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International Law Situations

With Solutions and Notes

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SITUATION II

ACTION DURING CIVIL STRIFE

There is a disturbed condition of affairs in state O, a party to the Havana Conventions of February 1928, which is followed by an organized armed attempt by the Liberal Party to overthrow the established government of President Smith in state O. No state has recognized the belligerency of the Liberal Party.

(a) The *Able*, a vessel of war of the United States is in Obo, a port of state O.

(1) The *Ali*, a merchant vessel flying the flag of the United States, which vessel is reported to have been chartered to a leader of the Liberal Party, is entering the port of Obo. The local authorities, having no naval force available, request the commander of the *Able* to seize or to prevent the landing of the cargo of the *Ali*.

(2) In the port of Obo, the *Atto*, another merchant vessel flying the flag of the United States, is fitting out to cruise against the fleet of state O. The local authorities request the commander of the *Able* to seize or at least to prevent the sailing of the *Atto*.

(b) At night the *Armo*, a cruiser of the United States, discovers within 3 miles of the coast of the United States a merchant vessel transferring coal to a vessel of war apparently flying the flag of the Liberal Party. On discovering the *Armo*, the merchant vessel and the vessel of war flee in opposite directions before their identity is established.

(1) The commander of the *Armo* considers which vessel to pursue if either.

(2) The commander of the *Armo* decides to pursue the vessel of war, which arrives in Port Obo before the

Armo can overtake her. The *Armo* in the early morning sails out to cruise along the coast of O, and sights the vessel of war 3 miles off the coast.

(c) The *Ora*, originally a cruiser of state O, is seized by the Liberal Party, raises the flag of state M and puts to sea.

(1) It is met by the *Able* and makes the customary salute to the flag officer of the United States vessel of war.

(2) Later the *Ora* seizes a merchant vessel of the United States bound with a cargo of arms to a port occupied by the forces of state O. The *Ora* takes the merchant vessel to Obo. The following day the *Ora* flying the flag of the Liberal Party is seen on the high seas by the *Armo*.

What would be the lawful action in each case?

SOLUTION

(a) 1. The commander of the *Able* should decline the request of the local authorities, though he should warn the master of the *Ali* of the risk he runs.

2. The commander of the *Able* should decline the request of the local authorities, though he should warn the master of the *Ato* of the risk he runs.

(b) 1. The commander of the *Armo* should pursue the vessel of war.

2. The pursuit must not continue within the jurisdiction of state O and, when the pursuit is thus discontinued, cannot be resumed the following morning.

(c) 1. The commander of the *Able* should not return the salute of the *Ora* which is under a false flag.

2. The commander of the *Armo* should seize and hold the *Ora* pending instructions.

NOTES

Disturbed condition of affairs.—That there should be differences of opinion within states, and that partisans

should at times resort to the use of force in endeavoring to support their positions, is a common occurrence. Many new states have established themselves through such action. During the nineteenth century especially, uprisings ostensibly or really due to attempts to realize worthy political aims were frequent and states on the American continent looking to their own origins viewed these movements with little disfavor.

Treaties, Central American States, 1907.—On December 20, 1907, the delegates from the five Central American States, Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador signed a general treaty of peace and amity at Washington.

This treaty provided, in the first article, for a Central American Court of Justice and in articles following stated that—

“ARTICLE II. Desiring to secure in the Republics of Central America the benefits which are derived from the maintenance of their institutions, and to contribute at the same time in strengthening their stability and the prestige with which they ought to be surrounded, it is declared that every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said Republics.

“ARTICLE III. Taking into account the central geographical position of Honduras and the facilities which owing to this circumstance have made its territory most often the theater of Central American conflicts, Honduras declares from now on its absolute neutrality in event of any conflict between the other Republics; and the latter, in their turn provided such neutrality be observed, bind themselves to respect it and in no case to violate the Honduran territory.” (Foreign Relations, U. S., 1907, Part II, p. 693.)

In an additional convention of the same date it was agreed that,

“The Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'état*, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.” (Ibid., p. 696.)

Nicaragua, 1909.—The plans for overthrow of one party and the establishment of another involving domestic disturbance have sometimes been known in advance and instructions to foreign diplomatic agents have been given accordingly.

In 1909 on October 7, a telegram was received by the Secretary of State from the American consul at Bluefields that there was reason to believe,

“that a revolution will start in Bluefields on the 8th; that the State, with the present governor proclaimed provisional president, will constitute an independent republic, with Bluefields the capital; appeal will be made to Washington immediately for recognition.” (Foreign Relations, U. S., 1909, p. 452.)

A telegram received by the Secretary of State October 12, reported that the provisional government was established on the tenth “without difficulty, or the firing of a shot”, and that the new government “is friendly to American interests and is progressive”, has granted the American consul recognition, “has formed new cabinet; and has sent him assurances in writing friendship American Government.” The Acting Secretary of State sent to consul Moffatt a telegram to the following effect,

“DEPARTMENT OF STATE,
“Washington, October 13, 1909.

“Mr. Adee instructs Mr. Moffatt to do nothing whatever which might indicate the recognition of provisional administration, and says he should have no official intercourse with it in his representative capacity. Mr. Adee adds that if any action of the temporary power should require interposition to protect American interests Mr. Moffatt should personally and informally address whatever visible local agency may be in a position to afford de facto relief. Mr. Moffatt is directed to confine himself strictly within these limits.” (Ibid., p. 453.)

Later, on November 21, 1909, the Secretary of State sent another telegram:

“DEPARTMENT OF STATE,
“Washington, November 21, 1909.

“Mr. Knox states that in the light of recent occurrences, particularly in regard to cases affecting American interests and

property, it is appropriate that the revolutionary party should understand that the United States reserves all claims and rights growing out of acts or omissions of the revolutionary party to which this Government or its citizens may be entitled under international law, and that such timely reservation is not to be deemed to imply admission of a full state of revolutionary belligerency with the rights and obligations attaching thereto under the doctrines of international law. Mr. Knox refers particularly to the reported action of the revolutionary party in respect to the steamer *Dictator* which is under charter of the Bluefields Steamship Co., an American corporation, and says, this Government reserves all rights in respect to the validity of any proceedings against that vessel as a prize of war, and that if the vessel is actually held by the revolutionary party it is suggested that it be released under bond from the charterers to insure her departure from Nicaragua and to engage that she shall not attempt to enter any invested port after due notice and warning of effective investment." (Ibid., p. 454.)

In spite of the fact that Nicaragua was a party to the Central American treaties of 1907 which aimed to secure peace in that area, the disturbed conditions in Nicaragua in 1909 led the Secretary of State in a long note of December 1909 to say to the Nicaraguan Chargé,

"The Government of Nicaragua which you have hitherto represented is hereby notified, as will be also the leaders of the revolution, that the Government of the United States will hold strictly accountable for the protection of American life and property the factions de facto in control of the eastern and western portions of the Republic of Nicaragua. * * *

"From the foregoing it will be apparent to you that your office of chargé d'affaires is at an end. I have the honor to inclose your passport, for use in case you desire to leave this country. I would add at the same time that, although your diplomatic quality is terminated, I shall be happy to receive you, as I shall be happy to receive the representative of the revolution, each as the unofficial channel of communication between the Government of the United States and the de facto authorities to whom I look for the protection of American interests pending the establishment in Nicaragua of a Government with which the United States can maintain diplomatic relations." (Ibid., p. 456.)

Mexico, 1916.—In reply to a Senate resolution of January 6, 1916, the Secretary of State said:

“(1) The government at present existing in Mexico is a *de facto* government, established by military power, which has definitely committed itself to the holding of popular elections upon the restoration of domestic peace.

“(2) This *de facto* Government of Mexico, of which Gen. Venustiano Carranza is the Chief Executive, was recognized by the Government of the United States on October 19, 1915, and a copy of the letter to Mr. Eliseo Arredondo, the representative of the *de facto* government at this capital, informing him of such recognition is hereto appended (inclosure No. 1). The said *de facto* government has since been recognized by substantially all the countries of Latin America; also by Great Britain, France, Italy, Russia, Japan, Austria-Hungary, Germany, and Spain; and several other countries have recently announced their intention of extending recognition. The said *de facto* government is at present maintained at Querétaro, near Mexico City.

“It can not be said that the *de facto* Government of Mexico is a constitutional government. The *de facto* government, like the majority of revolutionary governments, is of a military character, but, as already stated, that government has committed itself to the holding of elections, and it is confidently expected that the present government will, within a reasonable time, be merged in or succeeded by a government organized under the constitution and laws of Mexico.” (Foreign Relations, U. S., 1916, p. 469.)

Other parts of the reply set forth the disturbed conditions in Mexico and showed what the United States had done and proposed to do in regard to the situation then prevailing. American troops were sent to the frontier to enforce the rules of neutrality and the neutrality statutes of the Federal Government.

Owing to the disturbed conditions along the frontier, a reciprocal arrangement was made between the United States and Mexico by which troops of either state might pursue lawless bands into the territory of the other.

“The Government of the United States, in view of the unusual state of affairs which has existed for some time along the international boundary and earnestly desiring to cooperate with

the *de facto* Government of Mexico to suppress this state of lawlessness, of which the attack on Columbus, New Mexico, is a deplorable example, and to insure peace and order in the regions contiguous to the boundary between the two Republics, readily grants permission for military forces of the *de facto* Government of Mexico to cross the international boundary in pursuit of lawless bands of armed men who have entered Mexico from the United States, committed outrages on Mexican soil, and fled into the United States, on the understanding that the *de facto* Government of Mexico grants the reciprocal privilege that the military forces of the United States may pursue across the international boundary into Mexican territory lawless bands of armed men who have entered the United States from Mexico, committed outrages on American soil, and fled into Mexico.

“The Government of the United States understands that in view of its agreement to this reciprocal arrangement proposed by the *de facto* Government the arrangement is now complete and in force and the reciprocal privileges thereunder may accordingly be exercised by either Government without further interchange of views.

“It is a matter of sincere gratification to the Government of the United States that the *de facto* Government of Mexico has evinced so cordial and friendly a spirit of cooperation in the efforts of the authorities of the United States to apprehend and punish the bands of outlaws who seek refuge beyond the international boundary in the erroneous belief that the constituted authorities will resent any pursuit across the boundary by the forces of the Government whose citizens have suffered by the crimes of the fugitives.

“With the same spirit of cordial friendship the Government of the United States will exercise the privilege granted by the *de facto* Government of Mexico in the hope and confident expectation that by their mutual efforts lawlessness will be eradicated and peace and order maintained in the territories of the United States and Mexico contiguous to the international boundary.” (Ibid., p. 488.)

That there might be no fear of intervention, the Secretary of State, under authority of the President, made a public statement of policy:

“In order to remove any apprehension that may exist either in the United States or in Mexico, the President has authorized me to give in his name the public assurance that the military operations now in contemplation by this Government will be

scrupulously confined to the object already announced, and that in no circumstances will they be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind in the internal affairs of our sister Republic. On the contrary, what is now being done is deliberately intended to preclude the possibility of intervention." (Ibid., p. 489.)

This position was approved by a congressional resolution of March 17, 1916, and a detailed draft of an arrangement was proposed by Mexico, March 19, 1916. The problem of maintaining a position that would be free from suspicion when any intervention is undertaken is always difficult, and the situation in Mexico in 1916 supports the position that no intervention of any kind should take place save under exceptional circumstances, and then as a last resort.

Civil strife.—The term, civil strife, is used in the Habana Convention of 1928: Rights and Duties of States in the Event of Civil Strife.

The first paragraph of article I of this convention obligates a contracting state to use the means at its disposal to prevent the promotion of civil strife in another state, party to the convention, by aid from within the jurisdiction of the first state. The second paragraph provides for internment of what are called rebel forces. The third paragraph forbids traffic in arms except with the established government, and the fourth paragraph binds a state to prevent fitting out of vessels "intended to operate in favor of the rebellion."

Article 2 refers to insurgent vessels and article 3 provides for treatment of the crews of insurgent vessels as political refugees.

This convention seems, therefore, to relate to what has come to be called insurgency, implying the existence of an organized body of men pursuing public ends by force of arms, and temporarily beyond the control of the civil authority of the established state.

The United States at Montevideo Conference, 1933.—The Montevideo Conference of American States, 1933, considered the question of the rights and duties of states

which had been referred to it by the Habana Conference, 1928, a draft having been prepared by the Commission of Jurisconsults at Rio de Janeiro in 1927. It was stated that the questions were sufficiently developed to be susceptible of codification. Article 8 of the proposed Convention of the Rights and Duties of States said of intervention, "no state has the right to intervene in the internal or external affairs of another."

Secretary Hull, of the delegation of the United States, commenting on this convention on December 19, 1933, set forth the position of his Government, and, in signing the convention, reservation was made as follows:

"The Delegation of the United States of America, in signing the Convention on the Rights and Duties of States, does so with the express reservation presented to the Plenary Session of the Conference on December 22, 1933, which reservation reads as follows:

"The Delegation of the United States, in voting 'yes' on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven articles of the project or proposal that the United States Delegation made to the first ten articles during the final vote in the full Commission, which reservation is in words as follows:

"The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4. I have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this time thoroughly understand that under the Roosevelt Administration the United States Government is as much opposed as any other government to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations.

"In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as

has been suggested, no government need fear any intervention on the part of the United States under the Roosevelt Administration. I think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretations and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every government, I desire to say that the United States Government in all of its international associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4 which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted." (Report of the Delegates of the United States of America to the Seventh International Conference of American States, 1933, p. 20.)

This is a very comprehensive reservation and would involve interpretation of many "acts and utterances" which might not always be similarly understood.

Intervention, Montevideo, 1933.—A proposal for a definition of intervention was brought forward in the report of the second subcommittee on the rights and duties of states at the Montevideo, 1933, International Conference of American States. Concepts of nonintervention, not always identical, had been discussed at length and with warm eloquence at the fifth session of the subcommittee on December 19, 1933. Some of the speakers had made very vigorous opposition to the point of view expressed by certain states at Habana in 1928 that "Interposition is indispensable, in certain cases." This in 1933 was called "the nefarious principle of intervention." Some of the delegates called the Montevideo conference a "nonintervention conference."

Article 1-10, inclusive, of the convention on rights and duties of states were approved by the second com-

mittee without reservation other than "statements and declarations" made by the delegation of the United States.

Article 11 of the convention was also approved by the second committee though the United States abstained from voting and some other votes were conditional. This article 11, providing for nonrecognition of territorial acquisitions originating in violence, was held by some of the delegates to be merely a corollary of the principle of nonintervention.

There were questions as to the precise meaning of the word "intervention." One delegate maintained that "America knows perfectly well what intervention is, because it has lived it", and the Cuban delegate affirmed that "Cuba was born with the congenital vice of intervention" in the Platt amendment.

A definition of intervention was at length proposed as follows:

"Any act of a state through diplomatic representation, by armed force, or by any other means involving effective force, with a view to making the State's will dominate the will of another State, and, in general, any maneuver, interference or interposition of any sort, employing such means, either directly or indirectly in matter of the obligations of another State, whatever its motive, shall be considered as *Intervention*, and likewise a violation of International Law." (Seventh International Conference of American States, First, Second and Eighth Committees, Minutes and Antecedents, p. 165.)

Interpretation, 1936.—In an address of Under Secretary of State Phillips in Chicago, February 16, 1936, an interpretation of the clause relating to intervention in the convention on the rights and duties of states was given:

"I have heard it said that the State Department has put into a treaty with Latin American countries the assurance that the United States would never again use force for any purpose. It is true that a convention signed at Montevideo, entitled 'Convention on the Rights and Duties of States', contained the provision that 'no state has the right to intervene in the internal

or external affairs of another', and it is true also that our Government is opposed to the interference with the freedom, the sovereignty, or the internal affairs of the governments of other nations, just as we Americans are opposed to the intervention in the affairs of this country by any foreign power. But our Government, no more than any other responsible government, has never renounced the right to protect those legitimate rights of its citizens which are generally recognized and accepted by international law and by international conventions. The protection of the lives of citizens is and must be a matter of first concern to any responsible government, whenever and wherever the local authorities of the country in which they reside are clearly unable to afford such protection, and whenever the lives of its citizens are in real jeopardy.

"What we have renounced, however, is any right to claim that because we are more powerful than our neighbors we can use that superior force to intervene in the internal affairs of weaker nations, thereby acting in flagrant disregard of their sovereign rights. What we have renounced is a right to establish an American police force in other independent nations whenever the properties of the American citizens resident therein are believed to be endangered." (Department of State Publication, no. 844, *The United States in World Affairs*, p. 8.)

Navy attitude, 1891.—The laws in regard to conduct in time of insurrection particularly developed on the American continent because insurrections were more frequent in this area and many American states had originally based their right to exist upon successful revolution.

On March 4, 1891, the Secretary of the Navy sent to Admiral McCann general instructions which are in many respects now generally accepted by other states and in some definitely embodied in treaties.

"Insurgent vessels, although outlawed by Chilean Government, are not pirates unless committing acts of piracy. Observe strict neutrality. Take no part in troubles further than to protect American interests. Take whatever measures are necessary to prevent injury by insurgent vessels to lives or property of American citizens, including American telegraph cables. Endeavor to delay bombardment by insurgents until American citizens and property are removed, using force, if necessary, only as a last resort, and when serious injury is threatened.

American vessels seized by the insurgents without satisfactory compensation are liable to be recovered forcibly, but you should investigate matter fully before taking extreme measures, and use every precaution to avoid such measures if possible." (H. Ex. Doc. No. 91, 52d Cong., 1st sess., p. 245.)

The provision in regard to piracy is now generally approved. There is much uncertainty as to what constitutes neutrality and as to the nature of neutral rights even in time of duly declared war. There would be, even after the receipt of the general instructions from the Secretary of the Navy, points upon which question might be raised and more explicit provisions were issued to meet other situations.

"As a further and more explicit guide for your action you are directed:

"(1) To abstain from any proceedings which shall be in the nature of assistance to either party in the present disturbance, or from which sympathy with either party could be inferred.

"(2) In reference to the ships which have been declared outlawed by the Chilean Government, if such ships attempt to commit injuries or depredations upon the person or property of Americans, you are authorized and directed to interfere in whatever way may be deemed necessary to prevent such acts; but you are not to interfere except for the protection of the lives or property of American citizens.

"(3) Vessels or other property belonging to our citizens which may have been seized by the insurgents upon the high seas and for which no just settlement or compensation has been made are liable to forcible recovery; but the facts should be ascertained before proceeding to extreme measures and all effort should be made to avoid such measures.

"(4) Should bombardment of any place, by which the lives or property of Americans may be endangered, be attempted or threatened by such ships, you will, if and when your force is sufficient for the purpose, require them to refrain from bombarding the place until sufficient time has been allowed for placing American life and property in safety.

"You will enforce this demand if it is refused, and if it is granted, proceed to give effect to the measures necessary for the security of such life or property.

"(5) In reference to the granting of asylum, your ships will not, of course, be made a refuge for criminals. In the case of

persons other than criminals, they will afford shelter wherever it may be needed, to Americans first of all, and to others, including political refugees, as far as the claims of humanity may require and the service upon which you are engaged permit.

“The obligation to receive political refugees and to afford them an asylum is, in general, one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contending factions or their leaders are facilitated. You are not to invite or encourage such refugees to come on board your ship, but, should they apply to you, your action will be governed by considerations of humanity and the exigencies of the service upon which you are engaged. When, however, a political refugee has embarked, in the territory of a third power, on board an American ship as a passenger for purposes of innocent transit, and it appears upon the entry of such ship into the territorial waters that his life is in danger, it is your duty to extend to him an offer of asylum.

“(6) Referring to paragraph 18, page 137, of the Navy Regulations of 1876, which is as follows:

“‘If any vessel shall be taken acting as a vessel of war or a privateer without having proper commission so to act, the officers and crew shall be considered as pirates and treated accordingly.’”

“You are informed that this paragraph does not refer to vessels acting in the interests of insurgents and directing their hostilities solely against the State whose authority they have disputed. It is only when such vessels commit piratical acts that they are to be treated as pirates, and, unless their acts are of such a character or are directed against the persons or property of Americans you are not authorized to interfere with them.

“(7) In all cases where it becomes necessary to take forcible measures, force will only be used as a last resort, and then only to the extent which is necessary to effect the object in view. (Ibid.)

Restrictions upon the action of foreign vessels of war in ports where civil strife prevailed were later made particularly in regard to granting asylum on vessels of war which might be easily abused.

Protection of alien property.—At the time of an insurrection in Cuba in 1906, the American Chargé d’Af-

fares sent a telegram to the Secretary of State of which the following is a paraphrase:

"Mr. Sleeper asks to be advised if the following is satisfactory reply and advice to send to Americans requesting protection of property: 'In all cases of damage, destruction, or seizure of property against the will of the owner by agents of the Government or other parties, a complaint stating the facts and containing a list of the property so damaged, destroyed, or seized should be made to the court having jurisdiction, a copy of said complaint being forwarded at the same time to this legation. Wherever possible a statement in case property is damaged or destroyed and a receipt in case property is appropriated, subscribed to by the person or persons responsible for such damage or destruction or making such appropriation should be procured.'" (Foreign Relations, U. S., 1906, Part I, p. 457.)

This advice was approved by the Acting Secretary of State on August 29, 1906.

In a report to the Secretary of State, Chargé Sleeper said on September 8, 1906:

"Regarding the safeguarding of American interests, I have to say that, so far as I can ascertain, no effort has been made by the Government to afford the protection which I have from time to time requested through the foreign office. Fortunately, there has been no loss of life or destruction of property thus far, the rebels having confined themselves to the seizure of animals, arms, and equipment." (Ibid, p. 471.)

Owing to the then existing treaty relations between the United States and Cuba, the United States decided to intervene. Article 3 of the treaty of 1903 provided:

"The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba." (33 U. S. Stat. 2248.)

This treaty was terminated May 29, 1934.

Arms traffic in civil strife.—While there are not, so far as the United States is concerned, many new features in the Habana Convention of 1928 on the Rights and

Duties of States in the Event of Civil Strife, it was the purpose of the conference to reach a general agreement. Traffic in arms with the established government was not restrained, but according to article 1,

“The contracting states bind themselves to observe the following rules with regard to civil strife in another one of them:

* * * * *

“3. To forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.” (Report of the American Delegates, Sixth International Conference of American States, Habana, 1928. p. 228.)

British action, Nanking, 1927.—The so-called Nanking incident of March 24 and 25, 1927, in which lives were taken and property destroyed made action for protection essential. The Chinese requested an expression of regret from the British authorities, but were informed that protective measures were necessary.

“Dr. C. T. Wang to Sir M. Lampson.

“Nanking, August 9, 1928.

“Sir:

“Referring to the notes exchanged this day on the subject of the settlement of questions arising out of the Nanking incident of the 24th March, 1927, I have the honour to invite your Excellency’s attention to the fact that on that date fire was opened upon Socony Hill, at Nanking, by the British war vessel ‘Emerald,’ then lying in the port. In view of this fact, the Nationalist Government earnestly hope that His Majesty’s Government in Great Britain will express regret at this action.

“I avail, etc.

WANG CHENG TING”

“Sir M. Lampson to Dr. C. T. Wang.

Peking, August 9, 1928

“Sir.

I have the honour to acknowledge the receipt of your Excellency’s note of to-day’s date in which reference was made to the fact that on the 24th March, 1927, the British war vessel, H. M. S. ‘Emerald,’ then lying in the port, opened fire upon Socony Hill, at Nanking, and in which the hope was expressed

that His Majesty's Government in Great Britain would indicate their regret at this action.

"In reply, I have to point out that the firing referred to was, in fact, a protective barrage strictly confined to the immediate neighbourhood of foreign houses in which a number of British subjects had been driven to seek refuge from the assaults of an unrestrained soldiery; and not only did it provide the only conceivable means by which the lives of this party were saved from the danger that imminently threatened them, but it also made possible the evacuation of other British residents at Nanking, who were in actual peril of their lives. His Majesty's Government in Great Britain therefore feel that the measures taken by H. M. S. 'Emerald' were absolutely necessary for the protection of British lives and property, however deeply they may deplore the fact that the circumstances at Nanking on the 24th March, 1927, were such as to render necessary the adoption of these measures.

"I avail, etc.

(For His Majesty's Minister),

SIDNEY BARTON."

(Parliamentary Papers, China No. 1 (1928), Cmd. 3188, p. 4.)

Liability of insurgents.—Under the Habana Convention of 1928 on the Rights and Duties of States in the Event of Civil Strife it was provided in article 2 that—

"The declaration of piracy against vessels which have risen in arms, emanating from a government, is not binding upon the other states.

"The state that may be injured by depredations originating from insurgent vessels is entitled to adopt the following punitive measures against them: Should the authors of the damages be warships, it may capture and return them to the government of the state to which they belong, for their trial; should the damage originate with merchantmen, the injured state may capture and subject them to the appropriate penal laws.

"The insurgent vessel, whether a warship or a merchantman, which flies the flag of a foreign country to shield its actions, may also be captured and tried by the state of said flag." (Report of the American Delegates, Sixth International Conference of American States, Habana, 1928. p. 229.)

The first paragraph of article 2 in regard to declaration of piracy affirms a position which had long been

taken by many states, particularly on the American continent where many existing governments have been set up by armed revolution.

The second paragraph of article 2 supports a position which has been sometimes affirmed when the insurgent ship is taken at the time of committing the act of depredation. This paragraph does not specify any limit of time during which the vessel of the insurgent may be liable to capture, but prescribes what may be done to the vessel of war or merchant vessel with which the damage may originate.

The third paragraph of article 2 places the trial for this flying of a false flag by an insurgent "to shield its actions" in the state of the flag, but the false flag would not prevent capture by another state than that of the false flag which the vessel was flying if the vessel had committed depredations against that state. If, however, the only offense is flying of the false flag, the state whose flag is falsely flown would be entitled to capture and try the vessel.

The Perlas, 1909.—In a communication to the Honduran Minister, November 9, 1909, Mr. Knox, Secretary of State, said,

"The gasoline vessel *Perlas* is American built and was recently sent to Nicaragua, there to engage in ordinary and legitimate business. The vessel is the property of citizens of the United States.

"It is reported to this department that she was recently pressed into service by the revolutionary forces at Bluefields and dispatched with a passenger for Puerto Barrios. On the way she was obliged to put into Puerto Cortes for fuel, where she has been detained by the authorities of the Honduran Government.

"The Government of the United States does not raise the question as to the right of Honduras to hold the passenger that this vessel was carrying at the time it put into Puerto Cortes, but insists that the detention of the vessel is without warrant or authority, and has demanded and will continue to demand its immediate release from the Honduran authorities. The right to arrest the passenger does not carry with it the right to detain the vessel." (Foreign Relations, U. S., 1909, p. 377.)

On November 6, 1909, the paraphrase of a telegram to Minister Brown refers to the Colombian revolution of 1885,

"DEPARTMENT OF STATE,
"Washington, November 6, 1909.

"In re the detention by Honduras of the Perlas Co.'s launch, Mr. Knox instructs Mr. Brown to remind the minister for foreign affairs that the Government of the United States has upon occasion asserted and exercised the right to restore to the legitimate use of American owners vessels that had been impressed by revolutionists even going so far, in the Colombian revolution of 1885, as the retaking by a warship of such a vessel on the seas. Mr. Knox expresses the hope, however, that this aspect of the question will not be presented for discussion." (Ibid., p. 377.)

Flag similar to national flag.—Flying of false flag in time of peace or during an insurrection is regarded as a ground for protest. Even the flying of a flag which might be easily mistaken for the flag of a foreign state, has also been the ground for protest. There are, however, flags of several states which are not easily distinguishable at a distance, particularly when the distinction is mainly one of color.

In 1903 a Brazilian steamship line was flying a house flag similar to the flag of the United States, and the American minister brought the matter to the attention of the Brazilian Government.

AMERICAN LEGATION,
Petropolis, May 25, 1903.

"Mr. MINISTER: I herewith enclose you a sketch of the house flag used by the Brazilian firm of Rosa, Carvalho & Co., of Bahia and Pelotas, and regularly displayed in their ships which are engaged in the coastwise trade, and are registered at Pelotas.

"You will observe that this flag is substantially identical with the flag of my country, having 13 stripes alternately red and white, and a blue field in which stars are disposed in a circle in one of the forms authorized by our statutes and frequently used.

"The striking resemblance will appear by comparing the lithograph copy of our national ensign which I enclose with the sketch of the house flag of Rosa, Carvalho & Co.

"Our consular officers in Brazil have called my attention to the use of this ensign, and I believe you will agree with me that confusion may arise from the similarity of the two flags, and that Brazilian port officials as well as our consular officers might well mistake a Brazilian ship for an American or an American for a Brazilian.

"I do not know whether your Government has adopted any regulations in regard to the use of a national ensign as a house flag of a private firm, but I venture to call your attention for such action by the proper officials as may seem to you and them proper.

"D. E. THOMPSON."

(Foreign Relations, U. S., 1904, p. 102.)

The flag used by the steamship company had within the circle of 13 stars the monogram of the company, but this was not visible at any considerable distance.

The action of the American minister was reported on February 9, 1904, to have led to the "discontinuance of this abuse by order of the authorities."

A like occurrence in the following year led to another protest and a reply from the Brazilian Minister of Foreign Affairs as follows:

"MINISTRY OF FOREIGN AFFAIRS,

"Rio de Janeiro, June 14, 1905.

"Mr. AMBASSADOR: With reference to my note of the 2d of March ultimo, I have the honor to inform your excellency that the minister of marine has already instructed the captain of the port of Bahia to provide for the retiring of the flag flown by the schooner *Oliveira*, and on the same occasion he issued a circular to the captains of the ports of the Republic, prohibiting Brazilian shipping from using ensigns which resemble the flag of any country.

"I improve, etc.,

"RIO BRANCO."

(Foreign Relations, U. S., 1905, p. 99.)

Attitude of the United States, 1914.—Many differences of opinion have arisen in regard to the jurisdiction over private merchant vessels lawfully flying the flag of one state when in the port of another state. In 1914 the British Government informed the United States that as to criminal jurisdiction,

"The view adopted by His Majesty's Government has been that British jurisdiction in such cases is complete, but that has in several cases been disputed by the foreign Governments concerned." (Foreign Relations, U. S. 1914, p. 307.)

The British Government therefore proposed an investigation of the law and practice as to the exercise of criminal and civil jurisdiction over foreign merchant vessels in national ports and over national vessels in foreign ports. The Secretary of State of the United States made reply by citing many cases and quoting from diplomatic and other documents. In this long reply, it was said:

"With reference to the question of the jurisdiction over American merchant vessels in foreign territorial waters, it may be stated that the Government of the United States in the past has asserted in behalf of its vessels the rights which, as indicated by the judicial decisions to which attention has been called, are accorded to foreign vessels in waters of the United States. This Government, while conceding on the one hand that, when one of its vessels visits the port of another country for the purposes of trade, it is amenable to the jurisdiction of that country and is subject to the laws which govern the port it visits so long as it remains unless it is otherwise provided by treaty, has, on the other hand, on a number of occasions, made clear its views to the effect that, by comity, matters of discipline and all things done on board which affect only the vessels or those belonging to her and do not involve the peace or dignity of the country or the tranquillity of the port should be left by the local government to be dealt with by the authorities of the nation to which the vessel belongs, as the laws of that nation or the interests of its commerce may require." (Ibid, p. 312.)

Permitted coaling in time of peace.—Taking fuel by a vessel of war from a supply ship under its flag in foreign waters without previous arrangement may not be permitted. Sometimes advance arrangements of a general character are made.

Owing to differences which had arisen, a reciprocal arrangement was made between the United States and Mexico in 1907 when the United States wished to sta-

tion coaling vessels in Magdalena Bay. In regard to this, the Mexican Minister of Foreign Affairs sent the following communication to the American Chargé d'Affaires:

"DEPARTMENT OF FOREIGN AFFAIRS,
"Mexico, November 16, 1907.

"MR. CHARGÉ D'AFFAIRES: I have received your note, dated the 9th instant, in which you acknowledge the receipt of mine of the 4th, in which, acceding to the request of your Government, I advised you concerning that which Mexico considers reciprocity in regard to the permission for the stay of two coaling barges in Magdalena Bay, destined to supply the American squadron.

"You have kindly expressed your acceptance of the understanding of the Mexican Government about reciprocity, as also that the American Government is disposed to grant permission to Mexican men of war and other vessels to anchor or take coal in American ports, and you close your note by saying that with reference to coaling, the laws of the United States permit the same to all foreign vessels, this being the practice constantly observed by the United States.

"The above assertion from you compels me to make an explanation, which I consider in every sense necessary.

"In the same manner that the United States does, Mexico grants to all kinds of vessels in times of peace to anchor and take coal within Mexican waters, receiving them with the usual courtesy, permitting men of war to remain stationed in Mexican waters only during a short period of time, while the anchorage of the American coaling barges will be permanent during a period of three years, according to the communication relative to the matter addressed by the Executive to the Senate of Mexico, concerning which I had the honor to inform the embassy in my note of October 25 last.

"Therefore, I beg you to kindly advise me if the intention of your Government regarding reciprocity for the supply of Mexican war vessels is that they can remain stationed in American waters during the same period of three years, or only during the time ordinarily granted to all other foreign vessels.

"I consider your reply indispensable in order to act in accordance with the decision of the Senate, and I renew, etc.

"IGNO. MARISCAL."

(Foreign Relations, U. S., 1907, part 2, p. 845.)

The United States a month later expressed its willingness to make a reciprocal arrangement.

“AMERICAN EMBASSY,

“*Mexico, December 17, 1907.*”

“Mr. SUBSECRETARY: Referring to the note of your department of November 16, on the subject of the privilege desired by my Government of stationing coaling barges in Magdalena Bay, all of which was telegraphed to Washington by Mr. Coolidge:

“I now have a telegram from Mr. Root in which he regrets deeply that action has not before been taken on this telegram, he having been under the impression that it had been acted upon until the receipt of my telegram of Saturday, the 14th instant.

“I am instructed to say to the Government of Mexico that it is the intention of the American Government regarding reciprocity for the supply of Mexican war vessels, that they can remain stationed in American waters during the same period for which that privilege is accorded to the vessels of the United States in pursuance of our request.

“In other words, the Government of the United States will grant to Mexico, in the event that such privileges are desired, the same that Mexico is asked to grant to the American Government in the way of privileges to American coaling vessels in Mexican waters.

“The delay in answering your department’s note of November 16, reported to Washington by telegraph, seems to have been caused by referring the matter to the Navy Department, where an unexpected delay occurred.

“I avail, etc.,

“D. E. THOMPSON.”

(Ibid., p. 846.)

Use of foreign flag.—The respect for the flag of a nation has become in recent wars a matter of special concern and often of legislation. Even the occasions on which a flag may be displayed and the purposes for which it may be used, have been prescribed. Restrictions may apply to the use of a national or of a foreign flag.

The use of flags in the time of war is of special importance, and the consequences of misuse may be serious. Denmark regulated the use of belligerent flags in 1915 even on land by a notification stating:

"it is forbidden in this country to hoist any other flag than the Dannebrog, as it is likewise forbidden to make use of the flag of a belligerent power either under the open sky or in inns, public houses, or other places where the public is admitted, whether the use thereof is for decoration or any other purposes." (1917 Naval War College, International Law Documents, p. 83.)

Norway assumed surveillance of vessels in Norwegian waters under a notification of October 1, 1915, prescribing:

"SECTION 1. Vessels in Norwegian waters shall hoist the national flag on arrival at a place of anchorage, where Norwegian war or guard ships lie, and also when such ships are in sight. While in Norwegian waters they shall stop immediately when it is ordered by Norwegian war or guard ships, e. g., when a warning signal is given by steam whistle, hoisting a signal, or a warning shot." (Ibid, p. 193.)

As it would be difficult to regulate movements of submarines, it was provided that in Norwegian waters submarines should navigate only on the surface and fly their national flag. Other states made similar regulations. Special regulations were made during the World War in regard to the use of false colors. During the World War, by joint resolution of Congress, approved June 30, 1917, American authorities were directed to take over a vessel in American jurisdiction or

"which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag or was under register of any such nation or any political subdivision or municipality thereof." (Ibid, p. 246.)

Liability under charter.—The charter party, as the contract for hiring, places the vessel according to the terms of the contract under the control of the charterer. It may be presumed that both parties to the contract know what is involved in its performance.

In the Code of Private International Law of the Sixth Conference of American States, Habana, 1928, in

title III referring to maritime and air commerce it was stated:

“ARTICLE 274. The nationality of ships is proved by the navigation license and the certificate of registration and has the flag as an apparent distinctive symbol.

“ARTICLE 275. The law of the flag governs the forms of publicity required for the transfer of property in a ship.

“ARTICLE 276. The power of judicial attachment and sale of a ship, whether or not it is loaded and cleared, should be subject to the law of the place where it is situated.

“ARTICLE 277. The right of the creditors after the sale of the ship, and their extinguishment, are regulated by the law of the flag.

“ARTICLE 278. Maritime hypothecation, privileges, and real guaranties, constituted in accordance with the law of the flag, have extraterritorial effect even in those countries the legislation of which does not recognize nor regulate such hypothecation.

“ARTICLE 279. The powers and obligations of the master and the liability of the proprietors and ship's husbands for their acts are also subject to the law of the flag.

“ARTICLE 280. The recognition of the ship, the request for a pilot, and the sanitary police depend upon the territorial law.

“ARTICLE 281. The obligations of the officers and seamen and the internal order of the vessel are subject to the law of the flag.

“ARTICLE 282. The preceding provisions of this chapter are also applicable to aircraft.

“ARTICLE 283. The rules on nationality of the proprietors of ships and aircraft and ship's husbands, as well as of officers and crew, are of an international public order.” (Report of the Delegates of the United States to the Sixth International Conference of American States, Habana, 1928, p. 139.)

The Argentine delegation made certain reservations in regard to this proposed code:

“12. It makes specific reservation of the application of the ‘law of the flag’ to questions relating to maritime law, especially as regards the charter party and its legal effect, as it considers that these should be subject to the law and jurisdiction of the country of the port of destination.” (Ibid., p. 167.)

Paraguay also made reservation as to the “law of the flag.”

The delegates of the United States abstained from voting for the code, though they expressed the thought

that later the Government "may be enabled to adhere to at least a large portion thereof."

Navy regulations.—The conduct of a naval force of one state when in the territorial waters or port of a foreign state has often led to misunderstandings. To avoid controversies states have issued regulations to their naval officers providing in some respects in detail the line of action to be followed. In general, the naval officer is not to assume any functions of the diplomatic or consular officers except in the absence of such officers from a foreign port and even then to use greatest care in showing respect to the local authorities.

The United States Navy Regulations provide in article 720:

"In the absence of a diplomatic or consular officer of the United States at a foreign port the commander in chief, as senior officer present, has authority—

"(a) To exercise the powers of a consul in relation to mariners of the United States (Sec. 1433, R. S.);

"(b) To communicate or remonstrate with foreign civil authorities as may be necessary;

"(c) To urge upon citizens of the United States the necessity of abstaining from participation in political controversies or violations of the laws of neutrality."

In article 723 is the general statement, "The use of force against a foreign and friendly state or against anyone within the territories thereof is illegal."

Of course, the right of self-preservation is always assumed, though the exercise of this right is strictly circumscribed.

Insurrection in state O.—In this situation there is a disturbed condition of affairs in state O, followed by an organized armed attempt to attain a political objective, a condition of insurgency.

The 1928 Habana Convention on Rights and Duties of States in the Event of Civil Strife aimed to clarify the rules of action under such conditions as are set forth in situation II. Article 1 of the convention provides for

the application of certain restraints within its own jurisdiction by a party to the treaty when there is civil strife in another state party to the convention. Article 2 treats particularly of measures that may be taken by the established state in which the insurrection exists. Article 3 defines the treatment to be given an insurgent vessel in a foreign port. By the terms of article 4 this convention does not affect obligations previously undertaken through international agreements.

In accord with this Convention on the Rights and Duties of States in Event of Civil Strife, no authority is conferred upon a foreign state to interfere with acts taking place within the jurisdiction of the state in which the civil strife has arisen. Such acts are within the jurisdiction of the disturbed state and, though the local authorities may ask of a foreign vessel of war aid against insurgents, the vessel of war may not extend such aid except on instruction from his government.

A vessel of war of the United States would, under article 2 of this convention, be under obligation to prevent within jurisdiction of the United States the unlawful use of waters, by nationals or aliens for "gathering elements" "for the purpose of starting or promoting civil strife." An insurgent vessel of war, taking coal within the maritime jurisdiction of the United States, would be violating this article and should be apprehended though pursuit cannot lawfully continue into a foreign jurisdiction and pursuit for this offense, once abandoned, may not be resumed.

The transfer of a vessel of war can only take place through an act of the state to which the vessel belongs except in time of lawful war. Salutes would be made only to flags of vessels of duly recognized states. An insurgent vessel raising a false flag is not entitled to a salute but may be captured and turned over to the state of that flag.

As an insurgent has no recognized prize court its vessels may not lawfully seize foreign merchant vessels though insurgents may deny or even use force to prevent access to the ports of the established state.

Under article 2 of the 1928 Habana Convention an injured foreign state is entitled to capture vessels of war of insurgents when such vessels have committed depredations and these vessels may be returned to the state to which they belong for trial. Some of the facts may be difficult to determine and accordingly official instructions from the proper authorities may be requested.

SOLUTION

(a) 1. The commander of the *Able* should decline the request of the local authorities, though he should warn the master of the *Ali* of the risk he runs.

2. The commander of the *Able* should decline the request of the local authorities, though he should warn the master of the *Atto* of the risk he runs.

(b) 1. The commander of the *Armo* should pursue the vessel of war.

2. The pursuit must not continue within the jurisdiction of state O and, when the pursuit is thus discontinued, cannot be resumed the following morning.

(c) 1. The commander of the *Able* should not return the salute of the *Ora* which is under a false flag.

2. The commander of the *Armo* should seize and hold the *Ora* pending instructions.