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International Law Situations

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SITUATION II

INDEPENDENT PHILIPPINE ISLANDS

States X and Y are at war. Other states are neutral. Admitting that the Philippine Islands have been granted independence under the provisions of the proposed Act of January 17, 1933,¹ how should a seaplane of state X, which is under its own power and not dependent upon any ship, be regarded and what should be its treatment after arrival in the Port of Manila.

(a) By the Philippine Government?
(b) By the Yamba, a vessel of war of state Y which has been in Manila 20 hours?
(c) By the Namba, a vessel of war of state N, which is convoying merchant vessels of neutral states?
(d) By the Usa, a vessel of war of the United States?

SOLUTION

1. In case the Philippine Islands obtain independence and are not neutralized:
   (a) The Philippine Government should intern the seaplane.
   (b) The Yamba may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.
   (c) The Namba may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

¹ This act was rejected by resolution of the Philippine Legislature October 17, 1933, and the act of March 24, 1934, was accepted by a resolution of May 1, 1934. These acts are printed at the end of the discussion of this Situation II. See post pp. 111, 127.
(d) The *Usa* has no legal concern with the matter.

2. In case the Philippine Islands are neutralized:

(a) The Philippine Government should intern the seaplane.

(b) If state *Y* is a party to the neutralization treaty, the *Yamba* may perform such services as rest upon that vessel under the treaty but if state *Y* is not a party to the treaty, even though other states may be parties, the *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

(c) If state *N* is a party to the neutralization treaty, the *Nama* may perform such services as rest upon that vessel under the treaty but if state *N* is not a party to the treaty even though other states may be parties, the *Nama* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

(d) If the United States is, as may be inferred from the Act of January 17, 1933, a party to the treaty of neutralization, the *Usa* may perform such services as rest upon that vessel under the treaty but if the United States is not a party, even though other states may be parties, the *Usa* has no legal concern with the matter.

NOTES 1

Independence of Philippine Islands.—If section 10 of the Act of January 17, 1933, had been brought into effect by a favorable vote instead of being defeated by an unfavorable vote, conditions would have implied a considerable change in the conduct of American affairs in the western Pacific Ocean. By this act the Philippine Islands were to become "a separate and self-governing nation" and their officials were to become "officers of the free and independent government of the Philippine Islands." The

1 These notes were based upon the hypothesis admitting independence under provisions of the act of January 17, 1933. Section 11, in regard to neutralization, is identical in the act of 1933 and in the act of 1934.
Neutralization

President of the United States is requested at the earliest practicable date to open negotiations with foreign powers looking to the perpetual neutralization of the Islands. This date might presumably be as soon as the vote favorable to independence under conditions of the 1933 act had been taken with view to launching the Commonwealth of the Philippine Islands as a perpetually neutralized state.

Independence and neutralization.—By section 10 of the Act of January 17, 1933, the independence of the Philippine Islands was to be recognized 10 years after the new government under the constitution should be set up and all sovereignty of the United States was to be withdrawn. Under section 12, the President of the United States was to invite other states to recognize the independence of the Islands. This independence does not seem to be dependent upon the neutralization of the Islands though the wording of section 11 seems to anticipate that the negotiation of a neutralization treaty may precede independence. By this section, the President is requested "at the earliest practicable date" to negotiate for neutralization, "if and when Philippine independence shall have been achieved."

Situation II may therefore be considered from two points of view, i.e., the Philippine Islands may be independent and neutralized or the Philippine Islands may be independent but not neutralized.

Neutralization agreements.—Neutralization agreements have long been common and often have been regarded as satisfactory methods of solving perplexing or otherwise insolvable difficulties. Broadly these agreements have been unilateral or multilateral, i.e., one or more states have signed an agreement to the effect that each would respect the neutrality of a named area or entity, or states have agreed with one another that they would maintain the neutrality of a named area or entity.

Neutralization.—Some type of neutralization has often been resorted to when a state or states may be uncertain as to the immediate policy to be pursued in regard to the
subject of neutralization. Often there has been created by the adoption of the phrase in conventional framework a sense of security which subsequent events have shown to be visionary. Like other international agreements, however, the relations depend upon the nature of the obligations assumed. Many of the treaties and conventions providing for neutralization fix the period as “in perpetuity”, “forever”, “lasting”, etc. A review of these treaties shows that these words have been very loosely used. Even the clause of the Treaty of Vienna, 1815, relating to neutralization was not strictly observed. The provisions were that “the town of Cracow, with its territory, is declared to be forever a free, independent, and strictly neutral city, under the protection of Austria, Russia and Prussia”, with the further provision that “the Courts of Russia, Austria, and Prussia engage to respect and to cause to be always respected, the neutrality of the free town of Cracow and its territory.” The action of these powers in 1846 in annexing this territory to Austria showed that such terms as “forever” and “always” were not to be taken literally. Action under other similar treaties shows that “perpetual” and like words used in neutralization agreements implies that no predetermined date has been fixed upon for termination of the neutralized status and little more. It is a fact that Switzerland has been considered as neutralized and that at Paris, November 20, 1815, Austria, France, Great Britain, Prussia and Russia, acknowledged, “in the most formal manner, by the present act that the neutrality and inviolability of Switzerland and her independence of all foreign influence, enter into the true interests of the policy of the whole of Europe.” Switzerland has, however, from time to time as wars arose informed the foreign powers that the government would “maintain and defend” her neutrality by all the means in her power and Switzerland has ordinarily had a well-trained army.
Luxemburg neutralized under the Great Powers in 1867 and without defenses was a matter of controversy during the Franco-Prussian War, 1870, and overrun during the World War, troops entering as early as August 2, 1914. Lord Stanley, who had participated in the negotiation of the treaty in regard to the neutralization of Luxemburg, said of the obligation, "Such a guarantee has obviously rather the character of a moral sanction to the arrangements which it defends than that of a contingent liability to make war."

In the treaty of 1831 in regard to Belgium, it was agreed that it "shall form an independent and perpetually neutral state" and this was reaffirmed in 1839. In the Franco-Prussian War, however, Great Britain made treaties with France and with Prussia to the effect that if either should violate Belgian territory, Great Britain would for the defense of Belgium go in on the side of the other. Whether the simple moral sanction would have been sufficient to secure respect for the Belgian neutrality seems at least to have been doubted by the three powers parties to these treaties of 1870. Their doubts seem to have been justified by events of 1914.

It would seem from instances of neutralization that the risks consequent upon violation of neutralization agreements should be at least commensurate to the advantages which might be anticipated from disregard of these agreements as such sanctions only have proven effective.

Belgian position, 1914.—Belgium was in early 1914 under the provisions of the neutralization treaty, but had maintained an army and fortifications. The note communicated to the German Minister by the Belgian Minister of Foreign Affairs, M. Davignon, on August 3, 1914, at 7 a.m. shows the official attitude toward the condition that had arisen as follows:

The German Government stated in their note of August 2, 1914, that according to reliable information French forces intended to march on the Meuse via Givet and Namur, and that Belgium,
in spite of the best intentions, would not be in a position to repulse, without assistance, an advance of French troops.

The German Government, therefore, considered themselves compelled to anticipate this attack and to violate Belgian territory. In these circumstances, Germany proposed to the Belgian Government to adopt a friendly attitude toward her, and undertook, on the conclusion of peace, to guarantee the integrity of the Kingdom and its possessions to their full extent. The note added that if Belgium put difficulties in the way of the advance of German troops, Germany would be compelled to consider her as an enemy, and to leave the ultimate adjustment of the relations between the two States to the decision of arms.

This note has made a deep and painful impression upon the Belgian Government.

The intentions attributed to France by Germany are in contradiction to the formal declarations made to us on August 1, in the name of the French Government.

Moreover, if, contrary to our expectation, Belgian neutrality should be violated by France, Belgium intends to fulfil her international obligations and the Belgian army would offer the most vigorous resistance to the invader.

The treaties of 1839, confirmed by the treaties of 1870, vouch for the independence and neutrality of Belgium under the guarantee of the powers, and notably of the Government of His Majesty the King of Prussia.

Belgium has always been faithful to her international obligations, she has carried out her duties in a spirit of loyal impartiality and she has left nothing undone to maintain and enforce respect for her neutrality.

The attack upon her independence with which the German Government threaten her constitutes a flagrant violation of international law. No strategic interest justifies such a violation of law.

The Belgian Government, if they were to accept the proposals submitted to them, would sacrifice the honor of the nation and betray their duty toward Europe.

Conscious of the part which Belgium has played for more than 80 years in the civilization of the world, they refuse to believe that the independence of Belgium can only be preserved at the price of the violation of her neutrality.

If this hope is disappointed the Belgian Government are firmly resolved to repel, by all the means in their power, every attack upon their rights. (1917 Naval War College, International Law Documents, p. 53.)
The next day the German Minister was handed his passports and the British, French, and Russian ministers were "as guaranteeing powers" requested to cooperate in the defense of Belgian territory.

On August 4, all Belgian diplomatic representatives abroad were instructed to bring the action of their government to the attention of the states to which they were accredited.

A few days later the hope was officially expressed that the regime of neutralization would be permitted to continue in the Belgian dependencies in Africa particularly referring to the General Act of the Berlin Conference signed February 26, 1885, and article 11.

When the Austro-Hungarian declaration of war was received, the Belgian Government replied, August 29, 1914, in a manner showing recognition of Belgian obligations under the treaty of neutralization, saying,

Belgium has always entertained friendly relations with all her neighbors without distinction. She had scrupulously fulfilled the duties imposed upon her by her neutrality. If she has not been able to accept Germany's proposals, it is because these proposals contemplated the violation of her engagements toward Europe, engagements which form the conditions of the creation of the Belgian Kingdom. She has been unable to admit that a people, however weak they may be, can fail in their duty and sacrifice their honor by yielding to force. The government have waited, not only until the ultimatum had expired, but also until Belgian territory had been violated by German troops, before appealing to France and Great Britain, guarantors of her neutrality, under the same terms as are Germany and Austria-Hungary, to cooperate in the name and in virtue of the treaties in defense of Belgian territory. By repelling the invaders by force of arms, she has not even committed an hostile act as laid down by the provisions of article 10 of the Hague Convention respecting the rights and duties of neutral powers.

Germany herself has recognized that her attack constitutes a violation of international law, and, being unable to justify it, she has pleaded her strategical interests.

Belgium formally denies the allegation that Austrian and Hungarian nationals have suffered treatment in Belgium contrary to the most primitive demands of humanity. (Ibid., p. 58.)
Neutralization of the Philippine Islands.—As under section 11 of the Act of January 17, 1933, the President of the United States is requested to enter upon negotiations for the neutralization of the Philippine Islands, the American Government would naturally be supposed to have a plan to suggest and to be prepared to become a party to the "perpetual neutralization." The negotiation is not by the Act restricted to any specified powers but would seem to imply that the invitation to negotiate might be to all powers desiring to take part in the negotiation, at least, the powers mentioned in section 12, viz: those in diplomatic correspondence with the United States would expect to be invited as these are to be invited to recognize the independence of the Philippine Islands when it is attained.

There would be certain complications owing to existing treaties in regard to relations in the western Pacific. The Washington Conference of 1921-22 was not merely upon limitation of armament but also according to the official agenda upon Pacific and Far Eastern questions. It was recognized in this Conference that naval power might be conditioned on other factors than ships and article XIX of the Treaty Limiting Naval Armament contained the following provisions:

The United States, the British Empire and Japan agree that the status quo at the time of the signing of the present Treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder.

(1) The insular possessions which the United States now holds or may hereafter acquire in the Pacific Ocean, except (a) those adjacent to the coast of the United States, Alaska and the Panama Canal Zone, not including the Aleutian Islands, and (b) the Hawaiian Islands;

(2) Hongkong and the insular possessions which the British Empire now holds or may hereafter acquire in the Pacific Ocean, east of the meridian of 110° east longitude, except (a) those adjacent to the coast of Canada, (b) the Commonwealth of Australia and its Territories, and (c) New Zealand;

(3) The following insular territories and possessions of Japan in the Pacific Ocean, to wit; the Kurile Islands, the Bonin Islands,
Amami-Oshima, the Loochoo Islands, Formosa and the Pescadores, and any insular territories or possessions in the Pacific Ocean which Japan may hereafter acquire.

The maintenance of the status quo under the foregoing provisions implies that no new fortifications or naval bases shall be established in the territories and possessions specified; that no measures shall be taken to increase the existing naval facilities for the repair and maintenance of naval forces, and that no increase shall be made in the coast defences of the territories and possessions above specified. This restriction, however, does not preclude such repair and replacement of worn-out weapons and equipment as is customary in naval and military establishments in time of peace. (1921 Naval War College, International Law Documents, p. 301.)

If the neutralization of the Philippine Islands takes place, it will evidently be of an area of which the military status is already subject to international restriction. Subject to these restrictions the Philippine Islands would be unable to establish any very strong military power. The withholding of the military and naval bases limited to the strength of February 6, 1921, would scarcely be of great value to the United States as these areas would be open to attack and occupation by any enemy in time of war while adjacent Philippine areas would be neutralized.

American commitments in the Philippines.—Under article 3 of the Treaty of 1898, Spain ceded to the United States the Philippine Islands and the United States paid Spain $20,000,000. Under other articles of this treaty Spanish ships and merchandise were for a period of ten years to be admitted to the Islands on the same terms as American, the return of prisoners of war and disposition of other persons were provided for, outstanding claims were allocated, and all public properties of Spain such as buildings, wharves, military structures, public highways, and other immovable property passed to the United States.

At the Washington Conference of Limitation of Naval Armament, 1921, Japan wished assurances as to the attitude of the United States and Great Britain toward
increase of fortifications and naval bases in the Pacific. After discussion, article XIX, mentioned above, was inserted in the Treaty Limiting Naval Armament. How far such a restriction would be embodied in any agreement setting up a Philippine state should be a matter of careful consideration.

Under the Act of January 17, 1933, the proposal of section 5 was that "land or other property" which had been designated by the President of the United States for military and other reservations of the Government of the United States should not pass to the Philippine Government, and may be redesignated by the President within 2 years after the proclamation of withdrawal of the sovereignty of the United States. If neutralization should take place under section 11 of the Act, the value to the United States of military bases in the status quo of 1922 in a foreign state would be doubtful.

Neutralization of Panama Canal.—In the preamble of the treaty between the United States and Great Britain, 1901, regarding the Panama Canal mention is made of the "general principle" of neutralization and in article 3 this is referred to as substantially that "embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal," viz:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations
in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than 24 hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within 24 hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal. (32 U.S.Stat., Pt. II, pp. 1903, 1904.) (1929 Naval War College, International Law Situations, p. 22.)

Neutralization of Aaland Islands; 1921.—One of the more recent conventions relating to neutralization was that in regard to the Aaland Islands signed by the states bordering on the Baltic and by British and Italian representatives, October 22, 1921. This convention, which defines the area of the Aaland Islands in article 2, had as its object “the nonfortification and neutralization of the Aaland Islands in order that these islands may never become a cause of danger from the military point of view” and for the maintenance of this aim the powers may individually or jointly ask the Council of the League of Nations to decide upon the measures to be taken and the parties to the convention agree to assist in these measures. The method of determining upon the measures was outlined as follows:

When, for the purposes of this undertaking, the Council is called upon to make a decision under the above conditions, it will invite the Powers which are parties to the present Conven-
tion, whether Members of the League or not, to sit on the Council. The vote of the representative of the Power accused of having violated the provisions of this Convention shall not be necessary to constitute the unanimity required for the Council's decision.

If unanimity cannot be obtained, each of the High Contracting Parties shall be entitled to take any measures which the Council by a two-thirds majority recommends, the vote of the representative of the Power accused of having violated the provisions of this Convention not being counted. (1924 Naval War College, International Law Documents, p. 59.)

That the high contracting parties "undertake to assist" or are "entitled to take any measures which the Council by a two-thirds majority recommends" does not necessarily commit any of the high contracting parties to any predetermined action as, these powers would be members of the council for deciding the measures to be taken.

The Aaland Islands remain an integral part of the Republic of Finland and Finland may take measures for the defense of the neutrality of the islands and of the Finnish mainland in case of sudden attack and pending intervention by the high contracting parties under terms of the convention.

_Civil and military aircraft._—In 1919 a convention for the regulation of aerial navigation was signed at Paris. The general provisions of this convention have been approved and have been embodied in other agreements and proposed agreements. Distinction was made between private and state aircraft and also in the categories of state aircraft. Some restrictions were also imposed upon aircraft.

Art. 30. The following shall be deemed to be State aircraft:

(a) Military aircraft.
(b) Aircraft exclusively employed in State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All state aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.
Art. 31. Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.

Art. 32. No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorisation. In case of such authorisation the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

Art. 33. Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorised to cross the frontier. They shall in no case be entitled to the privileges referred to in Article 32. (XI League of Nations Treaty Series, p. 173 (1922).)

These principles, somewhat elaborated, formed a part of the rules drawn up at The Hague in 1923 as is stated in the report of the Commission. It was recognized, however, that "a clear distinction must be made between aircraft that form a part of the combatant forces in time of war and those which do not." Accordingly a rule was drawn up as article 3 that "A military aircraft shall bear an external mark indicating its nationality and military character," while article 5 stated, "Public non-military aircraft other than those employed for customs or police purposes shall in time of war bear the same external marks, and for the purposes of these rules shall be treated on the same footing, as private aircraft." (1924 Naval War College, International Law Documents, p. 110.)

Seaplanes and neutral waters.—It is admitted in all proposed regulations that aircraft in distress may enter neutral jurisdiction. Red Cross aircraft are also permitted to enter, as are aircraft on board ships of war.

It has further been generally held that an aircraft taking off from a vessel of war within neutral waters or entering the neutral aerial jurisdiction is liable to internment.

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The report of the Commission of Jurists at The Hague, in 1923, stated that,

The obligation on the part of the neutral Power to intern covers not only the aircraft, but its equipment and contents. The obligation is not affected by the circumstances which led to the military aircraft coming within the jurisdiction. It applies whether the belligerent aircraft entered neutral jurisdiction, voluntarily or involuntarily, and whatever the cause. It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent. *

The obligation to intern belligerent military aircraft entering neutral jurisdiction entails also the obligation to intern the personnel. These will in general be combatant members of the belligerent fighting forces, but experience has already shown that in time of war military aeroplanes are employed for transporting passengers. As it may safely be assumed that in time of war a passenger would not be carried on a belligerent military aircraft unless his journey was a matter of importance to the Government, it seems reasonable also to comprise such passengers in the category of persons to be interned.

"ARTICLE 42.

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

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

Article 46 of these rules speaks of "departure by air of any aircraft." Whether a seaplane arriving and departing by water would receive different treatment is not stated. It might be queried whether aerial or maritime navigation is the auxiliary or principal fact in use of a hydroplane. Article 42 apparently is drawn with reference to aircraft which in flight enter neutral jurisdiction, though the second paragraph might strictly be extended to a seaplane which had alighted outside and navigated within neutral jurisdiction.
In a communication of the German Ambassador, J. Bernstorff, of January 19, 1915, to the Secretary of State, there was mentioned certain data which the Ambassador understood to be reliable in regard to hydro-aeroplanes. In concluding, the Ambassador said,

There is no doubt that hydro-aeroplanes must be regarded as war vessels whose delivery to belligerent states by neutrals should be stopped under Article 8 of the thirteenth convention of the Second Hague Conference of October 18, 1907. [Art. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of every vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted, entirely or in part, for use in war.] Hydro-aeroplanes are not mentioned by name in the convention simply because there was none in 1907 at the time of the conference.

On the supposition that hydro-aeroplanes are delivered to belligerents against the wishes of the Government of the United States, I have the honor to bring the foregoing to your excellency's kind knowledge. (1915 U.S. Foreign Relations, Supplement, p. 776.)

To this communication the Secretary of State made a somewhat full reply on January 29, 1915:

EXCELLENCY: I have the honor to acknowledge the receipt of your excellency's note of the 19th instant, and in reply have to inform you that the statements contained in your excellency's note have received my careful consideration in view of the earnest purpose of this Government to perform every duty which is imposed upon it as a neutral by treaty stipulation and international law.

The essential statement in your note, which implies an obligation on the part of this Government to interfere in the sale and delivery of hydro-aeroplanes to belligerent powers, is:

"There is no doubt that hydro-aeroplanes must be regarded as war vessels whose delivery to belligerent states by neutrals should be stopped under Article 8 of the thirteenth convention of the Second Hague Conference of October 18, 1907."
As to this assertion of the character of hydro-aeroplanes I submit the following comments: The fact that a hydro-aeroplane is fitted with apparatus to rise from and alight upon the sea does not in my opinion give it the character of a vessel any more than the wheels attached to an aeroplane fitting it to rise from and alight upon land give the latter the character of a land vehicle. Both the hydro-aeroplane and the aeroplane are essentially aircraft; as an aid in military operations they can only be used in the air. The fact that one starts its flight from the surface of the sea and the other from the land is a mere incident which in no way affects their aerial character.

In view of these facts I must dissent from your excellency’s assertion that “there is no doubt that hydro-aeroplanes must be regarded as war vessels,” and consequently I do not regard the obligations imposed by treaty or by the accepted rules of international law applicable to aircraft of any sort.

In this connection I further call to your excellency’s attention that according to the latest advices received by this Department the German Imperial Government include “balloons and flying machines and their component parts” in the list of conditional contraband, and that in the Imperial prize ordinance, drafted September 30, 1909, and issued in the Reichs-Gesetzblatt on August 3, 1914, appear as conditional contraband “airships and flying machines” (Article 23, section 8). It thus appears that the Imperial Government have placed and still retain aircraft of all descriptions in the class of conditional contraband, for which no special treatment involving neutral duty is, so far as I am advised, provided by any treaty to which the United States is a signatory or adhering power.

As in the views of this Department the provisions of Convention XIII of the Second Hague Conference do not apply to hydro-aeroplanes I do not consider it necessary to discuss the question as to whether those provisions are in force during the present war. (Ibid., p. 780.)

Probably the statement of the Secretary of State that he did “not regard the obligations imposed by treaty or by the accepted rules of international law applicable to aircraft of any sort” was to be taken merely as emphasizing his interpretation of neutral obligations as regards this particular case rather than as regards all possible cases.

**Analogy of aerial and maritime rules.**—It has often been maintained that aerial and maritime rules should
be the same. Many of these ideas are due to the use for aircraft of the same words and phrases that are used for marine craft. Such words as ships, navigation, landing, pilots, registry, papers, right-of-way, etc., are in the marine and aerial vocabularies but the application may be quite unlike.

The analogy fails when consideration is given to the nature of ships of the sea and of the air, speed and range of navigation, place of landing, use of pilots, etc. These differences must be taken into the reckoning when the responsibility of the neutral is to be estimated even under the rule of due diligence.

**Due diligence as to aircraft.**—The rule requiring of a neutral state exercise of due diligence in maintaining its neutrality has been interpreted as obliging the neutral state to use the "means at its disposal." If the interpretation put upon the words, "due diligence," in the Alabama case, i.e. diligence in "exact proportion to the risks which either of the belligerents may be exposed from failure to fulfill the obligations of neutrality" is to be applied to aircraft, the safe rule would be to prohibit under liability to internment the entrance of aircraft to neutral jurisdiction.

The risk from the entrance to neutral territory of belligerent land forces entails internment for the period of the war. Under certain conditions the internment of vessels of a belligerent may be necessary in order that neutrality may be maintained but ordinarily the movements of vessels are sufficiently under control so that neither belligerent is prejudiced unduly if a degree of equality in granting privileges essential to keep the vessels seaworthy is granted. The risk from aircraft is relatively so much greater that the neutral has forbidden entrance to neutral jurisdiction under penalty of internment except to hospital aircraft.

*Naval War College opinion, 1912.*—While aircraft had been only moderately developed before 1912, the Naval War College had given attention to certain aspects of
aerial navigation. In referring to the analogy of taking coal for naval vessels and gas for balloons, in the Situations for 1912 it was said,

Even with this extension of the right of coaling, the entrance of a balloon into neutral territory may be in marked contrast to the entrance of a vessel of war into a neutral port. One belligerent may easily learn of the entrance of a vessel of his enemy to a neutral port. The course which the vessel will follow on departure, the time of sojourn, and other facts may be reasonably determined. A vessel in a neutral port must ordinarily put to sea before reaching a home or an enemy port. A belligerent would ordinarily, therefore have an opportunity to meet and to engage the vessel of his opponent in an area where battle is lawful and without material risk to the neutral.

It is possible, however, that the territory of States might be so situated that a neutral State might be directly between the two belligerents; e.g., if war existed between Germany and Spain. In such a case would the bringing of a war balloon to the French frontier from Germany place France under any obligation to permit the balloon to enter and take the necessary gas to make it navigable? If German balloons were permitted to enter French territory, take gas, and from points of advantage attack Spanish forces and territory, would such permission by France be analogous to the entrance of German troops, or would it be the use of French territory as a base? Whether or not the right of absolute sovereignty in the air is in the subjacent State, certainly France would be under no obligation to receive a German war balloon into its territory when France is neutral except on ground of humanity or vis major. France could scarcely permit German war balloons to use French territory as a point from which to attack Spain, and if German forces should enter French territory internment would be the penalty. (1921 Naval War College, International Law Situations, p. 85.)

It was at that time pointed out that the situation would be modified if the aircraft maintained continuous physical contact and was appurtenant to a cruiser or similar vessel.

Hague rules, 1923.—The Commission of Jurists to Consider and Report upon the Rules of Warfare which was appointed under provisions of a resolution of the Washington Conference of 1922 reported upon radio and aircraft in 1923. In this report it was said,
No attempt has been made to formulate a definition of the term "aircraft," nor to enumerate the various categories of machines which are covered by the term. A statement of the broad principle that the rules adopted apply to all types of aircraft has been thought sufficient, and article 1 has been framed for this purpose.

"ARTICLE 1

"The rules of aerial warfare apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on the water." (1924 Naval War College, Int. Law Documents, p. 108.)

While these rules have not been ratified, they embodied the opinion of the delegates from six naval powers and are therefore worthy of careful consideration.

Dependent aircraft.—It has gradually become customary to add to the naval fighting forces aircraft carriers or vessels having facilities for carriage of aircraft. For some years it had generally been the rule that such aircraft should be regarded while on the ship as part of the ship. This matter had been considered at The Hague in 1923 and the Report of the Commission explains that,

The customary rules of international law authorise the admission of belligerent warships to neutral ports and waters. There is no obligation upon neutral States to admit warships belonging to belligerent States, but it is not in general refused. The admission of belligerent military aircraft, however, is prohibited by article 40, and account must therefore be taken of the fact that it has now become the practice for warships to have a certain number of aircraft assigned to them and that these aircraft usually rest on board the warship. While they remain on board the warship they form part of it, and should be regarded as such from the point of view of the regulations issued by the neutral States. They will therefore be allowed to enter the neutral jurisdiction on the same footing as the warship on board which they rest, but they must remain on board the warship and must not commit any act which the warship is not allowed to commit.
"ARTICLE 41.

"Aircraft on board vessel of war, including aircraft-carriers, shall be regarded as part of such vessels." (1924 Naval War College, Int. Law Documents, p. 131.)

Aircraft over neutral jurisdiction.—The practice and general opinion before the end of the World War supported the right of a neutral state to exclude all belligerent aircraft from the air above its land. Aircraft were generally excluded from air above the land by proclamation or decree of some kind. The early ordinance of Switzerland, August 4, 1914, was explicit as to the right of the Swiss Government to control this aerial space.

17. As to aviation, attention will be given to what follows:

(a) Balloons and aircraft not belonging to the Swiss Army can not rise and navigate in the aerial space situated above our territory unless the persons ascending in the apparatus are furnished with a special authorization, delivered in the territory occupied by the army, by the commander of the army: in the rest of the country, by the Federal military department;

(b) The passage of all balloons and aircraft coming from abroad into our aerial space is forbidden. It will be opposed if necessary by all available means and these aircraft will be controlled whenever that appears advantageous.

(c) In case of the landing of foreign balloons or aircraft, their passengers will be conducted to the nearest superior military commander who will act according to his instructions. The apparatus and the articles which it contains ought, in any case, to be seized by the military authorities or the police. The Federal military department or the commander of the army will decide what ought to be done with the personnel and material of a balloon or aircraft coming into our territory through force majeure and when there appears to be no reprehensible intention or negligence. (1916 Naval War College, International Law Topics, p. 73.)

The Proclamation of the United States in regard to the Panama Canal Zone and the cities and harbors of Panama and Colon was comprehensive:

Rule 15.—Air craft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air
spaces above the lands and waters within said jurisdiction. (1915 Naval War College, International Law Topics, p. 14.)

**Internment.**—Internment of vessels of war is a relatively modern practice. It first became generally recognized in the Russo-Japanese War in 1904–05. The Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime Law of 1907, Article 24, stated the right of internment and outlined the procedure of internment. Provision was made for interning vessels of war in many of the neutrality proclamations and regulations during the World War.

The analogous principle had been earlier applied to belligerent land forces entering upon neutral territory.

The internment of aircraft unless attached to a vessel was the rule during the World War and prohibitions of flight over neutral jurisdiction were common as in the Italian decree of September 3, 1914.

**Article 1.** It is forbidden for any apparatus or means of aerial locomotion, such as dirigibles, aeroplanes, hydroplanes, balloons, flying kites, or captive balloons, etc., to fly or ascend over any points of territory of the state or colonies or of the territorial seas, except for those established by military authorities and for other aeronautics that are authorized from time to time by the ministers of war and navy. No permission will be granted to any foreigners.

**Aircraft and outbreak of World War.**—When the German Ambassador withdrew from Paris, August 3, 1914, he said in his letter to the President of the Council, M. Viviani:

The German administrative and military authorities have established a certain number of flagrantly hostile acts committed on German territory by French military aviators. Several of these have openly violated the neutrality of Belgium by flying over the territory of that country; one has attempted to destroy buildings near Wesel; others have been seen in the district of the Eifel; one has thrown bombs on the railway near Karlsruhe and Nuremberg.

I am instructed, and I have the honor to inform your excellency that in the presence of these acts of aggression the German Empire considers itself in a state of war with France in consequence of the acts of this latter power. (1917 Naval War College, International Law Documents, p. 103.)
In the reply M. Viviani said,

I formally challenged the inaccurate allegations of the Ambassador, and for my part I reminded him that I had yesterday addressed to him a note protesting against the flagrant violations of the French frontier committed two days ago by detachments of German troops. (French Yellow Book, No. 148.)

Proclamation of United States, February 28, 1918.—Soon after the United States entered the World War as a belligerent, it found problems arising from the use of aircraft and on February 28, 1918, a proclamation was issued requiring license from government authorities for any person flying over certain areas, and no private flying was to be permitted after 30 days from February 28. (40 U.S.Stat., Pt. 2, 1753). The presumption would under such circumstances be that all aircraft of the registry of the United States would from that date be public aircraft and liable to be treated accordingly.

Spaight’s opinion.—J. M. Spaight who has given much attention to laws relating to aircraft gives certain practical arguments for refusal of entrance to belligerent aircraft within neutral jurisdiction.

The pre-war argument for refusing to belligerent aircraft the right to circulate in neutral atmosphere, namely, that such a right must be accorded to both or neither of the belligerents, and that if accorded to both there must always be the danger of conflicts above neutral soil, with consequent danger to life and property below, received a concrete confirmation in an occurrence of the war. In December, 1917, it was reported that an aerial combat took place over Swiss territory, and that as a result a good deal of damage was caused near Muttenz by the fall of bombs. Other combats also occurred over neutral territory—over Aardenburg (Zeeland), for instance, in January, 1918; over Cadzand in April, 1918; and over Ameland in July, 1918. The fact that such incidents can occur is the best answer to the question which has been asked—Why should not the maritime rule of entry of neutral jurisdiction apply to aircraft? The answer is, in brief, that the circumstances are dissimilar, and that the practical objections to allowing entry of aircraft outweigh any advantages that would result from applying the naval rule. The question has often been considered, and the general conclusion has been in favour of prohibition of entry. (Spaight, Air Power and War Rights, 2d ed., p. 422.)
Mr. Spaight also adds that exceptions to the prohibition of entrance should not be made and were not made on account of force majeure, error in crossing a neutral frontier or other reason. This position was embodied in the rules drawn up by the Commission of Jurists at The Hague in 1923 in article 40 which forbade to belligerent military aircraft entrance to neutral jurisdiction.

The 24-hour rule.—Gradually there evolved a rule that the same regulations should be applied by neutrals to the vessels of war of each belligerent sojourning in the neutral port. As vessels of war changed in character, there were varying proposals as to the length of time of permitted sojourn and of the interval between the sailing of vessels of different nationalities. Even during the World War distinctions among different types of vessels were for a time made. The Brazilian rules of August 4, 1914, contained the following provision:

Art. 18th. If warships of two belligerents happen to be together in a Brazilian port or harbor, an interval of twenty-four hours shall elapse between the sailing of one of them and the sailing of her enemy, if both are steamers. If the first to sail is a sailing vessel and the next being an enemy is a steamer, three days' advance will be given to the first belligerent ship. Their time of sailing will be counted from their respective arrivals, exceptions being made for the cases in which a prolongation of stay may be granted. A belligerent ship of war cannot leave a Brazilian port before the departure of a merchant ship under an enemy flag, but must respect the aforesaid provisions concerning the intervals of departure between steamers and sailing vessels. (1916 Naval War College, International Law Topics, p. 12.)

The rule commonly called the 24-hour rule was generally accepted. By this rule 24 hours was the limit of sojourn of a belligerent vessel of war in a neutral port under ordinary circumstances and 24 hours must elapse between the departure of vessels of war of opposing belligerents. The reason for the establishing of this period was that neither belligerent should be able to obtain an advantage over the other by entering neutral
ports. It was thought 24 hours of sailing time would enable the leading vessel to reach a point where pursuit would be improbable.

The sailing distance of a surface vessel in 24 hours would, however, be a relatively short journey for an aircraft. It was early seen that the 24-hour rule would not be practicable as between aircraft and of little use between air and surface craft. The only safe rule for the neutral was soon discovered to be to prohibit entrance of aircraft and to intern any that transgressed this regulation.

Résumé.—While the final issue of the effort to adjust Philippine relations is still (1933) uncertain, the plan set forth in the Act of January 17, 1933, is one of the most definite thus far proposed and seriously considered. This plan would specially involve the viewing of the Act from three points of view, the attitude and consequences for (1) the United States; (2) the Philippine Islands; and (3) other states.

The United States has in passing the Act of January 17, 1933, over the President’s veto, presumably set forth the policy which it is willing to pursue. This involves independence for the Islands after 10 years under specified conditions.

The Philippine Legislature has in failing to approve the conditions in the Act of January 17, 1933, indicated that the conditions are unsatisfactory and subsequently that certain amendments in the act were essential.

Other states would be interested in any changes which might be made in the status of the Philippine Islands because introducing new factors into the international politics of the Pacific and Far East, where conditions are already uncertain. While some form of neutralization might involve less serious problems for a time than would independence without such an agreement, there are still many problems even under neutralization if precedents can be made a basis of judgment. Now the relations are between the United States and foreign powers. The ad-
ditional relations which would follow, if Philippine independence is established, would be these which arise when a new state enters the family of nations. If neutralization of the Philippine Islands eventuates, not merely the Islands enter new international relations but all the parties to the neutralization enter new relations to one another as well as to nonparticipating states.

Further, it may be questioned whether the Philippine Islands, on the frontier between the Eastern and Western Worlds, would feel assured of their independence without more definite sanctions than are ordinarily embodied in neutralization agreements. As states are not yet accustomed to follow altruistic policies, it is doubtful whether there would be sufficient advantages eventually flowing from the neutralization of the Islands to warrant commitments which might involve sacrifices on the part of the states whose participation would be essential for effective neutralization.

By the hypothesis of situation II the Philippine Islands have been granted their independence and this independence may or may not be accompanied by neutralization. If the Philippine Islands are not neutralized, all the rights and obligations of any state would reside in the Commonwealth of the Philippine Islands. As regards seaplanes, general practice seems to recognize that a great degree of risk is involved in their movements and that a neutral has a corresponding obligation in controlling their movements. Internment has come to be regarded as the proper course of action on the part of a neutral. Other states may justly condition their action to a reasonable degree upon the effectiveness of the action of the neutral.

If the Commonwealth of the Philippine Islands is neutralized, the respective states parties to the neutralization treaty will probably, judging from precedent, assume as little obligation as possible. The obligations of the Commonwealth of the Philippine Islands remain as would be the case without any neutralization treaty unless the treaty specifically provides otherwise.
1. In case the Philippine Islands obtain independence and are not neutralized:
   
   (a) The Philippine Government should intern the seaplane.
   
   (b) The *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

   (c) The *Namba* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

   (d) The *Usa* has no legal concern with the matter.

2. In case the Philippine Islands are neutralized:
   
   (a) The Philippine Government should intern the seaplane.

   (b) If state Y is a party to the neutralization treaty, the *Yamba* may perform such services as rest upon that vessel under the treaty, but if state Y is not a party to the treaty, even though other states may be parties, the *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

   (c) If state N is a party to the neutralization treaty, the *Namba* may perform such services as rest upon that vessel under the treaty, but if state N is not a party to the treaty, even though other states may be parties, the *Namba* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

   (d) If the United States is, as may be inferred from the Act of January 17, 1933, a party to the treaty of neutralization, the *Usa* may perform such services as rest upon that vessel under the treaty, but if the United States is not a party, even though other states may be parties, the *Usa* has no legal concern with the matter.