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 I

PROTECTION BY VESSELS OF WAR

States X and Y, non-American states, are at war. State Z, an American state, is an ally of state Y. Other states are neutral.

States B, C, and D are American states parties to the Habana treaties of 1928,\(^1\) the Montevideo treaties of 1933,\(^2\) and the Buenos Aires treaties of 1936,\(^3\) but state Z is not a party to any of the above treaties though carefully observing international law.

States L, M, and N are non-American states and not parties to any of the above treaties.

(a) The Bami, an innocent merchant vessel in ballast lawfully flying the flag of state B, is passing through a strait which is fifteen miles wide and is between two islands belonging to state Y when it is seized eight miles from land by the Yosu, a vessel of war of Y, on the ground that this area is a proclaimed war zone and closed to all ships. The Bami requests protection of the Bosu, a vessel of war of state B, which proceeds immediately and overtakes the Bami and the Yosu in the strait seven

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\(^2\) Additional protocol to the general convention of inter-American conciliation. *Post*, p. 158.

\(^3\) Convention for the maintenance, preservation, and reestablishment of peace. *Post*, p. 160.


Convention to coordinate, extend, and assure the fulfillment of the existing treaties between the American States. *Post*, p. 163.
miles from land. What action may the *Bosu* lawfully take?

(b) The *Zosu*, a vessel of war of state Z, captures and puts a prize crew on board the *Lami*, a merchant vessel lawfully flying the flag of state L and bound for a port of L, passing through the same strait with a cargo of bananas consigned to a merchant in an inland state bordering on state X. The *Losu*, a vessel of war of state L, later meets the *Lami* five miles from land. What action may the *Losu* lawfully take if asked to protect the *Lami*?

(c) State X, not able effectively to blockade any port of Y, proclaims all articles bound for Y to be contraband. State C has not included oranges, though state D has included oranges in the list of prohibited exports. The *Xalu*, a vessel of war of state X, seizes on the ground of carriage of contraband the *Cemi*, a merchant vessel, with a cargo of oranges two-thirds from state C and one-third from state D, lawfully flying the flag of state C and bound for a non-military port of Y. What action may the *Cosa*, a vessel of war of state C, lawfully take when appealed to by the *Cemi*?

(d) The *Nami*, a merchant vessel lawfully flying the flag of state N, calls at a port of state D and takes on board passengers, nationals of state D, bound for state X. State D has prohibited the sailing of its nationals in the war area during the hostilities. The *Nami* also has on board passengers, nationals of states L and M bound for state X. The *Zosu* visits the *Nami* 100 miles at sea off state N and is removing the passengers, nationals of states D, L, and M, when the *Losu* approaches and the nationals of L request protection. The nationals of D and M also request protection of the
Dosu, an approaching vessel of war of state D. What action may the Losu and Dosu lawfully take?

SOLUTION

(a) (1) The commander of Bosu should raise question with the commander of Yosu as to whether the Bami has not been illegally seized on high seas and request the release of the Bami.

(2) The commander of the Bosu should report to the Navy Department his action.

(b) (1) As the Zosu has placed a prize crew on the Lami and is sending the Lami in for adjudication, the commander of the Losu may take no further action other than to inquire reasons for capture.

(2) The commander of the Losu should report the circumstances to Navy Department.

(c) As oranges may legally be declared contraband and as the entire cargo of the Cemi may be liable to condemnation, the capture of the Cemi by the Xalu is lawful and the commander of the Cosa may take no further action other than to report the facts.

(d) (1) The passengers on the Nami being under the jurisdiction of state N, no third state may take action in regard to their safe removal in time of war by a vessel of war of state Z. This becomes primarily a matter of concern between states N and Z.

(2) The commanders of the Losu and Dosu may request reasons for the action of the Zosu and report the facts to their Navy Departments for appropriate action. The subsequent treatment of the nationals of D, L, and M may become a matter for action of those states.
Notes

Pan American treaties.—

(a) General survey.—President Coolidge in opening the Sixth International Conference of American States, Habana, January 16, 1928, reviewing the history of the American states and their methods of "resolving international differences without resort to force," said:

"If these conferences mean anything, they mean the bringing of all our people more definitely and more completely under the reign of law. After all, it is in that direction that we must look with the greatest assurance for human progress. We can make no advance in the realm of economics, we can do nothing for education, we can accomplish but little even in the sphere of religion, until human affairs are brought within the orderly rule of law. The surest refuge of the weak and the oppressed is in the law. It is preeminently the shield of small nations. This is necessarily a long, laborious process, which must broaden out from precedent to precedent, from the general acceptance of principle to principle." (Report of the Delegates of the United States of America, p. 68.)

The aspiration for peace was further voiced in the pronouncement of President Roosevelt, 1933, of a "good neighbor" policy. Secretary Hull at the opening of the Buenos Aires Conference in 1936 had among other objectives enunciated as vitally important for the Western World "a common policy of neutrality" and that "international law should be reestablished, revitalized, and strengthened." On his return, speaking of the work of the Conference, he said:

"This welding of inter-American friendship has now become a powerful, positive force for peace throughout the world." (January 13, 1937.)
The Conventions of 1928, 1933, and 1936 show the trend of American states toward a policy of peace, and were negotiated with view to advancing that policy. Accordingly they should be interpreted in this spirit.

It should be noted that by becoming party to the above convention of 1936, a state commits itself to obligations under five other agreements, 1923–1933, mentioned in Article I.

(b) Inter-American consultation and cooperation.—The "Convention to coordinate, extend, and assure the fulfillment of the existing treaties between the American states," Buenos Aires, December 23, 1936, affirms the loyalty of American states to the principles of treaties of recent years aiming to assure peace without the use of force. These include the treaties negotiated among American states such as those of Santiago, May 3, 1923; Paris, August 28, 1928; Washington, January 5, 1929; Rio de Janeiro, October 10, 1933.

Article 6 of the Convention of Buenos Aires, December 23, 1936, provides:

"Without prejudice to the universal principles of neutrality provided for in the case of an international war outside of America and without affecting the duties contracted by those American States members of the League of Nations, the High Contracting Parties reaffirm their loyalty to the principles enunciated in the five agreements referred to in Article I, and they agree that in the case of an outbreak of hostilities or threat of an outbreak of hostilities between two or more of them, they shall, through consultation, immediately endeavor to adopt in their character as neutrals a common and solidary attitude, in order to discourage or prevent the spread or prolongation of hostilities.

"With this object, and having in mind the diversity of cases and circumstances, they may consider the imposition of prohibitions or restrictions on the sale or shipment of
arms, munitions and implements of war, loans or other financial help to the States in conflict, in accordance with the municipal legislation of the High Contracting Parties, and without detriment to their obligations derived from other treaties to which they are or may become parties." Pan American Union. Congress and Conference Series, No. 22, pp. 37, 39; post p. 166.)

In this article the American states agree under certain circumstances that "they shall, through consultation, immediately endeavor to adopt in their character as neutrals a common and solidary attitude in order to discourage or prevent the spread or prolongation of hostilities" "without prejudice to the universal principles of neutrality" or "treaties to which they are or may become parties." The American states "in their character as neutrals" propose in their "common and solidary attitude" "the imposition of prohibitions or restrictions on the sale or shipment of arms, munitions, and implements of war, loans or other financial help to the states in conflict, in accordance with the municipal legislation of the High Contracting Parties, and without detriment to their obligations derived from other treaties to which they are or may become parties."

(c) Fulfillment of existing treaties, 1936.—On July 15, 1937, the President ratified on behalf of the United States the "Convention to coordinate, extend, and assure the fulfillment of the existing treaties between the American states" which was signed at Buenos Aires, December 23, 1936. This is a comprehensive regional agreement by which there is recognized differences in the binding force of certain regional treaties and of universal principles of international law applicable outside the Americas.
In Article 1 of this Convention the agreements to which the "Governments represented at the Inter-American Conference for the Maintenance of Peace" are bound are enumerated:

"Taking into consideration that, by the Treaty to Avoid and Prevent Conflicts between the American States, Signed at Santiago, May 3, 1923, (known as the Gondra Treaty), the High Contracting Parties agree that all controversies which it has been impossible to settle through diplomatic channels or to submit to arbitration in accordance with existing treaties shall be submitted for investigation and report to a Commission of Inquiry:

"That by the Treaty for the Renunciation of War, signed at Paris on August 28, 1928, (known as the Kellogg-Briand Pact, or Pact of Paris), the High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another;

"That by the General Convention of Inter-American Conciliation, signed at Washington, January 5, 1929, the High Contracting Parties agree to submit to the procedure of conciliation all controversies between them, which it may not have been possible to settle through diplomatic channels, and to establish a "Commission of Conciliation" to carry out the obligations assumed in the Convention;

"That by the General Treaty of Inter-American Arbitration, signed at Washington, January 5, 1929, the High Contracting Parties bind themselves to submit to arbitration, subject to certain exceptions, all differences between them of an international character, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law, and, moreover, to create a procedure of arbitration to be followed; and

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4 Post, p. 132.
1129 Naval War College International Law Situation, p. 104.
46 Stat. 2209; post, p. 146.
"That by the Treaty of Non-Aggression and Conciliation,8 signed at Rio de Janeiro, October 10, 1933, (known as the Saavedra Lamas Treaty), the High Contracting Parties solemnly declare that they condemn wars of aggression in their mutual relations or in those with other States and that the settlement of disputes or controversies between them shall be effected only by pacific means which have the sanction of international law, and also declare that as between them territorial questions must not be settled by violence, and that they will not recognize any territorial arrangement not obtained by pacific means, nor the validity of the occupation or acquisition of territories brought about by force of arms, and, moreover, in a case of non-compliance with these obligations, the contracting States undertake to adopt, in their character as neutrals, a common and solidary attitude and to exercise the political, juridical or economic means authorized by international law, and to bring the influence of public opinion to bear, without, however, resorting to intervention, either diplomatic or armed, subject nevertheless to the attitude that may be incumbent upon them by virtue of their collective treaties; and, further, undertake to create a procedure of conciliation;

"The High Contracting Parties reaffirm the obligations entered into to settle, by pacific means, controversies of an international character that may arise between them."

(Treaty Series, No. 926.)

(d) Pan American solidarity, 1936.—At the Buenos Aires Conference, 1936, a formal statement of common aspiration was agreed upon by the twenty-one American states. It was stated in the Declaration of Principles of Inter-American Solidarity and Cooperation, that

"The Governments of the American Republics, having considered:

"That they have a common likeness in their democratic form of government, and their common ideals of peace and justice, manifested in the several Treaties and Conventions

849 Stat. 3363, 3375; post, p. 152.
which they have signed for the purpose of constituting a purely American system tending towards the preservation of peace, the proscription of war, the harmonious development of their commerce and of their cultural aspirations demonstrated in all of their political, economic, social, scientific and artistic activities;

“That the existence of continental interests obliges them to maintain solidarity of principles as the basis of life of the relations of each to every other American nation;

“That Pan Americanism, as a principle of American International Law, by which is understood a moral union of all of the American Republics in defense of their common interests based upon the most perfect equality and reciprocal respect for their rights of autonomy, independence and free development, requires the proclamation of principles of American International Law; and

“That it is necessary to consecrate the principle of American solidarity in all non-continental conflicts, especially since those limited to the American Continent should find a peaceful solution by the means established by the Treaties and Conventions now in force or in the instruments hereafter to be executed.

“The Inter-American Conference for the Maintenance of Peace Declares:

“1. That the American Nations, true to their republican institutions, proclaim their absolute juridical liberty, their unrestricted respect for their several sovereignty and the existence of a common democracy throughout America;

“2. That every act susceptible of disturbing the peace of America affects each and every one of them, and justifies the initiation of the procedure of consultation provided for in the Convention for the Maintenance, Preservation and Re-establishment of Peace, executed at this Conference; and

“3. That the following principles are accepted by the international American community;

“(a) Proscription of territorial conquest and that, in consequence, no acquisition made through violence shall be recognized;

“(b) Intervention by one State in the internal or external affairs of another State is condemned;
“(c) Forcible collection of pecuniary debts is illegal; and
“(d) Any difference or dispute between American nations, whatever its nature or origin, shall be settled by the methods of conciliation, or full arbitration, or through operation of international justice.” (Pan American Union. Congress and Conference Series, No. 22, p. 60.)

Observance of international law.—These conventions of recent years among American states have not merely affirmed the purpose to fulfill existing treaty agreements but in many articles have affirmed the intention to support international law. In general this has been the case in regard to matters to which the conventions do not specifically refer. There would, therefore, be a large field of international law to which the usually accepted principles would apply. This would be the case in most areas of maritime and fluvial jurisdiction, both in peace and in war. The jurisdiction over straits has been a subject for consideration for many years and has not been covered in a special American convention.

In most maritime matters the generally accepted international law would apply among American states without reference to special treaties. Questions as to straits have been discussed from early days of international law to recent times.

Grotius on limits of strait.—After mentioning the acquisition of rights over rivers, Grotius in 1625 says:

“In the light of the example just given it would appear that the sea also can be acquired by him who holds the lands or both sides, even though it may extend above as a bay, or above and below as a strait, provided that the part of the sea in question is not so large that, when compared with the lands on both sides, it does not seem a part of them.” (De Jure Belli ac Pacis [Carnegie Classic], Bk. II, chap. III, viii.)
From the days of Grotius and Bynkershoek, attempts have been made by many writers to make more definite the limits and nature of jurisdictional rights of adjacent states over narrow seas and straits. For this purpose conventions have often been concluded even in recent times.

"Straits" convention, Montreux, July 20, 1936.—
The straits which for many years have received the most constant attention are the waters connecting the Aegean and Black Seas. These waters include "the Straits of the Dardanelles, the Sea of Marmora, and the Bosphorus comprised under the general term 'Straits.'" The use of these waters had been regulated by many agreements particularly since the Treaty of Adrianople, 1829. The Convention of Lausanne of July 24, 1923, had regulated the use of the "Straits," but the Convention of Montreux, July 20, 1936, replaced the provisions of the Convention of Lausanne. The expression "not being a belligerent" replaces the word "neutral."

Article 5 of the Montreux convention provides that:

"In time of war, Turkey being belligerent, merchant vessels not belonging to a country at war with Turkey shall enjoy freedom of transit and navigation in the Straits on condition that they do not in any way assist the enemy.

"Such vessels shall enter the Straits by day and their transit shall be effected by the route which shall in each case be indicated by the Turkish authorities." (173 League of Nations Treaty Series, p. 213; 31 American Journal of International Law, Supplement, p. 4.)

Article 20 further provides that:

"In time of war, Turkey being belligerent, the provisions of Articles 10 to 18 shall not be applicable; the passage of warships shall be left entirely to the discretion of the Turkish Government." (Ibid, p. 8.)
It is presumed in Article 21 that Turkey, when threatened with war, will make reasonable provision for the passage of vessels of war which do not belong to the threatening state.

Regulations restricting passage of non-belligerent merchant vessels to certain routes and to entrance by day in such narrow waters as the "Straits" seem, however, to be reasonable.

This Article 5, above, is a material modification of the Convention of Lausanne, July 24, 1923, which is as follows:

Article 2, Annex 1 (c). "In time of war, Turkey being a belligerent.

"Freedom of navigation for neutral vessels and neutral non-military aircraft, if the vessel or aircraft in question does not assist the enemy, particularly by carrying contraband, troops or enemy nationals. Turkey will have the right to visit and search such vessels and aircraft, and for this purpose aircraft are to alight on the ground or on the sea in such areas as are specified and prepared for this purpose by Turkey. The rights of Turkey to apply to enemy vessels the measures allowed by international law are not affected.

"Turkey will have full power to take such measures as she may consider necessary to prevent enemy vessels from using the Straits. These measures, however, are not to be of such a nature as to prevent the free passage of neutral vessels, and Turkey agrees to provide such vessels with either the necessary instructions or pilots for the above purpose."


Article 20 of the Montreux Convention above gives to Turkey much greater control of the passage of the "Straits" than was provided under the Convention of Lausanne:

Article 2, Annex 2 (c). "In time of war, Turkey being belligerent."
“Complete freedom of passage for neutral warships, without any formalities, or tax, or charge whatever, but under the same limitations as in paragraph 2 (a).

“The measures taken by Turkey to prevent enemy ships and aircraft from using the Straits are not to be of such a nature as to prevent the free passage of neutral ships and aircraft, and Turkey agrees to provide the said ships and aircraft with either the necessary instructions or pilots for the above purpose.

“Neutral military aircraft will make the passage of the Straits at their own risk and peril, and will submit to investigation as to their character. For this purpose aircraft are to alight on the ground or on the sea in such areas as are specified and prepared for this purpose by Turkey.”

It is evident that even in regard to the Bosphorus and Dardanelles, long subject to international regulation, a final adjustment may not have been reached. Other areas have often been placed under special restriction, but not always without protest by other states.

**Defensive sea areas, United States.**—An act, March 4, 1917, provided that whoever shall—

“willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, shall be punished, on conviction thereof in a district or circuit court of appeals of the United States for the district or circuit in which the offense was committed, or into which the offender is first brought, by a fine of not more than $5,000, or by imprisonment for a term not exceeding five years, or by both, in the discretion of the court.” (39 Stat. 1194; 1918 Naval War College, International Law Documents, p. 162.)

This act applied in time of peace provided for penalty to be determined by the district or circuit court. Defensive sea areas were established under
this act before the United States became a belligerent as in the case of Chesapeake Bay, Hampton Roads, and more than twenty-five other areas on April 5, 1917. Entrance to these areas was prohibited except as prescribed in conditions as to place, route, speed, conduct, etc. Failure to observe these regulations subjected the offender to the use of necessary force as well as prosecution.

The exercise of control over defensive sea areas or other similar areas may give rise to controversy or to questions of conflict of authority in such areas.

_Navy regulations, United States._—As a general principle a state is under obligation to protect the lives and property of its citizens when in danger and merchant vessels lawfully employed. In some exceptional cases the United States had in early treaties agreed to protect the lives and property of citizens of other states. The general obligation as to injury or threatened injury to citizens or property is stated in the United States Navy Regulations as follows:

"722. 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 demand, 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.

"723. 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 can not 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."

Under these provisions action by naval forces is to a high degree limited. Except in time of war in which the United States is a belligerent, there would rarely arise a condition of arbitrary violence, actual or impending, "whereby the State or its citizens may suffer irreparable injury."

These regulations of the United States are in accord with generally accepted practice and seem essential for the protection of recognized fundamental rights of state existence.

Restrictions on travel.—Under the Act of May 1, 1937," amending prior legislation the earlier provisions on "travel on vessels of belligerent states" were repeated. This Act if applied in Situation I made it possible for the President of the United States to "find that there exists a state of war between, or among, two or more foreign states" and to "proclaim such fact."

Section 9 of the Act of May 1, 1937, states that—

"Whenever the President shall have issued a proclamation under the authority of section 1 of this Act it shall there-

*Post, pp. 171, 181."
after be unlawful for any citizen of the United States to travel on any vessel of the state or states named in such proclamation, except in accordance with such rules and regulations as the President shall prescribe: Provided, however, "That the provisions of this section shall not apply to a citizen of the United States traveling on a vessel whose voyage was begun in advance of the date of the President's proclamation, and who had no opportunity to discontinue his voyage after that date: And provided further, That they shall not apply under ninety days after the date of the President's proclamation to a citizen of the United States returning from a foreign state to the United States. Whenever, in the President's judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply with respect to the state or states named in such proclamation, except with respect to offenses committed prior to such revocation." (50 Stat. 121, 127.)

This act shows the attitude of the United States toward travel upon vessels of certain states in time of a Presidentially proclaimed war. The act, however, applies merely to the "vessel of the state or states named in such proclamation" and would place no limitation upon travel on vessels of other states not parties in the conflict. The penalty for violation of this law is under the domestic law of the United States as prescribed in Section 12 and not under international law.

A state may prohibit its citizens from traveling in a specified manner and penalize them in case of violation of the prohibition, but such a law does not confer upon a foreign state any authority to interfere with such transit. In vessels under a foreign flag, the authority of the flag prevails, and in case of interference with this authority in violation of right, recourse rests in the state concerned.
Neutrality.—The concept of neutrality has slowly developed. The support that the idea of neutrality has received has varied and at times has been determined by policy of the states concerned. In ancient times it was usually held that in time of war, when a state was near enough to a combatant to feel the effects of the war, that state would be on one or the other side in the struggle. As belligerents resorted to maritime warfare contacts with non-belligerents became common and the risk of unduly offending a non-belligerent became a matter of serious significance, while the risk which the non-belligerent might run in offending the belligerent might be immediately apparent. Maritime commerce in war time introduced matters of policy often influencing both belligerents to avoid irritating a state having large resources or easily able to make powerful alliances.

Some of the concepts of war became more clearly defined under Gentilis (1552–1608) and Grotius (1583–1645). Bynkershoek (1673–1743) in writing upon war had a chapter on “How War Affects Neutrals.” (Quaestionum Juris Publici, Lib. I, c. ix.) At the beginning of this chapter he says “Non hostes appelo, qui neutrarum, partium sunt, nee ex foedere his illisve quiequam debent; si quid debeant, Foederati sunt, non simpliciter amici,” which may be read, “I call those neutrals who are of neither party, and do not by treaty owe anything to the one or the other; if they owe anything they are allied, not simply friends.” The word neutrality had been used hundreds of years before the eighteenth century and references in treaties and elsewhere to the law of neutrality had been frequent. Bynkershoek in 1737, however, contributed
much toward clarifying the concepts of neutrality, contraband, free ships, free goods, etc. Of course, states having a large export trade were averse to interference with commerce, and such a state, if neutral, would be in a position to be of service to one or both belligerents as a source of supply. The law of maritime neutrality was also developing concurrently with the law applied in admiralty and prize courts, some early evidences of which were seen in the fourteenth century. The printed reports of the decision of Lord Stowell from the end of the eighteenth century gave great impetus to the study of and respect for prize law.

The gradual substitution of a professional navy for the irregular methods of maritime warfare introduced direct responsible state control and made the demand for observance of law more tenable.

Common attitude.—Identical provisions are included in many bilateral treaties relating to war and neutrality, particularly since the early eighteenth century. The provisions in regard to visit and search, etc., of the first treaty of the United States with France, February 6, 1776, were repeated in many later treaties, indicating a common attitude upon this subject. Other subjects have been similarly treated. This does not imply, however, that such bilateral treaties become generally binding but only that each state is bound to act in the manner agreed upon in its relations to the other party to the specific treaty.

The fact that identical provisions were common to many bilateral treaties tended to give such provisions the weight of law in international courts. The many identical lists of contraband during the nineteenth century gave support to the idea cur-
rent at the Hague Peace Conferences that a multilateral agreement could be reached upon the articles to be included in the category of contraband. The attempt to obtain general assent to a list as enumerated in the Declaration of London, 1909, was not successful in the early days of the World War.

Attempts were, however, made to agree upon common courses or principles of action upon topics or in regions more or less extended, as in the Hague Peace Conventions of 1899 and 1907, and in the rules of neutrality of Denmark, Norway, and Sweden in 1912.

American solidarity, 1914.—During the World War, while the United States was neutral, there were many proposals looking to agreements by American states upon common action to protect neutral rights or to extend neutral protection. Propositions for the defining of areas about American coasts from which belligerent vessels of war should be excluded or within which they could exercise no rights as regards neutral commerce were common. In a lengthy memorandum from the Peruvian Minister of Foreign Affairs to the Department of State, November 10, 1914, the problems are set forth. The concluding part is as follows:

"In the present European war, which has unfortunately already been extended to Asia, it is not admissible that America, and especially South America, should also become a battlefield. The American countries are not bound up with the European nations either politically or by reason of their interests. The hospitality which they systematically accord to everything from abroad which may contribute to their advancement and development can not be extended to the point of permitting the coasts of the American Continent
to be used for the maintenance of a permanent system of persecution of merchant vessels and for an intermittent and sterile struggle which benefits no one and injures all.

"For this reason the Peruvian Government believes that the time has come for making felt the joint action of all the American Republics to guarantee the inviolability of their trade routes by freeing them throughout their extent from the effects of the hostilities of the belligerent naval forces. An agreement to this effect, asserting that America will not permit its commerce within the maritime areas corresponding to the continent (which area may be considered marked by a line equidistant from the other continents on both the Pacific and the Atlantic sides) to be subject to the contingencies of the present European war, would afford a sufficient guarantee to mitigate at least in part the consequences of the crisis which has already begun to be felt very acutely, and it would enforce respect for the interests affected, such respect not seeming thus far to have entered the minds of the belligerent powers.

"It is permissible to suppose that such an attitude would not be regarded unfavorably by these powers themselves, since it would benefit them likewise, by virtue of the guarantees which would be granted to their merchant vessels, besides relieving them of the obligation of detaching squadrons at such a distance to protect the vessels of their nationality or to pursue those under the enemy's flag." (Foreign Relations, U. S., 1914, Supplement, p. 443.)

Other American states made somewhat similar propositions and on December 8, 1914, the Governing Board of the Pan American Union passed a resolution in which it declared:

"1. That the magnitude of the present European war presents new problems of international law, the solution of which is of equal interest to the entire world.

"2. That [in] the form in which the operations of the belligerents are developing they redound to the injury of the neutrals.

"3. That the principal cause for this result is that the respective rights of the belligerents and of the neutrals are-
not clearly defined, notwithstanding that such definition is demanded both by general convenience as by the spirit of justice which doubtless animates the belligerents with respect to the interests of the neutrals.

“4. That considerations of every character call for a definition of such rights as promptly as possible upon the principle that liberty of commerce should not be restricted beyond the point indispensable for military operations.

“On these grounds the Governing Board of the Pan American Union resolves:

“1. A special commission of the same is hereby appointed, to consist of nine members, of which the Secretary of State of the United States shall form part, acting as chairman thereof, ex officio.

“2. This commission shall study the problems presented by the present European war and shall submit to the Governing Board the suggestions it may deem of common interest. In the study of questions of a technical character, this commission will consult the board of jurists. Each government may submit to the committee such plans or suggested resolutions as may be deemed convenient, on the different subjects that circumstances suggest.” (Ibid, p. 444.)

Venezuela proposed a congress of neutrals to define “neutral rights and duties in the light of the new conditions introduced by modern war”, and that revised rules should be “embodied in international law” as a “pledge of peace for the future.” To this end Venezuela also proposed a league of neutrals to bring a neutral code into operation.

Proposals for the neutralization of American waters were made by many states. The Scandinavian states had at Malmö on December 20, 1914, assumed an obligation to confer in case of difficulties in maintaining neutral rights, and intimated in late 1914 that the cooperation of the United States would be viewed with satisfaction. Italy
also showed a desire that its action should be "along parallel lines with that of the United States."

Regional understandings.—The Covenant of the League of Nations, for which President Wilson was a main protagonist, recognized in article 21 the desirability of maintaining "regional understandings like the Monroe doctrine." This doctrine was not an international agreement, but a unilateral pronouncement of one powerful state in regard to its policy in a specified area. Other regional understandings have been proposed for specified areas, as the "open door in China," etc., which have later been embodied in international agreements as were the understanding in regard to China in the "Nine Power Treaty" of the Washington Conference, 1922, which provided for "full and frank communication between the Contracting Powers concerned" when the carrying out of the stipulations of the treaty seemed to be involved.

The events since 1922 have seemed to warrant the "full and frank communication," but this has not taken place in any effective manner.

American solidarity, 1917.—The attempts to bring about a common attitude on neutrality prior to 1917 had met with only moderate approval. After the United States entered the war there was some support for a conference of neutral American states, but soon this support became so limited that the proposed meeting was given up and a sentiment in favor of the Peruvian proposition for a "conference doctrine of solidarity with the United States" became general. American states soon broke off relations with Germany, and Brazil declared war on October 26, 1917. Other states gave special privileges. Costa Rica, El Salvador, and
some other states placed their ports at the disposal of the United States.

For many years regional agreements have been common and in one sense any treaty may have a regional significance. Many early treaties applied to limited areas. Such treaties as those relating to the balance of power or concert of powers were usually regional in application. It could scarcely be expected that states having a common type of civilization and interest would not unite for common ends. Alliances of varying nature were the characteristic of a long period of European diplomacy. As competition among states increased, offensive and defensive alliances followed. These were sometimes openly entered into and sometimes secret. It was hoped that at the end of the World War there would be a change in attitude of states and that the world should be made safe "as against force and selfish aggression." President Wilson in his address to Congress, January 8, 1918, proposed as the first of his fourteen points in a "programme of the world's peace":

"I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view." (Foreign Relations, U. S., 1918, Sup. 1, I, 15.)

In this address President Wilson also said:

"For such arrangements and covenants we are willing to fight and to continue to fight until they are achieved; but only because we wish the right to prevail and desire a just and stable peace such as can be secured only by removing the chief provocations to war, which this programme does remove." (Ibid., p. 16.)
As to how far the Treaty of Versailles embodied the "fourteen points" and achieved the aims of his programme is a matter of difference of opinion.

Pan American treaties, 1823–1936.—To some degree there has been a feeling of solidarity among the states of the American continent since the early nineteenth century. The Congress of Panama called under the influence of Bolivar in 1826 contemplated a type of league of states. The idea was kept before American states by other American conferences as at Lima (1847), at Santiago (1856), and at Lima (1864). At the conference of 1864 a somewhat elaborate scheme for a league was presented. The Monroe Doctrine of the United States, from 1823, gave a sense of security to states in advocating a united policy. Even in the Congress of Panama, 1826, some of the later principles of conciliation and arbitration were advocated. The movement for strengthening common bonds by the creation of a Pan American Union developed rapidly from 1889 and meetings of representatives of the American states became frequent. Each conference made contributions by discussing advanced projects for international peace and cooperation. The tentative idea of a Pan American Union dating from 1889 was further elaborated at the Fourth Conference at Buenos Aires in 1910.

The Sixth International Conference of American States, Habana, 1928, was considered of such importance that the President of the United States visited Habana and made an address at the opening session emphasizing the need of "continental responsibility" and "international cooperation." Delegations from each of the American republics
were in attendance at this Habana Conference, thus making its acts of significance for all the American states. The scope of the Conference involved the signing of eleven conventions, sixty-two resolutions, seven motions and four agreements.

Subsequent conferences at Montevideo and Buenos Aires elaborated the work of the Habana Conference, and introduced new topics upon which action has been taken.

As many of the conventions signed at these conferences have subsequently been ratified, there is a considerable body of law common to the American states, relating to the time of peace, war, and neutrality. These conventions, binding upon American states, are not always in exact accord with the accepted international obligations as understood among non-American states.

The Conference at Buenos Aires, 1936, was specifically called the Inter-American Conference for the Maintenance of Peace and had as a background the recent war between Bolivia and Paraguay.

*Habana Convention, 1928.*—Of the ten conventions signed at the Sixth International American Conference, Habana, January 16–February 20, 1928, the Convention on Maritime Neutrality (1935 Naval War College, International Law Situations, p. 115) contains provisions applicable in such a war as that between X and Y. Many of these are similar to those of Hague Convention XIII, 1907, on Neutral Rights and Duties in Maritime War. The preamble of the Habana Convention on Maritime Neutrality implies that there will be to some
degree concerted action by the Governments of the Republics represented, which—

"Desiring that, in case war breaks out between two or more states the other states may, in the service of peace, offer their good offices or mediation to bring the conflict to an end, without such an action being considered as an unfriendly act;

"Convinced that, in case this aim cannot be attained, neutral states have equal interest in having their rights respected by the belligerents;

"Considering that neutrality is the juridical situation of states which do not take part in the hostilities, and that it creates rights and imposes obligations of impartiality, which should be regulated;

"Recognizing that international solidarity requires that the liberty of commerce should be always respected, avoiding as far as possible unnecessary burdens for the neutrals;

"It being convenient, that as long as this object is not reached, to reduce those burdens as much as possible; and

"In the hope that it will be possible to regulate the matter so that all interests concerned may have every desired guaranty;

"Have resolved to formulate a convention to that effect and have appointed the following plenipotentiaries:" (Ibid.)

Limitation on Habana Convention, 1928.—The title of the Habana Convention on Maritime Neutrality, 1928, implied that the Convention applies to a definite status. This status is set forth in the preamble in the words, "neutrality is the juridical situation of states which do not take part in hostilities, and * * * it creates rights and imposes obligations of impartiality, which should be regulated." The Convention is divided into four sections: "Section I. Freedom of commerce in time of war; Section II. Duties and rights of belligerents; Section III. Rights and duties of neutrals; Section IV. Fulfilment and observance of laws
of neutrality." The text of this Convention refers to previous laws and accepted rules and follows some of the rules of the earlier Hague conventions. Indeed, Article 28 specifically states that—

"The present convention does not affect obligations previously undertaken by the contracting parties through international agreements."

In signing this Convention, the delegations of the United States and of Cuba made reservation on the treatment of armed merchantmen, and Chile on the transit of arms, munitions, etc., to a "Mediterranean country."

It was clearly shown that the Habana Conference of 1928 appreciated the difference between war and civil strife, as a later convention was concluded on the "Rights and Duties of States in the Event of Civil Strife." At this time there was therefore a definite concept of neutrality in the sense of international law.

Treaties of 1933.—Among the treaties of the Seventh International Conference of American States at Montevideo, 1933, was one on "The Rights and Duties of States," which again affirms that "the present convention shall not affect obligations previously entered into by the high contracting parties by virtue of international agreements." (Article 12.) This provision reaffirms many conventional agreements upon neutrality.

The Anti-War Treaty on Non-Aggression and Conciliation * signed at Rio de Janeiro, October 10, 1933, aimed to end wars of aggression and for territorial acquisition. This treaty refers to war and neutrality.

* Post, p. 152.
Conventions, Buenos Aires, 1936.—The Convention for the Maintenance, Preservation, and Reestablishment of Peace, 10 December 23, 1936, Article II, refers to "the event of war or a virtual state of war between American states" and also refers to "the standards of international morality." An additional protocol declares "inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the parties," but "mutual consultation" may follow with view to conciliation, arbitration, or judicial settlement.

Passengers bound for belligerent ports.—The treatment of persons having a belligerent destination has long been an important question. Provisions in regard to such persons appeared in treaties in the seventeenth and eighteenth century. The Trent case, November 8, 1861, when an American vessel of war required the surrender of Mason and Slidell by the British mail steamer, emphasized the need of definite rules. It was maintained that the persons should not be removed, but the vessel, in case of probable carriage of enemy military persons, should be brought into port.

The consideration of the matter of carriage of enemy persons led to the formulation of Article 47 of the unratified Declaration of London in 1909:

"Any individual embodied in the armed force of the enemy, and who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel." (1909 Naval War College, International Law Topics, p. 111.)

10 Post, p. 160.
The comment on this article explains the point of view in 1909:

"Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel which is visited and searched. If the vessel is subject to condemnation, the cruiser will capture her and take her to one of her own ports with the persons on board. Clearly the soldiers or sailors of the enemy State will not be set free, but will be considered as prisoners of war. It may happen that the case will not be one for the capture of the ship—for instance, because the master does not know the status of an individual who had the appearance of an ordinary passenger. Must the soldier or soldiers on board the vessel be set free? That does not appear admissible. The belligerent cruiser cannot be compelled to set free active enemies who are physically in her power and are more dangerous than this or that contraband article; naturally she must act with great discretion, and it is at her own responsibility that she requires the surrender of these individuals, but the right to do so is hers; it has thus been thought necessary to explain the point." (Ibid.)

In Article 45 of the Declaration of London, there is reference to "the transport of individual passengers who are embodied in the armed force of the enemy" or "persons who with the knowledge of the owner" during the voyage, lend direct assistance to the operations of the enemy."

There is no doubt as to the liability of the vessel to be seized on the ground of unneutral service in case of such transport, but the removal of such persons from the neutral vessel had usually been opposed till the twentieth century. The interference with neutral shipping involved in bringing in a large neutral passenger liner, because a single soldier of an enemy was on board, came to be regarded as unnecessary and it was conceded that the passenger might be turned over to the visiting
vessel of war. The liability would be assumed by the belligerent. Some states have taken positions involving an approval of action which still would be regarded as extreme, as in the Italian regulations of 1927, which provide:

"Persons belonging to or intending to join the enemy's armed forces found on board a neutral vessel may be made prisoners of war, even though the ship be not subject to capture." (Norme de Diritto Marittimo di Guerra, Roma, 1927, Article 78.)

The Instructions for the Navy of the United States, June 1917, stated that the persons "must be actually embodied in the military service of the enemy. Reservists or other persons subject to military duty but not formally incorporated in military service are not included."

The status and treatment of enemy persons on neutral vessels received somewhat full treatment at the Naval War College in 1928 (1928 Naval War College, International Law Situations, pp. 73–108). The discussion in 1928 led to the statement that, "while neutrals may after arriving in a belligerent state, enroll in the military service, this does not subject them to interference prior to entering enemy service." It was also concluded that—

"the present rules in regard to capture do not confer a right to remove from a neutral merchant vessel, when on a regular voyage, passengers of enemy nationality on the ground that from their age or capacity they may be called for military service."

There would not be a general obligation resting upon all neutral vessels of war to interfere in cases in which neutral vessels lawfully flying other flags than that of the vessel of war might be concerned.
Habana Convention, 1928, on transit.—The passage of goods across American states is as among the parties to the Habana 1928 Convention on Maritime Neutrality regulated by Article 22, which specifically refers to inland states:

"Neutral states are not obligated to prevent the export or transit at the expense of any one of the belligerents of arms, munitions and in general of anything which may be useful to their military forces.

"Transit shall be permitted when, in the event of a war between two American nations, one of the belligerents is a mediterranean country, having no other means of supplying itself, provided the vital interests of the country through which transit is requested do not suffer by the granting thereof." (1935 Naval War College, International Law Situations, p. 120.)

In the first paragraph the neutral state is "not obligated to prevent the export or transit." In the second paragraph, "transit shall be permitted."

Cargoes contraband.—In December 1915 certain boxes of Valentia oranges were seized on Norwegian steamships, *Norne*, *Grove*, and *Hardanger*, on a voyage from Valentia, Spain, to Rotterdam, Holland. The fruit was to be sold at auction in Rotterdam. The Judicial Committee of the Privy Council on appeal from the British Prize Court stated:

"At the date of the seizure the oranges had been declared conditional contraband. * * * Whether goods in any particular instance are contraband, by application of the doctrine of continuous voyage, is a question of fact. Under the terms of the Order in Council the appellants must discharge the burden of proving that the destination, if the voyage had not been interrupted, would have been innocent. When an exporter ships goods under such conditions that he does not retain control of their disposal after arrival at the port of delivery, and the control but for their interception and seizure would have passed into the hands of some other persons,
who had the intention either to sell them to an enemy government or to send them to an enemy base of supply, then the doctrine of continuous voyage becomes applicable, and the goods on capture are liable to condemnation as contraband. The case for the respondent is that the cases of oranges on arrival at Rotterdam would have passed under the control of Lutten and Sohn, of Hamburg." (1 A. C. [1921] 765.)

The decision of the Prize Court condemning the oranges as conditional contraband destined for an enemy base was affirmed. Whether all the opinion would have been affirmed had it not been for the domestic Orders-in-Council is open to question, but oranges bound for an enemy base of supply would be conditional contraband. Similar decisions were given as to conditional contraband in the German Court (Medea, 1 Entscheidungen des Oberprisengerichts 131) and in the French court (Athènes, Fauchille, Jurisprudence Francaise en Matière de Prises, p. 428).

The Hakan.—The Hakan, a Swedish merchant vessel, was captured by a British vessel of war April 4, 1916, with a cargo of salted herrings. The Hakan was bound to Lubeck in Germany. The British Prize court condemned the ship and cargo. The Judicial Committee of the Privy Council heard the case on appeal.

"In their lordships' opinion, goods which are conditional contraband can be properly condemned whenever the court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes, the Jong Margaretha. * * *

"In the present case Lubeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand,
it is quite certain that the persons to whom the goods were consigned at Lubeck were bound forthwith to hand them over to the Central Purchasing Co., of Berlin, a company appointed by the German Government to act under the direction of the imperial chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualing of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and, this being so, their lordships are of opinion that the goods were rightly condemned."

There is here introduced the idea of contraband by substitution, which has often been advanced in recent wars.

The ship itself was also condemned on the ground that authorities held that "knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify condemnation of the ship—at any rate, where the goods in question constitute a substantial part of the cargo." (Ibid.)

Reservations on contraband, 1936.—In signing the Buenos Aires, 1936, Convention to coordinate, extend, and assure the fulfillment of the existing treaties between American states, the Argentine delegation made the following reservation:

"In no case, under Article VI, can foodstuffs or raw materials destined for the civil populations of belligerent coun-
tries be considered as contraband of war, nor shall there exist any duty to prohibit credits for the acquisition of said foodstuffs or raw materials which have the destination indicated.

"With reference to the embargo on arms, each Nation may reserve freedom of action in the face of a war of aggression."

(Pan American Union, Congress and Conference Series, No. 22, p. 40; post p. 168.)

Paraguay made a like reservation. (Ibid.)

Restriction of joint resolution of United States on export of arms, etc.—The joint resolution providing for the prohibition of the export of arms, ammunition, and implements of war to belligerents, etc., adopted by the Congress of the United States, May 1, 1937, contained in section 4a a restriction on its application. This section is as follows:

"Sec. 4. This Act shall not apply to an American republic or republics engaged in war against a non-American state or states, provided the American republic is not cooperating with a non-American state or states in such war."

It is not the intent of the Government of the United States to apply the provisions of this joint resolution in wars in which an American republic or republics may be engaged against a non-American state or states, provided the American state is not "cooperating" on the non-American side. The joint resolution would not specially apply when the war is one wholly between non-American states even though an American republic should become an ally of one of the parties.

Prior treaties.—The recent multipartite treaties among American states have usually contained or implied a stipulation to the following effect:

"The present convention does not affect obligations previously undertaken by the contracting parties through international agreements."
This form appears in the conventions of 1928, 1933, and 1936. Some articles make specific reference to obligations of American states as members of the League of Nations. Modification of obligations previously existing may in any given instance be very limited as the provisions of a prior treaty would prevail and the later treaty would merely impose additional obligations as among the ratifying parties.

*Résumé.—A belligerent state has in general the right to regulate the use of its territorial waters. The right of innocent passage may be claimed by neutral merchant vessels. There may be and often is in time of war difference of opinion as to what is meant by the term "innocent passage."

In straits which are the sole waterway between high seas, if proclaimed war zones, defense areas or similarly designated, the right of innocent passage may not be prohibited even though such passage necessarily involves entering territorial waters.

If a territorial strait, proclaimed a war zone, is not the sole waterway between two seas though it is the more convenient and customary route, the passage of the strait may be restricted by reasonable military regulations, and passage may even be prohibited.

Cases involving differences of opinion between commanders of naval vessels of belligerents and neutrals in regard to neutral rights of merchant vessels do not usually demand the immediate resort to force on the part of the neutral. If any injury to the neutral merchant vessel is not remedied by the belligerent courts, diplomatic means are available. In such cases, however, the facts so
far as ascertainable should be reported to the proper authorities and if neutral rights are clearly violated, formal protest may be made or if in doubt reasons for the action may be requested.

An innocent merchant vessel in ballast within a war zone, but outside territorial waters would not ordinarily be liable to seizure solely on the ground of its presence there but the presumption would be that its seizure would not be justified.

If a neutral merchant vessel with cargo has been seized and if the belligerent has placed a prize crew on board, from that time a merchant vessel is under the military control of the belligerent state and any protest in regard to further action should be by the political authorities of the neutral state concerned, unless the naval commander has special instructions. This is particularly true, as in recent years the list of articles liable as contraband has varied, the effect of ultimate destination in determining the treatment of goods has not been uniform, and treaty provisions and national legislation have introduced exceptional practices.

In recent wars belligerents have usually extended the list of contraband as the maintenance of blockade has become increasingly difficult. During the World War the rule of the unratified Declaration of London in regard to the proportion of contraband in the cargo rendering the vessel liable as well as the cargo was usually followed in the prize courts.

Recently when states have without declaring war resorted to the use of force against each other, some states have prohibited the export of certain articles to the states engaged in the conflict. That a state engaged in a declared war should consider
such prohibited exports properly within the category of contraband when bound to an enemy would seem reasonable even from the point of view of the neutrals concerned.

Certain states have made it unlawful for their nationals to travel on vessels of states engaged in hostilities. A state may also lawfully forbid its nationals to travel within the war area during hostilities or may notify them that such travel is at their own risk. The nationals of any state, when traveling on a vessel on the high seas, are under the jurisdiction of the state whose flag the vessel lawfully flies. In treatment of neutral nationals on the high seas, belligerents are under obligations to have due regard for their safety and not to place them under restraint unless they are engaged in aiding the enemy or embodied in the service of the enemy.

SOLUTION

(a) (1) The commander of the Bosu should raise question with the commander of the Yosu as to whether the Bami has not been illegally seized on high seas and request the release of the Bami.

(2) The commander of the Bosu should report to the Navy Department his action.

(b) (1) As the Zosu has placed a prize crew on the Lami and is sending the Lami in for adjudication, the commander of the Losu may take no further action other than to inquire reasons for capture.

(2) The commander of the Losu should report the circumstances to Navy Department.

(c) As oranges may legally be declared contraband and as the entire cargo of the Cemi may be
liable to condemnation, the capture of the Cemi by the Xalu is lawful, and the commander of the Cosa may take no further action other than to report the facts.

(d) (1) The passengers on the Nami being under the jurisdiction of state N, no third state may take action in regard to their safe removal in time of war by a vessel of war of state Z. This becomes primarily a matter of concern between states N and Z.

(2) The commanders of the Losu and of the Dosu may request reasons for the action of the Zosu and report the facts to their Navy Departments for appropriate action. The subsequent treatment of the nationals of D, L, and M may become a matter for action of those states.