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

VISIT BY AND INTERNMENT OF AIRCRAFT

States X and Y are at war. Other states are neutral.

(a) The Yaga, a cruiser of state Y, launches a plane, the Ya-10, which locates a merchant vessel of state X, the Xala, on the high seas and by radio orders the Xala to proceed to the Yaga. The Xala gives no evidence of receiving the message.

1. The Xala starts zigzagging in the opposite direction.
2. The Xala stops and remains stopped.
3. The Xala apparently knows that a cruiser of X is approaching, and the cruiser can be seen from the Ya-10.

What should be the action of the Ya-10, if each of the above supposed conditions arise?

4. Would the same action be taken under identical conditions in the case of the Nela, a merchant vessel of neutral state N?

(b) What should be the action of Ya-10, if the same orders had been in a message dropped on the deck and picked up by an officer of the respective merchant vessels?

(c) A carrier-based plane, Pa-11, of state Y is engaged in operations against state X.

1. The Pa-11 is pursued by an aircraft of state X and is flying within three miles of state K. The aircraft of state X is over the high sea. State K has prohibited the flying of belligerent aircraft within its juris-
diction, and a patrol vessel and an aircraft of state K are near.

2. The Pa-11 enters port N of state O in order to take fuel from a naval tanker of state Y.

3. The Pa-11 enters port P of state R and alights on the Yema, an aircraft carrier, which entered port P two hours earlier and from which the Pa-11 had flown three hours before the Yema entered the territorial waters of state R.

What action may the neutral authorities lawfully take?

SOLUTION

(a) 1. The Ya-10 should not use force against the Xala till certain that the Xala has received and understood the summons. When certain that summons has been received and is understood, the Ya-10 may use force sufficient only to bring the Xala to the Yaga under escort, or in case of persistent or active resistance the Ya-10 may sink the Xala, after assuring the safety of passengers, crew, and papers.

2. The Ya-10 should not use force against the Xala till certain that the Xala has received and understood the summons. When certain that summons has been received and is understood, the Ya-10 may use force sufficient only to bring the Xala to the Yaga under escort, or in case of persistent or active resistance the Ya-10 may sink the Xala, after assuring the safety of passengers, crew, and papers.

3. The Ya-10 should not use force against the Xala till certain that the Xala has received and understood the summons. When certain that summons has been received and is understood the Ya-10 may use force sufficient only to bring the Xala to the Yaga under escort. If the Ya-10 decides not to incur risk from the
approaching cruiser of X, the Yα-10 may take no further action in regard to the Xala.

4. If a merchant vessel of neutral state N, the Nela, should be summoned by the Yα-10 under conditions identical to (1), (2), and (3) above, the same action may be taken.

(b) The commander of the Yα-10 being already certain that the summons is received, should also be certain that it is understood, when he may proceed as in (1), (2), (3), and (4) above.

(c) 1. State K should use due diligence to intern the Pa-11, an aircraft of state Y.

2. State O should use due diligence to intern the Pa-11, an aircraft of state Y, and if the tanker of state Y has furnished fuel to the Pa-11, should intern the tanker.

3. State R should request the Yema to turn over the Pa-11 for internment and if the request is not granted, should use due diligence to intern the Yema with the Pa-11 on board.

NOTES

Changing rules.—New methods of warfare introduce new problems. It is not usually the case that the rules for the use of new methods are adopted in advance. It also requires some knowledge of the manner in which the new method works before suitable rules may be devised.

In spite of the novelty of a new instrument of war, the principles of its use may be well established. Many of the principles embodied in “Lieber’s Code” (General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 1863,) are illustrative of rules previously existing, which in the form given by Lieber are, with few modifications, continuing to the present day. The principles of the law of maritime war stated by Lord Stowell early in the nineteenth century were regarded as binding in courts of
the twentieth century. Some of these principles were disregarded during the World War, though often the arguments put forth for disregarding early precedents were not valid.

Such principles as that the use of materials which cause unnecessary suffering should be prohibited were regarded as of universal acceptance. That poison should be prohibited was generally approved. The reason for prohibiting the discharge of projectiles from balloons in the late nineteenth century was largely lack of effective control in directing the movements of the aircraft. This would make the aim and course of the projectiles uncertain and create an undue risk for innocent population. As aircraft became perfected and their movements could be reasonably controlled, the restrictions upon their use correspondingly changed.

The argument sometimes advanced to the effect that because an instrument of war is weak in respect to defense, it is entitled to special consideration either from the enemy or from a neutral, certainly has not received much support. War is a contention of strength and if either belligerent uses instruments which are weak, not self-sufficient, or to which the belligerent cannot furnish adequate support, such instrument is not entitled to exceptional consideration from the neutral, and will not receive it from the opposing belligerent.

Air power.—As there is great difference of opinion as to “war as an instrument of national policy”, so there is wide difference as to the use of an air force in war. Certainly the use of the air has modified the conduct of war, even though opinion is not uniform as to what extent and in what respects modification has taken place and must take place. There is not agreement either as evidenced in discussion of or in appropriations for air equipment.
In some early wars land forces have been the main and determining factor, in others surface sea power, in the World War for a time subsurface sea force was threatening to dominate, and now air force is an incalculable factor, but uncertainty as to the issue is often a stimulus to war.

Gunpowder, torpedoes, mines, and submarines have at different periods in history been hailed as the last word in war, as aircraft are now considered by some.

Thus far in history man as an animal of many inventions has shown a defensive mentality commensurate to the offensive, though sometimes a little delayed.

Aircraft.—The introduction of aircraft as a means of warfare greatly modified the conduct of war upon the earth surface, on the water as well as on land. The earlier rules for warfare were concerned with surface combat. These rules could not in every instance be extended by analogy to aerial warfare, because the forms of warfare were not analogous. There was an attempt on the part of some writers to extend the three mile maritime jurisdiction doctrine to the superjacent air. In this attempt the early recognition of the fact that the law of gravity did not act horizontally and vertically in the same manner destroyed the analogy. Differences in speed and in other respects introduced other complications in attempts to extend maritime and land rules to the air. Aircraft were coming more and more to be used in war; therefore rules had to be devised.

The World War experiences and problems contributed valuable basal data for the determination of the nature of possible regulation of use of aircraft. The equipment of aircraft with radio introduced other problems.

Hague limitations on aerial warfare, 1899, 1907.—At times there have been movements advocating the prohibition of aerial warfare or of the use of aircraft in war except for purposes of observation and signaling.
While other restrictions were advocated as aircraft became more perfected, there was little limitation upon the object for which the aircraft might be used, but some restriction upon the method of use was demanded in order that there might not be a risk disproportionate to the advantage. It might be reasonable to restrict the use of certain specified agencies in war for a time until their operation could be better known, and it might be essential to prohibit the use of other instrumentalities immediately.

While the principle that the use in war of instruments or materials that would cause unnecessary suffering should be prohibited might meet general support in an international conference, it is not certain that an instrument, which at a given date would be in the category of those which might cause unnecessary suffering, would remain in that category. At the Hague Conference of 1899 certain types of bullets were prohibited, and it was also proposed to prohibit the discharge of projectiles from balloons. In discussing this proposal Captain (General) Crozier, of the American Delegation, said:

"The general spirit of the proposals that have received the favorable support of the subcommission is a spirit of tolerance with regard to methods tending to increase the efficacy of means of making war and a spirit of restriction with regard to methods which, without being necessary from the standpoint of efficiency, have seemed needlessly cruel. It has been decided not to impose any limit on the improvements of artillery, powders, explosive materials, muskets, while prohibiting the use of explosive or expanding bullets, discharging explosive material from balloons or by similar methods.

"If we examine these decisions, it seems that, when we have not imposed the restriction, it is the efficacy that we have wished to safeguard, even at the risk of increasing suffering, were that indispensable.

"Of the two cases where restrictions have been imposed, the first, the prohibition of making use of certain classes of bullets, proceeds exclusively from a humanitarian sentiment, and it is therefore reasonable to suppose that the second has its basis in such a sentiment. Now, it seems to me difficult to justify by a humanitarian motive the prohibition of the use of balloons for
the hurling of projectiles or other explosive materials. We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented, who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view.

"I do not know of machines thus efficient and thus humanitarian, in the incomplete stage of development in which aerostation now is; but is it desirable to shut the door to their possible introduction among the permitted arms? In doing so, would we not be acting entirely in the dark, and would we not run the risk of error inherent in such a manner of procedure? The balloon, as we know it now, is not dirigible; it can carry but little; it is capable of hurling, only on points exactly determined and over which it may pass by chance, indecisive quantities of explosives, which would fall, like useless hailstones, on both combatants and noncombatants alike. Under such conditions it is entirely suitable to forbid its use, but the prohibition should be temporary and not permanent. At a later stage of its development, if it be seen that its less desirable qualities still predominate, there will still be time to extend the prohibition; at present let us confine our action within the limits of our knowledge.

"That is why I have the honor to propose the substitution of the following text for the text already voted:

"For a period of five years from the date of the signature of this act it is forbidden to employ balloons or other similar means not yet known for the purpose of discharging projectiles or explosives."" (Proceedings of the Hague Peace Conference, 1899. Carnegie Translation, vol. III, p. 354.)

On July 29, 1899, a Declaration was signed to the following effect:

"The Contracting Powers agree to prohibit, for a term of five years, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." (32 Stat. 1839.)

By its provisions this Declaration would terminate on July 29, 1904. This was during the Russo-Japanese War. Both Russia and Japan observed the provisions of the Declaration, however, to the end of the war. When it was proposed at the Second Hague Conference in 1907 to renew this declaration, M. Louis Renault, the able delegate from France, said:
"The method of discharging the projectiles makes little difference. It is lawful to try to destroy an arsenal or barracks whether the projectiles used for this purpose comes from a cannon or from a balloon; it is unlawful to try to destroy a hospital by either method. That, in our minds, is the essential idea to be considered. The problem of aerial navigation is progressing so rapidly that it is impossible to foresee what the future holds for us in this regard. One cannot, therefore, legislate with a thorough knowledge of the question. One cannot forbid in advance the right to profit by new discoveries which would not in any way affect the more or less humanitarian character of war and which would permit a belligerent to take effective action against his adversary, while respecting the requirements of the Hague Regulations." (Proceedings of the Hague Peace Conference, 1907. Carnegie Translation, vol. III, p. 147.)

At the Second Hague Peace Conference, 1907, it was also proposed by the Italian and Russian delegations to make restrictions requiring dirigibility of aircraft which might drop projectiles. The form was as follows:

"It is forbidden to throw projectiles and explosives from balloons that are not dirigible and manned by a military crew. "Bombardment by military balloons is subject to the same restrictions accepted for land and sea warfare, in so far as this is compatible with the new method of fighting." (Ibid., p. 28.)

There was only about a two-third vote of the membership of the Conference in support of either proposal. It was also stated that

"On account of the distinct character of its two articles, the German delegation asked that they be separated, observing, as regards the first, that it was possible to throw projectiles from nondirigible balloons, and further, that there was no connection between the power to direct balloons and that of throwing projectiles from them." (Ibid.)

In discussing the Italian-Russian proposal it was set forth that the 1899 Declaration in regard to discharge of projectiles from balloons reflected the uncertainty existing at the time in regard to the use of balloons and that with light and powerful motors in prospect in 1907 it would be futile to try to limit the lawful use of aircraft.

The Second Hague Peace Conference of 1907 proposed in its Final Act:
"The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."

The only change from the 1899 Declaration was in fixing a period to the close of the Third Peace Conference which was projected for 1915, at which time the World War was in progress. As the Declaration was not generally ratified, it has since 1907 received little consideration.

Rule on submarines.—During the World War, 1914–18, the submarine was for the first time extensively used. Claims were made that it should not be required to conform to rules long accepted for warfare upon the sea, that as it could not take on board the passengers and crew of a visited vessel, it might dispense with visit, and torpedo a vessel without even summoning the vessel. The structure of the submarine is relatively light and not suitable for defense against projectiles. The submarine is also relatively slow and relies upon its underwater protection for effectiveness. It is now agreed that the submarine does not for this reason have any special rights in war. The London Naval Treaty of 1930, Part IV, Article 22 provides:

"The following are accepted as established rules of International Law:

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

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board." (46 Stat. (Pt. 2), 2858.)

This principle was more widely accepted in 1936 as the French and the Italian Governments deposited their
ratifications of Part IV with the British Government on November 6, 1936. In a protocol of the same day, the states parties to Part IV, from that time, the United States, Australia, Canada, France, Great Britain and Northern Ireland, India, Irish Free State, Italy, Japan, New Zealand, and South Africa, requested the British Government to communicate the rules to all the Powers not signatory to the Treaty of London with an invitation that they accede to Part IV "definitely and without limit of time."

Rules on aircraft.—Thus there have been from time to time suggestions that aircraft, because of the nature of their construction, the space in which they operate, their speed, and other considerations, be given special exemptions. For a time the doctrine of freedom of the air was a slogan meaning the freedom of all air. Then this freedom was claimed by some for air above a certain zone in all areas. Now by many agreements it is conceded that freedom of the air does not extend outside the limits of the air above the high seas and some contend that as elevation enlarges the range of vision the jurisdiction of the coast state should be extended to a corresponding degree.

There has been a claim that the speed of aircraft and their weakness should give to them special privileges in time of war. The aircraft gains from speed an advantage somewhat comparable to that which the submarine gains from its underwater movements. Under present development of aircraft, the taking on board of the passengers and crew of a visited merchant vessel would be less feasible than for a submarine. The aircraft is dependent upon the supply of fuel at comparatively short intervals and fuel bases are of capital importance.

Interference with neutral commerce, 1914.—There was much correspondence upon the matter of interference with neutral commerce in the early days of the World
War. There were many differences of opinion upon contraband, blockade, unneutral service, visit and search, capture, destruction, etc.

Soon after the beginning of the war the diversion of ships and cargo became a subject of diplomatic notes. To a request of the American Secretary of State of August 13, 1914, the American Ambassador in Great Britain replied on August 18:

"Sir Edward Grey informs me that the British Government will consider claims of American shippers whose cargoes destined for ports of British enemies are diverted to British ports and sold. If such claims for loss by such diversion be established, the British Government will in due time pay them." (Foreign Relations, U.S., 1914, Supplement, p. 305.)

During August and September 1914 there had been much correspondence on the diversion of American shipping to British ports, and after protests by the American Government as to delays of ships and cargoes the British Government proposed to do, and asserted that they were—

"doing all in their power to ensure that innocent neutral cargo shall be restored to its owners with as little delay as possible, and that the unavoidable inconvenience to neutral merchants shall be minimized so far as possible." (Ibid., p. 316.)

Mr. Van Dyke, the American Minister in The Netherlands, sent a telegram, which was received in Washington, October 2, 1914, as follows:

"We desire to protest energetically against measures taken by belligerent governments regarding shipments consigned us from the United States which have resulted in the Holland-America Line refusing to accept cargo intended for us unless consigned to the Dutch Government. We feel that American houses are entitled to conduct their business direct with their branches without interference as long as the goods clearly bear the neutral origin, character, and destination and are transported to neutral destination by neutral carriers. We are willing to sign a declaration to the effect that we are the consignees of the respective goods; that they are or will be sold to our customers in the Netherlands exclusively or for reexportation to such countries only as are not at war. This declaration should fully cover the requirements of all belligerents." (Ibid., p. 317.)
World War opinions, 1914.—As early as October 9, 1914, the Acting Secretary of State of the United States gave a reply to a query regarding the destruction of ships of belligerents engaged in transportation of neutral goods between neutral ports:

"The practice of nations in the past, stated generally, has been to sink prizes of war taken on the seas if either the ship or any part of her cargo was neutral property only when military necessity made this course imperative. This practice has now been embodied, at least in part, in the rules on the subject laid down by the Declaration of London, which Germany appears to have adopted for her guidance in the present naval warfare, and on which she has presumably based her action in this instance. It is not to be presumed, however, that the German Government will refuse to grant indemnity for neutral property which has been lost in such manner and which would otherwise have been restored by a court of prize." (Foreign Relations, 1914, Supplement, p. 319.)

In the case of the *Glitra* before the German prize court on July 30, 1915, it was said:

"As regard the condition of naval warfare in particular there is no protection either general or specific afforded to neutral merchandise by article 3 of the Paris declaration against the acts of the belligerent party resulting from the circumstances of the war. Article 3 referred to above is intended to afford protection against the prize law to which, up to the time of the Paris declaration, neutral merchandise in the enemy ship was exposed. Whatever the circumstances of the war demand, must be permitted to take place without regard to the fact that neutral merchandise is on board the ship. If, according to article 2 of the Paris declaration, the neutral flag protects enemy merchandise, this does not mean that vice versa the enemy ship is to be protected by neutral merchandise, protected in the first place, perhaps only against destruction, but by the same token in innumerable cases against any exercise of the prize law."

"As far as can be ascertained, no one has disputed this even down to the most recent time." (1922 Naval War College. International Law Decisions, p. 35.)

British interference with American merchant vessels, 1914.—Toward the end of December 1914 the Government of the United States sent a long note to the British Government stating its attitude on the conduct of British authorities toward American shipping. While assuring the British Government of its friendly spirit, the American Government did not wish its silence on certain
British practices to be construed as acquiescence in an infringement upon neutral rights when American goods destined for neutral ports were taken into and long detained in British ports, even when the goods were destined to named persons in a state guaranteeing non-exportation of contraband. The American Government considered the interference with American commerce had been of a character “not justified by international law or required under the principles of self-preservation.” The American note called attention to British inconsistencies in the application of announced British policies particularly as regards contraband. This note of December 26, 1914, further stated that:

“The Government of the United States readily admits the full right of a belligerent to visit and search on the high seas the vessels of American citizens or other neutral vessels carrying American goods and to detain them when there is sufficient evidence to justify a belief that contraband articles are in their cargoes; but His Majesty’s Government, judging by their own experience in the past, must realize that this Government can not without protest permit American ships or American cargoes to be taken into British ports and there detained for the purpose of searching generally for evidence of contraband, or upon presumption created by special municipal enactments which are clearly at variance with international law and practice.

“This Government believes and earnestly hopes His Majesty’s Government will come to the same belief, that a course of conduct more in conformity with the rules of international usage, which Great Britain has strongly sanctioned for many years, will in the end better serve the interests of belligerents as well as those of neutrals.

“Not only is the situation a critical one to the commercial interests of the United States, but many of the great industries of this country are suffering because their products are denied long-established markets in European countries, which, though neutral, are contiguous to the nations at war. Producers and exporters, steamship and insurance companies are pressing, and not without reason, for relief from the menace to transatlantic trade which is gradually but surely destroying their business and threatening them with financial disaster.

“The Government of the United States, still relying upon the deep sense of justice of the British nation, which has been so often manifested in the intercourse between the two countries during so many years of uninterrupted friendship, expresses confidently the hope that His Majesty’s Government will realize the obstacles and difficulties which their present policy has placed in the way of
commerce between the United States and the neutral countries of Europe, and will instruct their officials to refrain from all unnecessary interference with the freedom of trade between nations which are sufferers, though not participants, in the present conflict; and will in their treatment of neutral ships and cargoes conform more closely to those rules governing the maritime relations between belligerents and neutrals, which have received the sanction of the civilized world, and which Great Britain has, in other wars, so strongly and successfully advocated.” (Foreign Relations, U. S., 1914, Suppl., p. 374.)

British policy, 1914-16.—Sir Edward Grey (later Viscount Grey of Fallodon) carried on the negotiations in regard to contraband and other controversies arising with foreign states early in the World War. Such argumentative notes as that of December 26, 1914, sent by the American Government required reply, but the reply was not always in form of an adequate legal defense. Of some of this correspondence while Mr. Walter H. Page was American Ambassador, Sir Edward Grey said:

"The Navy acted and the Foreign Office had to find the argument to support the action; it was anxious work. British action provoked American argument; that was met by British counter-argument. British action preceded British argument; the risk was that action might follow American argument. In all this Page's advice and suggestion were of the greatest value in warning us when to be careful or encouraging us when we could safely be firm.

"One incident in particular remains in my memory, Page came to see me at the Foreign Office one day and produced a long despatch from Washington contesting our claim to act as we were doing in stopping contraband going to neutral ports. 'I am instructed,' he said, 'to read this despatch to you.' He read, and I listened. He then said: 'I have now read the despatch, but I do not agree with it; let us consider how it should be answered!' On other occasions he would urge us to find means of avoiding provocation of American feeling; for instance, he urged us to find some way of acting other than by Orders in Council, which since 1812 had had such odious associations for the United States. He knew that these were only a matter of form, and that there was nothing in them intrinsically offensive to the United States, but the name was hateful in America. Unfortunately Orders in Council were formalities essential to make our action legal in British Courts of Law and we could not do without them.” (Grey of Fallodon, Twenty-five Years, vol. II, p. 160.)

Search at sea, 1915-16.—After the receipt of several notes assuring the United States that the measures taken
by the Allied Governments would not unjustifiably infringe upon neutral rights, the American Secretary of State sent to the American Ambassador in Great Britain a long communication on October 21, 1915, for presentation to the British Secretary of State for Foreign Affairs. The note called attention to various vexatious interferences with American commerce which the American Government had expected would cease. Among the annoyances mentioned was delay of shipping without adequate grounds of suspicion. This note states:

"(4) In regard to search at sea, an examination of the instructions issued to naval commanders of the United States, Great Britain, Russia, Japan, Spain, Germany, and France from 1888 to the beginning of the present war shows that search in port was not contemplated by the Government of any of these countries. On the contrary, the context of the respective instructions shows that search at sea was the procedure expected to be followed by the commanders. All of these instructions impress upon the naval officers the necessity of acting with the utmost moderation—and in some cases commanders are specifically instructed—in exercising the right of visit and search, to avoid undue deviation of the vessel from her course.

"(5) An examination of the opinions of the most eminent text writers on the laws of nations shows that they give practically no consideration to the question of search in port, outside of examination in the course of regular prize-court proceedings.

"(6) The assertion by His Majesty's Government that the position of the United States in relation to search at sea is inconsistent with its practice during the American Civil War is based upon a misconception. Irregularities there may have been at the beginning of that war, but a careful search of the records of this Government as to the practices of its commanders shows conclusively that there were no instances when vessels were brought into port for search prior to instituting prize court proceedings, or that captures were made upon other grounds than, in the words of the American note of November 7, 1914, ‘evidence found on the ship under investigation and not upon circumstances ascertained from external sources.’ A copy of the instruction issued to American naval officers on August 18, 1862, for their guidance during the Civil War, is appended.

"(7) The British contention that 'modern conditions' justify bringing vessels into port for search is based upon the size and seaworthiness of modern carriers of commerce and the difficulty of uncovering the real transaction in the intricate trade operations of the present day. It is believed that commercial transactions of the present time, hampered as they are by censorship of telegraph and postal communications on the part of belligerents, are essentially no more complex and disguised than in the
WARS OF RECENT YEARS, DURING WHICH THE PRACTICE OF OBTAINING EVIDENCE IN PORT TO DETERMINE WHETHER A VESSEL SHOULD BE HELD FOR PRIZE PROCEEDINGS WAS NOT ADOPTED. THE EFFECT OF THE SIZE AND SEAWORTHINESS OF MERCHANT VESSELS UPON THEIR SEARCH AT SEA HAS BEEN SUBMITTED TO A BOARD OF NAVAL EXPERTS, WHICH REPORTS THAT—

"'AT NO PERIOD IN HISTORY HAS IT BEEN CONSIDERED NECESSARY TO REMOVE EVERY PACKAGE OF A SHIP'S CARGO TO ESTABLISH THE CHARACTER AND NATURE OF HER TRADE OR THE SERVICE ON WHICH SHE IS BOUND, NOR IS SUCH REMOVAL NECESSARY. * * *

"'THE FACILITIES FOR BOARDING AND INSPECTION OF MODERN SHIPS ARE IN FACT GREATER THAN IN FORMER TIMES; AND NO DIFFERENCE, SO FAR AS THE NECESSITIES OF THE CASE ARE CONCERNED, CAN BE SEEN BETWEEN THE SEARCH OF A SHIP OF A THOUSAND TONS AND ONE OF TWENTY-THOUSAND TONS—EXCEPT POSSIBLY A DIFFERENCE IN TIME—FOR THE PURPOSE OF ESTABLISHING FULLY THE CHARACTER OF HER CARGO AND THE NATURE OF HER SERVICE AND DESTINATION. * * *

THIS METHOD WOULD BE A DIRECT AID TO THE BELLIGERENTS CONCERNED IN THAT IT WOULD RELEASE A BELLIGERENT VESSEL OVERHAULING THE NEUTRAL FROM ITS DUTY OF SEARCH AND SET IT FREE FOR FURTHER BELLIGERENT OPERATIONS.'" * * *

"'(12) THE FURTHER CONTENTION THAT THE GREATLY INCREASED IMPORTS OF NEUTRAL COUNTRIES, ADJOINING GREAT BRITAIN'S ENEMIES, RAISE A PRESUMPTION THAT CERTAIN COMMODITIES, SUCH AS COTTON, RUBBER, AND OTHERS MORE OR LESS USEFUL FOR MILITARY PURPOSES, THOUGH DESTINED FOR THOSE COUNTRIES, ARE INTENDED FOR REEXPORTATION TO THE BELLIGERENTS WHO CAN NOT IMPORT THEM DIRECTLY, AND THAT THIS FACT JUSTIFIES THE DETENTION FOR THE PURPOSE OF EXAMINATION OF ALL VESSELS BOUND FOR THE PORTS OF THOSE NEUTRAL COUNTRIES, NOTWITHSTANDING THE FACT THAT MOST OF THE ARTICLES OF TRADE HAVE BEEN PLACED ON THE EMBARGO LISTS OF THOSE COUNTRIES, CAN NOT BE ACCEPTED AS LAYING DOWN A JUST OR LEGAL RULE OF EVIDENCE. SUCH A PRESUMPTION IS TOO REMOTE FROM THE FACTS AND OFFERS TOO GREAT OPPORTUNITY FOR ABUSE BY THE BELLIGERENT, WHO COULD, IF THE RULE WERE ADOPTED, ENTIRELY IGNORE NEUTRAL RIGHTS ON THE HIGH SEAS AND PREY WITH IMPUNITY UPON NEUTRAL COMMERCE. TO SUCH A RULE OF LEGAL PRESUMPTION THIS GOVERNMENT CAN NOT ACCED, AS IT IS OPPOSED TO THOSE FUNDAMENTAL PRINCIPLES OF JUSTICE WHICH ARE THE FOUNDATION OF THE JURISPRUDENCE OF THE UNITED STATES AND GREAT BRITAIN.'" * * *

This was the championship of neutrality note, of which a paragraph at the end declares:

"This task of championing the integrity of neutral rights, which have received the sanction of the civilized world, against the lawless conduct of belligerents arising out of the bitterness of the great conflict which is now wasting the countries of Europe, the United States unhesitatingly assumes, and to the accomplishment of that task it will devote its energies, exercising always that impartiality which from the outbreak of the war it has sought to exercise in its relations with the warring nations." (Ibid., p. 589.)

At this time replies were long delayed to such protests, and often conditions were much changed before replies were received. The British Ambassador in the United States transmitted the reply to the note of October 21, 1915, on April 24, 1916, after more than six months. This reply gave extended consideration to the matter of visit and search sur place:

"5. When visit and search at sea are possible, and when a search can be made there which is sufficient to secure belligerent rights, it may be admitted that it would be an unreasonable hardship on merchant vessels to compel them to come into port, and it may well be believed that maritime nations have hesitated to modify the instructions to their naval officers that it is at sea that these operations should be carried out, and that undue deviation of the vessel from her course must be avoided. That, however, does not affect the fact that it would be impossible under the conditions of modern warfare to confine the rights of visit and search to an examination of the ship at the place where she is encountered without surrendering a fundamental belligerent right.

"6. The effect of the size and seaworthiness of merchant vessels upon their search at sea is essentially a technical question, and accordingly His Majesty's Government have thought it well to submit the report of the board of naval experts, quoted by the United States Ambassador in paragraph 7 of this note, to Admiral Sir John Jellicoe for his observation. The unique experience which this officer has gained as the result of more than 18 months in command of the Grand Fleet renders his opinion of peculiar value. His report is as follows:

"'It is undoubtedly the case that the size of modern vessels is one of the factors which renders search at sea far more difficult than in the days of smaller vessels. So far as I know, it has never been contended that it is necessary to remove every package of a ship's cargo to establish the character and nature of her trade, etc.; but it must be obvious that the larger a vessel and the greater the amount of cargo, the more difficult does exam-
ination at sea become, because more packages must be removed. "This difficulty is much enhanced by the practice of concealing contraband in bales of hay and passengers' luggage, casks, etc., and this procedure, which has undoubtedly been carried out, necessitates the actual removal of a good deal of cargo for examination in suspected cases. This removal cannot be carried out at sea, except in the very finest weather.

"Further, in a large ship the greater bulk of the cargo renders it easier to conceal contraband, especially such valuable metals as nickel, quantities of which can easily be stowed in places other than the holds of a large ship.

"I entirely dispute the contention, therefore, advanced in the American note, that there is no difference between the search of a ship of 1,000 tons and one of 20,000 tons. I am sure that the fallacy of the statement must be apparent to anyone who has ever carried out such a search at sea.

"There are other facts, however, which render it necessary to bring vessels into port for search. The most important is the manner in which those in command of German submarines, in entire disregard of international law and of their own prize regulations, attack and sink merchant vessels on the high seas, neutral as well as British, without visiting the ship and therefore without any examination of the cargo. This procedure renders it unsafe for a neutral vessel which is being examined by officers from a British ship to remain stopped on the high seas, and it is therefore in the interests of the neutrals themselves that the examination should be conducted in port." (Foreign Relations, U. S., 1916, Supplement, p. 369.)

After a statement in regard to abuse of neutral rights by Germany, the note continues:

"The French Ministry of Marine shares the views expressed by Sir J. Jellicoe on the question of search at sea, and has added the following statement:

"Naval practice, as it formerly existed, consisting in searching ships on the high seas, a method handed down to us by the old Navy, is no longer adaptable to the conditions of navigation of the present day. Americans have anticipated its insufficiency and have foreseen the necessity of substituting some more effective method. In the Instructions issued by the American Navy Department, under date of June 20, 1898, to the cruisers of the United States, the following order is found (clause 13):

"'If the latter (the ship's papers) show contraband of war, the ship should be seized; if not, she should be set free unless by reason of strong grounds for suspicion a further search should seem to be requisite.'

"Every method must be modified having regard to the modifications of material which men have at their disposal, on condition that the method remains humane and civilised.

"The French Admiralty considers that to-day a ship, in order to be searched, should be brought to a port whenever the state of the sea, the nature, weight, volume, and stowage of the suspect
cargo, as well as the obscurity and lack of precision of the ship's papers, render search at sea practically impossible or dangerous for the ship searched.

"On the other hand, when the contrary circumstances exist, the search should be made at sea.

"Bringing the ship into port is also necessary and justified when, the neutral vessel having entered the zone or vicinity of hostilities, (1) it is a question, in the interests of the neutral ship herself, of avoiding for the latter a series of stoppages and successive visits and of establishing once for all her innocent character and of permitting her thus to continue her voyage freely and without being molested; and (2) the belligerent, within his rights of legitimate defence, is entitled to exercise special vigilance over unknown ships which circulate in these waters."

"The question of the locality of the search is, however, one of secondary importance. In view of His Majesty's Government the right of a belligerent to intercept contraband on its way to his enemy is fundamental and incontestable, and ought not to be restricted to intercepting contraband which happens to be accompanied on board the ship by proof sufficient to condemn it. What is essential is to determine whether or not the goods were on their way to the enemy. If they were, a belligerent is entitled to detain them, and having regard to the nature of the struggle in which the Allies are engaged they are compelled to take the most effectual steps to exercise that right." (Ibid., p. 370.)

The practice of searching vessels in port continued.

Opinion of J. A. Hall.—Mr. J. A. Hall, who, before the World War, published a book on the Law of Naval Warfare, issued a second edition after the war and after connection with the British Navy. The closing sentence of his preface reads:

"Navies and armies have not ceased to be necessary with the passing of the Great War, and so long as that is the case a knowledge of international law remains of special importance to the Officers of that Service 'whereon, under the good providence of God, the wealth, safety, and strength of the kingdom chiefly depend.'" (Law of Naval Warfare, 2d ed., p. vii.)

In discussing the right of visit and search and after he has referred to diversion for search in port, Mr. Hall says:

"Apart altogether from the special circumstances of the Great War arising out of Germany's illegal practices at sea, the following permanent reasons for this development of the right seem to afford it full justification:

"1. The ship's papers in these days, when telegraphs and other means of rapid communication are available for merchants, need afford no reliable indication of the destination of the cargo.
"2. The destination of the vessel owing to railways and other modern means of land transport is no criterion of the destination of the cargo.

"3. The ship's officers may be equally ignorant on this point.

"4. Modern means of communication, while reducing the value of evidence from the ship, has enormously increased the powers of a belligerent government to obtain information from the vessel's port of departure and pass on instructions to its examining cruisers.

"5. The size of modern merchant ships enables them to keep at sea when weather conditions make even visiting them impossible.

"6. The necessary extension of contraband to cover articles of small bulk but of great value for war, together with the huge cargo capacity of modern ships, has made concealment easy and an adequate examination of such cargo at sea impossible." (Ibid., p. 206.)

It is admitted that war will cause inconvenience to neutral commerce, but that the right of visit and search should not be abused.

"In the first place the spot selected for search must not involve an unreasonable deviation of the vessel from her voyage. In the second place, it seems perfectly clear that nothing in international law can justify diversion merely in the hope of discovering by subsequent search evidence of contraband or other noxious trading: there must be some substantial ground, no matter from what source it is derived, for suspecting that this particular vessel is engaged in such trade, although the evidence may not at the moment be sufficient to support a plea for condemnation in the prize court." (Ibid., p. 267.)

National rules on diversion.—The diversion of a merchant ship from its course has long been restricted and often specific rules were issued.

The German Prize Ordinance of 1909 prescribed in regard to neutral ships:

"S1. The captain must as much as possible avoid diverting a ship under a neutral flag from her course during the visit and search; he shall especially endeavor to cause the ship the least possible inconvenience, especially will he in no circumstances require the master to come on board the man-of-war, or that a boat, men of the crew, the ship's papers, etc. be sent on board."

"S5. If the weather make boarding impossible, the captain will prescribe a given course to the ship, in case he has serious suspicion of her and will follow himself, until it is possible to carry out the visit."

"10. Should anything, for example, bad weather, prevent a boarding party from being sent on board, a suspect ship is to be brought into port without further procedure."
"Should it be necessary at the same time to declare such a ship as captured, she must be ordered to haul down her flag and to follow the war vessel."

"11. It must be clearly stated in the Prize Report whether the ship has been captured or merely brought into port for search; in the latter case the reason must be given, for example, whether search was impossible for military reasons or owing to the nature of the cargo, weather, etc."

"91. If the making of the search is proved to be necessary, but at the time is not practicable to carry out, the ship will be searched later at a suitable place. If this causes serious disadvantages to the ship to be searched, the captain will proceed to the provisional capture."

The Japanese Regulations of 1904, in Article 51, said briefly:

"In visiting or searching a vessel the captain of the man-of-war shall take care not to divert her from her original course more than necessary and as far as possible not to give her inconvenience."

Case of the Joseph W. Fordney.—There were many cases of detention on grounds of doubtful legality during the World War, 1914–18.

Protests by the Government of the United States were met by delays and by correspondence often confusing the issues. The delays and excuses in the case of the steamer Joseph W. Fordney led the American Secretary of State after long correspondence to say in a letter to the American Ambassador in Great Britain on November 3, 1915:

"The note addressed to you by Foreign Office under date October 6, 1915, confirms Department's original supposition seizure cargo steamer Joseph W. Fordney was an illegal act on part British authorities since goods were seized on suspicion and without probable cause. These goods were subject to seizure only if consigned to German Government or its armed forces. Department observes Foreign Office states that, as His Majesty's Government 'now' have reason to believe that the goods 'were for the enemy Government or its armed forces, proceedings for condemnation are being taken on that ground.' In other words, it appears that approximately one half year after seizure goods British authorities believe they have such evidence as alone would have justified seizure this cargo. Department does not perceive the pertinency to matter under discussion of statement to you by Foreign Office pointing out that when it was arranged that you should be informed regarding detention of ships, with an indication of the grounds of detention, it was emphasized that this undertaking would not be understood as debarring British Government from
raising additional grounds for proceeding against a cargo or ship in prize court. If adequate evidence warranting seizure goods was not disclosed by due examination of vessel at time of its seizure, there of course could be no lawful seizure of the cargo and, therefore, no subsequent lawful prize court proceedings. 

"Communicate with Foreign Office in sense foregoing, and since it would appear from British Government's own statement cargo was illegally seized, you may renew your request for its release." (Foreign Relations, U. S., 1915, Supplement, p. 608.)

After further correspondence and delays on April 13, 1916, the Secretary of State sent another dispatch to the American Ambassador:

"Representatives Atlantic Export Company, shippers of cargo on steamer *Joseph W. Fordney*, inform Department they have been advised by English lawyers that new order in council, March 30 last, regarding conditional contraband is construed by British authorities as retroactive and will be applied to cargo of this vessel and in other American cases set for early trial. These representatives state that proceedings of this character would amount to denial justice in the case of this cargo. Department agrees with views of shippers as to unwarranted character these proceedings. Department has made known to British Government through you its views that if proper examination warranting the seizure of goods in question was not disclosed by proper examination of vessel at the time its seizure, there could be no lawful seizure of the cargo and, therefore, no subsequent lawful prize court proceedings, and that seizure of a vessel and cargo can not be justified on the strength of evidence of illegal destination cargo discovered, as appears according to the British Government's statement to have been the case with reference to steamer *Joseph W. Fordney*, approximately one-half year after seizure took place. No reply justifying such a course has been made by British Government.

"Communicate with Foreign Office in sense foregoing and say that this Government considers it is entitled to receive statement from British Government regarding their views as to how such evidence can warrant a seizure of this kind and prize court proceedings in relation thereto." (Ibid., p. 363.)

Not until May 9, 1916, did the Ambassador inform the Secretary of State that the Foreign Office stated that "the British Government must decline to enter into any discussion of points which are awaiting decision in a case pending in the prize court."

A long note from Sir Edward Grey was transmitted to the Secretary of State on April 24, 1916, in which the actions complained of by the United States were discussed
and the course pursued by British authorities was defended.

The cargo of the *Joseph W. Fordney*, "10 million pounds of feed and cake" recognized as conditional contraband consigned to a neutral country was condemned as good and lawful prize.

**Resistance.**—As visit and search in time of war is generally regarded as the exercise of a legitimate war right, resistance to visit and search makes the merchant vessel liable to consequences. Naval regulations relating to resistance vary. An attempt to escape, as by flight or under cover of darkness, does not justify condemnation, but does render the ship suspect and liable to capture and bringing into port. Such force may be used as is necessary to bring the merchant vessel to, and this usually consists in firing a shot in advance of the vessel and across the bow. Forcible resistance makes the vessel liable to condemnation. The German Prize Code, 1916, Article 5, stated:

"Care is to be taken in determining whether an attempt has been made to escape.

"The commanding officer must:

"(1) Make certain that the signals have been understood, especially if there is another ship in the vicinity.

"(2) In the case of merchant ships, any increase in speed is generally small, and barely distinguishable from any great distance, as they in any case usually steam at full speed.

"(3) Some companies have ordered their ships, in the event of their being held up, not to reverse the engines, but simply to stop and allow the ship to proceed until she has lost her way."  (1925 Naval War College. International Law Documents, p. 44.)

In the German Prize Ordinance, September 30, 1909, it was explained that—

"An attempt to escape renders the ship suspect and therefore justifies her being captured and brought into port without further procedure. If, however, the ship is not liable to confiscation on other ground—for example, on account of carrying contraband or rendering assistance contrary to the laws of neutrality—she may not be sunk, nor, if it is impossible to bring her into port, may any other disadvantages be imposed upon her by way of punishment."  (Ibid., p. 44.)
The unratified Declaration of London, 1909, was considered as reflecting the general opinion on the law at that period. Article 63 of the Declaration of London states:

"Forcible resistance to the legitimate exercise of the right of stoppage, visit and search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment which the cargo of an enemy vessel would undergo. Goods belonging to the master or owner of the vessel are regarded as enemy goods." (1909 Naval War College, International Law Topics, p. 145.)

A provision to the above effect was in many national rules in 1914.

The Spanish Instructions of 1898, after referring to hoisting the flag and firing a blank shot, show a considerate attitude toward the merchant vessel:

"If the merchant vessel does not obey this first intimation, and either refuses to hoist her flag or does not lay to, a second gun will be fired, this time loaded, care being taken that the shot does not strike the vessel, though going sufficiently close to her bows for the vessel to be duly warned; and if this second intimation be disregarded, a third shot will be fired at the vessel, so as to damage her, if possible, without sinking her. Whatever be the damage caused to the merchant vessel by this third shot, the commanding officer of the man-of-war or captain of the privateer can not be made responsible.

"Nevertheless, in view of special circumstances, and in proportion to the suspicion excited by the merchantman, the auxiliary vessel of war or privateer may delay resorting to the last extremity until some other measure has been taken, such as not aiming the third discharge at the vessel, but approaching it and making a fresh notification by word of mouth; but if this last conciliatory measure prove fruitless, force will immediately be resorted to." (Article 4, b.)

Resistance and armed merchant vessels of belligerents.—Before the days of steam navigation, merchant vessels were usually equipped for defense against pirates, sea robbers, privateers, and often against the more lightly armed vessels of war. With the introduction of modern armored and armed vessels of war, there was little reason for arming merchant vessels. The Declaration of Paris, 1856, that "Privateering is and remains abolished", re-
moved one of the reasons formerly advanced to support arming of merchant vessels, but the claim to the right to convert fast steam vessels into vessels of war under government control soon followed. The Hague Conference of 1907 made an effort to regularize such conversion by conventional agreement, but some of the most important commercial states did not ratify the convention. The conditions of World War, 1914–18, led, however, to the arming of many vessels ordinarily classed as merchant vessels. There then arose the controversy as to the distinction between an unarmed merchant vessel and one armed for defense. Attempts to define what might constitute armament for defense met with indifferent success. The distinction between defensive and offensive action at the time of approach for visit and search would usually rest upon the intention of the master of the armed merchant vessel which would not be provable, and a test to which the visiting vessel of war would scarcely care to submit.

W. E. Hall, whose treatise on International Law was a standard in England from the latter half of the nineteenth century, said:

"The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is within the rights possessed by a state in amity with the country to which the neutral ship belongs, the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship.

"The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection. 'I stand with confidence', said Lord Stowell, 'upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of..."
our own country, when I venture to lay it down, that by the law of nations as now understood a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequences of confiscation.' " ([The Maria (1799) 1 C. Rob. 369.] Hall, International Law, Higgins, 8th ed., p. 891.)

**Holland's opinion, 1905.**—Sir Thomas Erskine Holland, late professor of international law at Oxford University and responsible for the Admiralty Manual of Prize Law of 1888, gave a summary of his opinion upon the sinking of neutral prizes in a letter to the London Times, June 29, 1905:

"1. There is no established rule of international law which absolutely forbids, under any circumstances, the sinking of a neutral prize. A consensus gentium to this effect will hardly be alleged by those who are aware that such sinking is permitted by the most recent prize regulations of France, Russia, Japan, and the United States.

"2. It is much to be desired that the practice should be, by future international agreement, absolutely forbidden—that the lenity of British practice in this respect should become internationally obligatory.

"3. In the meantime, to adopt the language of French instructions, "On ne doit user de ce droit de destruction qu'avec plus la grande réserve"; and it may well be that any given set of instructions (e. g. the Russian) leaves on this point so large a discretion to commanders of cruisers as to constitute an intolerable grievance.

"4. In any case, the owner of neutral property, not proved to be good prize, is entitled to the fullest compensation for his loss. In the language of Lord Stowell:

"The destruction of the property may have been a meritorious act towards his own Government; but still the person to whom the property belongs must not be a sufferer ... if the captor has by the act of destruction conferred a benefit upon the public, he must look to his own Government for his indemnity.' " (Holland, Letters on War and Neutrality, 3d ed., 179.)

**American attitude, 1916.**—When relations were strained between the United States and Germany in early 1916 questions were raised in regard to visit and search. In a communication from the Secretary of State to the American Ambassador in Germany, April 28, 1916, it was said:

"If Secretary von Jagow asks you as to the methods of warfare which this Government considers to be legal, you may hand to him a memorandum reading as follows:
Memorandum on Conduct of Naval Vessels toward Merchant Ships.

1. A belligerent warship can directly attack if a merchant vessel resists or continues to flee after a summons to surrender.

2. An attacking vessel must display its colors before exercising belligerent rights.

3. If a merchant vessel surrenders, the attack must immediately cease and the rule as to visit and search must be applied—
   (a) by a visit to the vessel by an officer and men of the attacking ship; or
   (b) by a visit to the attacking ship by an officer of the vessel attacked, with the ship's papers.

4. An attacking vessel must disclose its identity and name of commander when exercising visit and search.

5. If visit and search disclose that the vessel is of belligerent nationality, the vessel may be sunk only if it is impossible to take it into port, provided that the persons on board are put in a place of safety and loss of neutral property is indemnified.

   Note: (a) A place of safety is not an open boat out of sight of land.
   (b) A place of safety is not an open boat, if the wind is strong, the sea rough, or the weather thick, or if it is very cold.
   (c) A place of safety is not an open boat which is overcrowded or is small or unseaworthy or insufficiently manned.

6. If, however, visit and search disclose that the vessel is of neutral nationality, it must not be sunk in any circumstances, except of gravest importance to the captor's state, and then only in accordance with the above provisos and notes.

You may further state that this Government is unwilling and cannot consent to have the illegal conduct of Germany's enemies toward neutrals on the high seas made a subject of discussion in connection with the abandonment of illegal methods of submarine warfare." (Foreign Relations, U. S., 1916 Supplement, p. 252.)

Attempt to escape.—The attempt of an enemy merchant vessel to escape visit and search is natural and lawful, and well established rules exist to protect the merchant vessel in the exercise of the effort to escape. Even when attempting to escape the merchant vessel has from the eighteenth century been entitled to considerate treatment and is not liable to penalty merely because of the attempt. Signals must be given to bring the merchant vessel to. The warning gun across the bow was commonly required, and the vessel of war was required to hoist its true colors before firing a gun in action. In order that no undue risk may be incurred by the mer-
chant vessel, the visiting personnel was limited in number and arms. The master of the visited vessel or his representative should not be required to come on board any visiting vessel to show his papers or for any other purpose, though on board he may be required to show his papers or open receptacles or hatches for investigation. If the master refuses to furnish information or declines to show essential papers, this may be considered a ground of suspicion justifying bringing the ship before a prize court. Even an enemy merchant vessel may have on board neutral persons and property entitled to consideration under the law. It has been said of visit and search that, "All that was necessary to this object was lawful; all that transcends it was unlawful." (The Anna Maria [1817], 2 Wheaton 327.)

Article 22, London Naval Treaty, 1930.—The Articles of the London Naval Treaty of 1930 were in general to remain in force till December 31, 1936, but part IV, Article 22, was to "remain in force without limit of time." This article provides:

"Article 22. The following are accepted as established rules of International Law:

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

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

"The High Contracting Parties invite all other Powers to express their assent to the above rules." (1930 Naval War College, International Law Situations, p. 159; 46 Stat. (Pt. II), 2858.)

While it might have been preferable to have an article which would have limited its provisions to the statement
of the first paragraph, merely requiring submarines to conform to the rules for surface vessels, the statement does not necessarily extend by analogy to aircraft.

The general principles of visit and search would, however, be unchanged, even though a new instrumentality might be introduced. The summoning, bringing to, boarding, inspection of papers, search in certain cases, taking in, and bringing before a prize court was the general procedure, though in certain cases some of these steps might be omitted. A surface vessel under modern conditions might consider it expedient to escort a vessel to port for search by port authorities, omitting other procedure. The state of the escorting vessel in such a case assumes all liability for the action if it proves ungrounded, and in any case the service of the escorting vessel has been for the time lost to its forces. The seized vessel cannot complain that the belligerent making the seizure has not acted in good faith and shown adequate evidence of suspicion. The placing of a prize crew on board is analogous as an evidence of intent to make a *bona fide* seizure.

The mere ordering into port for search is a practice of a different character and liable to grave abuses.

*Discussion, The Hague, 1923.*—At The Hague in 1923 the Commission of Jurists did not find it easy to agree upon rules for visit and search, and the Netherlands Delegation made reservations upon the rules as formulated. This delegation regarded aircraft as a new engine of war unlike a vessel of war and unable to exercise a similar control over a merchant vessel and uncertain as to its control over private aircraft. No article upon the exercise of visit and search of merchant vessels by aircraft received a majority vote of the delegations. The United States, British Empire, France, Italy, Japan, and the Netherlands were represented. A majority of the
delegations did not feel able to support the principle embodied in Article 49 of the Report of the Commission to the following effect:

"Private aircraft are liable to visit and search and to capture by belligerent military aircraft."

All agreed that such an article should be carefully guarded in order to avoid abuse. It was evident that visit and search *sur place* would often be impossible by aircraft of any type in use in 1923, and would be possible only under very favorable conditions. It was agreed that to permit an aircraft to compel a merchant vessel to come to a convenient place for visit and search would impose much inconvenience and heavy losses on the vessel, and that such an act on the part of a belligerent surface vessel of war was of doubtful validity.

"The French Delegation proposed the following text:  
"Aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject."  (1924 Naval War College, International Law Documents, p. 138.)

The discussion which is summarized in the General Report of the Commission of Jurists, February 19, 1923, is of such significance that it is presented somewhat fully.

*Visit and search by aircraft.*—The preliminary drafts of a code for aerial warfare before the Commission of Jurists upon the revision of the rules of warfare at The Hague, 1922–23, were those of the United States and Great Britain. The commission worked on the basis of a draft submitted by the American Delegation, and the American and British drafts provided for the use of aircraft in visit and search. Some of the other states were opposed. The Netherlands Delegation felt:

"that the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce. No justification exists for the extension of those
rights to an aircraft, which is a new engine of war entirely different in character from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels. Consequently there is no reason to confer on a military aircraft the right to make captures as if it were a warship, and no reason to subject commerce to capture when carried in an aircraft. In developing international law the tendency should be in the direction of conferring greater, not less, immunity on private property.” (1924 Naval War College, International Law Documents, p. 137.)

The majority of delegations, however, did not oppose visit and search and capture of private aircraft by belligerent military aircraft, but a majority of votes was not secured upon an article extending to belligerent military aircraft the right of visit and search of merchant vessels and wide divergence of view was expressed, and in the report it was stated that:

“The aircraft in use to-day are light and fragile things. Except in favourable circumstances they would not be able to alight on the water and send a man on board a merchant vessel at the spot where the merchant vessel is first encountered (visite sur place). To make the right of visit and search effective it would usually be necessary to direct the merchant vessel to come to some convenient locality where the aircraft can alight and send men on board for the purpose. This would imply a right on the part of the belligerent military aircraft to compel the merchant vessel to deviate from her course before it was in possession of any proof derived from an examination of the ship herself and her papers that there were circumstances of suspicion which justified such interference with neutral trade. If the deviation which the merchant vessel was obliged to make was prolonged, as might be the case if the aircraft was operating far from land, the losses and inconvenience imposed on neutral shipping would be very heavy.

“Is or is not a warship entitled to oblige a merchant vessel to deviate from her course for the purpose of enabling the right of visit and search to be carried out? Would an aircraft be exercising its rights in conformity with the rules to which surface warships are subject if it obliged a merchant vessels to deviate from her course in this way? Even if a warship is entitled on occasion to oblige a merchant vessel to deviate from her course before visiting her, can a similar right be recognised for military aircraft without opening the door to very great abuses?” (Ibid., p. 137.)

Prohibition of the use of aircraft against merchant vessels except under the rules applicable to surface ves-
sels of war was the principle supported by the majority in 1924.

The Report of the Commission of Jurists shows the attempts made in 1924 to reach an agreement.

"The American Delegation, therefore, proposed the following text:

"Aircraft are forbidden to visit and search surface or subsurface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject.

"In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft cannot divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft cannot capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested." (Ibid, p. 139.)

The British Delegation, maintaining the analogy to the submarine, proposed the language of the unratified Washington Treaty of February 6, 1922, substituting, except in the phrasing of the preliminary cause, the word "aircraft" for "submarine", as follows:

"The use of aircraft against merchant vessels must be regulated by the following provisions, which, being in conformity with the rules adopted by civilised nations for the protection of the lives of neutrals and non-combatants at sea in time of war, are to be deemed an established part of international law:

"A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

"A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.

"A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.

"Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested." (Ibid., p. 139.)

The Japanese Delegation saw practical difficulties and dangers in this procedure, but at length expressed readiness to accede to the American proposal.
The Italian Delegation suggested the addition of the following to the British proposal:

"After the first paragraph add—

"Visit must in general be carried out where the merchant vessel is first encountered. Nevertheless, in cases where it may be impossible to alight and there is at the same time good ground for suspicion, the aircraft may order the merchant vessel to deviate to a suitable locality, reasonably accessible, where she may be visited. If no good cause for this action is shown, the belligerent State must pay compensation for the loss caused by the order to deviate.'

"After the third paragraph add—

"If the merchant vessel is in the territorial waters of the enemy State and not on the high seas, she may be destroyed after previous notice has been given to the persons on board to put themselves in a place of safety and reasonable time has been given them for so doing."' (Ibid., p. 140.)

The Italian Delegation also maintained that a majority of the European Powers admitted that a merchant vessel might be obliged to deviate to a suitable port where visit might take place.

The Netherlands delegation accepted the American proposal.

"When put to the vote the American proposal was supported by the Japanese and Netherlands Delegations and opposed by the British, French and Italian. The French proposal was opposed by the American, British, Japanese and Netherlands Delegation. The British and Italian Delegations explained that they could only support it if it was amplified in the way indicated in the British and Italian amendments.

"Although all the Delegations concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and non-combatants, the Commission, by reason of a divergence of views as to the method by which this result would best be attained, was unable to agree upon an article dealing with the exercise of belligerent rights by aircraft against merchant vessels. The code of rules proposed by the Commission therefore leaves the matter open for future regulation." (Ibid., p. 141.)

Mr. Spaight on aircraft operations against merchant vessels.—Mr. J. M. Spaight, who has given much attention in Great Britain to the aspects of aviation as a factor in war, has a chapter on the operation of aircraft against merchant vessels in his book upon "Air Power and War
Among the questions he raises is whether aircraft have the right to visit and search, and to capture merchant vessels. This question became a practical one during the World War, 1914–18, and Mr. Spaight says:

"Unquestionably the visit or boarding of a marine craft by an aircraft is technically not impossible."

He also cites instances of acts involving the exercise of visit and search and capture:

"In the Aeroplane of 4 July, 1917, there will be seen a photograph of a German seaplane floating beside a submarine and a German officer or man standing on one of the seaplane’s floats and handing a document to the commander of the submarine. Here, then, was a clear case of visit. It was unofficially reported from Rotterdam on 23 July, 1917, that the Dutch steamer "Gelderland" was stopped by three German seaplanes off the Hook of Holland, and that a German officer went on board and forced the ship to proceed to Zeebrugge. It has been placed on record by Naval Capt. Hollender that the German airship L. 40, after landing on the water, examined a ship’s papers, and that the L. 23 surpassed this feat by not only sending a party (in the ship’s boats) to inspect the cargo of a Norwegian three-masted sailing ship, but put a prize crew of three on board the vessel, which was then safely brought into a German port, after a voyage of 43 hours in the North Sea." (2d edition, p. 471.)

Mr. Spaight, while admitting that such visit and search may have been exceptional during the World War, foresees that with changed conditions the exception may in a modified form become the rule.

Judge Moore on Hague Commission, 1922–23.—Judge John Bassett Moore, of the American Commission of Jurists meeting at The Hague in 1922–23 and drawing up rules for the control of radio in time of war and rules of aerial warfare, was elected President of the Commission. He said of the rules submitted in the General Report of the Commission made on February 19, 1923:

“Among the numerous and varied questions with which the Commission undertook to deal, the only one for the regulation of which it was unable to agree upon a rule was that of visit and search of merchant vessels by aircraft. Proposals on the subject were presented by the British as well as by the American delegation; but the American delegation, in the light of what the discussions developed, soon became convinced that both proposals were
defective, and that, without stricter and more specific regulation and control, aircraft might inflict on life and property at sea calamities fully as startling as those that had resulted in the recent war from the employment of submarines. * * *

"As regards the second topic—the visit and search of surface ships—the report, after describing the normal practice of cruisers, including the sending of an officer aboard in order to ascertain whether there is cause for capture, and the sending of a prize crew aboard if a case for capture is established, found that, if aircraft observed regular methods, they could exercise visit and search 'only under favorable conditions,' but that, if 'the right of diverting merchant vessels, without boarding them,' were 'legally established', aircraft could exercise it 'up to the limit of their range of action from their land or floating base.' Such range of action may fairly be considered as extending to a distance of at least two hundred-and-fifty miles. As regarded the right under certain conditions to sink a prize after due provision has been made for the safety of the crew, the report, while not intimating that such provision could ordinarily be made by the aircraft itself, stated that 'in favorable weather, and when it is easy to reach a friendly or neutral port, a crew may be compelled to abandon their ship and the ship may be fired upon and sunk by the aircraft.' The contemplation of aircraft thus ranging the seas and issuing to unvisited and unsearched vessels orders enforceable by bombing the ship or by firing upon the persons aboard, can scarcely be indulged without grave apprehensions. It was the possibilities thus suggested that led Mr. Struycken, first delegate from The Netherlands, to declare, both in subcommittee and in plenary session, that such a method of warfare might readily mean the terrorizing of the seas."

* * *

"Had the American delegation, in view of the divergence of opinions as to the right, or the extent of the right, even of surface craft to deviate merchantmen without search, been willing to concur in a mere enunciation of the principle that aircraft should have, as regarded the exercise of visit and search, the same rights as surface vessels, without attempting to say what those rights were, a majority vote might have been obtained for such a resolution. This would have been a compromise, and compromise is said to be of the essence of statesmanship. But there are two kinds of compromise. One kind is that in which there is a meeting of minds, resulting in an agreement. This is a wholesome and salutary process. The other kind is that in which there is no meeting of minds, but the divergence is veneered with a deft formula, cloaking a disagreement. This process is but a breeder of future quarrels." (Moore, International Law and Some Current Illusions, pp. 202, 204.)

Aircraft and deviation.—From their nature and physical limitations, aircraft might act as agents for deviation when they might not have the personnel or
other requisites essential for making a capture in the manner prescribed for surface vessels of war. If notification, with instructions to proceed to a named port only, is all that is necessary to constitute capture, it would be easy for an aircraft equipped with radio to make a large number of captures of this nature. J. M. Spaight, of Great Britain, writing from the point of view of the operations of a stronger sea power, said in 1926:

"Deviation is likely to become the rule, not the exception, in future. Visit and search at sea by aircraft will always probably be difficult. The ransacking of a liner will certainly be a practical impossibility. Even if visit sur place is declared obligatory, it is unlikely to be anything but perfunctory. But most probably there will be no visit at all. Ships will be ordered to named ports and if they take the risk of disobeying the order and persist in disobeying it, they will be attacked and perhaps sunk.

The conditions of 1915-18 may be reproduced in an aggravated form.

"The position of neutral commerce will indeed be wellnigh intolerable. Freedom of the sea will be dead and gone. Neutral shipping will be policed and dragooned as it never has been before. It was scourged with whips in 1914-18; it will be scourged with scorpions in a future war. Because the complete interruption of all neutral trade beneficial to the enemy will be more important than ever, because the grip on that trade will be tighter than ever and evasion more difficult, the conflict of belligerent and neutral interests will be sharper, the consequent disputes more bitter, and the danger of actual war with neutral States greater than in the past." (Aircraft and Commerce in War, p. 52.)

**Understood summons.**—The consequences of visit and search are so important that there should be no doubt that the summons is understood and the visiting vessel should especially guard against extreme action until convinced that an appearance of disregard of a signal is not misleading.

The Japanese Instructions of 1916, after providing day and night signals, stated:

"3. In the event of the merchant ship disregarding the orders given under the preceding two clauses, it may be fired on by the warship.

"4. For the time being, if it is found that the meaning of the signals above mentioned is not understood, His Imperial Majesty's
ships will communicate with merchant ships in the international code of signals. The procedure hitherto followed in other respects remains unchanged."

The Instructions for the Navy of the United States Governing Maritime Warfare, 1917, stated:

44. Subject to any special treaty provisions the following procedure is directed: Before summoning a vessel to lie to, a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (coup de semonce), by other international signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

"45. If the summoned vessel resists or takes to flight she may be pursued and brought to, by forcible measures, if necessary."

Treaties often made very particular provisions as to the method which the whole conduct of the visit and search should follow. Each vessel was entitled to know the identity of the other and measures necessary to this end were essential. The summoning gun was the method of attracting attention before the use of radio became common. If another method equally effective with the summoning gun is available, that method may be used. It is essential that the summons, by whatever means, be understood, and it is admitted that there may be many causes which might make summons by radio ineffective.

"Proceed as directed."—In the unratified treaty of the Washington Conference of 1921 on the "Use of Submarines and Noxious Gases in Warfare", Article I, there was the following:

"A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

"A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure." (1921 Naval War College, International Law Documents, p. 330.)

The words of this paragraph were discussed as regards submarines at the Naval War College. (1926 Naval War College, International Law Situations, pp. 42, et seq.).
In 1926 it was stated that as to submarines—"there would be some doubt as to the meaning of the words 'to proceed as directed after seizure.' " There was also uncertainty as to the significance of the words "capture" and "seizure" used in Article I.

The late Admiral Harry S. Knapp, U. S. N., in 1924, published an article in which he predicted that this convention, if adopted, would be a regrettable restriction upon any attempt to formulate the laws of war.

The failure of this treaty to receive approval of the signatory powers left many questions open, and a part of these came before the London Naval Conference of 1930.

_American aircraft over Mexico, 1919._—American troops in 1919 crossed the Mexican frontier, the American Government affirming on August 26 that it could not

"be expected to suffer the indefinite continuance of existing lawless conditions along its border which expose its citizens to maltreatment at the hands of ruffianly elements of the Mexican population which their Government seems unable to control, and which have undoubtedly been encouraged to continue their acts of aggression against citizens of the United States by reason of the immunity from punishment for such acts which they have enjoyed.

"No violation of the national sovereignty of Mexico was intended by this expedition. It was despatched upon the hot trail of the bandits in question with the sole object of punishing them for their mistreatment of officers of the American Army, and of preventing future activities of a similar nature upon our frontier. This object, having been accomplished as far as was possible in the circumstances, orders have been issued for the return of the troops to American territory" (Foreign Relations, U. S., 1919, vol. II. p. 560).

A few days later the Mexican Ambassador, on September 1, communicated to the Secretary of State that—

"It has been reported to my Government during the afternoon of the 28th of August, 1919, two aeroplanes of the United States which came from and afterward returned in the direction of Ojinaga flew over the city of Chihuahua and although this is the first time that U. S. aeroplanes flew over that city, they are known to cross the boundary line of the two Republics daily.
"And, in compliance with instructions received from my Government, I have the honor to bring the foregoing to Your Excellency's knowledge and to ask that you kindly use your good offices in having the facts complained of duly investigated in order that those found guilty be punished and repetition of violations like those above stated be prevented.

"I duly thank Your Excellency [etc.]

Y. Bonillas"

(Ibid., p. 561.)

On September 8, 1919, the Secretary of State said that the "War Department promises to issue strict orders against repetitions."

The Mexican Ambassador sent a further communication to the Secretary of State on October 25, 1919:

"It has been reported to my Government that on the 23rd of this month, at eleven a. m., an army aeroplane from Douglas, Arizona, flew at a height of about eight hundred meters above Nogales, Arizona, near the boundary line. The crew fired a machine gun several times, and some of the bullets carried as far as Nogales, Sonora, one hitting a dwelling where it luckily caused no bodily injury.

"Under instructions received to that effect from my Government, I have the honor to bring the foregoing to Your Excellency's knowledge with a request that you kindly use your good offices to have the facts investigated and suitable punishment brought upon those who may be found guilty.

"I take [etc.]

Y. Bonillas."

(Ibid., 564.)

To this communication the Acting Secretary of State replied on December 26:

"With further reference to Your Excellency's note No. E-4670 of October 25, 1919, concerning a report to the effect that on October 23rd the crew of a United States Army Aeroplane fired into the town of Nogales, Sonora, I have the honor to say that I am now in receipt of a communication from the branch of this Government to which the matter was referred stating that a careful investigation fails to disclose such an occurrence on October 23rd. I am officially informed, however, that a Lieutenant in the Air Service of the United States Army is being tried by a General Court Martial on the charge of having fired into the town of Nogales on October 19, 1919.

"Accept [etc.]

Frank L. Polk."

(Ibid., p. 565.)

Aircraft in distress, etc.—While naval vessels in distress have been allowed to enter neutral jurisdiction for

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repairs necessary to make the vessel seaworthy, the obligation to intern a belligerent aircraft entering neutral jurisdiction is comprehensive except for flying ambulances and aircraft upon vessels of war.

During the World War, 1914–18, no exceptions were made for disability, error, fog, or other reasons. Aircraft crossing a neutral frontier were shot down—in some cases on sight. This accords with the rules subsequently drawn up at The Hague, 1923:

"Article 40.
"Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State. * * *

"Article 42. A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

"A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any." (1924 Naval War College, International Documents, pp. 131, 133.)

The obligation to intern the aircraft also extends to passengers, personnel, and contents. The report of the Commission of Jurists in 1923 says of internment,

"It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent." (Ibid., p. 133.)

Aircraft and neutral jurisdiction.—During the World War the question of the relation of aircraft to neutral jurisdiction for the first time became one of major importance. In general, entrance by belligerent aircraft to the air above neutral territory was prohibited. Questions as to entrance of the air above neutral territorial waters arose and this right was denied. Aircraft resting upon and remaining upon vessels of war were regarded as parts of the vessel and the vessel was not discriminated against because having aircraft. Aircraft carriers are not to be excluded if other vessels of war are admitted though the aircraft must remain on the carrier.
Mr. J. M. Spaight says of aircraft and neutral jurisdiction:

"The important question whether the laws of neutrality allow belligerent military aircraft to come and go in neutral jurisdiction was answered by the practice of 1914–18 with a firm and unmistakable negative. The unanimity of the answer was remarkable. All the neutral States who had occasion to decide the question decided it in the same general way, and their decision gave rise to no protest on the part of the belligerents concerned, with one single exception, which the subsequent action and compliance of the State making it deprived of all its force. The Netherlands, Switzerland, Denmark, Norway, Sweden, Spain, and Italy, Roumania, Bulgaria, and China, while still neutral, showed by words or acts or both that they adhered to the principle of prohibition of belligerent air entry, coupled with the obligation of the neutral State to intern any aircraft and airmen effecting entry in face of such prohibition. How general was the acceptance of this principle was shown by the fact that even in Persia, in which British, Russian, and Turkish land forces had been already fighting for two years, an attempt was made to intern a British pilot—Lieut. Browning—when he flew to Teheran in January, 1918. His aeroplane had been stripped of its machine-guns and other armament on the Persian frontier—"so that he should not violate neutrality," says Lieut. Col Tennant—but, notwithstanding this, the Swedish gendarmerie at Teheran proposed to intern him, and were only prevented from doing so by the Cossacks who were present in superior numbers to the Swedes." (Air Power and War Rights, 2d ed., p. 421.)

Admiral Richmond on rules for aircraft.—The Washington Naval Conference of 1921–22 proposed an agreement restricting the use of submarines which was never ratified. At the London Naval Conference of 1930 the submarine was for certain purposes put under the rules for surface vessels of war. Of this Admiral Richmond, writing a few years later, said:

"The Conference which sat in London agreed that it is contrary to humanity that merchant ships should be sunk by submarines, and that the rules which govern surface vessels apply with equal weight to submarines: that is to say, that the act of sinking a merchant ship by means of a torpedo was condemned. It is curious that the same rules should not have been applied to the air flotilla, for there is no intrinsic difference between sinking a vessel with a torpedo fired from an underwater craft, and sinking her with a torpedo fired or a bomb from a craft which navigates above the surface. Presumably, the conduct of aircraft was imagined to be a matter of 'air warfare' with which the Conference had nothing to do: if so, it illustrates how un-
fortunate it is to approach questions of this kind in the subjective manner. If aircraft had been recognised to be what they are, flying torpedo-boats and gun-boats, units of sea power, this illogical discrimination could not have been made." * * *

"If, however, it should be resolutely declared that what is not tolerable in a submarine is not tolerable in any other form of vessel: that weakness or technical inability to fulfil certain conditions does not release an instrument from obligations which bind other instruments; then it would follow that this form of attack [sinking surface craft] was illegal. Illegality, it may be said, does not matter: each nation may have its own view on that question; and though one may elect to consider an act illegal, that decision has no binding effect upon another who thinks otherwise, and to whom the particular practice appears advantageous. But illegality is not so easily disposed of. It is a maxim that illegal acts justify retaliation. Those who consider attack in this form upon the noncombatant merchant ship to be illegal are at complete liberty to warn those who take the other view that they hold themselves entirely free to adopt whatever measures of retaliation they may choose. If the civilian in the ship is to be shot or drowned; if instead of legal condemnation by a Prize Court, summary execution is to be the practice; and if direct protection against these abnormal practices should prove, in the nature of things, to be impossible, the people threatened with this form of sea-hooliganism may find itself constrained to use measures equally detestable and more far-reaching. The bombardment of the civilian on the sea may be answered by the bombardment of the civilian in coastal towns and cities. Where it would end, it is impossible to say. What is called 'civilisation' had produced, until the War of 1914-18, certain agreements to limit the acts of war. It was recognised that indiscriminate conduct was, in the end, disadvantageous: that it caused suffering while doing nothing towards attaining the final object of war, which is Peace. The removal of those restraints upon certain forms of warfare profited no one in the recent war, and, from the profound hatreds which were created, has been one of the principal obstacles in the resumption of peace." (Admiral Sir Herbert Richmond, "Sea Power in the Modern World", pp. 146-49.)

Netherlands American Steam Navigation Co. v. H. M. Procurator General, 1925.—The detention by British authorities for forty-one days in 1915 of a vessel belonging to a Netherlands American Company led to a claim for the loss of the use of the vessel. This claim in appeal from the War Compensation Court came before the King's Bench Division of the High Court of Justice and judgments were delivered November 9, 1925. The Court through Bankes L. J., stated:
"There is no dispute about the facts, which can be stated quite shortly. Early in the month of October, 1915, the respondents' vessel, the Sommelsdijk, was on a voyage from Buenos Ayres to Helsingborg and Malmo with a cargo of maize, linseed and bran. On or about October 15, when the vessel entered the Downs, she was detained by H. M. Naval Patrols and searched, as far as it was possible to search her, without discharging her cargo and bunkers. The detention in the Downs continued until October 25, when an armed guard and a pilot were placed on board, and orders were given that the vessel was to proceed to London, and then, quoting the language of the master in para. 13 of his affidavit: 'The ship was taken to Gravesend accompanied by a torpedo-boat from the Edinburgh Channel, and brought to an anchor at Gravesend,' and from Gravesend the vessel was taken up into the Royal Albert Dock and there thoroughly searched, her cargo for that purpose being discharged. After the search was completed, the cargo was reloaded, and ultimately on December 5, again quoting the master's language: 'The ship was allowed to resume her voyage.' * * *

The question for decision in the present case is whether the modern practice of carrying out the right of visit and search constitutes a seizure within the meaning of the commission. In the absence of any authority to the contrary it would seem that the means adopted under the present practice of carrying out a visit and search would amply justify a finding of a seizure. What more is wanted than the forcible detention of a Yessel, followed by the placing of an armed guard on board in order to compel the carrying out of orders that the vessel is to proceed to some named port and there to remain until allowed to proceed?" (Netherlands American Steam Navigation Company v. H. M. Procurator General, 1 K. B. [1926] 84, 93.)

In this case Scrutton, L. J., said:

"What had happened to the Sommelsdijk was agreed by counsel to be that in exercise of the belligerent rights of search she had been detained in the Downs, then brought to London with an armed crew of forces of the Crown on board and in charge of one of His Majesty's destroyers, there searched and ultimately released.

'It was common ground that before the war the belligerent right of search of neutral vessels was usually exercised at sea, but that during the war the presence of submarines and the size of modern ships led to an extension of that procedure, by which the neutral ship was brought into port for examination, without being necessarily brought before the Prize Court for adjudication. Oppenheim (International Law, vol. ii., 429) speaks of capture or seizure 'because grave suspicion demands a further enquiry which can be carried out in a port only.' and (184) that 'seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board,' or directing her to steer according to the captor's orders. I cannot doubt that what happened here was a 'seizure,' the legality of which could be investigated in the Admiralty sitting in Prize, which
also would deal with any claim for compensation for undue delay in seizure and examination. The President informed us that such matters had been frequently dealt with by the Admiralty sitting in Prize, and we were supplied with a list of cases supporting his view.” (Ibid., 97.)

Atkin, L. J., concurring in the same case, said:

“If there were an immediate intention at the commencement of the operation to bring the vessel in for adjudication, there would be an obvious capture, and in my opinion it makes no difference that the present intention is to bring her in for search, with the further intention if the search results in a particular way to have the vessel or goods adjudicated. It cannot be doubted that the practice of the Prize Court in this country has been to act on this view. I have no doubt myself that in proper circumstances the owners of a vessel or goods so brought in for search alleging unreasonable delay may apply to the Prize Court for relief, and that the Prize Court has jurisdiction in such a case to order release; and further has jurisdiction to award compensation if the ship has been brought in for search unreasonably or otherwise in the course of the search has been treated unreasonably. It would be remarkable if the result were otherwise, for in the absence of domestic legislation in the belligerent country the neutral owner would apparently be without remedy.” (Ibid., 100.)

Radio.—The use of wireless telegraphy early in the twentieth century had shown that international regulations were essential, because some of the proposed national restrictions would not be generally acceptable. Regulations as to use of wireless telegraphy in time of peace were not particularly difficult to devise as is evident in the Berlin Convention of 1906, in the London Convention, 1912, and in others of later date. The restrictions upon the erection of wireless stations and use of wireless telegraphy in time of war in neutral territory, provided in V Hague Convention of 1907, covered only a part of the problems that soon arose. The proclamations and decrees during the world war varied greatly in character and effectiveness, and an attempt was made to set forth the rules for the use of radio and aircraft in the Report of the Commission of Jurists, The Hague, 1923.
The Hague Convention V of 1907 had forbidden the erection by belligerents of a wireless or like station on neutral territory or the use of such installation established before the war for military purposes unless it had also been open for service of public messages.

On the outbreak of the World War, Switzerland, August 2, 1914, forbade the installation of new radio stations and the use of existing stations.

Some states included under the prohibited means of communication, optical apparatus, lights, flags, etc., and required dismantling of radio apparatus on all vessels entering their waters. The use of radio except on Canal business was forbidden by the United States to all belligerent vessels in the Panama Canal Zone. The regulations in regard to the use of radio issued by South American states were often very detailed.

In referring to summons by aircraft in the Naval War College, International Law Situations, 1930, it was said:

“Summons of a merchant vessel is the means by which the attention of such a vessel is drawn to a vessel of war which desires to communicate with the merchant vessel. The summons may be by signal flag or by an other effective method. There is not any necessary implication that the use of force is contemplated. Visit and search may or may not follow the summons. There seems to be no reason why the use of radio may not be as lawful as any other means of attracting attention or why an aircraft may not summon a merchant vessel as well as any other craft.” (1930 Naval War College, International Law Situations, p. 102.)

Résumé.—In the Naval War College International Law Situations, 1930, pages 98 to 135, there is a discussion of the use of aircraft. It was shown that practice and court decisions logically regarded an aircraft attached to a vessel and the personnel of the aircraft as a part of the equipment and personnel of the vessel of war. The British and to some degree the Italian point of view favored deviation for visit and search. “To proceed as
directed” after seizure, unless under escort, or after a prize crew had been placed upon the seized vessel, is not an accepted obligation under international law. Some states decline to admit any obligation to the belligerents as resting upon its vessels to follow a routing unless the force to make the orders effective is present, and only so long as it is present. In every case the orders of the visiting vessels whether naval or air craft, must be made known to and be understood by the visited craft before responsibility for carrying out the orders can be presumed. Upon the high sea vessels may be met whose radio apparatus may not be working or the instructions may be misunderstood.

During the early stages of the development of aircraft, there was uncertainty as to the obligations of neutral states in regard to the use of the superjacent air by belligerents. Gradually the absolute prohibition of such use became the accepted rule. Of course, in case of distress an aircraft might seek a landing in neutral jurisdiction but it would be interned with the personnel. Aircraft might be brought within neutral jurisdiction on a vessel which might lawfully be permitted to enter, but they must not be separated from the vessel under liability to internment.

**SOLUTION**

(a) 1. The $Y_a-10$ should not use force against the $Xala$ till certain that the $Xala$ has received and understood the summons. When certain that summons has been received and is understood, the $Y_a-10$ may use force sufficient only to bring the $Xala$ to the $Yaga$ under escort or in case of persistent or active resistance, the $Y_a-10$ may sink the $Xala$, after assuring the safety of passengers, crew, and papers.

2. The $Y_a-10$ should not use force against the $Xala$ till certain that the $Xala$ has received and understood
the summons. When certain that summons has been received and is understood, the \textit{Ya–10} may use force sufficient only to bring the \textit{Xala} to the \textit{Yaga} under escort or in case of persistent or active resistance, the \textit{Ya–10} may sink the \textit{Xala}, after assuring the safety of passengers, crew, and papers.

3. The \textit{Ya–10} should not use force against the \textit{Xala} till certain that the \textit{Xala} has received and understood the summons. When certain that summons has been received and is understood, the \textit{Ya–10} may use force sufficient only to bring the \textit{Xala} to the \textit{Yaga} under escort. If the \textit{Ya–10} decides not to incur risk from the approaching cruiser of \textit{X}, the \textit{Ya–10} may take no further action in regard to the \textit{Xala}.

4. If a merchant vessel of neutral state \textit{N}, the \textit{Nela}, should be summoned by the \textit{Ya–10} under conditions identical to (1), (2), and (3) above, the same action may be taken.

\(b\) The commander of the \textit{Ya–10} being already certain that the summons is received, should also be certain that it is understood, when he may proceed as in (1), (2), (3), and (4) above.

\(c\) 1. State \textit{K} should use due diligence to intern the \textit{Pa–11}, an aircraft of state \textit{Y}.

2. State \textit{Q} should use due diligence to intern the \textit{Pa–11}, an aircraft of state \textit{Y}, and if the tanker of state \textit{Y} has furnished fuel to the \textit{Pa–11}, should intern the tanker.

3. State \textit{R} should request the \textit{Yema} to turn over the \textit{Pa–11} for internment and if the request is not granted, should use due diligence to intern the \textit{Yema} with the \textit{Pa–11} on board.