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

INTERFERENCE WITH SHIPS

States X and Y are at war in 1934. Other states are neutral. States X, Y, N, M, and O are parties to the Washington Treaty Limiting Naval Armament of 1922 and the London Naval Treaty of 1930.

A private ship-building company in state N, prior to the war, has built for state X several 20,000-ton unarmed vessels equipped with decks for aircraft landing and flying off, and these vessels have been serving on the high sea as stations for the regular transoceanic air service between state X and state M.

(a) One of these vessels, the No. 5, which had been nearly completed in 1929 but on which on account of an accident and labor troubles construction had been delayed, having on the day before war was declared sailed under the flag of N for state M in order to install there certain essential flying-off equipment, was met at sea the day after war was declared and before reaching state M, by the Yoba, a vessel of war of state Y. The captain of the Yoba wished to convert the No. 5 immediately into an aircraft carrier to accompany the Yoba and accordingly seized the No. 5 and made this conversion.

(b) If the Yoba had met the No. 5 after installing its equipment in state M, and when sailing under the flag of state N for X, would the decision be the same as in (a)?

(c) A private shipbuilding company in state R has completed a vessel of 9,000 tons with 5-inch guns and a deck for two aircraft, the No. 6, for which state X has paid but which had not sailed from R before the decla-
ration of war. Y communicates to R a request that the No. 6 be interned.

(d) The Saba, a merchant vessel, lawfully flying the flag of state S is summoned to lie to by a submarine of state X and is visited by a boat from the submarine. State S has a treaty with state X agreeing to the “delivering up” of contraband and the Master of the Saba offers to “deliver up” all contraband maintaining this is his sole obligation under the conditions. The submarine threatens to sink the Saba unless it agrees to change its course and proceed to port Xena of state X.

What are the lawful rights of all the parties under the above conditions?

SOLUTION

(a) The No. 5 was on a lawful voyage when met by the Yoba.

The Yoba could seize the No. 5 and bring her to a prize court of Y.

Except in the case of urgent military necessity conversion before adjudication would not be lawful and in any case full compensation must be made for N’s loss.

(b) The No. 5 after installing its equipment in state M and sailing for state X should be brought to a prize court.

Except in case of urgent military necessity conversion before adjudication would not be lawful.

States N and M have no responsibility nor would Y have any liability as the No. 5 is bound for X, a belligerent destination.

(c) The No. 6 should be interned by state R.

The construction of the No. 6 in state R is lawful.

(d) The Saba is under legal obligation to “deliver up” the contraband. The Saba is under no legal obligation to agree to change its course and to proceed to port Xena, though it would be under obligation to go if accompanied by the submarine or in control of a prize crew.
Treaties and international law.—Treaty is the general term used to cover agreements between two or more states. It is understood that to be valid it must be in accord with the law of both of the parties to the treaty and in accord with international law. Other political entities than states may enter into international agreements so far as they have capacity under their fundamental law, and the treaty-making capacity of some states is not unlimited. Two or more states may enter into a treaty for a specific purpose which has little or no relation to other states, and which may have no bearing on international law, e. g., two states might agree between themselves as to the diversion of the waters of a shallow boundary stream. Two or more states might enter into a treaty which, while binding only the parties, might have a far-reaching effect upon other states, e. g., two states might agree upon an offensive and defensive alliance. Two or more states might agree upon principles which should for a specified period or for specified conditions be considered as binding, e. g., the principles of the Treaty of Washington of 1871 in regard to neutral liability. Such treaties may or may not be regarded as important for international law, but they tend to become significant as precedents and may, as in the case of the principles of the Treaty of Washington, become generally accepted as setting forth international law. When a principle once a subject for treaty negotiation becomes generally recognized, it may be regarded as international law, e. g., inviolability of ambassadors.

The most common type of treaty is an international agreement in which the parties provide for mutually advantageous conduct or understandings with reference to one another. Such a treaty as the Washington Treaty of 1922, limiting naval armament, may have been satisfactory to the parties as putting an end for the time
to their competition in naval armament, and the London Naval Treaty may have elaborated these understandings. These treaties would not necessarily create any legal obligations for nonparty states, nor form bases for principles of international law, though the policies of third states might be modified by the obligations assumed by the party states.

The states party to a treaty have an international obligation to observe the provisions of a treaty into which they have entered, though there is often a difference of opinion as to the interpretation of the provisions. There could not be any legal objection raised when a state avails itself of the provisions of a treaty in accord with which it may modify its relations to the other parties to the treaty, or by actual denunciation in accord with the provisions of the treaty may put an end to all its obligations under the treaty. Treaties concluded in perpetuity, or without provision for revision or denunciation, have usually been causes of international disputes and misunderstandings.

Aircraft station vessel.—There may be a distinction between an aircraft station vessel and a seadrome, as the aircraft station vessel is itself capable of navigation and comes within the category of vessels, while the seadrome is a structure for a specific purpose. The status of the seadrome would therefore be subject to different laws from those governing vessels.

While an aircraft station vessel might not be primarily designed for an aircraft carrier, such a vessel might be transformable into an aircraft carrier. No intention to furnish an aircraft carrier to a belligerent could be based simply on the fact of pre-war construction of an aircraft station vessel of a type already in use for maritime aircraft stations on a line between two states.

Further there is no limitation upon the tonnage of such vessels in any treaty, as these vessels are not constructed for war purposes. It may be doubtful whether one belligerent, when both belligerents were parties to
Hague Convention VI of 1907 relating to status of enemy merchant ships at the outbreak of hostilities, would be justified in detaining in its own ports at the outbreak of war such a vessel under the provisions of article V, which reads:

"The present Convention does not affect merchant-ships whose build shows that they are intended for conversion into vessels of war."

If the build of an aircraft station vessel did not show that it was intended for conversion into a vessel of war, articles 2 and 3 of the convention provides that if such a vessel is detained in a belligerent port or met at sea and is requisitioned, there must be payment of compensation.

In the discussion at the Naval War College in 1932 artificial structures and maritime jurisdiction were considered and it was pointed out that a seadrome as located at a defined place at sea would be different in character from an aircraft vessel from the nature of its construction and possible use. The seadrome as a fixed structure would have rather more of the attributes usually associated with land jurisdiction while the aircraft vessel would in the main be under maritime rules even though, if permanently located at a specified place at sea, the jurisdiction might be somewhat modified from that exercised over a vessel navigating under ordinary circumstances.

Aircraft carrier.—In the Washington Treaty on the Limitation of Armament, 1922, Chapter II, Part 4, "Aircraft Carrier" was defined as follows:

"An aircraft carrier is defined as a vessel of war with a displacement in excess of 10,000 tons (10,160 metric tons) standard displacement designed for the specific and exclusive purpose of carrying aircraft. It must be so constructed that aircraft can be launched therefrom and landed thereon, and not designed and constructed for carrying a more powerful armament than that allowed to it under Article IX or Article X as the case may be." (1921 Naval War College, International Law Documents, p. 322.)

This definition was replaced in the London Naval Treaty, 1930, Article 3, by the following:
"The expression "aircraft carrier" includes any surface vessel of war, whatever its displacement, designed for the specific and exclusive purpose of carrying aircraft and so constructed that aircraft can be launched therefrom and landed thereon." (1930 Naval War College, International Law Situations, p. 144.)

This definition of 1930 is specifically limited to "vessels of war" and in the same article there is provision that the fitting of a landing-on or flying-off platform or deck on a capital ship, cruiser, or destroyer not designed or adapted exclusively as an aircraft carrier, would not make these vessels chargeable against aircraft tonnage.

Regulations of United States, 1914.—Shortly after the declaration of war in 1914, the United States as a neutral issued instructions in regard to foreign vessels in ports of the United States. The following telegraphic instruction was sent in early August to the collector of customs of the port of New York:

"'Have representative of each foreign vessel in your port certify to this Department whether she is a merchant vessel intended solely for the carriage of passengers and freight, excluding munitions of war, or whether she is a part of the armed force of her nation. This information is for purpose of maintaining the neutrality of the United States under recent proclamation President. Clearance will be refused in absence of this certificate. "'Wire Department before issuing clearance papers to foreign vessels unless you are satisfied after careful inspection that ship has not made any preparations while in port tending in any way to her conversion into a vessel of war. Taking on abnormal amount of coal, except in case of colliers, would indicate such conversion. Unpacking of guns already on board would be conclusive. Painting of vessel a war color would indicate conversion. It must be clear that she is not to be used for transportation recruits or reserves for a foreign army or navy. This does not prevent transportation of passengers in usual sense, as where there are women and children and men of different nationalities even though among them there were a few reserves without your knowledge. If her passengers are nearly all men and practically all of same nationality, clearance cannot be granted. It must be unquestionable that she has no arms or munitions of war aboard.'" (Foreign Relations, U. S., 1914 Supplement, p. 595.)
Such instructions had been preceded by a communication of the British chargé d'affaires of August 4, 1914, in which he said to the Secretary of State:

"Sir: His Majesty's Government have been informed that the German vessel Kronprinz Wilhelm sailed from New York on the night of the 3d of August, without passengers, but with a heavy load of coal, 7,000 tons, and fitted with two long-range guns. Her superstructure had also been painted gray. All these preparations were made before the vessel left United States waters.

"It is a matter of common knowledge that similar preparations are being made on board other German vessels, notably the Vaterland and the Barbarossa, in United States ports, and they will no doubt attempt to adopt the same tactics as the Kronprinz Wilhelm.

"In view of the state of war now existing between Great Britain and Germany I have the honour, under instructions from Sir Edward Grey, to call your most serious attention to the action taken in regard to these vessels and to urge the United States Government to take immediate steps to prevent these and other such vessels leaving United States waters without passengers and after carrying out such obviously warlike preparations as described above, which, when carried out in neutral waters, constitute a distinct breach of the laws of neutrality." (Ibid, p. 594.)

In reply for the Secretary of State, Mr. Lansing said:

"Sir: I have the honor to acknowledge your note No. 254 dated August 4, 1914, 11 p.m., but presented to the Department on the following day, on the subject of the equipment and sailing of the Kronprinz Wilhelm from New York on the night of the 3d instant, and of preparations being made on board the German vessels Vaterland and Barbarossa in United States ports.

"Under instructions from Sir Edward Grey you call my attention, in view of the state of war existing between Great Britain and Germany, 'to the action taken in regard to these vessels and to urge the United States Government to take immediate steps to prevent these and other such vessels leaving United States waters without passengers and after carrying out such obviously warlike preparations as described above, which, when carried out in neutral waters, constitute a distinct breach of the laws of neutrality.'

"In reply I have the honor to inform you that as the instance of the Kronprinz Wilhelm occurred, as you say, on the 3d instant before the declaration of war with Germany had been issued by the British Government, it would appear that the statement in
your last paragraph quoted above has no application to the case of that vessel.

"As to the attitude of the United States Government toward the other vessels mentioned in your note I have the honor to advise you that these vessels are, and have been for some time, under the surveillance of United States authorities with a view to preventing a breach by them of the neutrality of the United States. The Department is advised that these vessels have not as yet left American waters.

"With reference to your statement quoted above as to what in the opinion of His Britannic Majesty's Government may be considered as constituting a breach of the laws of neutrality in cases of this character, I have the honor to refer you to my note of the 19th instant relating in some respects to the rights and duties of the United States as a neutral power during the pending European wars." (Ibid. p. 602.)

Naval vessel in port.—While under the Washington Treaty of 1922 on Limitation of Naval Armament, Article XI, there was a restriction upon the construction by one of the contracting parties for another contracting party of vessels of war exceeding 10,000 tons displacement, this provision did not apply to non-contracting parties. By article 8 of the London Naval Treaty of 1930, the exemption on the ground of tonnage is somewhat further restricted and more definite provisions are enumerated as to equipment.

Though the parties to the specific provisions of the Washington and London treaties would be bound by the provisions of these treaties and though states not parties to these treaties would not be bound by the treaties as such, all parties would be bound by the principles of international law.

The rules in regard to internment of vessels of war are comparatively modern rules, and Hague Convention XIII, Article 24, provides for internment of a vessel of war with its officers and crew. The instructions of states in regard to internment usually provide for vessels of war which have entered neutral ports after the outbreak of war. The regulations in regard to submarines issued
during the World War mainly contemplated the entrance of armed and commissioned vessels.

A vessel which is in a neutral port, completed, armed, and paid for by one of the belligerents but not yet manned or commissioned may be a potential threat to the other belligerent. It might quickly become an instrument of war if conveyed outside of neutral jurisdiction and so long as it remains within neutral jurisdiction it is safe from capture. In order that this protection afforded by neutral jurisdiction may not be used by one belligerent to the advantage of one as against the other, it has been customary to require that neutrals show due diligence in supervising activities tending to aid either belligerent along certain well-defined lines in furnishing and equipping ships.

The *Somers*, 1898.—A torpedo boat, the *Somers*, belonging to the United States, had, during the war with Spain in 1898, been stored at Falmouth, England. In November 1898, after active hostilities had ceased and before the treaty of peace had been signed, the United States desired to bring the *Somers* from England and requested permission from the British Government stating that "in case of resumption of hostilities with Spain this vessel will not be made use of."

After considering the American proposition, the British Government through the Foreign Office said on December 8, 1898:

"In view of this assurance I have the honor to state that Her Majesty's Government are glad to comply with your request, and that the necessary instructions will at once be sent to the proper authorities in order to facilitate the departure of the vessel." (Foreign Relations, U. S., 1898, p., 1007.)

*American attitude on submarines, 1930.*—At the London Naval Conference in 1930, the members of the American delegation endeavored by speeches over the radio and otherwise to make known, not merely to the Conference, but to the world at large, their attitude upon questions before the Conference. The chairman of the
American delegation on February 6 stated to the press that “Our delegation is in agreement on every item of our program”, and at the end of the Conference this was reaffirmed.

At the plenary session of the Conference on February 11, he said:

“The essential objection to the submarine is that it is a weapon particularly susceptible to abuse, that it is susceptible of use against merchant ships in a way that violates alike the laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way that is most effective for immediate purposes, regardless of consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished. We have come to the conclusion that our problem is, whether in this day and age, and after the experiences of the last war, the nations at this conference are justified in continuing to build these instruments of warfare, thereby assuming responsibility for the risk of repeating in any possible future wars the inhumane activities which have been condemned by the verdict of history.

“It seems to the American Delegation that we have a common interest in the abolition of the submarine; first of all, for the purpose of suppressing costly weapons which we can forego by agreement and by the abolition of which we reduce our requirements in other classes of ships; and, second, for the purpose of eliminating for the future the dreadful experiences of the past.

“The American Delegation, therefore, urges that we set aside purely technical considerations and give careful study to the possibility of eliminating this whole problem.” (Publications of the Department of State, Conference Series No. 3, pp. 21-22.)

On the proposition of the French delegation on that day, the five powers agreed to place the use of submarines under the same rules as the use of surface vessels of war, though there has been question as to whether the article of the treaty drafted for the purpose accomplished that end.
In a radio address on February 16, 1930, Senator Robinson, a member of the American delegation, stated the French proposition as that:

"all of the nations should agree that hereafter submarines shall be forbidden to attack merchant ships, except after visitation and search, and provision made for the safety of passengers and crew in the same way that international law requires surface vessels to do."  (Ibid, p. 26.)

_Treaty agreement on rules for submarines, 1930._—The London Naval Conference agreed upon rules for the conduct of submarines as regards merchant vessels in part IV, article 22, which states:

"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."  (Publications of the Department of State, Conference Series, No. 2, p. 16)

In a pamphlet issued in 1930 by the Department of State containing a digest of the treaty it was said:

"Part IV. (This part applies to the United States, Great Britain, France, Italy, and Japan.)

"Article 22. This article specifies that submarines must conform to the rules of international law to which surface vessels are subject regarding merchant ships, and further provides that any warship (whether surface vessel or submarine) must not sink or render incapable of navigation, a merchant vessel without first having placed the passengers, crew, and ship's papers in a place of safety, except when such merchant vessel persistently re-
fuses to stop on being duly summoned or actively resists visit or search. It also provides that the merchant ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured under existing conditions by the proximity of land or the presence of another vessel which is in a position to take them on board.

"All the powers not party to the treaty are invited by this article to express their assent to the above rules." (Publications of the Department of State, Conference Series, No. 4, p. 9.)

This part of the treaty is to "remain in force without limit of time."

The earlier rules to which it may be presumed this article 22 refers are in regard to visit and search, though in wording this article is comprehensive and refers to all action of "surface vessels" "with regard to merchant ships." It is also presumed that article 22 in mentioning "surface vessels" intended to include all types though in preceding articles it has been customary to refer specifically to "surface vessels of war" or even "naval surface combatant vessels."

Question may be raised as to action on the part of a merchant vessel of an enemy or of a neutral which might constitute "persistent refusal" to stop on being "duly summoned" or "active resistance."

The instructions for the Navy of the United States of June 1917 state:

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

The United States has regarded resistance or flight as ground for using force sufficient to cause the merchant vessel to lie to for visit and search, but not as ground for sinking the vessel. Of course the merchant vessel might be sunk in the exercise of the right, but the use of force was held to be restricted to that necessary to bring the vessel to, and forcible resistance by the merchant vessel was not in itself a ground for sinking the merchant vessel, but a just ground for its condemnation.

As by the explanations and remarks of those negotiating the treaty, the intent was to restrict the action of
submarines in order that they should conform to the accepted rules for surface vessels under international law, it would be unwise for any naval officer to be less strict in interpretation of the rules of international law in regard to the use of force in connection with visit and search than prior to 1930. In other words, the merchant vessel might be "brought to by forcible measures if necessary" and such measures should be strictly limited to that end, as more extreme action must depend upon other considerations, some of which may rest upon the results of the visit and search for which the merchant vessel is brought to.

Hitherto even in case of flight or "persistent refusal to stop" sinking of a merchant vessel would not be approved if the vessel could otherwise be stopped, and sinking in case of "active resistance" or of resistance would be only a last resort. It cannot be presumed that those are in error who would read the treaty as follows:

(1) In general, in their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject, but
(2) In particular, 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, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search.

Sending in of seized vessels.—The "sending in" of prizes was understood to involve the placing of a prize crew on board the vessel seized and the navigating of the vessel to the nearest convenient prize court, or the escorting of the vessel to such port by the capturing vessel. Detailed instructions were given for this action. In this action the will of the captain was substituted for that of the master of the seized vessel and the responsibility was correspondingly shifted.

Gradually, with the abolition of privateering, and the increase in size and speed of public and private vessels, the "sending in" of seized vessels became much more of a problem. A prize crew, if it could be spared, might
be unable to control the movements of a modern vessel of large tonnage, and a submarine could not spare a crew. Escorting a vessel under modern conditions where aid might be summoned by the seized vessel by radio would make the escorting perilous. The results of bringing the seized vessel in, either as to the material goods condemned to the captor, or kept from the other belligerent, would ordinarily be slight as compared to the loss of time and the risk involved in the operation.

The risk of attack by submarine or other hostile force during the "delivering up" of goods at sea has made this procedure of doubtful value and expediency in most cases.

It was but natural that other methods should be suggested and resorted to in recent years, when the character of vessels of war and of peace had become so unlike in many respects as compared with those of the early nineteenth century.

Recent practice and suggestions.—Article 48 of the unratified Declaration of London of 1909 embodied the general opinion of that period upon the treatment of neutral vessels seized as prize. It said that:

"A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights as regards the validity of the capture."

Article 49, however, made an exception in regard to a vessel which would be liable to condemnation in case the taking in of the seized vessel "would involve danger to the ship of war or to the success of the operations in which she is at the time engaged." In the general report of the conference, which had official weight, it was held that danger must exist "at the moment when the destruction takes place." The argument being in part that as the ship was already practically lost to the owner, being liable to condemnation, it would involve no further loss to him but would constitute the destruction of belligerent property by the belligerent. Article 50 provided for placing the persons on board and the ship's papers in safety
before destruction, and the exceptional emergency had always to be proved before any suit for condemnation would have effect, and this was to be proved "in a manner to meet the opposition of the neutral"; otherwise compensation was due the neutral. Other liabilities also guarded against destruction, and for innocent goods destroyed compensation must be made. There had been much discussion of this subject. Lord Stowell in 1819 had declared that destruction could be justified only "by a full restitution in value", (The Felicity, 2 Dodson Admiralty Reports, 381) and there had been a general opinion against destruction (1911 Naval War College, International Law Situations, pp. 51-98). The Italian Government had applied the provisions of the Declarations of London in its war with Turkey in 1911.

As the Declaration of London was operative only during the early weeks of the World War, new considerations arose.

It was proposed by some that each merchant vessel should be examined prior to departure from a port, and be certified as to the character and as to the nature of its cargo, thus putting a heavy burden and responsibility upon the neutral. The difficulty of effective enforcement of any such insurance as to the nature of a cargo was often evident during the period while the prohibition of importation of alcohol into the United States was in force. It was also evident that one of the belligerents might be benefited while the other might be injured by such a rule, and that in some cases weak states not accustomed to being or not able to be self-sufficient might be placed at great relative disadvantage or be put to great expense to become self-sufficient in materials essential in time of war.

Sequestration in a neutral port pending the decision of a prize court was frequently proposed before and during the World War, and there were some treaties which provided for such sequestration. It has been argued with some force that during the World War the position
of Great Britain and its allies would have been strengthened if sequestration had been the rule on the ground that neutral shipping which was sunk might have been sequestrated for a time, and innocent cargo and shipping would have been freed. In any case there would have been less irritation of neutrals, and with ships which had been sequestrated in their ports there would be possibilities of bringing pressure upon belligerents disregarding the laws of war.

Such a proposition as this, made in regard to sequestration, may, as is the case in the proposition in regard to certification, be an indirect recognition that destruction of a seized vessel is approved. Destruction, according to accepted law is unlawful, save under very exceptional circumstances. Another and frequently made suggestion has been that submarines be banned, but this suggestion need not be seriously considered while naval treaties embody present provisions.

The rule as embodied in article 22 of the London Naval Treaty, 1930, practically restricts the use of the submarine to that of a surface cruiser as regards vessels of commerce, while leaving the submarine unrestricted as regards vessels of war, making it once more essential that vessels of war and vessels of commerce be clearly distinguished and distinguishable. It cannot easily be presumed that armed merchant vessels could be tolerated while submarines should be required to conform to article 22.

*Delivery of contraband.*—The subject of delivery of contraband at sea was considered at length in International Law Situations, 1911, pages 99–110. It was there shown that early treaties permitted masters of merchant vessels to “agree, consent, and offer to deliver” contraband goods, when these formed a part of the cargo, after which they might proceed.

Gradually, limitations began to be inserted recognizing the difficulties of delivering cargoes at sea, as in article
18 of the treaty between the United States and Brazil, of 1828, in which it was said:

"... No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they cannot be received on board the capturing ship without great inconvenience; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment, according to law." (8 U. S. Statutes, p. 394.)

Provisions to the same effect appear in many treaties of the nineteenth century, but toward the end of the century there was a growing support for the position that prize court proceedings should be essential in the change of title to goods seized as prize. Article 44 of the unratified Declaration of London, 1909, provided for the delivery of contraband under certain circumstances if it was not of an amount sufficient to make the vessel itself liable to condemnation. Other provisions in regard to delivery of contraband at sea were also discussed, but difficulties of a practical nature were often advanced in opposition to the extension of the practice by general agreement of the naval powers.

The actual form upon which the London Naval Conference agreed in the Declaration of London in 1909 was as follows:

"**Article 44.** A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship.

"The delivery of the contraband is to be entered by the captor on the logbook of the vessel stopped, and the master of the vessel must furnish the captor duly certified copies of all relevant papers.

"The captor is at liberty to destroy the contraband which is thus delivered to him." (1909 Naval War College, International Law Topics, p. 95.)
The report of the British delegation to Sir Edward Grey showed the course of discussion at the conference, and some of the reasons for the adoption of article 44.

"18. Careful consideration was given to the question, raised in paragraph 33 of our instructions, whether any satisfactory arrangement could be devised for allowing the immediate removal by the captor of any contraband found on board a neutral vessel. Proposals were put forward by several delegations. The most far-reaching one was one submitted by Austria-Hungary, under which the neutral vessel carrying contraband was to be given the right to proceed on her way without further molestation if the master was ready to hand over the contraband to the captor on the spot, a proviso being added which made it necessary that the subsequent decision of a prize court should intervene in order either to validate the transaction or to decree compensation where the captor should have been proved to have acted wrongfully. In this form, the proposal did not meet with general support. It was objected that to concede an absolute right in the terms to the neutral would constitute an unjustifiable interference with the legitimate rights of belligerents, and that, moreover, the rule would be found in practice unworkable. The Conference therefore fell back upon the clause now embodied in the Declaration as article 44, which goes no further than authorizing the handing over of contraband, or its destruction, on the spot, by common agreement between captor and neutral, subject to the subsequent reference of the case to the prize court. It is not anticipated that it will be possible to apply this rule in very numerous instances, as, under modern conditions of maritime commerce, the transshipment or destruction of cargo on the high seas is likely in most cases to present serious or insuperable difficulties. But, so far as it goes, the rule may afford a welcome measure of relief in favorable circumstances. (Parliamentary Papers, Miscellaneous, No. 4, 1909, International Naval Conference, Cd. 4554, p. 97.)

Regulations during the World War.—The instructions to naval officers in the period 1914–1918 and earlier in the nineteenth century contain provisions embodying in large measure the principles of the Declaration of London. This is evident in such provisions as the Japanese regulations governing capture at sea of 1914, article 70 of which provides:
"A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship. The delivery of the contraband is to be entered by the captor on the log book of the vessel stopped, and the master of the vessel must furnish the captor duly certified copies of all relevant papers. The captor shall prepare a document in duplicate according to Form No. 6 with regard to kinds of contraband and shall give one copy to the master of the vessel. The captor is at liberty to destroy the contraband which is thus delivered to him." (1925 Naval War College, International Law Documents, p. 166.)

The Instructions issued by the United States in June 1917, article 86, provide that "if circumstances preclude such delivery of the contraband cargo, the vessel should in general be sent in."

Difficulties of delivering cargoes at sea.—At the time when treaties relating to the delivery of cargoes at sea were made, from the seventeenth to the middle of the nineteenth century, there was a considerable equality in size and in other respects between vessels engaged in war and vessels engaged in commerce. Often the amount of cargo liable to condemnation, if the merchant vessel should be taken in, might be insignificant as compared with the whole cargo, or as compared with the expense or inconvenience of taking the vessel in even though there was no question as to the strict right to take the vessel to a prize court. With view to meeting such conditions without unduly inconveniencing either party, these early treaties inserted such provisions as article 7 of the treaty of February 24, 1676-77, between Great Britain and France, which said:

"If the vessel is laden but in part with contraband goods, and the master thereof offers to put them in the captor's hands, the captor shall not then oblige him to go into any port, but shall suffer him to continue his voyage." (1911 Naval War College, International Law Situations, p. 100.)
It was early recognized that there might be grave risks and possibilities of irregularities if delivery of cargo at sea was not carefully safeguarded, and later treaties were elaborated to meet these contingencies. Gradually, such treaty provisions became less frequent, but regulations for the conduct of naval war even during the World War provided for delivery of cargo at sea. Some of these follow closely article 44 of the unratified declaration of London of 1909, and provide that the commander of the visiting vessel may destroy the contraband which has been delivered to him.

It was maintained that resort to delivery of contraband subjected the visiting vessel to undue risk, as the change in conditions due to speed of vessels, use of radio, and of submarines and other modern instruments in war rendered the reasons for delivering up of contraband at sea no longer valid. Even if this be true, it was contended that this did not give one belligerent a right to change the laws of war during the period of war. Then belligerents began to advance the doctrine of reprisal as basis of their acts, disregarding the fact that reprisal gave no ground for limiting the rights of neutrals, though neutrals might be liable to inconvenience or other incidental consequences of acts of reprisal aimed directly at one belligerent by the other.

"Proceed as directed."—In the unratified treaty in relation to the use of submarines and noxious gases in warfare, drawn up at the Washington Conference in 1922, under article I was the clause:

"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."

The Institute of International Law in 1913 differentiated seizure and capture: Seizure in time of war is the taking possession of a vessel or goods with or without the assent of the master, not necessarily involving bringing the matter to a prize court; capture implies that the authority of the captor is substituted for the authority
of the master of the captured vessel, though the ultimate disposition of the vessel and cargo may rest in the prize court. The definitions of the Institute imply that seizure when applied to a cargo may involve detaining the vessel pending decision of the prize court upon the liability of the cargo to condemnation.

There may be exigencies which would justify seizure of a neutral merchant vessel and immediate use of a part or the whole of its cargo, but these exigencies should be immediate and compelling and in such cases inventories must be made and care must be taken to avoid liabilities other than for payment for cargo taken.

Such statements as were made in regard to seizures in British orders in council during the World War were not statements of new principles of international law, but of what the British authorities proposed to do or what they had done when neutrals confined their opposition to the writing of notes protesting such practices. Referring to the period subsequent to the German war zone declaration of January 31, 1917, the British War Cabinet reported:

"Two steps were taken to deal with the situation. In the first place the Blockade Order in Council of the 16th February, 1917, was issued, the effect of which was to make vessels trading to and from neutral ports in Europe liable to the risk of capture and condemnation if they were found attempting to evade calling for examination at a British port; and, in the second place, it was announced through the public press that neutral vessels would, on certain conditions, be allowed the privilege of calling for examination at certain British ports outside the United Kingdom such as Halifax in Nova Scotia instead of at Kirkwall, and that British bunker coal would only be allowed to those neutral vessels which undertook to call at an appointed British port and perform certain services in return. Concurrently with these measures insurance on favorable terms was laid open to all vessels engaged in trading in the Allied interests, and His Majesty's Government further offered to hire or purchase large blocks of neutral shipping.

"These expedients have, on the whole, worked exceedingly well. There has been no serious attempt to break the blockade; and, on the other hand, the power to give or refuse what are called Halifax
facilities—that is to say, the privilege of being examined outside the danger zone—has furnished us with a powerful inducement to neutral shipowners to comply with the various blockade and shipping requirements that we have put forward.” (1918 Naval War College, International Law Documents, p. 94.)

While there was in international law no rule requiring neutral vessels voluntarily to go to a belligerent port of either belligerent for examination, such action might be made advantageous by exempting from liability the vessels which had conformed to the order, or coal and other supplies might be withheld from vessels which had not conformed to the order. If neutral vessels proceed to belligerent ports for examination for their own convenience or advantage, they cannot complain on account of delay or risks encountered. Neither can they complain if on reasonable suspicion they are taken in by a prize crew or escorted in by a vessel of the belligerent forces.

The ordering of a neutral merchant vessel to proceed to a named port without prize crew or escort is beyond the legal competence of a belligerent, and the merchant vessel incurs no liability for disregarding such order and is under no obligation to agree to proceed by itself to a port named by a belligerent visiting vessel.

If the submarine had the right to order the Saba to agree to proceed to port Xena of state X under penalty of being sunk, it might be maintained that the submarine might by radio transmit such orders to all neutral merchant vessels at sea, and then sink such as were not obeying the order. Manifestly no such practice is upheld by international law.

The obligation to “proceed as directed” would therefore, if within the lawful rights of belligerents, imply that the directing force was on board the neutral merchant vessel in a prize crew or escorting the vessel as by an accompanying cruiser.

**Threat by government agent.**—The commander of the submarine is a government agent of the state. His word
is in effect the expression of the will of his state. State X is responsible for the acts of the commanders of its submarines. The master of the Saba may know that a submarine commander's right to regulate the movements of a neutral merchant vessel under the circumstances prevailing in the case of the Saba are limited to placing a prize crew on board, or escorting the Saba to port, thus maintaining a continuing effective control.

The authority of the commander of a belligerent vessel of war is limited by the degree of force at his disposal. If he cannot spare a prize crew, or cannot leave the area of his operations to escort a prize to port, he must release the vessel and any action beyond this is in excess of his lawful authority, unless permitted by treaty agreement to which the belligerent state and the neutral state concerned are parties. The Saba would be under obligation by treaty to "deliver up" the contraband. The Saba would be under no lawful obligation to agree to change its course or to proceed to Xena, nor would an agreement made under such compulsion be valid.

The commander of the submarine has no lawful authority to make or to enforce a threat to sink the Saba because it does not agree to change its course and proceed to Xena.

SOLUTION

(a) The No. 5 was on a lawful voyage when met by the Yoba.

The Yoba could seize the No. 5 and bring her to a prize court of Y.

Except in the case of urgent military necessity conversion before adjudication would not be lawful and in any case full compensation must be made for N's loss.

(b) The No. 5 after installing its equipment in state M and sailing for state X should be brought to a prize court. Except in case of urgent military necessity conversion before adjudication would not be lawful.
States N and M have no responsibility nor would Y have any responsibility as the No. 5 is bound for X, a belligerent destination.

(c) The No. 6 should be interned by state R. The construction of the No. 6 in state R is lawful.

(d) The Saba is under legal obligation to “deliver up” the contraband. The Saba is under no legal obligation to agree to change its course and to proceed to port Xena, though it would be under obligation to go if accompanied by the submarine or in control of a prize crew.