SITUATION I

CONTRABAND AND BLOCKADE

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

(a) State X declares that all distinction between conditional and absolute contraband is abolished and that all goods bound for Y will be treated as contraband.

(b) State Y declares all ports of X blockaded and maintains a line 3 miles off the coast of state D to prevent vessels passing up the river Dana which is the sole navigable waterway through state D to the capital of state X.

What are the rights of the belligerents and of the neutrals?

SOLUTION

(a) State X may declare all distinction between absolute and conditional contraband abolished, but this does not make all goods contraband nor does it give to state X a right to treat all articles bound for Y as contraband.

(b) State Y may not lawfully maintain a blockade of the ports of state X to which there is access only through a navigable river of neutral state D; nor may state Y prevent vessels from entering the river Dana, though it may seize vessels outside neutral jurisdiction when transporting prohibited goods having an ultimate enemy destination.

NOTES

Earlier discussions of contraband.—Contraband has often been the subject of discussion at the Naval War
College in past years. From these discussions it will be evident that opinions of different states have from time to time changed. In general, though not in every case, belligerents have been inclined to extend the list of contraband and neutrals have endeavored to restrict the list. When the maintenance of blockade is easy, the contraband list might be short; and when blockade was difficult or impossible, the list would be extended. The idea of contraband is so old that there are many examples of diversity in practice.

Early attitude toward contraband.—The word contraband, Latin contrabandum, implied disregard of a decree or prohibition. The word was used in early times in deferring to domestic restrictions usually upon trade in named articles as in regard to trade in salt which often was a government monopoly. Later prohibitions were issued restricting within specified areas trade in materials which might be of use in war.

The prohibition on export of arms, an idea receiving particular attention again in the twentieth century, was common in Roman and Byzantine periods when it was extended to supplies which might be serviceable to possible enemies. At times religious penalties were prescribed by the early church for those who furnished war materials to infidels. In these instances the measures taken were domestic or applied to those under the authority of the source of the prohibitions and the prohibitions might be applied both in time of peace and in time of war. Kings of England in the fourteenth century issued prohibitions, sometimes in regard to furnishing articles to nationals of named states and sometimes in regard to furnishing specified articles to any foreigner. England also made treaties in this century prohibiting the supplying of specified articles under penalty of forfeiture to the king (Edward III, 1370).

1 For references, see General Index to International Law Situations, Topics, Discussions, Documents, and Decisions, Vols. I to XXX, 1901–30.
EARLY ATTITUDE ON CONTRABAND

Gradually the prohibitions aimed at regulating domestic trade began to extend to the activities of foreign merchants in time of war. This extension created the demand that for the security of traders the list of prohibited areas should be made known either by previous treaty agreement or by special proclamation, and such action became usual from the seventeenth century. The early enumerations were not based on any uniform principle but were often determined by political or other motives.

It was easy to extend the domestic prohibition of furnishing certain goods to certain areas or to infidels by analogy to the furnishing of such goods to enemies. As belligerents would have no authority over acts of traders within neutral jurisdiction, they began to seize goods of the nature of contraband when these were outside of the immediate control of the neutral state, as in transit on the high sea. Here there would be a degree of conflict between the rights of the neutral to protect the shipping under its national flag and the right of the belligerent to prevent the delivery to his opponent of goods which might be used for his defeat or injury. The right of the belligerent was to a degree gradually conceded as dominant over the right of the neutral trader, and the belligerent assumed the right to enumerate by proclamation, or otherwise to determine, what should be regarded as under the ban.

The furnishing of contraband was, at first, regarded as an act for which the state should be held responsible. Gradually the problem of supplying of contraband by subjects of neutral states gave rise to controversies. Attempts were made to extend to states responsibility for acts of their subjects. The discussions of these topics were often by theologians because prohibitions had been against furnishing contraband to infidels and the course of argumentation differed from modern discussions though involving like principles. This was especially true of the fourteenth and fifteenth centuries.
In a posthumous book of Gentilis (1552–1608), the mingling of the modern and earlier attitude is shown. The negative aspect of the Golden Rule “that one should not do unto others what he would not that they should do to him” was emphasized. Gentilis quotes the civil laws:

“Let no one have the power to transport wine, oil, or any liquid to heathendom even to give them a taste, to say nothing of satisfying the demands of trade.” “Let no one dare to sell to alien heathen * * * coats of mail, shields, bows, arrows, broadswords, swords, or arms of any other sort whatsoever. Let absolutely no weapons be retailed to them by anyone, and no iron at all, whether already made up or not, for it would be harmful to the Roman Empire, and would approach treason to furnish the heathen, who ought to be without equipment, with weapons to make them stronger. But if anyone shall have sold any kind of arms anywhere to alien heathen of any nation whatever in violation of the interdicts of our holy religion, we decree that all his goods be straightway confiscated, and that he too suffer capital punishment.” (Gentilis, Hispanicae Advocationis, Bk. I, Chap. XX.)

Gentilis extends these principles in the sixteenth century and takes up many of the questions arising from destination, proportion, and ownership of the cargo.

The neutral began to demand that the evidence that the trade would be dangerous to the belligerent must also be clear not only from the nature of the goods themselves which might, if going to another neutral, be innocent, but that the goods if liable to capture must have an enemy destination. The nature of the goods and the destination thus became early determining factors in liability for contraband.

Opinion of Grotius.—Grotius (1583–1645) in his epoch-marking book, De jure belli ac pacis, 1625, looking backward and surveying earlier practices, said:

But there often arises the question, What is permissible against those who are not enemies, or do not want to be called enemies, but who furnish our enemies with supplies? For we know that this subject has been keenly debated in both ancient
and modern times, since some champion the relentlessness of warfare and others the freedom of commercial relations.

First, we must make distinctions with reference to the things supplied. There are some things, such as weapons, which are useful only in war; other things which are of no use in war, as those which minister to pleasure; and others still which are of use both in time of war and at other times, as money, provisions, ships, and naval equipment. (Carnegie Endowment for International Peace, Grotius, “De Jure Belli ac Pacis”, Vol. II, Book III, Chap. I, V, p. 601.)

In this chapter Grotius shows how questions in regard to these three classes of goods have been regarded both in early practice and in law. He quotes Seneca (3 B.C.-65 A.D.):

Money, by means of which a satellite may be kept in service, I shall not supply. If he shall desire marbles and robes, that which his luxurious taste amasses will harm no one; soldiery and arms I shall not furnish. If, as a great favour, he seeks craftsmen of the stage and things which may soften his savagery, I shall gladly proffer them. To him to whom I would not send triremes or ships with bronze rams, I shall send pleasure craft, and sleeping-barges, and other follies of kings who revel on the sea. “On Benefits”, VII, xx. Car (Ibid, p. 602).

Grotius set out also that the practices had not been consistent among different states or at different times in the same state.

Attitude of United States.—Even before the American colonies became independent, the matter of treatment of goods of the nature of contraband was considered in the Continental Congress. (III Journals 371–375, 437; IV Ibid, 229–232; 253–254; V Ibid, 768.) Some of these documents use the word contraband and refer to “prohibited or contraband goods.” In general during the eighteenth century the doctrine of “free ships, free goods, except contraband of war” met with growing favor and many added “free goods always free.”

The lists such as in the treaty with France, February 6, 1778, vary, but cover most of the articles later included in the categories of absolute and conditional contraband though no such distinction is there made.
The instructions issued in 1780 to commanders of private armed vessels having commissions or letters of marque and reprisal enjoined them to take care "not to infringe or violate the laws of nations, or the laws of neutrality", and not to interfere with vessels of allies unless they were "employed in carrying contraband goods or soldiers to our enemies."

_American treaties and contraband._—The United States entered into about 25 treaties containing provisions relating to contraband during the nineteenth century. Some of the treaties provided that "in general, whatever is comprised under the denomination of arms and military stores, of what description soever, shall be deemed objects of contraband." (Prussia, 1828.) Others, as the treaty with Brazil, 1828, specifically enumerated contraband.

**ARTICLE XVI.** This liberty of commerce and navigation shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods shall be comprehended—

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuzes, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds and grenades, bombs, powder, matches, balls and all other things belonging to the use of these arms.

2d. Bucklers, helmets, breast plates, coats of mail, infantry belts and clothes made up in the form and for a military use.

3d. Cavalry belts, and horses with their furniture.

4th. And generally all kinds of arms and instruments of iron, steel, brass and copper or of any other materials manufactured, prepared and formed expressly to make war by sea or land.

**ARTICLE XVII.** All other merchandises and things not comprehended in the articles of contraband, expressly enumerated and classified as above, shall be held and considered as free and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded; and, to avoid all doubt in this particular, it is declared that those places are only besieged or blockaded which are actually attacked by a force capable of preventing the entry of the neutral. (8 U.S. Statutes, Part II, pp. 390, 394.)
Other treaties with South American states contained similar provisions.

*Declaration of London lists, 1909–14.*—Early in the World War the belligerents showed a disposition to adopt the list as set forth in the unratified Declaration of London of 1909. The list of absolute contraband was,

1. Arms of all kinds, including arms for sporting purposes, and their unassembled distinctive parts.
2. Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts.
3. Powder and explosives specially adapted for use in war.
4. Gun-carriages, caissons, limbers, military wagons, field forges, and their unassembled distinctive parts.
5. Clothing and equipment of a distinctively military character.
6. All kinds of harness of a distinctively military character.
7. Saddle, draught, and pack animals suitable for use in war.
8. Articles of camp equipment, and their unassembled distinctive parts.
10. Warships and boats and their unassembled parts specially distinctive as suitable for use only in a vessel of war.
11. Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or of military material for use on land or sea. (1909 Naval War College, *International Law Topics*, p. 59.)

This list of absolute contraband was the same as that upon which agreement had been reached at the Second Hague Peace Conference in 1907.

The subject of conditional contraband was considered at the same conference but “lack of time and the complication of interests involved did not admit of the elaboration at present [1907] of a text adopted by all.” (1 *Proceedings of the Hague Peace Conference*, p. 259.) At this Second Peace Conference, the American naval delegate, Admiral Sperry, former president of the Naval War College, and the British seemed to be favorable to the exclusion of any list of conditional contraband. Admiral Sperry also suggested:
That a paragraph be added to the list already approved, stipulating that no article is to be included in this list which is not intended exclusively for military use, and moreover that trade in any article whatever not legally included in the list shall never be prohibited as the result of a state of war. (Ibid, p. 1116.)

At the London Naval Conference, 1908–09, suggestions from the 10 leading maritime states varied in regard to conditional contraband. Some states favored the abolition of the category of conditional contraband as in the case of Spain and The Netherlands, and some made propositions of a general character covering articles which might be useful in peace and war. After much discussion in the Conference a list of conditional contraband was also drawn up and embodied in the following terms:

**Article 24.** The following articles and materials susceptible of use in war as well as for purposes of peace, are without notice, regarded as contraband of war, under the name of conditional contraband:

1. Food.
2. Forage and grain suitable for feeding animals.
3. Clothing and fabrics for clothing, boots and shoes, suitable for military use.
4. Gold and silver in coin or bullion; paper money.
5. Vehicles of all kinds available for use in war, and their unassembled parts.
6. Vessels, craft and boats of all kinds, floating docks, parts of docks, as also their unassembled parts.
7. Fixed railway material and rolling-stock, and material for telegraphs, radio telegraphs, and telephones.
8. Balloons and flying machines and their unassembled distinctive parts as also their accessories, articles and materials distinctive as intended for use in connection with balloons or flying machines.
10. Powder and explosives which are not specially adapted for use in war.
11. Barbed wire as also the implements for placing and cutting the same.
13. Harness and saddlery material.
Provision was made for additions to the above list by means of notified declarations in articles 23 and 25 and for omissions in article 26. In articles 27 and 28 attempt was made to exempt articles which in general are not susceptible of use in war and also certain articles which were in a specified free list. Many of the articles specifically exempted in 1909 were within a few years of special use in war and before 1914 this list was seen to be unduly restrictive.

The Declaration of London of 1909 had been operative during the Turco-Italian War in 1911–12 as shown in the following dispatch of October 19, 1911.

By a royal decree of October 13 the following instructions were approved in conformity with the principles of the Declaration of Paris, April 16, 1856, which belligerent countries are bound to respect, with the rules of The Hague Conventions of October 18, 1907, and of the Declaration of London of February 26, 1909, which the Government of the King desires to be respected as well, so far as the provisions of the laws in force in the Kingdom allow, although they have not yet been ratified by Italy; and they will serve to regulate the conduct of naval commanders in the operations of capture and prize during the war. (1912 Naval War College, International Law Situations, p. 108.)

The provisions of the Declaration of London as regards absolute and conditional contraband, were before 1914 regarded as satisfactory in view of the articles permitting changes on notification. There was, however, understandable criticisms of the list of articles enumerated as not to be declared contraband of war.

There was little criticism of article 29 which provided:

Neither are the following to be regarded as contraband of war:

(1) Articles and materials serving exclusively for the care of the sick and wounded. They may, nevertheless, in case of urgent military necessity and subject to the payment of com-
pensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles and materials intended for the use of the vessel in which they are found, as well as those for the use of her crew and passengers during the voyage (1909 Naval War College, International Law Topics, p. 71.)

Many of the provisions of the Declaration of London were embodied in national rules before 1914 and while some of these remained in force during the World War, the provisions relating to contraband because of changes in the use of materials and methods of warfare suffered wide extensions.

*Early World War changes in contraband lists.*—The British Government had on August 5, 1914, made known that it would regard as contraband the articles named as absolute and conditional contraband in the Declaration of London with the transfer of aircraft from the conditional to the absolute list.

On August 6, 1914, the American Secretary of State addressed to the American Ambassadors in the belligerent states and the Minister to Belgium an inquiry as to whether the respective states were "willing to agree that the laws of naval warfare laid down by the Declaration of London, 1909, shall be applicable to naval warfare during the present European conflict, provided that the governments with whom" they were or might be at war also agree to such application. The Secretary also said, "You will further state that this Government believes that acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between belligerent and neutral powers. It, therefore, earnestly hopes that this inquiry may receive favorable consideration." (1914 U.S. Foreign Relations, Supplement, p. 216.)

Germany, August 10, and Austria-Hungary, August 13, replied to the effect that they would observe the provisions of the Declaration of London conditioned upon "like observance on the part of the enemy."
As replies were delayed from other states, the Secretary of State sent another telegram, August 19, pressing for reply. The reply from the British Foreign Office dated August 22 but received in Washington August 26, 1914, stated that the British Government had "decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations." These modifications changed the lists of contraband, duration of liability and presumption of destination as well as other provisions. Russia and France followed Great Britain. The Government of the United States examined the British propositions hoping they might be of such character that the Government could advise general acceptance, but could not reach such a conclusion. Nevertheless, in a note of September 26, 1914, the Acting Secretary of State wrote:

* * * The United States stands ready either to accept the declaration as a whole, provided all of the belligerents accept it, or, to accept it for the period of the war with modifications and additions acceptable, on the one hand, to the United States and the Netherlands, the two neutral signatories, and, on the other hand, to all of the belligerents.

This Government in seeking general acceptance of the declaration as a code of naval warfare for the present war had in mind the adoption of the declaration as a whole and not such part of it as might be acceptable to certain belligerents and not to other belligerents. It considered that the declaration was to be applied as a complete code of which no rule could be ignored or supplemented, and in so doing it followed Article 65 of the declaration, which stipulates: "The provisions of the present declaration must be treated as a whole and cannot be separated."

The only reasonable explanation for the inclusion in the declaration of this requirement is that the instrument is composed largely of compromises on the part of the governments represented at the conference. Although the declaration is introduced with a general statement that "the signatory powers are agreed" that the rules contained in the declaration "correspond in substance with the generally recognized principles of international law", the proceedings of the conference as well as the documents relating to it prove that an agreement on many of the articles
was reached through reciprocal concessions. Being conceived in compromise and concession the declaration was accepted by the Government of the United States at the conference in London in the earnest hope that it might finally compose the differences which existed as to neutral rights and neutral duties, although in so accepting this Government was compelled to abandon certain rules of conduct which it has heretofore always maintained.

As might be expected in a settlement of divergent views and practices by mutual concession the Declaration of London contains provisions both advantageous and disadvantageous to the respective interests of neutrals and belligerents. But it is now proposed by Great Britain to retain all the provisions favorable to belligerents and to recast other provisions so that they will be less favorable to neutral interests. The result is a set of rules which limits neutrals' rights far more than does the declaration itself treated as a whole. War, in any event, bears heavily upon a neutral nation. The interruption of its commerce and the limitations placed upon its trade are sufficiently burdensome under the rules of the Declaration of London. In consenting to those rules the Government of the United States made great concessions on its part and it does not feel that it can, in justice to its own people, go further. It cannot consent to the retention of a part of this compromise settlement and to the rejection of another part. The adoption of the declaration so modified is contrary to the customary procedure incident to compromise settlements, to the express provisions of the declaration itself, and to the spirit which induced its signature. (Ibid, p. 227.)

This note further stated that the British modifications struck at accepted neutral rights, created misunderstandings, revised practices supposed to be abandoned even by Great Britain and, if admitted, might place the United States in an equivocal position which might imperil the friendly relations with Great Britain.

In a memorandum of a conference of Acting Secretary Lansing with the British Ambassador on September 29, 1914, it is said,

A discussion of the provisions of the order in council followed in which the Ambassador said that he agreed that the order in council practically made foodstuffs absolute contraband, which was contrary to the British traditional policy as well as to that of the United States. He said that the immediate cause had
been the introduction through Rotterdam in first days of the war of large quantities of food supplies for the German army in Belgium, and that it seemed absolutely necessary to stop this traffic.

I replied that, while I appreciated that such reasons must weigh very heavily with those responsible for the successful conduct of the war, it seemed unfortunate that some other means could not have been found to accomplish the desired purpose, either by getting the Netherlands to place an embargo on foodstuffs and other conditional contraband or by agreeing not to re-export such articles. The Ambassador said that he agreed that would be much the better way, and that he believed it could be done.

He said that now the chief anxiety seemed to be in regard to shipments of copper and petroleum and also of Swedish iron, and that the British Government was stopping vessels with such cargoes and purchasing them. He suggested that possibly the difficulty created by the order in council could be removed by rescinding it and adding to the list of absolute contraband petroleum products, copper, barbed wire and other articles of like nature now used almost exclusively for war purposes.

I said that as to this suggestion I could not speak for the Government but that it seemed worthy of consideration as it might offer a means of getting rid of the order in council which certainly menaced the very friendly relations existing if it became the subject of discussion by the press. I told him that I did not think that the feeling which the order in council would arouse when generally understood, would be among the shippers as much as among the American public at large; and that, even if no case arose under it, the fact that the British Government had issued a decree, which menaced the commercial rights of the United States as a neutral, in violation of the generally accepted rules of international law, would undoubtedly cause irritation, if not indignation, and might change the sentiment of the American people, of which Great Britain had no reason to complain at the present time. (Ibid., p. 234.)

There was much interchange of opinion between the belligerents and neutrals in regard to contraband. The European neutral states being the smaller states were often obliged to yield to the terms proposed by the strong belligerents. Each belligerent brought forth the argument that its extreme action was based on self-defense which might justify the setting aside its obligations under international law.
The United States, a powerful neutral, in its early contentions maintained the attitude of a state about to insist upon its neutral rights. Great Britain in a communication of October 9, 1914, indicated that its list of contraband should, subject to certain additions and modifications, conform to the Declaration of London and that it was hoped this list would meet the approval of the United States. This proposed list did include under absolute contraband rubber and ores which under article 28 of the Declaration of London had unwisely been placed in the list of articles not to be declared contraband of war. Some equitable adjustment between the Department of State of the United States and Great Britain on the basis of actual war conditions and needs seemed to be foreshadowed in early October 1914. On October 15, Mr. Walter Hines Page, Ambassador to Great Britain, said in a communication to the Secretary of State:

I recommend most earnestly the substantial acceptance of the new order in council or our acquiescence with a reservation of whatever rights we may have; and I recommend prompt information to the British Government of such action. (1914 U.S. Foreign Relations, Supplement, p. 249.)

To follow this recommendation would involve abandoning many of the positions which the State Department had recently taken and on October 16 the Department of State sent to the American Ambassador in Great Britain a telegram embodying certain new plans.

The desire of this Government is to obtain from the British Government the issuance of an order in council adopting the declaration without any amendment whatsoever and to obtain from France and Russia like decrees, which they will undoubtedly issue if Great Britain sets the example. Such an adoption by the allied Governments will put in force the acceptance of the Declaration of London by Germany and Austria, which will thus become for all the belligerent powers the code of naval warfare during the present conflict. This is the aim of the United States.

It cannot be accomplished if the declaration is changed in any way as Germany and Austria would not give their consent to a change.
In the frequent informal and confidential conversations which have taken place here and in the admirable frankness with which Sir Edward Grey has stated the reasons for the action which Great Britain has deemed it necessary to take in regard to the declaration, this Government feels that it fully understands and appreciates the British position, and is not disposed to place obstacles in the way of the accomplishment of the purposes which the British representatives have so frankly stated.

The confidence thus reported in this Government makes it appreciate more than ever the staunch friendship of Great Britain for the United States, which it hopes always to deserve.

This Government would not feel warranted in offering any suggestion to the British Government as to a course which would meet the wishes of this Government and at the same time accomplish the ends which Great Britain seeks, but you might in the strictest confidence intimate to Sir Edward Grey the following plan, at the same time stating very explicitly that it is your personal suggestion and not one for which your Government is responsible.

Let the British Government issue an order in council accepting the Declaration of London without change or addition, and repealing all previous conflicting orders in council.

Let this order in council be followed by a proclamation adding articles to the lists of absolute and conditional contraband by virtue of the authority conferred by Articles 23 and 25 of the declaration.

Let the proclamation be followed by another order in council, of which the United States need not be previously advised, declaring that, when one of His Majesty's Principal Secretaries of State is convinced that a port or the territory of a neutral country is being used as a base for the transit of supplies for an enemy government a proclamation shall issue declaring that such port or territory has acquired enemy character in so far as trade in contraband is concerned and that vessels trading therewith shall be thereafter subject to the rules of the declaration governing trade to enemy's territory.

It is true that the latter order in council would be based on a new principle. The excuse would be that the Declaration of London failing to provide for such an exceptional condition as exists, a belligerent has a right to give a reasonable interpretation to the rules of the declaration so that they will not leave him helpless to prevent an enemy from obtaining supplies for his military forces although the belligerent may possess the power and would have the right to do so if the port or territory was occupied by the enemy.
When the last-mentioned order in council is issued, I am convinced that a full explanation of its nature and necessity would meet with liberal consideration by this Government and not be the subject of serious objection.

I repeat that any suggestion, which you may make to Sir Edward Grey, must be done in an entirely personal way and with the distinct understanding that this Government is in no way responsible for what you may say. (Ibid, p. 249.)

In his telegram from London of October 15, 1914, relating to differences in regard to the Declaration of London and shipping questions, the American Ambassador, Mr. Page, had said:

The question seems wholly different here from what it probably seems in Washington. There it is a more or less academic discussion. Here it is a matter of life and death for English-speaking civilization. It is not a happy time to raise controversies that can be avoided or postponed. Nothing can be gained and every chance for useful cooperation for peace can easily be thrown away and is now in jeopardy. In jeopardy also are our friendly relations with Great Britain in the sorest time of need in her history. I know that this is the correct, larger view. (Ibid, p. 248.)

The United States as a neutral state had proposed the maintenance of neutral rights and the President himself replied on October 16.

Beg that you will not regard the position of this Government as merely academic. Contact with opinion on this side the water would materially alter your view. Lansing has pointed out to you in personal confidential despatch of this date how completely all the British Government seeks can be accomplished without the least friction with this Government and without touching opinion on this side the water on an exceedingly tender spot. I must urge you to realize this aspect of the matter and to use your utmost persuasive efforts to effect an understanding, which we earnestly desire, by the method we have gone out of our way to suggest, which will put the whole case in unimpeachable form.

This is private and for your guidance.

\[\text{WOODROW WILSON.}\]

(Ibid, p. 252.)

\textit{Disappearance of contraband distinctions.—}In a proclamation revising the British contraband list, October
29, 1914, there were two schedules, one to be treated as absolute contraband and the other as conditional contraband.

Vigorous protests had arisen against the German War Zone proclamation of February 4, 1915, which declared the waters surrounding Great Britain and Ireland to be comprised within the seat of war and that all enemy merchant vessels found in those waters after the eighteenth instant will be destroyed although it may not always be possible to save crews and passengers.

Neutral vessels expose themselves to danger within this zone of war since in view of the misuse of the neutral flag ordered by the British Government on January thirty-first and of the contingencies of maritime warfare it cannot always be avoided that neutral vessels suffer from attacks intended to strike enemy ships. (1915 U.S. Foreign Relations, Supplement, p. 94.)

The attitude of Great Britain in regard to American communications on contraband and maritime warfare in general as viewed by the American Ambassador in Great Britain may be seen in the following telegram of May 21, 1915, to the Secretary of State:

Unofficial critics praise the courtesy and admit the propriety of our communications, but they regard them as remote and impracticable. They point out that we have not carried our points: namely, that copper should not be contraband, that ships should be searched at sea, that to-order cargoes should be valid, that our export trade had fallen off because of the war. They point out these in good-natured criticism as evidence of the American love of protest for political effect at home. While the official reception of our communications is dignified, the unofficial and general attitude to them is a smile at our love of letter writing as at Fourth of July orations. They quietly laugh at our effort to regulate sea warfare under new conditions by what they regard as lawyers' disquisitions out of textbooks. They [receive] them with courtesy, pay no further attention to them, proceed to settle our shipping disputes with an effort at generosity and quadruple their orders 'from us of war materials.' They care nothing for our definitions or general protests but are willing to do us every practical favor and will under no conditions either take our advice or offend us. They regard our writings as addressed either to complaining shippers or to politicians at home.
For these reasons complaints about concrete cases as they arise are more effective than general communications about rules of sea warfare, which must be revised by the submarine, the aeroplane, the mine and our own precedents. (Ibid., p. 147.)

Further restrictions were put by the Allied Powers upon goods coming from or bound to Germany, and the American Secretary of State on March 30 said that the action constituted:

a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war. (Ibid., p. 152.)

In a long note of February 12, 1915, from the British Foreign Secretary to the American Ambassador, it was said:

The most difficult questions in connection with conditional contraband arise with reference to the shipment of foodstuffs. No country has maintained more stoutly than Great Britain in modern times the principle that a belligerent should abstain from interference with the foodstuffs intended for the civil population. The circumstances of the present struggle are causing His Majesty's Government some anxiety as to whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible the supplies which were intended for the civil population are effective for the purpose, or suitable to the conditions present. The principle which I have indicated above is one which His Majesty's Government have constantly had to uphold against the opposition of continental powers. In the absence of some certainty that the rule would be respected by both parties to this conflict, we feel great doubt whether it should be regarded as an established principle of international law. * * *
The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears.

In any country in which there exists such tremendous organization for war as now obtains in Germany there is no clear diversion [division] between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country. (Ibid., p. 332.)

The Department of State of the United States on October 28, 1915, made certain inquiries in regard to the control of German resources and imports by the Government itself.

In Department's consideration of destination of conditional contraband, it is necessary to ascertain to what extent the military authorities have superseded civil authorities in the Government of Germany so far as control over imports are concerned, and to what extent the Government controls the use of articles on contraband list of Great Britain and her allies. Are private consignees free to import such articles without interference by authorities? (Ibid., p. 603.)

In reply to the above query, the following was received from Berlin on December 4, 1915:

Following information communicated verbally by Foreign Office; written answer promised:

1. Owing to proclamation issued at outbreak of war, military authorities theoretically have power to supersede civil authorities, but, practically, power has been exercised in only few instances and not at all in connection with customs authorities.

2. In so far as control of use of imported goods is concerned, Government regards enemy's list of conditional contraband as of no importance.

3. Receipt and distribution of certain imported food and fodder products may take place only through central organization which distributes to civil parties only, but military authorities have power to requisition against payment anything needed by army or navy.
Chancellor has power to grant exemption from control and distribution and military authorities have power to guarantee in advance freedom from requisition of designated imported consignments in whole or part. (Ibid, p. 622.)

The protests of neutrals were answered after varying periods of delay but at length the Secretary of State of the United States after much correspondence said in a communication to the Ambassador in Great Britain, November 11, 1916,

Sir: With reference to the announcement made by the British Foreign Office, under date of April 13, 1916, of the intention of the British Government to treat alike absolute and conditional contraband, you are instructed to communicate to the Foreign Office a formal reservation, in regard to this announcement, in the sense that, in view of the established practice of a number of maritime nations, including Great Britain and the United States, of distinguishing between absolute and conditional contraband, the Government of the United States is impelled to notify the British Government of the reservation of all rights of the United States or its citizens in respect of any American interests which may be adversely affected by the abolition of the distinction between these two classes of contraband, or by the illegal extension of the contraband lists during the present war by Great Britain and her allies. (1916 U.S. Foreign Relations, Supplement, p. 483.)

The "Kim" and three other ships, 1915.—In October and November 1914 the Kim, the Alfred Nobel, the Bjornsterjne Bjornson, and the Fridland, all Norwegian ships except the Fridland, which was Swedish, sailed from New York for Copenhagen. In their cargoes were foodstuffs, rubber, and hides. The treatment of the cargoes and of the ships were made separate cases, and the reprisals order of March 11, 1915, was not made applicable.

In these cases inference as to ultimate destination to Germany of goods consigned to Copenhagen was based in the first instance upon the rapid increase in the relative amount of such goods shipped to Copenhagen in corresponding months of 1913 and 1914. There was also
an argument on the ground of evident deception and misinformation. The opinion states that

Two important doctrines familiar to international law come prominently forward for consideration; the one is embodied in the rule as to "continuous voyage," or continuous "transportation;" the other relates to the ultimate hostile destination of conditional and absolute contraband, respectively. ([1915] P. 215; reprinted, 1922 Naval War College International Law Documents, p. 50.)

The lists of contraband both absolute and conditional have varied from time to time and according to circumstances. The belligerent has usually stood for an extended list while the neutral has desired a restricted list. Destination has always been a deciding factor in determining contraband. This has been particularly important in the application of the doctrine of continuous voyage. It has been maintained that the ultimate destination is to the country in which the goods are actually to become "a part of the common stock."

Many of the questions relating to ultimate destination were raised in the American Civil War. The party to whom the goods may be consigned does not always prove the ultimate destination. Goods often in time of peace are "to order or assigns." Even the British Government in the American Civil War did not deny that such consignments on British vessels might not be open to suspicion "which might be dispelled by the shippers." Somewhat similar questions might arise in shipments of goods to branches or agents or when no consignee is named.

In the case of the Kim, however, it was stated that:

It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. (Ibid.)

Destination.—If a distinction is made between absolute and conditional contraband, the distinction between enemy country and enemy forces becomes important. If an unfortified area becomes fortified, its status changes as a place to which goods may without liability be
shipped. If the population of an area which has been subject only to the civil law is mobilized and put under military control the status of the population changes as a population to which goods may without liability be shipped. If the business of a consignee of a cargo should suddenly change, as from a lawyer with no trade relations and on a small salary to a merchant ship owner to whom large and valuable cargoes were consigned, the burden of proof of the genuineness of the consignment might be upon him. (The Hilleröd, 1918, App. Cas. 412.)

Direct interference with neutral trade.—The accepted laws of war give to belligerents the right to interfere with neutral trade in two respects, contraband and blockade. Extension of these rights may involve continuous voyage or ultimate destination and there are certain analogies to unneutral service. During the World War as difficulties in maintaining blockades in north Europe increased, more reliance was placed upon the liberal or extreme interpretation of the laws in regard to contraband without, in the early stages of the war, resort to what were later called reprisals. There were also many changes in trade relations due to introduction of new means of transportation and communication between merchants in different states which made the application of some of the decisions of the nineteenth century doubtful. The tonnage of modern merchant vessels may make the problem of search much more difficult than in the early nineteenth century when the captured vessels were ordinarily under 250 tons. How far a merchant vessel of a neutral of 25,000 or 50,000 tons with its passengers may be delayed or diverted for visit or search or what may justify such delay or diversion are still debatable questions. The changes in the nature of materials used in war have made it more difficult to list articles which may be liable to capture. Chemical processes have in recent years greatly enlarged the list of materials useful for or essential in war. Other processes and uses may
render some materials obsolete and introduce new categories.

*Exempt articles.*—While hospital supplies usually received a measure of consideration in transit from neutral to belligerent countries, other articles were from time to time allowed to be exported. Some neutral states, owing to weakness, protested and submitted to restrictions generally admitted to be beyond the limits of legality. Some neutral states, for reasons less evident, submitted to unjustifiable interference with commerce.

Articles other than hospital supplies which supposedly could be of no service in war were sometimes mentioned as in the communication of the Consul General at London to the Secretary of State, December 23, 1916:

Proclamation issued to-day requires that all articles exported to Holland be consigned to Dutch Government, diplomatic or consular officers, with permission of Ministry of Foreign Affairs, or Netherlands Oversea Trust, except printed matter, returned containers, worn clothing and personal effects, live animals not used for food, sanitary earthenware, pottery and common earthenware, books, dolls, toys, wooden clock cases, slate and slate pencils, postage stamp and postcard albums. Proclamation apparently intended to permit free shipment of articles here mentioned.

*(1916 U.S. Foreign Relations Supplement, p. 490.)*

*Hospital supplies.*—The American Ambassador in Spain sent on September 22, 1914, to the Secretary of State the following telegram:

In an interview yesterday morning His Majesty informed me confidentially condition of wounded soldiers, particularly in French hospitals where there are inadequate supplies, especially of bandages and absorbent cotton, was deplorable and expressed an earnest wish for our cooperation in relieving this situation. To that end he hopes that the United States and Spanish Ambassadors accredited near various European courts now at war will make a joint request for arrangements between countries of hospital supplies and the such supplies in transit on the high seas may be considered by them neither contraband nor conditional contraband of war but free. Please telegraph whether Department can see its way clear to give to our diplomatic officers concerned the
instructions necessary to realize His Majesty's hope. (1914 U.S. Foreign Relations, Supplement, p. 831.)

The American Government immediately communicated this request to diplomatic representatives of the United States in the belligerent countries. It was naturally suggested that the detailed list of articles should be determined, but agreement in principle was general. The Russian reply favored a broad interpretation. The German reply follows:

Your circular September 24. The Foreign Office replies to joint request that No. 28, paragraph 1, of the German prize ordinance of September 30, 1909, already provides that articles serving exclusively to aid the sick and wounded shall not be treated as contraband and may be requisitioned subject to payment compensation only in case of urgent military necessity and when their destination is to the territory of the enemy or to territory occupied by the enemy or to the armed forces of the enemy. (Ibid, p. 835.)

The French Government said:

While appreciating the humanitarian attitude of the United States Government, the French Government does not think the moment propitious for agreement between belligerents, even on a subject which by its character should be placed beyond reach of conflict. Experience of contempt which certain belligerents show for international conventions to which they have agreed gives grounds for apprehension that they would not observe a new agreement nor execute its provisions as soon as it was to their advantage not to do so. The French Government recalls that definition of objects mentioned in Article 29 of the Declaration of London was summarily made in the general report at the London conference by the drafting committee, and it was thus agreed that the immunity established under Article 29 applied to drugs and various medicines. The French Government adds that while it might be a delicate matter to be more precise and extend obligations of belligerents during war beyond where they were fixed in time of peace, nevertheless it would not refuse to study the suggestions of the American Government to draw up a list of drugs and medicines whose character as "articles serving exclusively to aid the sick and wounded" shall be closely defined. (Ibid, p. 836.)
Later much discussion was carried on and Great Britain withdrew the list of articles to which the British Government had given exemption.

The attitude of the British Government was considered in a letter of ex-President Taft, then chairman of the central committee of the American Red Cross to the Secretary of State on May 8, 1916. In this letter Mr. Taft said,

Since the beginning of the present war, the American Red Cross has invited contributions of money and supplies with which to aid the wounded and suffering of all the belligerents. We have shipped to the Red Cross societies of each belligerent hospital supplies contributed to us for that purpose. We have found no difficulty in sending such article to the Entente Allies. We have had to obtain permits from Great Britain for the shipments to the Red Cross of the Central powers. Until September 1915, there was substantially no delay in the granting of these permits by Great Britain. Since that time, we have had much difficulty in securing them, and the supplies donated in kind and designated for the use of the Central powers have accumulated in our warehouses in New York. A permit was granted for only one shipment since that time—in January of this year. Through your Department, we are now in receipt of a communication from the British Government, announcing that it does not intend to permit any further shipments, unless it is a shipment to our own hospital units, in a territory of the Central powers. This exception amounts to no concession, for the reason that as the British Government was advised in August last, after the first of October, for lack of funds, we were able to maintain no hospital units in any of the belligerent countries. The authorities of the American Red Cross believe that under the Geneva convention, to which the United States and all the belligerent powers are signatories, the United States has the treaty right to insist that articles serving exclusively to aid the sick and wounded in the form of hospital supplies, shipped by the American Red Cross to the Red Cross of the Central powers, shall not be declared contraband, but shall be allowed safe-conduct to their destination. (1916 U.S. Foreign Relations, Supplement, p. 948.)

Contraband distinctions.—As was shown in the World War, it is difficult and at times impossible to distinguish between absolute and conditional contraband. By na-
ture, some goods may equally serve the combatant and noncombatant population. If a consignment of goods is unquestionably for the civil population in a given area, these goods may in fact make it possible to send to the forces other goods which would have been essential in that area without the consignment and it has been held that it thus makes little difference which goods go to the forces as the result is the same. The means of transportation and methods of warfare have so far changed that nearly all parts of a state may serve its forces and nearly all goods may be of use for the forces. Indeed in the World War German courts seemed to regard all ports of England as ports which could be considered bases and the British seemed to regard practically all goods as of military use.

The distinctions between absolute and conditional contraband came to have little significance and to be little applied in practice. During the World War most states participating in the conflict formally abolished or tacitly disregarded the distinction.

Situation I (a) involves two matters: (1) the abolition of the distinction between conditional and absolute contraband; (2) the treatment of all goods bound for an enemy country as contraband.

Contraband consists of articles which a neutral may not furnish to one belligerent without risk of capture by the other belligerent. The essential items for consideration would be the nature of the article and the destination.

Goods of the nature of contraband of which capture might be justified would be such as would aid the belligerent in the conduct of the war. In early days when the conduct of the war depended almost wholly upon supplying the enrolled armed forces with the simple implements of war, lists were comparatively easy to draw up and did not vary greatly from year to year. Pitch-balls and javelins might be included in a contraband list, as in the treaties with Sweden, 1783, and some other early
treaties of the United States, but cotton and oil and many other articles were definitely excluded from the list, and it was provided they "shall not by any pretended interpretation be comprehended among prohibited or contraband goods" unless bound to places "besieged, blocked, or invested" so as to be "nearly surrounded by one of the belligerent powers."

The intention of such agreements was to confine the list of contraband to such articles as were actually for war use. Manifestly therefore for all contraband articles the destination was a matter of equal importance with the nature of the article itself, for if the article whatever its nature, was not destined for war use it would not be liable as contraband. Speaking of articles of ordinary use such as provisions, Mr. Justice Story in the case of the Commercen, 1816, said, "if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband." (1 Wheat. 387.)

The attitude of leading states has varied in regard to what articles and when articles might be treated as conditional contraband. Even during the World War there were many conflicting opinions.

If a state mobilizes its whole population and all its resources for war, evidently it will be difficult if not impossible to distinguish among consignments destined for that state, and anything bound for the state, unless exempted on humanitarian grounds, may be liable to capture as contraband. The grounds of humanity would exempt articles whose sole use would be for medicinal and surgical purposes and articles necessary for Red Cross operations.

The changing use and impossibility of determining what may be of use in war from day to day and the possibility of mobilization of population would therefore justify the declaration that the distinction between absolute and conditional contraband is abolished.
All goods other than those solely for humanitarian and Red Cross use might be declared contraband.

_Early blockades._—Some of the recent contentions in regard to blockades are similar to those made as early as the seventeenth century. The idea of a place besieged on land was coming to be applied to a port and for a time it was held that it should be closed by the enemy on all sides, landward as well as seaward. In the seventeenth century, however, some of the pronouncements speak of the ancient practice of forbidding transport of goods to certain areas under penalty and there seem to have been such proclamations as early as the thirteenth century. Of course, there was great variety of practice in these early days. The Dutch notification of June 26, 1630, declared in accord with ancient usage that vessels bound for enemy ports of Flanders, sailing from or entering, would with their cargoes be liable to confiscation. There were even in early days controversies in regard to what degree of force was essential to render such proclamations effective from a legal standpoint. Treaties of the seventeenth and eighteenth centuries refer to ports "besieged, blocked, or invested" and some prescribe how many ships shall be before a port in order that the blockade may be legal or how strong a battery must be on shore. The need of specification of limits to which the blockade would extend came later. Under article XIII of the treaty between the United States and Sweden and Norway, 1816, merchant vessels of either, when one was at war and the other was neutral, were entitled to notification of blockade at the line unless it could be proved that the neutral vessel knew or should have known of the blockade.

_Declaration of Paris, 1856._—The Declaration of Paris of 1856 was accepted as stating the approved attitude upon blockade in the middle of the nineteenth century. This declaration upon blockade was "blockade in order

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2 For treatment of special aspects of blockade, see Naval War College publications, 1901–32.
to be binding must be effective—that is to say maintained by a force sufficient really to prevent access to the coast of the enemy.” This declaration has been repeatedly reaffirmed even during the World War. Manifestly the actual words may not be taken too literally for if they were strictly construed, blockade would cease to be binding when a single inward breech should occur, though egress from the coast would not be considered in the interpretation. What it was really aimed to prevent was resort to paper blockades by requiring a reasonably adequate blockading force before the coast which was declared blockaded.

As was said in the Supreme Court of the United States in 1899 in the case of the Olinde Rodrigues:

But it can not be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position can not be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law. (174 U.S. 510.)

Declaration of London and blockade.—The provisions of the unratified Declaration of London, 1909, were agreed upon by representatives of the naval powers after full discussion. Article 1 of the Declaration of London stated,

A blockade must be limited to the ports and coasts belonging to or occupied by the enemy.

The purpose of this article was, viewing blockade as a war measure, to direct its consequences only against the enemy. The Declaration of London regarded the statement in the Declaration of Paris as the first necessary condition and as a matter upon which “for a long time there has been universal agreement.” Detailed
rules were prescribed for the establishing and raising of blockade.

Article 18 of the Declaration of London states that,

The blockading forces must not bar access to the ports or to the coasts of neutrals.

In the general report presented to the naval conference on behalf of the drafting committee, it was said of article 18,

This rule has been thought necessary for the better safeguarding of the commercial interests of neutral countries; it completes Article 1, according to which a blockade must be limited to the ports and coasts of the enemy, which implies that, since it is an operation of war, it should not be directed against a neutral port, in spite of the interest that a belligerent may have in it because of the part played by that neutral port in supplying his adversary. (1909 Naval War College, International Law Topics, p. 53.)

During the wars between 1909 and 1914 the provisions of the Declaration of London in regard to blockade were followed.

During the early days of the World War there were some slight changes in the provisions in regard to presumption of knowledge of blockade. In the areas outside of Western Europe the blockade was declared with the understood respect for ordinary rules.

American views.—Early in the World War controversies arose in regard to the use of ships in the neighborhood of the North Sea. Great Britain and Germany particularly argued with neutrals in regard to violation of neutral rights. The Government of the United States proposed adherence to the Declaration of London, but this was not adopted. The Government of the United States also protested against the extension of interference with American trade and British Orders in Council were mentioned in communications from the Department of State as early as September 29, 1914, as menacing "the commercial rights of the United States as a neutral, in violation of the generally accepted rules of interna-
tional law.” (1914 U.S. Foreign Relations, Supplement 234.) Later in referring to British and French declarations as to retaliation upon neutral commerce with Germany, the Secretary of State of the United States said on March 5, 1915,

While it appears that the intention is to interfere with and take into custody all ships both outgoing and incoming trading with Germany, which is in effect a blockade of German ports, the rule of blockade, that a ship attempting to enter or leave a German port regardless of character of its cargo may be condemned, is not asserted.

The language of the declaration is: “the British and French Governments will, therefore, hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation.”

The first sentence claims a right pertaining only to a state of blockade. The last sentence proposes a treatment of ships and cargoes as if no blockade existed. The two together present a proposed course of action previously unknown to international law.

As a consequence neutrals have no standard by which to measure their rights or to avoid danger to their ships and cargoes. The paradoxical situation thus created should be changed and the declaring powers ought to assert whether they rely upon the rules governing a blockade or the rules applicable when no blockade exists. (Ibid., 1915, Supplement, 132.)

World War discussions.—On August 20, 1914, a British Order in Council announced that the British, French, and Russian naval forces would, as affects neutral ships and commerce, conduct the war on similar principles. So far as practicable they would act in accordance with the provisions of the Declaration of London. In addition to exchanges in the provisions in regard to contraband, these states made some modifications as to destination of cargo and presumption of knowledge of blockade. The Government of the United States had made an effort to have the Declaration of London accepted without amendment and the Central Powers had expressed a favorable attitude toward this action.
In a note of September 26, 1914, the United States said of the Declaration of London:

As might be expected in a settlement of divergent views and practices by mutual concession the Declaration of London contains provisions both advantageous and disadvantageous to the respective interests of neutrals and belligerents. But it is now proposed by Great Britain to retain all the provisions favorable to belligerents and to recast other provisions so that they will be less favorable to neutral interests. The result is a set of rules which limits neutrals' rights far more than does the declaration itself treated as a whole. War, in any event, bears heavily upon a neutral nation. The interruption of its commerce and the limitations placed upon its trade are sufficiently burdensome under the rules of the Declaration of London. In consenting to those rules the Government of the United States made great concessions on its part and it does not feel that it can, in justice to its own people, go further. It cannot consent to the retention of a part of this compromise settlement and to the rejection of another part. The adoption of the declaration so modified is contrary to the customary procedure incident to compromise settlements, to the express provisions of the declaration itself, and to the spirit which induced its signature. (1914 U.S. Foreign Relations, Supplement, p. 228.)

The British additions and modifications greatly enlarged the Declaration of London presumption as to destination and would, according to the American note, give to Great Britain "the advantages of an established blockade without the necessity of maintaining it with an adequate naval force. The effect of this asserted right suggests the result which was sought by the so-called 'paper blockades' which have been discredited for a century, and were repudiated by the Declaration of Paris." (Ibid, p. 229.)

In this strong note of September 26, 1914, the United States further says,

Finally this Government considers that the Declaration of London, as changed by the order in council, would result in such an interference with the customary rights of neutral commerce that the United States could not assent to it or submit to its enforcement, for the reason that to recognize it as a measure of the neutral rights of the United States would, in the opinion of this
Government, be a manifest failure on its part to safeguard the interests of American citizens engaged in legitimate traffic with the subjects of belligerent and neutral nations.

In view of these considerations this Government is obliged to inform the Government of His Britannic Majesty that the United States would be unable to accept the declaration as thus modified though all the belligerents should concur in the modifications suggested by Great Britain. The Government of the United States, therefore, reserves all the rights which it has under the law of nations in relation to any losses or damages which may occur by reason of captures or condemnations made by the Government of Great Britain under the provisions of the Declaration of London as modified by the order in council of August 20, 1914. (Ibid., p. 231.)

In the British note of August 22, 1914, referring to the Order in Council of August 20, there had been the statement,

The peculiar conditions in the present war due to the fact that neutral ports such as Rotterdam are the chief means of access to a large part of Germany and that exceptional measures have been taken in the enemy country for the control by the Government of the entire supply of foodstuffs have convinced His Majesty's Government that modifications are required in the applications of Articles 34 and 35 of the declaration. These modifications are contained in paragraphs 3 and 5 of the accompanying order-in-council. (Ibid., p. 219.)

Paragraphs 3 and 5 here mentioned are as follows:

(3) The destination referred to in Article 33 [use of the armed forces or of a government department] may be inferred from any sufficient evidence, and (in addition to [the] presumption laid down in Article 34) shall be presumed to exist if the goods are consigned to or for an agent of the enemy state or to or for a merchant or other person under the control of the authorities of the enemy state. * * *

(5) Notwithstanding the provisions of Article 35 [ship's papers conclusive proof of voyage and port of discharge except when off course] of the said declaration, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture, to whatever port the vessel is bound and at whatever port the cargo is to be discharged. (Ibid., p. 220.)

The Acting Secretary of State Lansing also said in the note of September 26, 1914, in regard to interference with
commerce to a neutral port, such as Rotterdam, mentioned in the British memorandum,

Furthermore, if the modifications were acceptable to this Government, it would be unwilling, by accepting them, to prejudice the rights of the Netherlands, the other signatory of the declaration neutral in the present war, whose interests, as the memorandum of the Foreign Office discloses, will be vitally affected by the changes proposed. (Ibid., p. 231.)

The same matter received further consideration in an interview between the American Ambassador and the British Foreign Secretary.

The British purpose he went on to say was to prevent the enemy from receiving food and materials for military use and nothing more. I explained that the people of the United States had a trade with Holland apart from supplies and materials meant for Germany and that our Government could not be expected to see that sacrificed or interfered with. (Ibid., p. 233.)

Further correspondence expressed the American desire that there should be the minimum interference with neutral commerce and that the accepted principles of international law should be observed. The British Government replied to the effect that,

We [the British Government] had only two objects in our proclamations: To restrict supplies for German army and to restrict supply to Germany of materials essential for making of munitions of war. We wished to attain these objects with the minimum of interference with the United States and other neutral commerce. (Ibid., p. 237.)

After much more correspondence and proposals and counterproposals in regard to the Declaration of London, the Acting Secretary of State withdrew the suggestion that the Declaration of London be a temporary code of naval warfare and said,

this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London; and that this Government reserves to itself the right to enter a protest or demand in each case in which those rights
and duties so defined are violated or their free exercise interfered with by the authorities of His Britannic Majesty's Government. (Ibid, p. 258.)

The British Order in Council of March 11, 1915, clearly stated to be in reprisal against the German declaration of the war zone about the United Kingdom, was considered by some as in effect a blockade, but its provisions were quite unlike those establishing a blockade and involved consequences far in excess of blockade liabilities. The Order in Council of February 16, 1917, supplemental to earlier orders gives an idea of the extent to which under reprisal measures neutrals were expected to tolerate interference with their commerce:

1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination and, if necessary, for adjudication before the Prize Court.

2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or Allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in Article I shall arise.

3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

4. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order. (Statutory Rules and Orders, 1917, p. 953.)

As is evident neutrals were also liable under accepted principles of international law.

None of the Orders in Council specifically used the word blockade though the aim was to prevent communication with the enemy.

In the British memorandum of February 20, 1915, it was said in justification of their action,
The Government of Great Britain have frankly declared, in concert with the Government of France, their intention to meet the German attempt to stop all supplies of every kind from leaving or entering British or French ports by themselves stopping supplies going to or from Germany for this end. The British fleet has instituted a blockade, effectively controlling by cruiser "cordon" all passage to and from Germany by sea.

The difference between the two policies is, however, that while our object is the same as that of Germany, we propose to attain it without sacrificing neutral ships or non-combatant lives or inflicting upon neutrals the damage that must be entailed when a vessel and its cargo are sunk without notice, examination, or trial. I must emphasize again that this measure is a natural and necessary consequence of the unprecedented methods, repugnant to all law and morality, which have been described above, which Germany began to adopt at the very outset of the war, and the effects of which have been constantly accumulating.

(1915 U.S. Foreign Relations, Supplement, p. 142.)

This act departed from the accepted principles of international law in regard to blockades and later correspondence does not attempt to justify the Orders in Council on such grounds.

Proclaimed blockades in World War.—Blockades were regularly proclaimed in numerous instances during the early years of the World War.

Austria-Hungary proclaimed in 1914 "that from August 10, at noon, the coast of Montenegro will be held in a state of effective blockade by the Austro-Hungarian naval forces." (1917 Naval War College, International Law Documents, p. 53.)

The Japanese blockade of leased territory of Kiaochau was somewhat more detailed as to hours of grace for departure of vessels, etc.

The successive notifications in regard to the coast of the Cameroons show the regularity of certain British procedure.

FOREIGN OFFICE, April 24, 1915.

His Majesty's Government have decided to declare a blockade of the coast of the Cameroons as from midnight April 23-24. The blockade will extend from the entrance of the Akwayafe
PROCLAIMED BLOCKADES

River to Bimbia Creek, and from the Benge mouth of the Sanaga River to Campo.

Forty-eight hours' grace from the time of the commencement of the blockade will be given for the departure of neutral vessels from the blockaded area.

With reference to the notification, dated April 24, 1915, which appeared in the London Gazette of April 27 last, His Majesty's Government give notice that the blockade of the coast of Camerons has been raised so far as concerns the coast line from the Akwayafe River to Bimbia Creek. The blockade still remains in force from the Benge mouth of the Sanaga River to Campo.

Foreign Office, January 8, 1916.

With reference to the notification dated January 11, 1916, which appeared in the London Gazette of that date, His Majesty's Government give notice that the blockade of the coast of Camerons, which had been maintained in force from the Benge mouth of the Sanaga River to Campo, is completely raised as from midnight (Greenwich time), February 29—March 1. (Ibid., p. 135.)

The French notification of the blockade of Greece gives a detailed statement.

The Government of the French Republic, having agreed with its allies to declare a blockade of Greece, hereby gives notice of the conditions by which they will proceed.

The blockade is declared effective from December 8, 1916, at 8 o'clock in the morning.

The blockade extends to the coasts of Greece and comprises the islands of Eubee, Zarite, and Sainte-Maure from a point situated at 39°20' north, 20°20' east of Greenwich, to a point situated 39°50' north, 22°50' east of Greenwich, as well as the islands actually under the dependence or the occupation of the Royal Hellenic authorities.

Vessels of third powers finding themselves in blockaded ports can freely depart until December 10 at 8 o'clock in the morning.

The order has been given to the commander in chief of the blockading forces to proceed immediately to notify the local authorities of the present declaration.

Paris, December 7, 1916. (Ibid., p. 93.)

Export prohibitions and embargoes.—The extreme measures of the belligerents in regard to movement of goods in the World War led neutrals to prohibit the export of certain articles. Sometimes neutral prohibitions were resorted to in order to prevent undue depletion of
national stocks or resources and sometimes in order that foreign commerce might not be closed by belligerent restraints. Neutral states in close proximity to belligerent areas such as Denmark, Netherlands, Norway, Sweden, and Switzerland issued lists of articles of which export was prohibited. These lists varied in comprehensiveness. The lists of Greece and Spain were short. The list of Sweden was long. That of Switzerland enumerating more than 200 articles, e.g., "acetones" or categories, e.g., "telephone apparatus, as well as component parts thereof, notably microphones, field cables, insulating rubber, electric batteries; electric ignition plugs for automobiles" (1915 Naval War College, International Law Topics, p. 53), was about average in number of named articles or categories.

The belligerents placed restrictions or embargoes upon the export and transit of certain goods and blacklisted persons or firms so that the restraints on commerce became of serious consequence to many states. The British list was long and many firms were placed on the blacklist. The German list contained hundreds of articles arranged under careful classifications, as: I. Animals and animal products: (a) Living animals; (b) meat, meat products, fish (not live); (c) milk, butter, animal fats; (d) refuse, bristles, bones, etc. Under each of the above, detailed lists were given.

In spite of the self-imposed restrictions of neutral states, the belligerents continually added to the difficulties of carrying on neutral commerce.

Belligerent embargoes.—(a) British. There were several orders prohibiting certain exports from Great Britain during 1914 and 1915. These were issued under "The customs and inland revenue act, 1879", "The exportation of arms act, 1900", and "The customs exportation prohibition act, 1914." The proclamation of February 3, 1915, and the orders of March 2 and 18, of April 15, 21, and 26, of May 6 and 20, of June 2 and
24, and of July 8 and 19, were issued in pursuance of the above acts. In August 1914 it was deemed expedient to consolidate the proclamation and orders and a new proclamation to that end was made. The proclamation named goods in three categories: (a) exportation prohibited to all destinations, (b) exportation prohibited to other than British possessions and protectorates, and (c) exportation prohibited to all foreign countries in Europe and on the Mediterranean and Black Seas other than France, Russia (except Baltic ports), Italy, Spain, and Portugal.

(b) German. Under General Imperial Order of July 31, 1914, embargoes were placed on exportation, transit, and carriage of arms, ammunition, powder, etc. A long list of prohibited exports was published and to this articles were added by supplementary lists. This list became sufficiently comprehensive to include floating docks, truffles, and broccoli. No distinction was made as to destination in the German list.

It might be argued that the belligerents prohibited the export of the articles named in their lists because these articles were essential for war purposes or needed for the war in progress. If this was the case, the list issued by one belligerent might be regarded by the other belligerent as the basis for the enumeration of articles which it would proclaim contraband and it would be difficult of a neutral to maintain that these articles which the belligerent had itself declared thus essential might not be placed in the list of contraband.

Retaliation.—During the early days of the World War, action not sanctioned by international law but under Orders in Council was not held in British courts as conclusive against neutrals. In the decision in the case of the Zamora in 1916 it was said, however:

A prize court must, of course, deal judicially with all questions which came before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.
In the second place, the law which the prize court was to administer was not the national, or, as it was sometimes called, the municipal law, but the law of nations—in other words, international law. It was worth while dwelling for a moment on that distinction. Of course, the prize court was a municipal court and its decrees and orders owed their validity to municipal law. The law which it enforced might, therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law was well defined. A court which administered municipal law was bound by and gave effect to the law as laid down by the sovereign State which called it into being. It need inquire only what that law was, but a court which administered international law must ascertain and give effect to a law which was not laid down by any particular State, but originated in the practice and usage long observed by civilized nations in their relations with each other or in express international agreement.

The fact, however, that the prize courts in this country would be bound by acts of the imperial legislature afforded no ground for arguing that they were bound by the executive orders of the King in council.

An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. (1916 A.C. 77; 1922 Naval War College, International Law Documents, p. 126.)

While the right of retaliation as against an enemy may depend upon the action of the enemy, the justification of retaliation toward an enemy does not create new rights for either belligerent as regard neutrals. The degree of retaliation as regards the offending belligerent will naturally depend upon the character of the act against which retaliatory measures are instituted. The contention sometimes advanced that one belligerent may proportion his retaliatory measures so as to remedy evils to which neutrals may have been or may later be subjected presumes that this belligerent is defending or
maintaining neutral rights which is not within the sphere of lawful belligerent action and even might give grounds for the other belligerent to claim a nonneutral relation between its opponent and the protected neutral. There may be a wide divergence of interpretation between neutrals and belligerents as to their respective rights. It is entirely within the competence of a neutral to determine what action it may take to maintain its rights and not for one of the belligerents to take upon itself the definition and defense of assumed neutral rights under a plea of retaliation.

The neutral is, of course, liable to such inconvenience and restraint as may be incidental to the exercise of proper retaliatory action aimed directly at one belligerent by the other, but retaliatory measures should not be aimed directly or indirectly at neutrals.

To argue that one belligerent may be justified in interfering with neutral rights under retaliatory measures to secure the common good is to prejudge the merits of the contest or to affirm as usually is the case of each belligerent that its cause is the just cause.

Retaliatior measures, 1914.—The German proclamation of February 4, 1915, declared that after February 18 the waters surrounding Great Britain and Ireland and the waters of the English Channel would be a war zone within which all enemy merchant vessels would be destroyed and within which neutral vessels expose themselves to danger. The American Secretary of State viewed the act of Germany with "grave concern" and said on February 10,

It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly
determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. (1915 U.S. Foreign Relations, Supplement, p. 98.)

The German Embassy in Washington had on February 7 transmitted to the Secretary of State a "Memorandum of the German Government concerning retaliation against Great Britain's illegal interference with trade between neutrals and Germany" in which mention was made of the British disregard of the Declaration of Paris and of the Declaration of London.

This introduction of the idea of retaliation into the relations between the belligerents would threaten the rights of neutrals. If the neutrals were weak, vacillating, or hesitating in maintaining their rights, the retaliatory acts of belligerents would more and more impinge upon neutral rights. The belligerents might even argue that as neutral rights had been generally admitted as equable as regards belligerents and neutrals on the supposition that they would be maintained, any failure to maintain these rights as against one belligerent would be an act in favor of that belligerent. Indeed during the World War each belligerent protested the failure of the United States to insist upon its neutral rights which according to the protests had been disregarded by the other belligerent.

Germany in supporting the establishing of the war zone about Great Britain and Ireland and in the English Channel, in a note of February 16, 1915, said,

Germany is to all intents and purposes cut off from oversea supplies with the toleration, tacit or protesting, of the neutrals regardless of whether it is a question of goods which are absolute contraband or only conditional contraband or not contraband at all, following the law generally recognized before the outbreak of the war. On the other hand England with the indulgence of neutral governments is not only being provided with such goods as are not contraband or merely conditional contraband, namely, food-
stuffs, raw material, *et cetera*, although these are treated by England when Germany is in question as absolute contraband, but also with goods which have been regularly and unquestionably acknowledged to be absolute contraband. The German Government believe that they are obliged to point out very particularly and with the greatest emphasis, that a trade in arms exists between American manufacturers and Germany's enemies which is estimated at many hundred million marks.

The German Government have given due recognition to the fact that as a matter of form the exercise of rights and the toleration of wrong on the part of neutrals is limited by their pleasure alone and involves no formal breach of neutrality. The German Government have not in consequence made any charge of formal breach of neutrality. The German Government can not, however, do otherwise, especially in the interest of absolute clearness in the relations between the two countries, than to emphasize that they, in common with the public opinion in Germany, feel themselves placed at a great disadvantage through the fact that the neutral powers have hitherto achieved no success or only an unmeaning success in their assertion of the right to trade with Germany, acknowledged to be legitimate by international law, whereas they make unlimited use of their right to tolerate trade in contraband with England and our other enemies. Conceded that it is the formal right of neutrals not to protect their legitimate trade with Germany and even to allow themselves knowingly and willingly to be induced by England to restrict such trade, it is on the other hand not less their good right, although unfortunately not exercised, to stop trade in contraband, especially the trade in arms, with Germany's enemies. * * *

The German Government repeat that in the scrupulous consideration for neutrals hitherto practised by them they have determined upon the measures planned only under the strongest compulsion of national self-preservation. Should the American Government at the eleventh hour succeed in removing, by virtue of the weight which they have the right and ability to throw into the scales of the fate of peoples, the reasons which have made it the imperative duty of the German Government to take the action indicated, should the American Government in particular find a way to bring about the observation of the Declaration of London on the part of the powers at war with Germany and thereby to render possible for Germany the legitimate supply of foodstuffs and industrial raw materials, the German Government would recognize this as a service which could not be too
highly estimated in favor of more humane conduct of war and would gladly draw the necessary conclusions from the new situation thus created. (Ibid. p. 113.)

Pages of somewhat similar correspondence brought replies and counter replies from various neutrals and belligerents, but little in the way of observance of the accepted laws of maritime warfare.

The armed neutralities of 1780 and 1800 as well as the neutrality of the United States in the last decade of the eighteenth century and others showed that some means other than note writing might be essential to preservation of neutral rights. Switzerland took such means for safeguarding its territorial and aerial jurisdiction from invasion. The Netherlands extended protection also to its maritime jurisdiction. The Hague Conventions, as article 10, Convention V, 1907, recognize the possibility that neutrals may be called upon to maintain their rights, and this article states,

The fact of a neutral Power repelling even by force, attempts to violate its neutrality cannot be regarded as a hostile act.

Summary.—Modern conditions, as shown in the many and lengthy communications during the World War, have changed the ideas as to the actual conduct of war.

As to contraband, it has become increasingly difficult to employ intelligently such categories as contraband by nature because some article which by nature is specially essential to the life of a population at peace may be even absolutely essential to the state forces in time of war. A new invention or discovery during war may transform a category of articles, which at the beginning of the war were solely of use for the peaceful population, into essential war material. The list of such articles should ordinarily be determined by the belligerent and each belligerent would normally expect that the other might include in his contraband list any article included in the list of the opponent. There is also evi-
dent in modern times the influence of the unfavorable attitude which one or more neutral states may take toward a contraband list which does not bear the marks of military need justifying interference with neutral goods.

There is one category of goods the exemption from capture of which is generally recognized. That is, articles serving exclusively for the care of the sick and wounded. It is for the mutual advantage of both belligerents that such supplies be abundant.

As to blockade, it may be sufficient to repeat what was said in article 18, and the comment upon that article, of the Declaration of London:

The blockading forces must not bar access to the ports or to the coasts of neutrals. (1909 Naval War College, International Law Topics, p. 53.)

World War practice and the general opinion of writers does not afford sanction to the claim of a right of vessels to pass through a neutral river to a belligerent port. The fluvial and maritime navigation of a neutral state is within the jurisdiction of that state and not subject to regulation by a belligerent. Outside of neutral jurisdiction the belligerent may act in accord with the laws of war. Belligerent forces may, of course, seize outside of neutral jurisdiction vessels having a belligerent destination or having on board goods bound for a belligerent. Such vessels in Situation I (b) would not, when brought before a prize court, be liable for penalties under the laws of blockade.

SOLUTION

(a) State X may declare all distinction between absolute and conditional contraband abolished, but this does not make all goods contraband nor does it give to state X a right to treat all articles bound for Y as contraband.
(b) State Y may not lawfully maintain a blockade of the ports of state X to which there is access only through a navigable river of neutral state D, nor may state Y prevent vessels from entering the river Dana, though it may seize vessels outside neutral jurisdiction when transporting prohibited goods having an ultimate enemy destination.