reprisals—Four general rules.—The rules governing the conduct of reprisals and the relations between the contestants and third states have never been clearly developed, reprisals constituting an extremely foggy segment of international law. Out of the practice of reprisals both before 1914 and in these later days of "undeclared wars," certain general rules, however, do emerge. These are shadowy, it is true, and their listing is not in the least meant to be definitive. Four, however, can be discerned:

(1) The state engaging in reprisals is entitled to take those measures which are reasonably related to the end in view, and which do not interfere unreasonably with the rights of third states in what, after all, is still technically a state of peace. The meaning of the word "reasonable" is subject to legal determination. The law or the judge applying the law must take into account the fact that the state engaged in a reprisal partaking of the nature of force usually has a definite military or naval objective. Those acts which are connected with the attainment of this end must be condoned by third states to a certain extent; these latter must be prepared to permit some interference with their
normal peace time rights, and though they do not have to allow the exercise of belligerent rights, they must recognize some modification in the regular laws of peace. This principle may seem vague and abstract, but in concrete situations it is not too difficult to apply, for in these it is usually not impossible to make a compromise which grants the state applying force sufficient latitude for the attainment of its object but which does not destroy completely the rights of third parties. An example of such a compromise is to be found in pacific blockade, where the vessels of third states must identify themselves to ships of the blockading force. This adjustment of the needs of the military and naval forces of the state engaged in reprisals with the rights of third states is all-important, and its achievement along the lines of reasonable compromise is of paramount significance in any discussion of this topic.

(2) Despite the absence of formal agreement on this matter, there has been a distinct trend toward applying the laws of war to the conduct of hostilities between the parties in these non-war situations. The states engaged in the dispute are not belligerents but they have come to be regarded as being to some extent under the laws of belligerency. Where third states are concerned this means that the usual war-time doctrine of “military necessity” will be the criterion for the responsibility for damages committed by either contestant. In the Sino-Japanese conflict, for instance, it has been interesting to note how third powers, though not admitting the existence of war, have yet attempted to hold both Japan and China responsible for injuries as if there were a war. Foreigners’ loss
of life and property have brought a demand for reparation whenever such loss has seemed unconnected with "military necessity."

(3) Contestants in a non-war use of force must therefore pay damages on a war basis, a rule obviously and immediately related to the one preceding. Sometimes in the past, damages have not been paid, as in the case of the bombardment of Greytown in 1854 (4 Court of Claims Report 543, *Perrin v. the United States*), but the failure of the United States in this instance does not constitute a precedent, for in many other cases payment has been made for damages which were not the result of the actual needs of "warfare." In his article, "Responsibility for Damages to Persons and Property of Aliens in Undeclared War" (Proceedings of the American Society of International Law, 1938, pp. 127 to 140), Professor Clyde Engleton makes a thoroughgoing survey of the precedents on this point.

(4) Because there is no war in the legal sense, there is no neutrality during a period of reprisals. Third states accept inconvenience and interference, but they are not called upon to enforce neutral obligations, nor must they concede the full exercise of belligerent rights.

This enumeration of alleged rules may not really be law at all because the status of reprisals is basically so anomalous. On the one hand, there is legally peace and on the other, there is the employment of force which brings many war-like elements into the troubled picture. That the result legally is considerable confusion is not surprising, but a semblance of order may be maintained if reasonable compromises are made on the basis of the fore-
going outline. A stronger international law of peace and a better organized world of states would not tolerate such a hazy assemblage of alleged principles based upon a part-peace, part-war foundation, but for the present all that can be done is to salvage something in the way of order out of this unsatisfactory situation.

As above suggested, third parties have attempted to hold both Japan and China to the laws of war during the Far Eastern conflict. Both these powers seem to have admitted responsibility under the laws of war and have paid damages accordingly. The most notable instance of this is the case of the *Panay*, the full story of which is printed in the appendix to this volume. The Japanese paid the United States $2,214,007.36 for the sinking of the *Panay* (Press Releases, Vol. XVIII, No. 443, p. 410), while the Chinese Government paid the United States $264,887.47 as indemnification for personal injuries sustained as a result of the bombing of the S. S. *President Hoover* on August 30, 1937. (Press Releases, Vol. XIX, No. 468, p. 190.)

*American attitude toward Japanese conduct of hostilities.*—Since the renewal of the fighting between China and Japan in the Summer of 1937, the American Government, though never conceding that a formal war was in progress, has endeavored to call Japan to account as if the laws of war actually governed the situation. The American notes insist that the principles of the law of war are operative, e. g. in regard to bombing, and that damage or destruction are permissible only when “The objectives of Japanese military operations are limited strictly to Chinese military agencies and estab-
lishments.’” (See the next to the last paragraph of the American note printed immediately below.)

BOMBING OF NANKING

Upon instructions of the Secretary of State, the American Ambassador at Tokyo, Mr. Joseph C. Grew, delivered a note to the Minister for Foreign Affairs at Tokyo, September 22, 1937. The note read textually as follows:

“The American Government refers to the statement by the commander in chief of the Japanese Third Fleet which was handed to the American consul General at Shanghai on September 19 announcing the project of the Japanese Naval Air Force, after 12 o’clock noon of September 21, 1937, to resort to bombing and other measures of offense in and around the city of Nanking and warning the officials and nationals of third powers living there ‘to take adequate measures for voluntary moving into areas of greater safety.’

“The American Government objects both to such jeopardizing of the lives of its nationals and of noncombatants generally and to the suggestion that its officials and nationals now residing in and around Nanking should withdraw from the areas in which they are lawfully carrying on their legitimate activities.

“Immediately upon being informed of the announcement under reference, the American Government gave instruction to the American Ambassador at Tokyo to express to the Japanese Government this Government’s concern; and that instruction was carried out. On the same day the concern of this Government was expressed by the Acting Secretary of State to the Japanese Ambassador in Washington.

“This Government holds the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to principles of law and of humanity. Moreover, in the present instance the period allowed for withdrawal is inadequate, and, in view of the wide area over which Japanese bombing operations have prevailed, there can be no assurance that even in areas to which American nationals and noncombatants might withdraw they would be secure.

“Notwithstanding the reiterated assurance that ‘the safety of the lives and property of nationals of friendly
powers will be taken into full consideration during the projected offensive, this Government is constrained to observe that experience has shown that, when and where aerial bombing operations are engaged in, no amount of solicitude on the part of the authorities responsible therefor is effective toward insuring the safety of any persons or any property within the area of such operations.

"Reports of bombing operations by Japanese planes at and around Nanking both before and since the issuance of the announcement under reference indicate that these operations almost invariably result in extensive destruction of noncombatant life and nonmilitary establishments.

"In view of the fact that Nanking is the seat of government in China and that there the American Ambassador and other agencies of the American Government carry on their essential functions, the American Government strongly objects to the creation of a situation in consequence of which the American Ambassador and other agencies of this Government are confronted with the alternative of abandoning their establishments or being exposed to grave hazards.

"In the light of the assurances repeatedly given by the Japanese Government that the objectives of Japanese military operations are limited strictly to Chinese military agencies and establishments and that the Japanese Government has no intention of making nonmilitary property and noncombatants the direct objects of attack, and of the Japanese Government's expression of its desire to respect the Embassies, warships, and merchant vessels of the powers at Nanking, the American Government cannot believe that the intimation that the whole Nanking area may be subjected to bombing operations represents the considered intent of the Japanese Government.

"The American Government, therefore, reserving all rights on its own behalf and on behalf of American Nationals in respect to damages which might result from Japanese military operations in the Nanking area, expresses the earnest hope that further bombing in and around the city of Nanking will be avoided." (Press Releases, Vol. XVII, No. 417.)
“I am instructed by my Government to bring to Your Excellency’s attention reports and complaints from American residents that in the course of recent military operations at Nanking, Hangshow and other places the Japanese armed forces have repeatedly entered American property illegally and removed goods and employees and committed other acts of depredation against American property which has almost invariably been marked by American flags and by notices in English, Chinese and Japanese issued by the American authorities and setting forth the American character of the property concerned. According to these reports not only have Japanese soldiers manifested a complete disregard for these notices but they have also in numerous instances torn down, burned and otherwise mutilated American flags. I am directed to impress upon Your Excellency the seriousness with which my Government regards such acts and to convey its most emphatic protest against them. My Government finds it impossible to reconcile the flagrant disregard of American rights shown by Japanese troops as above described with the assurances contained in Your Excellency’s note of December 24, 1937, that ‘rigid orders have been issued to the military, naval and Foreign Office authorities to pay * * * * greater attention than hitherto to observance of the instructions that have been repeatedly given against infringement of, or unwarranted interference with, the rights and interests of the United States and other third powers.’

“In view of the fact that a number of these acts are reported as having occurred subsequent to the receipt of the aforementioned assurances of the Imperial Japanese Government and inasmuch as this disregard of American rights is reported as still continuing, the American Government is constrained to observe that the steps which the Japanese Government have so far taken seem inadequate to ensure that hereafter American nationals, interests and property in China shall not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever. My Government must, therefore, request that the Imperial Japanese Government reenforce the
instructions which have already been issued in such a way as will serve effectively to prevent the repetition of such outrages."

(Note presented by Ambassador Joseph C. Grew to the Japanese Minister of Foreign Affairs, January 17, 1938, Press Releases, Vol. XVIII, No. 435.)

American property occupied by Japanese.—
The American Ambassador to Japan, Mr. Joseph C. Grew, on May 31, 1938, addressed to the Japanese Minister for Foreign Affairs, under instruction from the Secretary of State, a note reading as follows:

"The problem of enabling American citizens in China to reenter and repossess their properties, from which they have been excluded by the Japanese military and of which the Japanese military have been and in some cases still are in occupation, is giving the Government of the United States increasing concern.

"An illustrative case is that of the property of the University of Shanghai, a large and valuable plant located at Shanghai in the Yangtzeopoo district. This university has been engaged for many years in educational work and is jointly owned by the Northern and Southern Baptist Missionary Societies. The premises of the university have been under continuous occupation by Japanese military and naval units since shortly after the outbreak of hostilities at Shanghai in August 1937. It is understood that the premises have been used by the Japanese for quartering troops and for military offices, and a portion of the campus for stationing airplanes and supplementing the runway for airplanes on the adjacent golf course which has been converted by the Japanese into a military flying field. During the period of Japanese occupancy several buildings have been damaged and the majority looted. Japanese occupation of the property has continued for a period of nine months, notwithstanding the fact that hostilities in this locality long ago ceased. Repeated written and oral representations made by the American Embassy at Tokyo to the Japanese Government and by the American Consul General at Shanghai to
the Japanese authorities there have not so far resulted in bringing about restoration of the premises to the rightful owners. Recently, representatives of the Baptist missionary societies have stressed, on behalf of the six million Baptists in the United States, the urgent need for the return to their possession of this important missionary educational property.

“In various places in the lower Yangtze Valley American businessmen and missionaries have been prevented by the Japanese authorities from returning to their places of business and mission stations and are denied even casual access to their properties. The American Consul General at Shanghai has made applications for passes in behalf of several American firms with important interests in that area in order to permit the representatives and employees of the firms to resume business there, but such applications have repeatedly been refused by the Japanese authorities on the ground that peace and order have not been sufficiently restored. This has been the case even when the applications were for visits for the purpose of brief inspection and checking of losses or for the purpose of taking steps to prevent further deterioration of their properties, including stocks and equipment, during their enforced absence. Many Japanese merchants and their families are known to be in the localities to which these Americans seek to return.

“American missionaries also have been prevented from returning to their stations in the lower Yangtze Valley. Certain mission properties in this region which were formerly under occupation by Japanese troops are now reported to have been vacated as a result of Japanese troop transfers, and the missionary societies concerned feel it highly important that their representatives reoccupy and preserve such properties. In view of the fact that Japanese civilians are freely permitted to go into and reside in such areas—as, for example, at Nanking where some eight hundred Japanese nationals, including a substantial number of women and children, are reported to be in residence—it is difficult to perceive any warrant for the continued placing by the Japanese authorities of obstacles in the way of return by Americans who have legitimate reason for proceeding to the areas in question.
"My Government is confident that the Japanese Government cannot but concede that the infringement of and interference with American rights in China by the Japanese authorities involved in the situation to which attention is herein brought are contrary to the repeated assurances of the Japanese Government that the American rights will be respected; that the Japanese Government will take immediate steps, in keeping with such assurances, to cause the return to their rightful owners of the premises of the University of Shanghai and other American property under the occupation of Japanese armed forces; and that the Japanese Government will issue instructions to have removed the obstacles interposed by the Japanese authorities in China against return by American nationals to places such as those mentioned in the areas under Japanese military occupation." (Press Releases, Vol. XVIII, No. 453.)

Airplanes and pacific blockade.—To date, there has not been a pacific blockade in which airplanes were employed, so that there are no precedents strictly applicable to the situation of the Safa in section (a) of this Situation. Applying the principles of maritime blockade, it would seem legal for the aircraft of state N to ask the Safa for identification. To do that would not be violating the peace-time rights of state S which could legally object to any further step amounting to visit and search. If the Safa refuses to comply with the request for identification, may the airplane use force? The treatises and precedents on this problem are exceedingly vague. In the view of the third party i.e. state S, any employment of force, even to secure identification, might seem to constitute an unwarrantable interference with its peaceful rights. But the objective of the blockading state must be kept in mind, and if unidentified vessels were allowed to pass the blockade, the entire measure of coercion might be placed in
jeopardy. It would be asking too much of the blockading state to forego measures of coercion against the ships of third states in all cases where identification could not be obtained. It does not seem unreasonable, therefore, to permit the application of force for the limited purpose of securing identity. To support this assertion there is the statement in Soule and McCauley, "International Law" page 50, "That States not Parties to the Pacific Blockade * * * cannot complain because they are required to establish their identity in the ordinary manner." In the Naval War College Situations, 1932, page 95, it is also asserted that "The blockading force may take such measures as are necessary for closing the port before which it is maintaining an effective blockade." This last statement is extremely broad, is liable to misinterpretation, and should not be taken as implying any rights over third party ships other than that of identification.

In Situation (a), therefore, the aircraft has no authority to order the freighter about if it has obtained identity. The command to lie to for 24 hours or until a cruiser of state N arrives to visit and search the Safa, is absolutely unjustified. Even were this a war-time situation, such tactics by an airplane encountering a surface vessel would appear to be illegal, as the discussion of Article 49 in the Jurists Report indicates.

What are the rights of a surface blockading squadron as against aircraft flying over a pacific blockade? Much the same type of reasoning is applicable here as that discussed immediately above. The Noan, the cruiser of state N, having the right to identify craft, acted legally in ordering the T-21 to
land at a nearby airport in order that its identity and right to pass might be established. This involves deviation on the part of the airplane, but such deviation of aircraft is essential as discussed in Situation I. It is not lawful for an airplane to force a surface vessel to deviate, at least not yet, but an aircraft or surface vessel meeting an aircraft might well have to order deviation in order to effect its lawful purpose. To the possible objection that a blockade of the air maintained solely by surface ships could not constitute an effective blockade, it can be answered that surface vessels by their antiaircraft guns are capable of making passage overhead extremely dangerous. Such a situation was definitely envisaged in Article 30 of the Jurists Report. In this case the fact that the Noan hit the T-21 proves the effectiveness of the blockade in fact.

For state N to allow the flight of unidentified airplanes over its blockade might well prove extremely risky and to ask a vessel of state N to withhold fire in such cases would not make sense. The order of the Noan to the T-21 was not unreasonable. Airplanes are difficult to identify in the air, and military and commercial craft nowadays look very much alike. As the landing field was nearby, no great inconvenience was being asked of the T-21 which should have complied with the order. To the possible claim that the situation was not sufficiently serious to warrant the firing upon a plane which in all likelihood would be seriously damaged if hit, the answer is the same as that given in Situation I. The pilot of the plane took his chances and must suffer the consequences. As was stated in the case of United States v. Dickelman (92 U. S. 520), “She voluntarily as-
sumed the risks of her hazardous enterprise and must sustain the losses that follow * * * (She) ought to have known they kept the port closed to the extent necessary for the vigorous prosecution (of the war).” Therefore, assuming that the Noan was really unaware of the T–21’s identity, and assuming further that a proper communications code was in effect (problem discussed in Situation I) so that the T–21 could reasonably be presumed to be aware of the summons, the initial firing by the Noan was lawful. This decision is based upon the previously mentioned principle that the blockading state may make reasonable interference with the rights of third parties for the attainment of its objective, the term “reasonable” being capable of interpretation in the light of the facts of an actual situation.

The firing upon the T–21 after it had been forced to land, was not justified. It was an excessive use of force which was not necessary for military purposes, and the Tafu should take energetic steps to protect the T–21 from further damage. The right of self-preservation is here brought into play.

Article 723 of U. S. Navy Regulations, 1920.—The use of force against a foreign and friendly state, or against anyone within the territories thereof, is illegal.

The right of self-preservation, however, is a right which belongs to states as well as to individuals, and in the case of states it includes the protection of the state, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation cannot be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance.
In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined.

It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed.

**General principle involved.**—It cannot be repeated too often that in non-war situations of force both the contestants and third states must base their actions upon the compromise principle of "reasonable interference." The application of this principle makes for the avoidance of controversy in a realm where specific rules are almost wholly absent. Though the laymen may feel that the bringing in of the word "reasonable" adds little clarity, students of the law know that courts and judges constantly have to deal with such matters as "reasonable risk" and "reasonable man." These words acquire definite meaning when employed in actual situations. They are legal terms judicially interpreted. In International Situations like those here under discussion, sensible men do not and will not find it unduly difficult to decide what is "reasonable" when the legitimate needs of the state engaging in force meets the equally legitimate right of a third state under the international law of peace. The principle may again be summarized, this time in the words of Professor Ellery C. Stowell (International Law, p. 555).

Quasi-neutrals must tolerate such modifications of the usual relations as are reasonably necessary to apply the justifiable measures of reprisal and to effect the legitimate purpose in view.
Nonmilitary occupation and extraterritoriality.—In the past there have been many occupations of territory when no war has been declared. In occupations of this sort the usual rules regulating a military occupant's conduct have been held to apply. Though occupation, either "pacific" or military is more than invasion and gives to the occupant certain rights including that of securing the obedience of the local population, it does not operate to transfer title to the land involved, or to terminate treaties. (See Note by Lester Woolsey, American Journal of International Law, April 1938, p. 319.)

American attitude toward Japanese occupation of China.—Following is the text of a letter from the Secretary of State to Senator William H. Smathers:

December 18, 1937.

My dear Senator Smathers: I have received your letter of December 13, 1937, in which you inform me that you favor the withdrawal of American ships and citizens from the area affected by the present conflict in the Far East. The question of the types and degrees of protection which this Government should afford to its citizens abroad presents many difficulties and is one in regard to which opinions may very readily differ. In a situation such as has prevailed in the Far East there have been developed during more than a century certain rights, certain interests, certain obligations and certain practices. In the light of peculiar features inherent in the situation, all of the major powers have developed and employed, with authorization by the Chinese Government, methods for safeguarding the lives and interests and property of their nationals believed to be appropriate to the situation and warranted by the peculiarities thereof. Thus, for instance, there came about and there is still in existence the system of extraterritorial jurisdiction and various of its concomitants. Concurrently, many nationals of this and other countries have, during several generations,
JAPANESE OCCUPATION

gone to China, established themselves there in various occupa­tions and activities, and subjected themselves both to the advantages and to the disadvantages of the conditions prevai­ling there, and the American Government has, along with other governments, accepted various rights and incurred vari­ous obligations. In a situation such as now prevails, many of our nationals cannot suddenly disavow or cut themselves off from the past nor can the American Government suddenly disavow its obligations and responsibilities. The American naval vessels and the small contingents of American landed forces which have been maintained in China were placed and have been kept there solely for the purpose of assisting in the maintenance of order and security as affecting the lives, the property and the legitimate activities of American nationals, especially in regard to conditions of local disorder and unauthorized violence. These vessels and troops have never had in any sense any mission of aggression. It has long been the desire and expectation of the American Gov­ernment that they shall be withdrawn when their appropriate function is no longer called for. We had thought a few months ago that the opportune moment for such a with­drawal was near at hand. The present, however, does not seem an opportune moment for effecting that withdrawal.

Officers of the American Government have repeatedly and earnestly advised American citizens, in face of dangers incident to residence in China, to withdraw and are making every effort to provide safe means whereby they may de­part. During the current situation in China the American military and naval forces have rendered important service in protecting the lives of American nationals, in assisting in evacuating Americans from areas of special danger, and in making possible the maintenance of uninterrupted communi­cations with our nationals and our diplomatic and consular Establishments in the areas involved.

As of possible interest in this connection there is enclosed a press release issued by the Department on August 23, 1937, outlining the policy on which the Government is pro­ceeding with reference to the situation in the Far East.

I am very grateful for your courtesy in bringing to my attention your views in regard to the situation in the Far
East, and I assure you that we welcome at all times thoughtful views and comment on any phase of our foreign relations.

Sincerely yours,

Cordell Hull.

(Press Releases, Vol. XVII, No. 430.)

At various times during recent decades various powers, among which have been Japan and the United States, have had occasion to communicate and to confer with regard to situations and problems in the Far East. In the conducting of correspondence and of conferences relating to these matters, the parties involved have invariably taken into consideration past and present facts and they have not failed to perceive the possibility and the desirability of changes in the situation. In the making of treaties they have drawn up and have agreed upon provisions intended to facilitate advantageous developments and at the same time to obviate and avert the arising of friction between and among the various powers which, having interests in the region or regions under reference, were and would be concerned.

In the light of these facts, and with reference especially to the purpose and the character of the treaty provisions from time to time solemnly agreed upon for the very definite purposes indicated, the Government of the United States deprecates the fact that one of the parties to these agreements has chosen to embark—as indicated both by action of its agents and by official statements of its authorities—upon a course directed toward the arbitrary creation by that power by methods of its own selection, regardless of treaty pledges and the established rights of other powers concerned, of a "new order" in the Far East. Whatever may be the changes which have taken place in the situation in the Far East and whatever may be the situation now, these matters are of no less interest and concern to the American Government than have been the situations which have prevailed there in the past, and such changes as may henceforth take place there, changes which may enter into the producing of a "new situation" and a "new order," are and will be of like concern to this Government. This Government is
well aware that the situation has changed. This Government is also well aware that many of the changes have been brought about by action of Japan. This Government does not admit, however, that there is need or warrant for any one power to take upon itself to prescribe what shall be the terms and conditions of a "new order" in areas not under its sovereignty and to constitute itself the repository of authority and the agent of destiny in regard thereto.

It is known to all the world that various of the parties to treaties concluded for the purpose of regulating contacts in the Far East and avoiding friction therein and therefrom—which treaties contained, for those purposes, various restrictive provisions—have from time to time and by processes of negotiation and agreement contributed, in the light of changed situations, toward the removal of restrictions and toward the bringing about of further developments which would warrant, in the light of further changes in the situation, further removals of restrictions. By such methods and processes, early restrictions upon the tariff autonomy of all countries in the Far East were removed. By such methods and processes, the rights of extraterritorial jurisdiction once enjoyed by occidental countries in relations with countries in the Far East have been given up in relations with all of those countries except China; and in the years immediately preceding and including the year 1931, countries which still possess those rights in China, including the United States, were actively engaged in negotiations—far advanced—looking toward surrender of those rights. All discerning and impartial observers have realized that the United States and other of the "treaty powers" have not during recent decades clung tenaciously to their so-called "special" rights and privileges in countries of the Far East but on the contrary have steadily encouraged the development in those countries of institutions and practices in the presence of which such rights and privileges may safely and readily be given up; and all observers have seen those rights and privileges gradually being surrendered voluntarily, through agreement, by the powers which have possessed them. On one point only has the Government of the United States, along with several other governments, insisted: namely, that new situations must have developed to a
point warranting the removal of "special" safeguarding restrictions and that the removals be effected by orderly processes.

The Government of the United States has at all times regarded agreements as susceptible of alteration, but it has always insisted that alterations can rightfully be made only by orderly processes of negotiation and agreement among the parties thereto.

The Japanese Government has upon numerous occasions expressed itself as holding similar views.

The United States has in its international relations rights and obligations which derive from international law and rights and obligations which rest upon treaty provisions. Of those which rest on treaty provisions, its rights and obligations in and with regard to China rest in part upon provisions in treaties between the United States and China, and in part upon provisions in treaties between the United States and several other powers, including both China and Japan. These treaties were concluded in good faith for the purpose of safeguarding and promoting the interests not of one only but of all of their signatories. The people and the Government of the United States cannot assent to the abrogation of any of this country's rights or obligations by the arbitrary action of agents or authorities of any other country.

The Government of the United States has, however, always been prepared, and is now, to give due and ample consideration to any proposals based on justice and reason which envisage the resolving of problems in a manner duly considerate of the rights and obligations of all parties directly concerned by processes of free negotiation and new commitment by and among all of the parties so concerned. There has been and there continues to be opportunity for the Japanese Government to put forward such proposals. This Government has been and it continues to be willing to discuss such proposals, if and when put forward, with representatives of the other powers, including Japan and China, whose rights and interests are involved, at whatever time and in whatever place may be commonly agreed upon.
Meanwhile, this Government reserves all rights of the United States as they exist and does not give assent to any impairment of any of those rights.

JOSEPH C. GREW.

(Note to the Japanese Minister for Foreign Affairs, December 31, 1938. Press Releases, Vol. XIX, No. 483.)

I desire also to call Your Excellency's attention to the fact that unwarranted restrictions placed by the Japanese military authorities upon American nationals in China—notwithstanding the existence of American treaty rights in China and the repeated assurances of the Japanese Government that steps had been taken which would insure that American nationals, interests, and properties would not be subject to unlawful interference by Japanese authorities—further subject American interests to continuing serious inconvenience and hardship. Reference is made especially to the restrictions placed by the Japanese military upon American nationals who desire to reenter and reoccupy properties from which they have been driven by the hostilities and of which the Japanese military have been or still are in occupation. Mention may also be made of the Japanese censorship of and interference with American mail and telegrams at Shanghai, and of restrictions upon freedom of trade, residence and travel by Americans, including the use of railways, shipping, and other facilities. While Japanese merchant vessels are carrying Japanese merchandise between Shanghai and Nanking, those vessels decline to carry merchandise of other countries, and American and other non-Japanese shipping is excluded from the lower Yangtze on the grounds of military necessity. Applications by American nationals for passes which would allow them to return to certain areas in the lower Yangtze Valley have been denied by the Japanese authorities on the ground that peace and order have not been sufficiently restored, although many Japanese merchants and their families are known to be in those areas.

(From the American Note to Japan, October 6, 1938. Press Releases, Vol. XIX, No. 474, p. 285.)
“Four. Concerning the return of American citizens to the occupied areas, Your Excellency is aware that in North China there is no restriction, excepting in very special cases where the personal safety of those who return would be endangered, while in the Yangtze Valley large numbers of Americans have already returned. The reason why permission to return has not yet been made general is, as has been repeatedly communicated to Your Excellency, due to the danger that persists because of the imperfect restoration of order and also to the impossibility of admitting nationals of third powers on account of strategic necessities such as the preservation of military secrets. Again, the various restrictions enforced in the occupied areas concerning the residence, travel, enterprise and trade of American citizens, constitute the minimum regulations possible consistent with military necessities and the local conditions of peace and order. It is the intention of the Japanese Government to restore the situation to normal as soon as circumstances permit.

“Five. The Japanese Government were surprised at the allegation that there exists a fundamental difference between the treatment accorded to Japanese in America and the treatment accorded to Americans in Japan. While it is true that in these days of emergency Americans residing in this country are subject to various economic restrictions, yet these are, needless to say, restrictions imposed not upon Americans alone but also on all foreigners of all nationalities as well as upon the subjects of Japan. I beg to reserve for another occasion a statement of the views of the Japanese Government concerning the treatment of Japanese subjects in American territory, referred to in Your Excellency’s note.

“As has been explained above, the Japanese Government, with every intention of fully respecting American rights and interests in China, have been doing all that could possibly be done in that behalf. However, since there are in progress at present in China military operations on a scale unprecedented in our history, it may well be recognized by the Government of the United States that it is unavoidable that these military operations should occasionally present obstacles to giving full effect to our intention of respecting the rights and interests of American citizens.”
Rules of "pacific" occupation.—As with measures of force short of war in general, very few specific regulations exist concerning "pacific" occupation, but certain lines of conduct emerge from an analysis of past measures of this sort:

(1) The coerced state retains title to the territory occupied and no legal change in sovereignty occurs without a definite treaty or without the workings of the principle of prescription.

(2) The occupant in his jurisdiction is limited to the right of garrison and of securing the safety of his troops on the territory occupied. This is fairly extensive jurisdiction, however, for naturally the occupying authorities in looking after the security of their troops will have to assume a large measure of control.

The problem, then, is to balance the interests involved, those of the occupant against those of third states and of the occupied state. As with military occupation, the local rules should continue in force "as far as possible," that is, as far as the safety of the military forces allows. This state of affairs is prescribed by Article 48 of Hague Convention IV, of 1907, Respecting the Laws and Customs of War on Land, and in Article VI of the Instructions for the Government of Armies of the United States in the Field (1863), which reads:

All civil and penal law shall continue to take its course under martial law unless stopped by order of the occupying military power.

In an occupied area there are thus two parallel legal systems. The occupant applies his own law in all cases of crime committed by his own officers.
and men, in all cases of crimes against the army of occupation by any one in the area, and in all cases of war crimes involving illegal attempts to interrupt lines of communication, to demolish bridges, to obstruct traffic, etc. The primordial right of self-protection gives the occupant this necessary jurisdiction. In an exhaustive treatise, "Des Occupations Militaires en dehors Occupations de Guerre" (Paris, 1913) by Raymond Robin, will be found a complete survey of the problems involved in "pacific" occupation.

(3) When the two jurisdictions come into collision, that of the occupant necessarily has priority. This conclusion is based upon the practice followed in the pre-war instances of occupation. In many of these, the occupying power clashed with the rights of third states established in extraterritoriality conventions. The occupant in each instance gave consideration to the stipulations of these treaties, but at certain times felt obliged because of military requirements to override the treaty rights. The occupation in itself, it should be remembered, did not abrogate these treaties which remained in force until arranged for by further negotiation.

Occupation and extraterritoriality—Precedents.—The French in Morocco in 1907 declared "the fact of occupation cannot modify in any manner the rules of procedure established by treaty, * * * at least in regard to infractions which do not directly concern the security of the occupying troops." (Robin op. cit., p. 546.) The famous Casablanca arbitration of 1909 involved a conflict between French troops and the German consular regime. Though the arbitral court rendered a Solomon-like award which endeavored to
placate both parties, the result really was favorable to the French whose military needs were recognized as taking precedence over all others. The court stated that it was wrong for the German Consul not to recognize—

the rights of exclusive jurisdiction which appertain to the occupying state in foreign territory, as well as in countries under capitulations, as regards the soldiers of the army of occupation, and the actions whatever they may be or from wherever they may come which are of a nature to compromise its safety. (Deserters at Casablanca, G. G. Wilson, "The Hague Arbitration" Cases, p. 91.) Likewise in the occupation of Tunis in 1881, the French tried some Italians who were urging violence in the military courts and refused to turn them over to the Italian consul who, the French alleged, would free them. (Robin op. cit., p. 671.) During the occupation of Crete by an international army in 1897, the military commanders were given complete jurisdiction over all offenses against the army, and Great Britain proclaimed the same rule when Cyprus was occupied in 1878. An American was held under French military jurisdiction in Madagascar in 1895, despite the provisions of the 1881 consular treaty between the United States and Madagascar. A final example of this rule of priority for the occupying forces is to be found in Bismarck’s instructions to the German Consul in Samoa in 1889 when he declared that the occupant had the right to defend himself by force against any threat to his safety. As summed up by Robin (ibid., p. 670) “In Capitulations countries, the military jurisdiction is competent for all attacks on the security of the army of occupation.”

Application to the problem.—Though the forces of state N have occupied a large slice of state M,
the fundamental juridical status of the area has not changed. Titles still belong to state M and the extraterritoriality treaty between state M and state T is still in force. The local laws of state T remain in effect insofar as they are not inconsistent with the military needs of state M. The latter’s rule is primary in all matters affecting the safety of its troops. If the nationals of state T had committed a crime or an act against the occupant, there would be no doubt as to the correctness of state N’s position were that power to try the nationals in its military courts. In the problem presented, however, the nationals concerned are accused of crime against citizens of state M and thus would seem to be eligible for trial by their own consul under the treaty, the security of N’s forces apparently not being involved. It is a jurisdictional dispute which ought to be a matter of negotiation between states T and N. It is therefore primarily a diplomatic and not a naval problem.

The Commander of the Tafu should remain close at hand, keeping in touch with the situation, and should notify the consul that he is ready to give protection if the lives of the state T nationals are placed in jeopardy. He should not issue any provocative demands upon the N authorities. The situation does not warrant such a drastic step which might involve state T in a difficult and embarrassing episode. Naval commanders should deal with local authorities through their own accredited consular and diplomatic representatives, and should threaten or use force in foreign countries only as a last resort dictated by the demands of self-defense.
RÉSUMÉ

On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the commander in chief shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof. (U. S. Navy Regulations, Rule 722.)

Résumé.—When states employ force against one another in time of peace, whether such measures be called reprisals or something else, international law is confronted with one of its most serious and difficult problems. The laws of war and neutrality cannot be made to apply in their entirety because technically a state of peace still reigns. The peace is a disturbed one, however, the contestants taking on some of the aspects of belligerents and third states becoming in reality quasi-neutrals. The terminology is apt to be very confusing because the legal situation itself is so muddled. The problems arise as a result of the absence of an organized international government which would decide questions of damages, and which would supervise law enforcement. Due to the lack of such a government, states have been in the habit of taking the law into their own hands under the theory of "self-help" which permits coercion when legally an injury has been received. In practice, the Great Powers, the only states which had effective force at their disposal, have abused the theory and have engaged in measures short of war against weaker nations ostensibly under the guise of law enforcement, but actually for political ends.
The weaker powers in such situations have usually not cared or been able to regard such measures as instituting a legal state of war. As a result, considerable practice has accumulated involving the procedures and tactics followed in these "force in peace" relationships. Unable to control the political use of force, international lawyers have accepted the practice and have formulated a few rules governing the de facto use of force. Since the framing of the League of Nations Covenant and the ratification of the Pact of Paris (Kellogg-Briand Treaty) the problem has continued to be an acute one. States using military and naval force against other powers have been reluctant to term their actions "war" because such a declaration would seem to identify them as violators of treaties which renounced or put restrictions upon the going to war. Since 1920 the only occasion upon which a participant in an international struggle has admitted that war was in progress was in 1933 when on May 10th of that year Paraguay formally declared war on Bolivia. None of the actual contestants in the Sino-Japanese or the Italo-Ethiopian conflicts has admitted a war status, though during the latter embroglio the American President "found" a war and most of the members of the League decided that Italy had "resorted to war" in violation of the Covenant.

Governing these non-war situations there is very little in the way of specific rules. Certain general principles, however, are applicable, and though these may seem inconsistent with the laws of peace and not in harmony with what many may regard as the proper ends of law, they must be accepted for the time being for lack of anything better. The
most important of these general principles is that which specifies that the state employing force may interfere with the rights of third states to an extent reasonably necessary for the attainment of the military or naval objective. Quasi-neutrals must accept some inconvenience. Examples of this necessary compromise between the interests of the force-employing state and third parties is the right of the former to identify all vessels and aircraft crossing a pacific blockade and the further right to use force to supplement this right of identification. Such an adjustment affords the blockading state an adequate opportunity to pursue its objective and yet does not accord it the complete belligerent rights of visit and search. A state using such measures cannot expect all the advantages of belligerency if it is unwilling to assume its obligations. The right of identification is a reasonable compromise for a non-war operation.

In military occupation on land, when no war status exists, a similar balancing of interests is possible. The occupant inevitably has priority in all matters relating to the security of its forces, but such rights do not include a termination of treaties or a complete suppression of the local laws. The guiding word in all this is "reasonable" which, though vague in the abstract, is capable of sensible interpretation in actual situations.

SOLUTION

(a) If the airplane is still with the Safa, the commander of the Sogu should direct the Safa to lie to, should proceed to the Safa to protect it, and should notify the commander of the N forces that the Safa is a vessel of state S and is not to be
molested, identification being all that the Safa is legally required to furnish the airplane. If the airplane has left the Safa, the Sogu should direct the latter to proceed into the port, and, if deemed essential for the protection of the Safa, the Sogu should accompany it into the port.

(b) The commander of the Tafu should warn the Noan that if the latter continues to fire upon the T-21, he will fire upon the Noan to force it to desist. He should attempt to interpose the Tafu between the Noan and the airplane with the object of halting the firing and should send out a small boat to rescue the survivors of the T-21.

(c) The commander of the Tafu should consult with the consul of state T at Mount and should report the incident to his superiors in the Navy Department. A demand for the return of the nationals of state T or a threat of the use of force on the part of the commander of the Tafu would not be warranted by the facts of this situation. As long as no immediate threat to the lives and property of state T nationals is involved, the matter is one for diplomatic negotiation between states T and N.