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International Law Situations

With Solutions and Notes

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## SITUATION I

### BELLIGERENTS IN NEUTRAL WATERS

States X and Y are at war. Other states are neutral. There is a condition of political turmoil in state B, and the local authorities are weak and incapable of enforcing order within the territory of B.

(a) A cruiser of X, the *Xane*, pursues a merchant vessel of Y, the *Young*, into a port of B. What action may it take there?

(b) What action might be taken if the pursued vessel were a vessel of war of state Y, the *Yarrow*?

(c) What action should the *Xane* take if it learns that a radio station belonging to state B is transmitting military messages for the *Yarrow*?

### SOLUTION

(a) The *Xane* should take no action against the *Young* merely because the *Young* has entered the port of B. In case the *Xane* is convinced that the *Young* is abusing its privileges in B because of the weakness of the local authorities, the *Xane* may visit and search the *Young* as a basis for determining subsequent action.

(b) If the *Yarrow* remains in port more than 24 hours, unless for the lawful taking on of coal or supplies or making repairs to render the ship seaworthy, the commander of the *Xane* may request the authorities of state B to intern the *Yarrow*.

(c) The commander of the *Xane* should protest against military use of radio; and if no competent local authority is present, should take such measures as may be least arbitrary to prevent its use.

## NOTES

*Belligerents in neutral jurisdiction.*—In general the action of belligerents within neutral jurisdiction has year by year become more and more restricted. New and varied conditions, new instruments and agencies of warfare, and other changes have given rise to problems for which conventions and regulations have endeavored to provide.

It is now generally admitted that a neutral should not permit its territory to be used as a base by a belligerent, but it is not always clear as to what constitutes such use and illustrations of this fact may be found in practically every modern war.

As a state is, in consequence of the allegiance of its subjects, under a degree of responsibility for their acts, these acts therefore must be supervised within and to a degree outside its jurisdiction.

*Early American attitude.*—The United States was early confronted with conditions which required that the position of the Government be defined. The acts of M. Genet made some declaration of policy necessary. Washington issued a proclamation on April 22, 1793, stating that,

Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other; and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those Powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition:

And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers, or by carrying to any of them those articles which are deemed contra-

band by the *modern usage* of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them. (1 Amer. State Papers, For. Rel., p. 140.)

This proclamation showed a disposition to keep the conduct of citizens of the United States clearly within what was at that time the unquestioned boundaries of proper neutral conduct. The action of belligerents within American jurisdiction gave rise to controversy and the Cabinet drew up a set of regulations in August 1793, as follows:

RULES ADOPTED BY THE CABINET AS TO THE EQUIPMENT OF VESSELS  
IN THE PORTS OF THE UNITED STATES BY BELLIGERENT POWERS,  
AND PROCEEDINGS ON THE CONDUCT OF THE FRENCH MINISTER.

AUGUST 3D, 1793.

1. The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service offensive or defensive is deemed unlawful.

2. Equipments of merchant vessels by either of the belligerent parties, in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

3. Equipments, in the ports of the United States, of vessels of war in the immediate service of the government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful; except those which shall have made prize of the subjects, people, or property of France, coming with their prizes into the ports of the United States, pursuant to the seventeenth article of our treaty of amity and commerce with France.

4. Equipments in the ports of the United States, by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall be made prize, &c.

5. Equipments of any of the vessels of France in the ports of the United States, which are doubtful in their nature, as being applicable to commerce or war, are deemed lawful.

6. Equipments of every kind in the ports of the United States, of privateers of the powers at war with France, are deemed lawful [unlawful].

7. Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful; except those stranded or wrecked, as mentioned in the eighteenth article of our treaty with France, the sixteenth of our treaty with the United Netherlands, the ninth of our treaty with Prussia; and except those mentioned in the nineteenth article of our treaty with France, the seventeenth of our treaty with the United Netherlands, the eighteenth of our treaty with Prussia.

8. Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist their own subjects or citizens, not being inhabitants of the United States; except privateers of the powers at war with France, and except those vessels which shall have made prize, &c.

The foregoing rules having been considered by us at several meetings, and being now unanimously approved, they are submitted to the President of the United States.

THOMAS JEFFERSON.  
ALEXANDER HAMILTON.  
HENRY KNOX.  
EDMUND RANDOLPH.

(7 Moore, International Law Digest, p. 891.)

Randolph, Secretary of State, in April 1795 sent to the Government of the several states the following circular instructions:

As it is contrary to the law of nations that any of the belligerent powers should commit hostility on the waters which are subject to the exclusive jurisdiction of the United States, so ought not the ships of war, belonging to any belligerent power, to take a *station in those waters in order to carry on hostile expeditions from thence*. I do myself the honor, therefore, of requesting of your excellency, in the name of the President of the United States, that, as often as a fleet, squadron, or ship, of any belligerent nation, shall clearly and unequivocally use the rivers, or other waters of ----- as a station, in order to carry on hostile expeditions from thence, you will cause to be notified to the commander thereof that the President deems such conduct to be contrary to the rights of our neutrality; and that a demand of retribution will be urged upon their government for prizes which may be made in consequence thereof. A standing order to this effect may probably be advantageously placed in the hands

of some confidential officer of the militia, and I must entreat you to instruct him to write by the mail to this Department, immediately upon the happening of any case of the kind. (Ibid., 934.)

This circular he subsequently explained did—

not request that vessels, using our waters as a hostile *station* should be ordered to depart—

but—

only that notice should be given to them of our intended demand upon their Government. An order to depart would be inconsistent with the letter of the 9th of Sept. 1793, which concedes to them our ports as a refuge in case of necessity and a resort for comfort or convenience, without limiting the time of their stay. (Ibid., 935.)

*Essential idea of base.*—The essential idea in base seems to be a place supporting the military force of the belligerent. The support may be of varying character. It may be a place from which fuel is drawn, a place to which retreat may be made for security, a place in which repairs may be made, etc. There would seem therefore to be a reason for the consideration of the question as to when a neutral port may be said to become a base. By the generally accepted law of war and neutrality, vessels of war of a belligerent may take a specified amount of coal at certain intervals within neutral jurisdiction, repairs to a limited extent may be allowed, sojourn for a period is permitted, etc. To furnish fuel to belligerent vessels of war, to allow repairs, to permit sojourn beyond the prescribed limits, may render the neutral open to charges of nonfulfillment of neutral obligations.

The neutral by modern regulations is under obligations to use “due diligence” or “the means at its disposal to prevent” violations of its neutrality by vessels of war and such use of force may not be considered unfriendly.

*Essential idea of base as regards private vessels.*—Private vessels in the time of war as in the time of peace are generally free to enter and to use neutral ports. A private vessel may, however, be subject to the control of a belligerent that it may not, in an exceptional case, use a

neutral port in such manner as to constitute the port a base.

*Presumption as to base.*—The presumption would naturally be that a vessel of war of a belligerent would, if unrestrained, use a neutral port as a base. The presumption would be that a private vessel entering a neutral port would be entering for innocent purposes.

The obligation of the neutral state would arise immediately on the entrance of a vessel of war of a belligerent to guard against the use of the port as a base.

The obligation as to a private vessel would arise only when there was reasonable evidence of such use.

There is, therefore, a good ground for difference in the regulations as to private and other ships.

*Protection afforded by neutral jurisdiction.*—Within neutral jurisdiction no act of war should take place. Here, therefore, a belligerent vessel is more safe than on the high sea or within its own ports for in either of these areas the belligerent vessel may be attacked. The natural consequence is that the belligerents desire to make such use of neutral waters as is permitted. The neutral state, in order to maintain neutrality, is obliged to make known the rules of conduct which it proposes to follow. There have been so many changes in the method of warfare that early rules may not be sufficiently detailed to cover new conditions. The idea of the use of an area within neutral jurisdiction as a base has gradually developed, though there is not an agreement as to what constitutes a base.

*Case of the "Alabama."*—The idea of "base of operations" as set forth in The Hague Convention of 1907 was influenced by the statement set forth in the second rule of the Treaty of Washington of 1871, relating to the *Alabama* claims. These rules provide that a neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry

on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as a base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. [1 Moore, *International Arbitrations*, p. 550.]

It was admitted in the case for the United States that the sale of arms or of military supplies in the way of ordinary commerce was not prohibited, but the use of a neutral port should not be allowed for a belligerent "for the renewal or augmentation of such military supplies or arms for the naval operations referred to in the rule."

The case further stated that,

The ports or waters of the neutral are not to be made the base of naval operations by a belligerent. Vessels of war may come and go under such rules and regulations as the neutral may prescribe; food and the ordinary stores and supplies of a ship not of a warlike character may be furnished without question, in quantities necessary for immediate wants; the moderate hospitalities which do not infringe upon impartiality may be extended, but no act shall be done to make the neutral port a base of operations. Ammunition and military stores for cruisers cannot be obtained there; coal cannot be stored there for successive supplies to the same vessel, nor can it be furnished or obtained in such supplies; prizes cannot be brought there for condemnation. The repairs that humanity demands can be given, but no repairs should add to the strength or efficiency of a vessel beyond what is absolutely necessary to gain the nearest of its own ports. In the same sense are to be taken the clauses relating to the renewal or augmentation of military supplies or arms and the recruitment of men. As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent. If her magazine is supplied with powder, shot, or shells; if new guns are added to her armament; if pistols, or muskets, or cutlasses, or other implements of destruction are put on board; if men are recruited; even if, in these days when steam



is a power, an excessive supply of coal is put into her bunkers, the neutral will have failed in the performance of its duty. [Ibid., p. 574.]

The United States enumerated the certain rules which it claimed were established :

1. That it is the duty of a neutral to preserve strict and impartial neutrality as to both belligerents during hostilities.

2. That this obligation is independent of municipal law.

3. That a neutral is bound to enforce its municipal laws and its executive proclamations; and that a belligerent has the right to ask it to do so; and also the right to ask to have the powers conferred upon the neutral by law increased if found insufficient.

4. That a neutral is bound to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace.

5. That a neutral is bound to use like diligence to prevent the construction of such a vessel.

6. That a neutral is bound to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against any power with which it is at peace, such vessel having been specially adapted, in whole or in part, within its jurisdiction to warlike use.

7. That a neutral may not permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other.

8. That a neutral is bound to use due diligence in its ports or waters to prevent either belligerent from obtaining there a renewal or augmentation of military supplies, or arms for belligerent vessels, or the recruitment of men.

9. That when a neutral fails to use all the means in its power to prevent a breach of the neutrality of its soil or waters, in any of the foregoing respects, the neutral should make compensation for the injury resulting therefrom.

10. That this obligation is not discharged or arrested by the change of the offending vessel into a public man-of-war.

11. That this obligation is not discharged by a fraudulent attempt of the offending vessel to evade the provisions of a local municipal law.

12. That the offense will not be deposited so as to release the liability of the neutral, even by the entry of the offending vessel into a port of the belligerent, and there becoming a man-of-war, if any part of the original fraud continues to hang about the vessel. [Ibid., p. 579.]

The general propositions laid down in the British case are also very suggestive and may be cited in full:

1. A neutral government is bound to exercise due diligence, to the intent that no place within its territory be made use of by either belligerent as a base or point of departure for a military or naval expedition, or for hostilities by land or sea.

2. A neutral government is not, by force of the above-mentioned obligation or otherwise, bound to prevent or restrain the sale within its territory, to a belligerent, of articles contraband of war, or the manufacture within its territory of such articles to the order of a belligerent, or the delivery thereof within its territory to a belligerent purchaser, or the exportation of such articles from its territory for sale to, or for the use of, a belligerent.

3. Nor is a neutral government bound, by force of the above-mentioned obligation or otherwise, to prohibit or prevent vessels of war in the service of a belligerent from entering or remaining in its ports or waters, or from purchasing provisions, coal, or other supplies, or undergoing repairs therein; provided that the same facilities be accorded to both belligerents indifferently; and provided also that such vessels be not permitted to augment their military force, or increase or renew their supplies of arms or munitions of war, or of men, within the neutral territory.

4. The unlawful equipment, or augmentation of force, of a belligerent vessel within neutral waters being an offense against the neutral power, it is the right of the neutral power to release prizes taken by means or by the aid of such equipment or augmentation of force, if found within its jurisdiction.

5. It has been the practice of maritime powers, when at war, to treat as contraband of war vessels specially adapted for war-like use and found at sea under a neutral flag in course of transportation to a place possessed or occupied by a belligerent. Such vessels have been held liable to capture and condemnation as contraband on proof in each case that the destination of the ship was an enemy's port, and provided there were reasonable grounds for believing that she was intended to be sold or delivered to or for the use of the enemy.

6. Public ships of war in the service of a belligerent entering the ports or waters of a neutral are, by the practice of nations, exempt from the jurisdiction of a neutral power. To withdraw or refuse to recognize this exemption without previous notice, or without such notice to exert, or attempt to exert, jurisdiction over any such vessel, would be a violation of a common understanding, which all nations are bound by good faith to respect.

7. A vessel becomes a public ship of war by being armed and commissioned—that is to say, formally invested by order or under the authority of a government with the character of a ship employed in its naval service and forming part of its marine for purposes of war. There are no general rules which prescribe how, where, or in what form the commissioning must be effected so as to impress on the vessel the character of a public ship of war. What is essential is that the appointment of a designated officer to the charge and command of a ship likewise designated be made by the government, or the proper department of it, or under authority delegated by the government or department, and that the charge and command of the ship be taken by the officer so appointed. Customarily a ship is held to be commissioned when a commissioned officer appointed to her has gone on board of her and hoisted the colors appropriated to the military marine. A neutral power may indeed refuse to admit into its own ports or waters as a public ship of war any belligerent vessel not commissioned in a specified form or manner, as it may impose on such admission any other conditions at its pleasure, provided the refusal be applied to both belligerents indifferently; but this should not be done without reasonable notice.

8. The act of commissioning, by which a ship is invested with the character of a public ship of war, is, for that purpose, valid and conclusive, notwithstanding that the ship may have been at the time registered in a foreign country as a ship of that country, or may have been liable to process at the suit of a private claimant, or to arrest or forfeiture under the law of a private claimant, or to arrest or forfeiture under the law of a foreign state. The commissioning power, by commissioning her, incorporates her into its naval force; and by the same act which withdraws her from the operation of ordinary legal process assumes the responsibility for all existing claims which could otherwise have been enforced against her.

9. Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.

10. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circum-

stances, and can not be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens. That even this measure of obligation has not been recognized in practice might be clearly shown by reference to the laws in force in the principal countries of Europe and America. It would be enough, indeed, to refer to the history of some of these countries during recent periods for proof that great and enlightened states have not deemed themselves bound to exert the same vigilance and employ the same means of repression, when enterprises prepared within their own territories endangered the safety of neighboring states, as they would probably have exerted and employed had their own security been similarly imperiled.

In every country where the Executive is subject to the laws, foreign states have a right to expect—

(a) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the government is under an international obligation to repress.

(b) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the government exercised.

But foreign states have not a right to require, where such laws exist, that the Executive should overstep them in a particular case in order to prevent harm to foreign states or their citizens; nor that, in order to prevent harm to foreign states or their citizens, the Executive should act against the persons or property of individuals, unless upon evidence which would justify it in so acting if the interests to be protected were its own or those of its own citizens. Nor are the laws or the mode of judicial or administrative procedure which exist in one country to be applied as constituting a rule or standard of comparison for any other country. Thus, the rules which exist in Great Britain as to the admission and probative force of various kinds of testimony, the evidence necessary to be produced in certain cases, the questions proper to be tried by a jury, the functions of the Executive in regard to the prevention and prosecution of offenses, may differ, as the organization of the magistrature and the distribution of authority among central and local officers also differ, from those which exist in France, Germany, or Italy. Each of these countries has a right, as well in matters which concern foreign states or their citizens as in other matters, to administer and enforce its own laws in its own forum, and according to its own rules and modes of procedure; and foreign states cannot

justly complain of this unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilized nations to be of universal obligation.

In connection with the foregoing propositions are to be taken the three rules stated in Article VI. of the treaty, and accepted by Her Britannic Majesty's government in the manner expressed in that article." (Ibid. p. 599.)

The Institute of International Law, which in 1874 and in 1875 took into consideration the three rules of the Treaty of Washington of 1871, adopted in the meeting at The Hague in 1875 the following rules:

1. A neutral State which is desirous of remaining on terms of peace and friendship with the belligerents, and of enjoying the rights of neutrality, must abstain from taking any part whatever in the war, by lending military assistance to one or both of the belligerents, and exercise vigilance to prevent its territory from becoming a center of organization or point of departure for hostile expeditions against one or both of the belligerents.

2. Consequently the neutral State cannot, in any manner whatever, put at the disposal of any of the belligerent States, or sell to them, its war vessels or military transports, nor material from its arsenals or military stores, for the purpose of assisting it in prosecuting the war. Furthermore, the neutral State is bound to exercise vigilance to prevent other persons from placing war vessels at the disposal of any of the belligerent States in its ports or in those portions of the sea subject to its jurisdiction.

3. When the neutral State is aware of enterprises or acts of this kind, incompatible with neutrality, it is bound to take the necessary measures to prevent them, and to prosecute the individuals who violate the duties of neutrality, as the guilty parties.

4. Likewise, the neutral State should not permit nor suffer one of the belligerents to use its ports or waters as a naval base of operations against the other, or permit military transports to use its ports or waters to renew or add to their military supplies or arms, or to secure recruits.

5. The mere fact that a hostile act has been committed upon neutral territory is not sufficient to make the neutral State responsible. Before it can be admitted that it has violated its duty, it must be shown that there was a hostile intention (*dolus*), or manifest negligence (*culpa*).

6. Only in serious and urgent cases, and only during the existence of war, has the Power injured by a violation of neutral

duties the right to consider neutrality as abandoned and to resort to force to defend itself against the State which has violated neutrality.

In cases of a minor character, or where the matter is not urgent, or after the war is over, complaints of this character should be settled exclusively by arbitration.

7. The arbitral tribunal decides *ex æquo et bono* on the questions of damages which the neutral State should, by reason of its responsibility, pay to the injured State, either for the State itself, or for its nationals (*ressortissants*). (Resolutions of the Institute of International Law. Carnegie Endowment for International Peace, 1916, p. 12.)

*Argument of Sir Roundell Palmer.*—In the supplemental argument supporting the British case before the Geneva tribunal, Sir Roundell Palmer said of the expression “base of naval operations”, after citing various authors :

The phrase now in question is a short expression of the principle that neutral territory is not to be used as a place from which operations of naval warfare are to be carried into effect: whether by single ships, or by ships combined in expeditions. It expresses an accepted rule of international law. Any jurist who might have been asked whether neutral ports or waters might be used as a base for naval operations, would have replied that they might not; and he would have understood the words in the sense stated above.

The above citations and references furnish at the same time the necessary limitations under which the phrase is to be understood. None of these writers question—no writer of authority has ever questioned—that a belligerent cruiser might lawfully enter a neutral port, remain there, supply herself with provisions and other necessities, repair damages sustained from wear and tear, or in battle, replace (if a sailing-ship) her sails and rigging, renew (if a steamer) her stock of fuel, or repair her engines, repair both her steaming and her sailing power, if capable (as almost all ships of war now are) of navigating under sail and under steam, and then issue forth to continue her cruise, or (like the *Alabama* at Cherbourg) to attack an enemy. “Ils y sont admis à s’y procurer les vivres nécessaires et à y faire les réparations indispensables pour reprendre la mer *et se livrer de nouveau aux opérations de la guerre;*” (Ortolan: Heffter.) “Puis sortir librement pour aller livrer de nouveaux combats;” (Hautefeuille.) The connection between the act done within the neutral terri-

tory and the hostile operation which is actually performed out of it, must (to be within the prohibition) be "proximate"; that is, they must be connected directly and immediately with one another. In a case where a cruiser uses a neutral port to lie in wait for an enemy, or as a station from whence she may seize upon passing ships, the connection is proximate. But where a cruiser has obtained provisions, sail-cloth, fuel, a new mast, or a new boiler-plate in the neutral port, the connection between this and any subsequent capture she may make, is not "proximate", but (in the words of Lord Stowell, quoted by Kent, Wheaton, and other writers) "remote." The latter transaction is "universally tolerated"; the other universally forbidden.

It is evident that if this phrase, "base of operations", were to be taken in the wide and loose sense now contended for by the United States, it might be made to comprehend almost every possible case in which a belligerent cruiser had taken advantage of the ordinary hospitalities of a neutral port. It would be in the power of any belligerent to extend it almost indefinitely, so as to fasten unexpected liabilities on the neutral. (Papers relating to Treaty of Washington, vol. 3, p. 434.)

*Replies to Sir Roundell Palmer.*—In the reply of Mr. Evarts to the argument of Sir Roundell Palmer, Mr. Evarts admits that ordinary dealings in contraband in the way of regular commerce is not prohibited. He adds, however,

But whenever the neutral ports, places, and markets are really used as the bases of naval operations, when the circumstances show that resort and that relation and that direct and efficient contribution and that complicity and that origin and authorship, which exhibit the belligerent himself, drawing military supplies for the purpose of his naval operations from neutral ports, *that* is a use by a belligerent of neutral ports and waters as a base of his naval operations, and is prohibited by the second Rule of the Treaty. Undoubtedly the inculcation of a neutral for permitting this use turns upon the question whether due diligence has been used to prevent it.

The argument upon the other side is that the meaning of "the base of operations", as it has been understood in authorities relied upon by both nations, does not permit the resort to such neutral ports and waters for the purpose of specific hostile acts, but proceeds no further. The illustrative instances given by Lord Stowell or by Chancellor Kent in support of the rule are adduced as being the measure of the rule. These examples are of this

nature: A vessel cannot make an ambush for itself in neutral waters, cannot lie at the mouth of a neutral river to sally out to seize its prey, cannot lie within neutral waters and send its boats to make captures outside their limits. All these things are proscribed. But they are given as instances, not of *flagrant*, but of *incidental* and *limited* use. They are the cases that the commentators cite to show that even casual, temporary, and limited experiments of this kind are not allowed, and that they are followed by all the definite consequences of an offence to neutrality and of displeasure to a neutral, to wit, the resort by such neutral power to the necessary methods to punish and redress these violations of neutral territory. (Ibid., p. 460.)

Mr. Waite, replying to Sir Roundell Palmer's argument in regard to "base of operations", said:

It is not contended by the Counsel of the United States, that all supplies of coal in neutral ports to the ships of war of belligerents, are necessarily violations of neutrality, and, therefore, unlawful. It will be sufficient for the purposes of this controversy, if it shall be found that Great Britain *permitted* or *suffered* the insurgents "to make use of its ports or waters as the base of naval operations against the United States", and that the supplies of coal were obtained at such ports to facilitate belligerent operations.

1. All naval warfare must, of necessity, have upon land a "base of operations." To deprive a belligerent of that is equivalent to depriving him of the power to carry on such a warfare successfully for any great length of time. Without it he cannot maintain his ships upon the Ocean.

2. A "base of operations" for naval warfare is not alone, as seems to be contended by the distinguished Counsel of Great Britain, (sec. 3, chap. iii, of his argument,) "a place from which operations of naval warfare are to be carried into effect." It is not, of necessity, the place where the belligerent watches for, and from which he moves against, the enemy; but it is any place at which the necessary preparations for the warfare are made; any place from which ships, arms, ammunition, stores, equipment, or men are furnished, and to which the ships of the navy look for warlike supplies and for the means of effecting the necessary repairs. It is, in short, what its name implies—the support, the foundation, which upholds and sustains the operations of a naval war. (Ibid., p. 513.)

*Opinion of Hall.*—The opinion of Hall that "continued use is above all things the crucial test of a base"



can hardly be supported. Indeed, Hall's own position seems in some respects to be inconsistent with this doctrine. A somewhat extended quotation from Hall shows this:

An argument placed before the Tribunal of Arbitration at Geneva on behalf of the United States, though empty in the particular case to which it was applied, suggests that the essential elements of the definition of a base possess a wider scope than is usually given to them. In 1865 *The Shenandoah*, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United States, her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the government of that country that "the main operation of the naval warfare" of *The Shenandoah* having been accomplished by means of the coaling "and other refitment", Melbourne had been converted into her base of operations. The argument was unsound because continued use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable. [An illustration of this is afforded by the voyage of the Russian Fleet, which quitted Libau on October 15, 1904, and was annihilated at the battle of the Tsu-shima, on May 26, 1905. During the whole of this period the squadrons both of Admiral Rohjstventsky, which went round

the Cape, and of the divisional commanders, who used the Suez Canal, were entirely cut off from their base; they never touched Russian territory from the hour they left the home waters, and they were entirely dependent for their supplies of coal and of fresh provisions upon what they could obtain on the way. A series of floating coal depots, indeed, had been laid down in advance, but the operation of coaling seems to have taken place more than once within territorial waters, and it is obvious that without a user of neutral ports, which is in conflict with the principles laid down above, the expedition could only have accomplished a small portion of its journey. The prolonged stay of the same fleet both at Madagascar and in French Cochin China is difficult to reconcile with the obligations of neutrality.<sup>1]</sup>

That previously to the American Civil War neutral states were not affected by liability for acts done by a belligerent to a further point than that above indicated, there can be no question; but there is equally little question that opinion has moved onwards since that time and the law can hardly be said to have remained in its then state. Even during the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval.<sup>2</sup> When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are

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[<sup>1</sup> See Smith and Sibley, *International Law*, 460-2. By the Declaration of the Governor of Malta of August 1904, belligerent vessels proceeding to the seat of war, or to any positions on the line of route with the object of intercepting neutral vessels, were prohibited from making use of British territorial waters for the purpose of coaling. Vessels in distress were exempted. Similar instructions were sent to the Governors of the Colonies (*The Times*, 23d August 1904; Smith and Sibley, *op. cit.*, 135).]

<sup>2</sup> Earl Russell to the Lords Commissioners of the Admiralty, January 31, 1862. *State Papers*, 1871, lxxi. 167. Among late writers, Ortolan (ii. 286), Bluntschii (§773), and Heffter (§149) simply register the existing rule. Calvo (§2674) expresses his approval of the English regulations.

changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety, is to provide the belligerent with means of aggressive action; and consequently to violate the essential principles of neutrality. (Hall, *International Law*, 8th ed., p. 724.)

*Westlake's opinion, 1907.*—Writing in 1907 and taking into consideration The Hague Conventions, Westlake says in regard to the Rules of the Treaty of Washington, "Some doubt has been felt whether 'base of operations' in the second rule was not intended to refer to a base used for large or repeated operations, the departure of a single ship from a neutral port having been dealt with in the first rule. But the term 'base' does not in itself carry any implication as to the importance or number of the operations proceeding from it, and the principle is the same whether an expedition consists of a fleet or of a single ship. Nay, more, the principle is the same for expeditions starting from land or from sea frontiers. The departure of a force from either with belligerent intent is a matter which in every country is reserved for the public authority, and any private person or foreign government which presumes to dispatch a force with such an intent usurps that authority, and involves the territorial government which permits such a usurpation in the charge of participating in the war. We are then entitled to omit the word 'naval' from the second *Alabama* rule, and to expand 'ports and waters' into 'territory.' We have it thus as a general rule that 'a neutral government is bound not to permit either belligerent to make use of its territory as the base of operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men'." (*International Law*, part II; War, p. 192.)

*Opinion of Westlake, 1910.*—Some writers upon the subject of what constitutes a base have endeavored to introduce the idea of habitual or repeated use as a neces-

sary prerequisite. Professor Westlake in 1910 referred to this idea,

L'interdiction de la transformation de ports neutres en bases d'opérations navales n'exclut pas seulement une série de pareilles opérations. Une seule peut être assez importante pour compromettre la neutralité d'un port qui en a été la base. Ainsi un Etat qui entend maintenir une neutralité impartiale ne jouit que d'un champ très restreint pour fixer à son gré la durée et les conditions du séjour des navires belligérants. Encore ce champ peut-il lui être plutôt nuisible. Il se peut qu'il veuille se réserver une certaine liberté de choix dans le matière, moins pour pouvoir substituer une neutralité bienveillante à une neutralité impartiale, que pour montrer aux deux parties de petites complaisances et éviter des explications fâcheuses avec l'une et l'autre également. Mais, même dans ce cas, l'Etat neutre ferait mieux d'aider à l'établissement de règles qu'il pourrait invoquer comme justifiant sa conduite. Leur existence empêcherait de se produire mainte plainte au sujet de laquelle, une fois produite, les explications pourraient être strictement suffisantes mais laisser fermenter une amertume dans les rapports subséquents des puissances en question. (23 Annuaire de l'Institut de Droit International, p. 132.)

*Lawrence on base of operations.*—The change of attitude upon the idea of "base of operations" is evident in the opinion of Dr. Lawrence as set forth in the earlier and later editions of his book *Principles of International Law*. Referring to Hall's statement that "continued use is above all things the crucial test of a base," Lawrence says:

and it is difficult to resist the arguments in favor of this view, which applies to a fleet or a single ship as well as to an army or a detachment of troops. The drawing of supplies once or twice from a given point in the course of long-continued hostilities will not make it into a base. Constant communication must be kept up with it, from it a stream of supplies must flow, and the way to it must be open for trains and convoys to pass and repass. General Sherman, in his march through Georgia in the autumn of 1864, was said to have cut himself off from his base, because for several weeks he was out of reach of communications from his own side, nor could he draw stores and reinforcements from any point in the possession of the Northern forces. The fact that he took provisions and forage from place after place passed by his army on its march did not make any of them into a base of operations, because the element of continuous use was wanting.

Now if we apply those considerations to assist us in determining the sense to be put upon the phrase when we find it in a rule of International Law, we shall be forced to the conclusion that a belligerent does not make neutral territory or a neutral port into a base of operations by obtaining in it once or twice, or at infrequent intervals, such things as provisions, coals and naval stores. It is true that there are some articles so directly useful for purposes of hostility that to take even a single supply of them is forbidden. But these restraints are imposed by the law of nations directly and in so many words. They are not left to be derived by construction from an interpretation of general terms. Other matters must be referred to in the prohibition of the use of neutral territory as a base of operations. Undoubtedly it is aimed at the frequent drawing of stores and equipments from depots situated in neutral territory and always open to the belligerent for the replenishment of his magazines. Each separate supply may be innocent in itself, or at most of a doubtful nature. It is their constant recurrence which makes them illegal. (1895 edition, p. 504.)

In the 1910 edition of the same work Lawrence says:

“but it is difficult to resist the argument that, though continuous use does undoubtedly make a place from which supplies and reinforcements are drawn into a base, yet we cannot go so far as to say that without continuous use there can be no question of any violation of neutrality. It is quite possible, for instance, to conceive of a case where the admission into a neutral port of a warlike expedition for the purpose of refitment and coaling would enable it to strike a successful blow at some neighboring possession of the other belligerent. Surely in such circumstances the port would be a base of operations, even though the belligerent flag was seen in it on no other occasion during the war. The phrase we are considering is often used in connection with such matters as the supply of arms and ammunition, the recruitment of men, and the addition of equipments of war. But these things were prohibited definitely and directly long before the phrase was introduced, and it cannot be regarded as prohibiting them all over again indefinitely and indirectly. It is suggested that the words should be used to cover cases where acts which neutrals need not prohibit when done to a slight extent or for a short time, have taken place on such scale or for so long a time as to turn them into occurrences highly beneficial to the belligerent in pursuit of his warlike ends. For instance, a brief visit to a neutral port is quite allowable, but a lengthy stay for purposes of rest and refitment should be forbidden; or a prize may be taken in and kept for

a short period, but if the port is filled with prizes and they are left in safety there for an indefinite time, it should be regarded as a base of operations." 1910 edition (p. 618).

*General responsibilities.*—The responsibility for acts which are legitimate only in the time of war rests upon the belligerent who commits the act. The acts of war must be within the rules recognized as regulating the conduct of hostilities. For acts not conforming to these rules the one violating the rules assumes the responsibility. This principle is definitely announced in the first article of the Hague Convention concerning the Rights and Duties of Neutral Powers in Maritime War which states that "Belligerents are bound to respect the sovereign rights of neutral powers."

The responsibility for acts generally legitimate both in time of peace and in time of war is determined by the act and the conditions under which it occurs. Entrance of a belligerent vessel to a neutral port with the purpose of departing within the time fixed by the neutral state would be legitimate so far as the belligerent and neutral states are concerned and a sojourn for a longer period on account of stress of weather might be equally legitimate. Sojourn by a belligerent vessel for a period longer than that allowed and without such reason, if unknown to the neutral, would be a violation of neutrality and the responsibility would rest upon the belligerent. Such sojourn with the knowledge and consent of the neutral would transfer the responsibility to the neutral state.

For the commission of acts legitimate in the time of peace but not legitimate within neutral jurisdiction in time of war the neutral state is responsible so far as the manifest neglect of the neutral state to exercise "due diligence" makes the acts possible.

*Privileges and obligations of belligerents.*—The general practice of permitting ships of war of belligerents to enter neutral maritime jurisdiction gives to the vessels certain privileges. The permission to enter would

be an empty one if the vessel should be necessarily in a less favorable condition on departure than before entrance, i.e., if a vessel enters and is allowed to purchase no supplies whatever the stock would be depleted by the amount consumed during the sojourn. The privilege of entrance would seem reasonably to carry with it the privilege of maintaining the vessel in a state of general efficiency at least equal to that existing at the time of entrance. On the grounds of humanity and in accordance with precedents, still further privileges have ordinarily been afforded. These have varied at different times and in different states. The privileges granted must not be such as to involve participation in the hostilities for this would violate the accepted principles of lawful neutral conduct.

The belligerent is under obligation in turn to respect the neutral jurisdiction. As the neutral state admits the belligerent vessel as a privilege, the belligerent should avoid acts which would partake of the nature of hostilities or be in disregard of the regulations of the neutral.

*Duty of belligerents.*—The Hague Convention XIII, concerning the Rights and Duties of Neutral Powers in Maritime War places the primary obligation upon the belligerent. In article I is the following statement:

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral Powers which knowingly permitted them, a non-fulfilment of their neutrality.

This position sustains the contention that the burden of war should so far as possible be borne by the belligerent. The need for regulations had been seen in the diversity of practice in recent wars. The form of article I follows closely the draft of the proposition originally submitted by Great Britain.

*Admission of private vessels.*—The admission of private vessels is generally without restriction, save necessary port regulations. The admission of a private vessel is usually assumed to be of advantage to the state receiving the vessel and to the vessel. The right of entrance subject to necessary port regulations may be said to be admitted in the family of nations. The private vessel would be subject to such restrictions as may be established; otherwise the vessels would be unrestrained. These restrictions might be somewhat more numerous in time of war than in time of peace, but, in general, to private vessels acts not prohibited may be regarded as allowed.

*Exclusion of vessels of war.*—The admission of a belligerent vessel of war to a neutral port or waters is, in general, not for the benefit of the neutral state. It is now usual for a neutral state to prescribe the conditions of admission and of sojourn. In some instances belligerent ships of war are excluded as in the case of the Netherlands proclamation of July 30, 1914:

ARTICLE 2. As long as the Order mentioned in Article I (Royal Order of October 30, 1909) is not in force, it is forbidden to war ships or similar vessels of foreign powers to enter the Netherlands territorial waters from the sea or to remain therein.

Other states have made regulations varying in character. Nearly all states assume the right to exclude foreign vessels of war from certain maritime areas and to regulate the action of foreign vessels of war in all areas.

The acts which may be allowed to a belligerent vessel of war within neutral jurisdiction are usually enumerated and acts not permitted are generally regarded as prohibited.

As the basis of regulation of the admission and conduct of private vessels and vessels of war differs, the regulations would naturally differ. The regulations for the admission of vessels of war are now regarded as proceeding from a generally accepted right of absolute



prohibition. To endeavor to make the regulations for both classes of vessels the same would lead to unnecessary confusion.

Enumeration of acts which should be prohibited to belligerent vessels would be manifestly impossible as these will vary.

The general principle is that action friendly and not involving participation in war will be allowed and that the burden of the war should not be unnecessarily thrown upon the neutral. A neutral state is not obliged by the existence of war between two states with which it is on terms of friendship to break off relations with those states but merely to refrain from participation in the contest by aiding one against the other. As regards maritime relations aid would be afforded if the neutral acted in such manner as to increase the fighting efficiency of either belligerent or if it allowed either belligerent to use the protection of the neutral jurisdiction to this end. A neutral state is under no obligation to endeavor to prevent acts within its jurisdiction which if having any relation at all to hostilities is only remote, e.g., innocent passage through its waters. On the other hand the obligation is clear where relation to the hostilities is proximate, e.g., fitting out and arming a vessel. Action other than permitted within neutral jurisdiction would constitute a violation or neglect to fulfill the obligations of neutrality. If committed by the belligerent without the knowledge of or in a manner beyond the control of the neutral, the responsibility would rest primarily upon the belligerent. If committed with the knowledge of and within the power of control of the neutral, there would be a nonfulfillment of neutral obligations and the responsibility would rest on the neutral state.

*Ideas of neutral base.*—Article 5 of the Hague Convention concerning the Rights and Duties of Neutral Powers in Maritime War forbids belligerents the use of neutral ports or waters as a base of naval operations,

against their adversaries. This same article specifies one particular use, viz, the erection of radio stations or any apparatus for the purpose of communication with belligerent forces on land or sea. Article 8 places the neutral government under obligation to prevent the fitting out or arming of any vessel designed to carry on war against a state with which the neutral state is at peace. Article 12 provides against long sojourn of belligerent ships in neutral ports. Article 17 limits repairs to belligerent ships of war to those necessary to render the ships seaworthy. Article 19 forbids the use of neutral waters for replenishing or increasing war material, armament or crews. Limitations upon supplies of food and fuel are imposed in article 19, and article 20 provides as to the frequency of taking such supplies. Article 25 provides for the enforcement of these rights of a neutral state by "the means at its disposal." Such acts as those above mentioned have been named by some as constituting neutral waters as a base.

The opinion has been frequently expressed that *repeated* use is necessary to constitute a place within neutral jurisdiction a base of operations.

This opinion is expressed by certain of the writers on international law particularly during the last quarter of the nineteenth century. It also appears in some state regulations.

*Base in neutral jurisdiction, definition.*—Often the idea has been expressed that it is necessary that the use of a neutral port or waters be repeated use in order to constitute a base. It is evident that frequent or repeated use would be one of the clearest evidences of the use of a port as a base. A single use of a port might, however, constitute the port a base provided this use were in excess of or in contravention of permitted use. It is now generally admitted that a belligerent is bound not to use neutral waters except as permitted and that the neutral state is bound to use the means at its disposal.

to prevent such unpermitted use. These general rules indicate the principle which underlies the idea of base, viz, use beyond that permitted to the belligerent and giving rise to an obligation on the part of the neutral state to use the force at his disposal to prevent. It is not for the belligerent to judge what should be permitted; it is the duty of the belligerent to refrain from acts which are not permitted by the laws and proclamations of neutrality. It may be said that in time of war the use of neutral ports or waters other than permitted by laws and proclamations constitutes such ports or waters a base.

A base within neutral jurisdiction is therefore a place which is used by a belligerent in a manner not permitted by law.

*Franco-Prussian War, 1870.*—There was much uncertainty in 1870 in regard to the proper regulation of neutral conduct. The arbitral award in the *Alabama* case later threw some light upon certain points in regard to neutral obligation. The proclamation issued by President Grant in October 1870 was quite comprehensive and has been the basis of subsequent proclamations. (For full text see *International Law Situations, 1904, p. 68.*) The reasons why this proclamation was so definite in regard to the use of American ports and waters may in part be seen from the letter of the British Minister of October 10, 1870.

WASHINGTON, Oct. 10, 1870.

MY LORD: I have the honour to inclose a copy of a Proclamation which was signed by the President of the United States on the 8th instant, and published yesterday, as to the manner in which, with reference to the war now existing between France and the North German Confederation and its allies, the armed vessels of either belligerent, whether public ships or privateers, are to be treated in the ports of the United States. The contents of this Proclamation are in many respects similar to the orders recently given by Her Majesty's Government with respect to the treatment of such vessels in British ports.

It would seem that the issue of this document has been instigated by the recent conduct of French vessels of war in the neigh-

bourhood of the port of New York. It is said that French gunboats have lately moored about the entrance of that port, and have sometimes been anchored outside, within three miles of the coast, for the purpose of intercepting any North German vessels which might leave New York, and particularly the German steamers, which, in consequence of the termination of the blockade of the German ports, have renewed their voyages. On one occasion the French gunboat "Latouche Tréville" steamed up the Bay of New York, round the steamer "Hermann", went out again, and anchored outside.

A French frigate and two smaller vessels of war arrived lately at New London in Connecticut, on the pretext of requiring repairs; they remained there for some days, although they only had to repair some spars, which could have been done nearly as well at sea as on shore. From that point notice could be given of the sailing of German vessels from New York, and men-of-war stationed at New London could easily have intercepted them.

Mr. Fish told me that he had represented to the French Minister that, although he could not positively allege a violation of international law, he considered that the proceedings of belligerent vessels of war in hovering about the entrance of a neutral port, and, as it were, blockading it, and making the neighbourhood a station for their observations, were contrary to custom, and were unfriendly and uncourteous to the United States. Mr. Fish added that M. Berthémy had written upon the subject to the French Admiral, who, in reply, had denied the fact of hovering about the port, or of using the neighbourhood as a station of observation; but confessed that the proceeding of the "Latouche Tréville" in entering the port of New York for the purpose of observing the steamer "Hermann" was improper, and that her commander had consequently been severely reprovved.

My Prussian colleague, in expressing his satisfaction at the issue of the inclosed Proclamation, has made observations which lead me to suppose that he imagines that by its provisions merchantships are prohibited from exporting arms and ammunition from the ports of the United States for the use of the belligerents, and I fear that he may have telegraphed in that sense to his Government; but though I did not feel called upon to question Baron Gerolt's view of the case, I can find no expressions in the Proclamation to justify such an interpretation; indeed, Mr. Fish denies that it was intended to convey any such meaning.

I have, etc.

EDW. THORNTON.

(Das Staatsarchiv. vol. 20, p. 351.)

Secretary Fish, in a letter to Minister Washburne at Paris, said :

DEPARTMENT OF STATE,  
*Washington, October 4, 1870.*

This Government desires and intends to maintain a perfect and strict neutrality between the two powers now unfortunately engaged in war. It desires also to extend to both the manifestation of its friendly feeling in every possible way, and will allow to the vessels of war of each power, equally, the hospitality of its ports and harbors for all proper and friendly purposes.

But this hospitality is liable to abuse, and circumstances have arisen to give rise in the minds of some persons to the apprehension that attempts at such abuse have taken place.

I am not in possession of facts to justify me in saying that such has been the case, but I have deemed myself justified in calling the attention of M. Berthémy, the French representative at this capital, to the current rumors, sustained as they are by the presence of a number of French vessels upon the coast of the United States. These vessels have appeared at or near the entrance of the harbor of New York, off Sandy Hook; at the entrance of the Long Island Sound; at or near the entrance of the Chesapeake Bay. One or more is represented to have been anchored not far from Sandy Hook (the main entrance to New York Harbor,) and there is a difference of statement as to the precise distance at which she lay from the shore; some claiming that she was within a marine league. But of this there is no positive evidence. She has entered the port of New York (as claimed by some) for the purpose of watching a German steamer about to sail thence. Three of them have put into the harbor of New London (which looks out upon Long Island Sound, the eastern entrance to the New York Harbor) avowedly for some small repairs; one recently asked permission, which was granted, to make some repairs at the Norfolk navy yard, near the entrance of Chesapeake Bay.

All this may be consistent with an intention of perfect observance of the neutral character of our waters and jurisdiction, and with an entire absence of undertaking any hostile movement against the vessels of North Germany, from those waters, or that jurisdiction.

A large trade has been carried on from the ports of the United States, approached by the waters in which these vessels have thus appeared, by vessels belonging to North Germany.

The appearance of French vessels in these immediate neighborhoods, in such numbers and force, does not fail to excite the

alarm of these vessels, and must have the effect to a greater or less degree to diminish that trade.

The United States are not prepared at present to say that any actual violation of international law has been committed, or that the hospitality of these waters has been positively abused. But the hovering of the vessels of war of a belligerent on the coasts near the entrance of the principal ports of a friendly power does interfere with the trade of the friendly power.

The interruption of the regular communication with you, by reason of the investment of Paris, has led me to represent to M. Berthémy our views on this subject, and to say that, although the vessels of either belligerents may not actually shelter within the jurisdiction of the United States and proceed thence against the vessels of its enemy, this Government would regard as an unfriendly act the hovering of such vessels upon the coast of the United States, near to its shores, in the neighborhood of its ports, and in the track of the ordinary commerce of these ports, with intent to intercept the vessels of trade of its enemy.

I have requested M. Berthémy to make known these views to the French government, and to express the confident hope of the President that there may be no cause of complaint on the part of this Government by reason of any such hovering by the vessels of the French government.

You will be pleased to take an early opportunity to present the same view to the minister for foreign affairs, which you may do by reading to him this dispatch.

HAMILTON FISH.

(1870, Foreign Relations. U. S., p. 70.)

*Japanese neutrality, 1870.*—The fact that there were special privileges accorded to certain European powers in the maintenance of ships of war in Japanese waters for protection of Europeans in the years before 1870 gave rise to complications on the outbreak of war. Japan issued a proclamation of neutrality, as follows:

#### PROCLAMATION OF NEUTRALITY.

Information having been received that war has broken out between Prussia and France, his Majesty the Emperor has declared his resolve to maintain strict neutrality, and he has therefore directed that the following regulations shall be made known, not only at the open ports, but also at all towns on the sea-coast, so as to prevent untoward consequences.

ARTICLE I. The contending parties are not permitted to engage in hostilities in Japanese harbors or inland waters, or within a distance of three ri from land at any place, such being the distance to which a cannon ball can be thrown. Men-of-war or merchant vessels will, however, be allowed free passage as heretofore.

ARTICLE II. Any vessel belonging to either of the contending parties, whether men-of-war or merchant vessels, shall be impartially supplied with wood, water, and provisions at the open ports, or other sea-ports of Japan in the same way as notified before, and shall receive assistance in case of distress.

ARTICLE III. If ships of war belonging to both parties shall enter the same port, the ship belonging to one party will not be allowed to sail until twenty-four hours after the departure of the other.

ARTICLE IV. Some countries have troops stationed at one of the open ports, their men-of-war are allowed to anchor there, and a marine camp has been formed; but this permission has been granted solely for the ordinary protection of their subjects resident at the port in question, and not for any purpose connected with foreign wars. These quarters must not be used in furtherance of any expedition against the enemy, and unconnected with their ordinary use.

ARTICLE V. Japanese vessels are prohibited from carrying troops, arms, or munitions of war for the service of either of the hostile parties.

ARTICLE VI. All persons, with the exception of pilots, who shall take service on board of ships of war of either of the contending parties, will do so at their own risk and peril.

ARTICLE VII. The sale of prizes in a Japanese harbor is prohibited. In case, however, it should become necessary to dispose of a prize in a Japanese harbor, permission should be applied for, and question decided in consultation with the diplomatic representative of the nation to which the captor belongs.

ARTICLE VIII. With regard to other articles of import and export the same rules are to be observed as hitherto.

ARTICLE IX. In case any of the provisions of the above regulations which relate to foreigners should be infringed, steps should be taken to put a stop to such acts by application to the consul of the party concerned, if committed at the open ports. If representations to the consul are of no effect, application should be made to the Japanese men-of-war stationed there to take the necessary steps. If a breach of these regulations be committed at a non-treaty port, the local authorities should inform the authorities at the nearest open port, and also the Japanese men-of-war. In the case of remote places, notice should be sent direct to the war and foreign offices.

The above regulations must be carefully attended to by the authorities of the open ports, and of the seaboard Fu, Han, and Ken.

DAJOKWAN.

AUGUST, 1870.

(1870, Foreign Relations, U.S., p. 188.)

*Practice of intervention.*—During the period before 1830 there had been in general a favorable attitude toward intervention in affairs of weak states, and the more powerful states had found no difficulty in persuading themselves of the necessity for “interfering,” “intermeddling,” or intervening in the affairs of weaker states.

During the last 100 years there has been a growing opinion favorable to nonintervention, though Gericke (*De jure interventionis*), in 1834, looking back upon the period of 45 years since the French Revolution found ample examples supporting the view that intervention was the normal conduct in international relations.

There have been many interventions since 1834 in many parts of the world. The United States has frequently intervened for varying reasons, and in a single year in countries in the Mediterranean, South America, and the Pacific Ocean. Revolutions in less advanced states have been numerous and have made it necessary that the more powerful states protect their own citizens at least. The grounds of intervention have ranged from self-protection to so-called “treaty obligations.”

Early doctrines of intervention are being revived by modern propositions in regard to the maintenance of world peace. States outside a dispute are presuming to determine in advance and without invitation how the issue of the dispute shall be regarded. In some of these instances reversion to the attitude of 200 years ago seems to be prevalent.

Though the topic of intervention has been much discussed there are still wide differences of opinion as to whether a right of intervention can be maintained. The reason for some of the differences of opinion is the difference in defining intervention. Early definitions usually



regarded intervention as interference in the internal affairs of one state by another state, or the interference by a third state in the relations of two other states without the consent of either. Some later writers have employed the word to define interference which is primarily to secure observance of international obligations, thus transferring the ground from internal to external affairs. This would involve opposing or preventing action by a state which would imperil the rights of another state as a sovereign political unity. Others deny that such action on the part of a state as is essential to the maintenance of its independence or of the independence of another state in the community of nations is in any sense intervention, but affirm that this action is merely self-defense or maintenance of the obligations due to members of the community of nations among themselves. Such action is sometimes collective or, if not, is constructively in the nature of unselfish effort in behalf of the community. The growing interdependence of states as of individuals within states requires a greater degree of cooperation among states, and many modifications of the range of activities within which entire freedom may be exercised. These changes would not be extensions of the field of intervention but rather extension of the field within which each state may lawfully act and defend its right to act. The distinction between intervention and maintenance of rights is not always easy to make in practice. As the word intervention is used in time of peace, it seems, to indicate (1) interference by one state in the internal affairs of another, (2) interference by a state in the relations between two other states, and (3) measures taken by a state to maintain international rights or what it may claim to be international rights.

*Belligerent vessels and neutral ports.*—The entrance of armed forces of one state upon the land of another state has long been prohibited both in time of peace and in time of war. The entrance of naval forces of one state into the waters of another state in time of peace is

usually subjected to few restrictions and in time of war is ordinarily permitted under stated restrictions. It has been generally maintained that the belligerent should not throw upon a neutral, which desires to have no part in the war, burdens for the conduct of the war. This is evident in the first article of XIII Hague Convention, 1907, concerning the Rights and Duties of Neutral Powers in Naval War which states that "Belligerents are bound to respect the sovereign rights of neutral powers," and to refrain from all acts which if knowingly permitted by the neutral would constitute a nonfulfillment of its neutrality. The duty rests upon the belligerent and it is the right of the neutral to demand that the belligerent observe the obligations to which it is bound. This principle is international law as well as also explicitly set forth in the Convention.

The preamble of this Convention affirms that it is—

for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents.

Article 2 provides,

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Article 25 reciprocally places certain obligations upon the neutral, the performance of which under article 26 would not be considered unfriendly:

ARTICLE 25. A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.

ARTICLE 26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the Article relating thereto. (36 U.S.Stat., p. 2415.)

This XIII Hague Convention is one of rights and duties and an impartial application of the rules is implied.

One of the preliminary questions is whether belligerent ships of war should be allowed to enter neutral waters. This gives rise to the question as to what constitutes neutral waters. In a general way it may be said that the expression "neutral waters" is a term which covers all the maritime area over which the neutral state is entitled to exercise jurisdiction. This area would include the marginal sea as well as ports, roadsteads, and inland waters.

It is evident that the responsibility of a neutral state would differ in degree according to the area. It could be fairly affirmed that the responsibility within a port could be regarded as more complete than one on a remote coast or near the outer line of the marginal sea, a point which might not always be easy to determine.

Article 32 of the original British proposition at The Hague, 1907, aimed to recognize the difference of obligation by stating that the articles of the proposed rules should not be interpreted in such manner as to prohibit the simple passage of the ships of war or of auxiliary ships of a belligerent through neutral waters. In the discussion of this proposition the Turkish delegate said that his government could not sign an engagement which would limit its control of the Dardanelles and Bosphorus. There had previously been a proposition that straits connecting open seas should never be closed.

The Danish delegate explained his idea in regard to straits, saying:

The amendment which the Danish delegation has taken the liberty of proposing to Article 32 of the British project limits the simple right of passage of war-ships and auxiliary vessels of a belligerent to the territorial waters uniting two open seas.

The Danish delegation, in presenting this amendment, was inspired mainly by the following reasons:

Recognition of an unlimited simple right of passage for belligerent war-ships can hardly be reconciled with the neutral's right to close interior waters for the purpose of defending his neutrality—notably bodies of water with two entrances—which offer

a belligerent fleet special opportunities as a base of operations, as well as for certain acts that are unlawful in neutral waters.

In granting belligerents the simple right of passage through territorial waters, and at the same time allowing neutrals to prevent admission to these waters, we would be taking away with one hand what we had given with the other.

As the laying of submarine mines by neutrals comes within the jurisdiction of another Commission, I cannot enter into the details of that question.

I only want to bring out the connection between the two questions and the desirability of not restricting by convention the exercise of a neutral's sovereign rights over his territorial waters in such a way as to deprive him of the most effectual means he has of enforcing the important prescriptions of this same convention. (Proceedings of The Hague Peace Conferences, Carnegie Endowment for International Peace, vol. III, p. 599.)

The regulation finally took a purely negative form as article 10.

The neutrality of a Power is not affected by the mere passage through its territorial waters of ships of war or of prizes belonging to belligerents.

Such a regulation may still leave the neutral state free to determine what action would involve more than simple passage through neutral waters.

It is generally admitted that there will be maritime areas within which belligerent ships of war will not be allowed to pass. Such areas have been specified from time to time in neutrality proclamations or otherwise. There seems therefore to be a general tendency to admit in practice the principle that while the waters of a neutral state are usually open to belligerent ships of war certain areas may be closed by general proclamation or by notification at the place.

*Russo-Japanese War, 1905.*—During the Russo-Japanese War, 1904-05, there were many examples of acts by belligerents which under ordinary conditions would be regarded as in violation of neutrality. Belligerent acts in Korea and in Manchuria were in an area technically neutral.

Admiral Togo, of the Japanese Navy, reported as follows in regard to the Russian destroyer *Ryeshitelni* in the neutral port of Chefoo:

According to the report from Commander Fujimoto, Commander of the First Torpedo-destroyer Flotilla, regarding the capture of the Russian destroyer *Ryeshitelni* at Chefoo, the Japanese destroyers *Asashiwo* and *Kasumi*, under the command of Commander Fujimoto, were searching for the enemy's warships on the night of the 10th inst. when one of the latter was sighted steaming westward. Our destroyers at once pursued the enemy, but the latter disappeared from view in the darkness of the night. A further search the following day (the 11th inst.) revealed the fact that the enemy's vessel had taken refuge in Chefoo harbour. Our destroyers accordingly remained outside the neutral zone, and waited for the Russian warship; but the enemy did not come out from the harbour.

On entering the port on the night of the 11th inst., our destroyers ascertained that the enemy's warship was the destroyer *Ryeshitelni*. It was also found that she had not been disarmed, but had taken in coal, all the officers and men remaining on board. At 3 p.m. on the 12th inst., Lieutenant Terajima of the *Asashiwo*, accompanied by ten petty officers and men, was despatched on board the enemy's destroyer, for the purpose of informing the captain of the Russian destroyer that our vessels had traced and watched him, and that, as he had entered the harbour at 4 a.m. the previous day and had not yet left it, he was offered an alternative either to issue from the harbour in one hour or surrender, the refusal of which would result in our disposal of the Russian destroyer at our will. The enemy, however, not only refused our demand, under various pretexts, but inflicted outrages by force on our officers and men. All of the Russians then jumped into the sea, meanwhile blowing up the fore part of the ship, whereupon we at once captured the destroyer and left the harbour at 5.15 p.m. with the vessel in tow. A Russian on board was taken prisoner. (S. Takahashi, International Law applied to the Russo-Japanese War, p. 437.)

According to the opinion of Professor Takahashi, who had been legal adviser to the Japanese fleet in the Chino-Japanese War and later a member of the legal committee of the Department of Foreign Affairs, the action in the case of the *Ryeshitelni* was justified. He says:

In the presence of this clear and distinct invasion of the neutrality of China by Russia and the failure of China to take any steps to prevent an infringement of her neutrality, the Japanese Government were fully justified in adopting such measures of self-protection as might seem necessary to them. They could not say that the unlawful acts of Russia and the supineness of China, working together, should be permitted to operate to the prejudice of their rights and interests. It is not alone in the matter of the *Ryeshitelni* that there has been a violation of the neutrality of Chefoo. In installing a system of wireless telegraphy between Port Arthur and the Russian Consulate at Chefoo there was a no less flagrant disregard of China's neutrality, and notwithstanding the repeated protests of the Japanese Government, China permitted the system to continue in operation. The Japanese Government had every wish and intention to continue to respect the neutrality of China outside those regions occupied by Russia so long as Russia did the same. But it is hardly to be expected that they would allow their enemy to escape the consequence of the war by disregarding China's neutrality. (*Ibid.*, p. 441.)

*General discussion at The Hague, 1907.*—At the Hague Conference in 1907 the question of elaborating a convention relating to the conduct of ships of war in neutral ports was recognized as complex and difficult, but none the less essential. As the President of the committee, Count Tornielli, said:

It is indeed a useful thing to make certain common rules more precise, but only on condition that in seeking an agreement upon this subject the fact is not lost sight of that the legislative independence of the several countries must not be unduly hampered.

The logical deductions from the immutable principle of national sovereignty seem considerably to simplify our task. If they prevail, our only reply to the question that has been put to us could be included in four precepts, upon which it should not be difficult to reach an agreement.

These precepts may be formulated thus:

(1) Mutual recognition by the contracting Powers of their legislative independence in the matter of respect for neutrality.

(2) Impartial application to all belligerent parties of the laws which the several States have enacted.

(3) Mutual renunciation by neutrals of the right to introduce changes in their national laws in this respect while a state of war exists between two or more contracting Powers.

(4) Absolute duty of belligerents to respect the laws of neutrals.

I should like to see the work which we are about to undertake follow these lines. If we are able to advance a little in this direction, our time will not have been wasted and what we accomplish will be in the interest of progress. (Proceedings of the Hague Peace Conference, Carnegie Endowment for International Peace, vol. III, p. 573.)

The British delegate in presenting the somewhat elaborate set of rules in behalf of his Government, said:

My government has deemed it its duty to propose to the Conference the draft regulations which have been filed in its name, because it considers that it is of the utmost importance to define precisely the treatment which a neutral State may apply to belligerent vessels in its ports and territorial waters. We owe it to neutrals to indicate to what extent they will be permitted, in time of war, to give shelter to and to provision vessels of one of the belligerents without exposing themselves thereby to justifiable complaint on the part of the other belligerent. Likewise it is no more than just to state the treatment which belligerents will have the right to expect from neutrals. Uncertainty in this respect can only give rise to misunderstandings and disputes. Now, it is indisputable that uncertainty prevails with regard to this matter. We need only consult the texts to convince ourselves of this. Thus, to cite an instance, it is stated in a number of works on international law that the so-called 24-hour rule is universally recognized, while we know that several States do not recognize this rule, and do not consider themselves bound to observe it. (Ibid., p. 575.)

The Netherlands delegate pointed out the existing difficulties confronting a state having remote dependencies, saying:

The delegation of the Netherlands wishes to observe that the question which is on the day's order of business is of the utmost importance to its Government, which in recent wars has observed the most impartial neutrality, but which, because of the colonies that it possesses in different quarters of the world and of the numerous ports therein, has nevertheless been placed at times in a very embarrassing situation.

The Government of the Netherlands therefore greatly desires that all questions which may arise as a result of the stay of

belligerent warships in neutral ports and waters may henceforth be obviated by a common agreement, establishing a system sanctioned by the rules of conventional law.

Without taking a stand on all the questions that may come up in the course of our debates, I shall confine myself for the time being to a general observation. It would seem to me, first of all, whatever definitive system may be agreed upon, that the rules defining this system should be precise and clear and should not leave a loophole for any future ambiguity.

The neutral must know what he is expected to do. His freedom of action must not be restricted without legitimate cause. Belligerents must be guaranteed perfect equality of treatment. These are two cardinal rules which must serve as the basis of a just and equitable system. (*Ibid.*, p. 578.)

The Japanese delegate pointed out certain difficulties under the present conditions:

There are not at present clear and universally recognized rules governing the relations between neutrals and belligerents with regard to the questions that have been laid before us, and history teaches us that the divergent and frequently conflicting interpretations and practices adopted in the past by different countries have been one of the most fruitful causes of international irritation and recrimination. It would therefore be desirable to remove as far as possible the dangers arising from this state of affairs.

The peaceful acts of neutrals should be respected to the greatest possible extent and as far as is compatible with the recognized rights of belligerents and should be allowed to proceed without being disturbed by war; but in order to insure the result desired, neutrals should see to it, on their side, that their territories and territorial waters are not utilized by belligerents as bases for the carrying on of military enterprises, so as to furnish cause for complaint.

To further the cause of peace by warding off war, to prevent abuse of the hospitality of neutrals by drawing a clear distinction between permissible peaceful acts and prohibited military operations on the part of belligerents in neutral ports and waters, to discourage as much as possible the use of these neutral ports and waters for military purposes by means of restrictions acting in a way as automatic prohibitions, without affecting in any way whatsoever the right and privilege of using these ports and waters as places of refuge and for purely humanitarian purposes, to protect neutrals in the enjoyment of their rights and in the



fulfillment of their duties by specifically defining these rights and duties—such is the purpose of the Japanese proposal. (*Ibid.*, p. 579.)

Perhaps M. Louis Renault, the reporter of the subcommittee having in charge the question of belligerent vessels in neutral waters, would be considered as speaking with the most general knowledge. He gave careful consideration to all the proposals and said after the preparation of the questionnaire and in his capacity as a French delegate rather than as reporter.

The exercise of the neutral's right of sovereignty, whose source is the common law, must naturally be reconciled with observance by the neutral of the duty incumbent upon him not to take part in hostilities. Now, as a matter of fact, the positive law of nations, as it stands at present, allows neutral States great latitude in regulating the status of belligerent war-ships in neutral ports and waters. This latitude has resulted in giving rise to divergences in the laws of the various countries on the subject, which divergences show themselves in the declarations of neutrality promulgated by neutrals on the outbreak of war. And that is not all. There have been cases where the same country has not observed the same rules of neutrality in different wars; at times it has even happened that it has changed its rules during different phases of the same war. This shows the very great uncertainty there is on this subject, a very annoying uncertainty, causing misunderstandings, recriminations, and at times calculated to lead to disputes.

Again, it may happen that this or that rule may, under various circumstances, favor one of the belligerents, although it was not made in his behalf. Geographical or military circumstances may create a situation that is to his advantage, without there being any intention on the part of the neutral to favor him. The other belligerent naturally finds this consequence an annoyance and may even be led to lodge a complaint on that score.

From this point of view it would be very beneficial to settle upon uniform regulations which, as they would not emanate from any one State, would be observed the more willingly. This general regulation, which is so desirable, would have the effect of eliminating causes of complaint which might easily degenerate into disputes.

Such is the ideal, if we can hope to succeed in reaching an agreement upon all the points and in concluding a general Con-

vention. But if it were merely possible to reach an agreement upon a few rules, we would thereby have reduced the uncertainty and narrowed the field of possible disputes. It is proper to note, in this connection, that as regards the points upon which it has been impossible to reach an agreement, the fundamental principle would remain intact and the legislative bodies of the several States, as our President has pointed out, would retain all their rights. (Ibid., p. 581.)

The demand for some regulations which should be so far as possible uniform was quite general. The inclination of the Conference was in the main favorable to clear statements in the rules. Naturally it was not possible to reach agreement upon all topics.

*Report, Hague Conference, 1907.*—In the report of M. Louis Renault made to the Hague Peace Conference in 1907 upon the Convention concerning the Rights and Duties of Neutral Powers in Naval War, after commenting on the accepted principle that “The territory of neutral States is inviolable”, M. Renault says:

Generally speaking, it may be said belligerents should abstain from any act which, if it were tolerated by the neutral state, would constitute failure in its duties of neutrality. It is important, however, to say here that a neutral's duty is not necessarily measured by a belligerent's duty; and this is in harmony with the nature of the circumstances. An absolute obligation can be imposed upon a belligerent to refrain from certain acts in the waters of a neutral state; it is easy for it and in all cases possible to fulfill this obligation whether harbors or territorial waters are concerned. On the other hand, the neutral state cannot be obliged to prevent or check all the acts that a belligerent might do or wish to do, because very often the neutral state will not be in a position to fulfill such an obligation. It cannot know all that is happening in its waters and it cannot be in readiness to prevent it. The duty exists only to the degree that it can be known and discharged. (Proceedings of The Hague Peace Conferences, Carnegie Endowment for International Peace, vol. I, p. 291.)

The report prepared by Mr. Renault referring to article 5 which prohibits the use of neutral waters as a base of operations, and recognizing that this article is

based on the second rule of the Treaty of Washington, says:

While the principle is easily stated, its applications require much care. We limit ourselves to giving one example by prohibiting a belligerent to erect on neutral territory a wireless telegraphy station or any apparatus for the purpose of communicating with a belligerent force on land or sea. The same provision occurs in the draft Regulations respecting the rights and duties of neutral States in war on land. The two provisions correspond exactly, for communication may be made from neutral territory either with an army or with a fleet.

We cannot expect to prevent the captain of a belligerent ship from communicating with the inhabitants or the consul of his country, or from using telegraph or telephone cables of the neutral country. There is a formal provision to this effect in Article 8 of the draft regulations on land warfare already referred to. It was suggested that we forbid making a neutral port a place for *concentration* or *rendezvous*. But it is hard to define what this would mean, and it would be almost impossible for neutral States to deal with the intention which brings a belligerent vessel into their waters. The interest in this question will be greatly diminished by the fixing of the maximum number of belligerent ships that may stay in a port at the same time. (Ibid., p. 293.)

*The Tinos, 1917.*—The German vessel *Tinos* and other vessels seized in the waters of Greece in September 1916 were declared good prize by the French Court in November 1917. It was argued for the Germans that the waters of Greece were at the time of the seizure of the vessels neutral waters. The French court considered that Grecian territory had already been used by the German forces in contravention of the laws of neutrality and had in consequence become an area of hostilities and lost its neutral status as regards the specific seizures before the court.

Considérant, dans ces conditions, que, sans avoir à apprécier ici, du point de vue de la neutralité, l'attitude du gouvernement royal alors au pouvoir en Grèce, il suffit de constater qu'en fait la succession d'actes d'hostilités accomplis par les ennemis dans les eaux et le territoire de la Grèce a transformé ceux-ci en un théâtre de la guerre et leur a enlevé *de facto* le bénéfice d'une

neutralité que les navires ennemis prétendraient vainement invoquer aujourd' hui. (Journal Officiel, 9 January, 1918, 401.)

Cases are possible in which a part, or the whole of the territory of a neutral State falls within the region of war. These cases arise in wars in which such neutral territories are the very objects of the war, as were Korea (then an independent State) and the Chinese province of Manchuria in the Russo-Japanese War; or when a neutral State, either deliberately, or because it has not at its disposal sufficiently strong naval forces, does not prevent a belligerent from committing hostilities in its territorial waters and making them a basis for military operations and preparations. These territorial waters become in consequence a part of the region of war, and the other belligerent may also commit hostilities there. (2 Oppenheim, International Law, 4th ed., p. 146.)

*Disturbed conditions in Danzig, 1931.*—For several years the use of the port of Danzig by Polish warships had been a matter disturbing the relations between the Free City of Danzig and Poland. The Danzig Government had maintained that Polish vessels of war were bound by the same international regulations as foreign vessels of war under other flags.

The report by Danzig in regard to Danzig-Polish relations during the 2½ months before August 14, 1931, states:

As regards military measures, the Danzig-Polish relations since the last session of the Council have been specially aggravated by the fact that on July 1st last, after the expiry of the Agreement concerning the access of Polish warships to the port of Danzig, Poland suddenly and without any special reason sent patrols of Polish sailors through the streets of Danzig and thereby created, as will readily be understood, great excitement among the Danzig population. The latter regarded those measures as highly provocative, and the Government of the Free City was obliged to apply to the High Commissioner of the League of Nations for a decision under Article 39 of the Paris Treaty of November 9th, 1920. (Permanent Court of International Justice, series C, no. 55, p. 41.)

In a report of August 15, 1931, the High Commissioner of Danzig says, in part,

At its meeting on May 22nd, 1931, the Council of the League of Nations invited me "to submit a further report on the situation

for the next session of the Council." I accordingly have the honour to follow up my report of April 25th, 1931, by submitting the present report to the Council:

On my return to Danzig at the end of May, I soon noted that the agitation caused by the deplorable incidents between Danzig citizens and Poles which occurred during April and to which I considered it my duty to draw the Council's attention in a special report had subsided to some extent. Unfortunately, I found that the general situation at Danzig was not so satisfactory; disturbances owing to party strife were still continuing. During the month of June, particularly violent clashes occurred between the organizations of the extremist parties even in the centre of the town, and, if they had spread, they would have constituted a very serious menace to public security. (Permanent Court of International Justice, series C, no. 55, 1931. Access to, or Anchorage in, the Port of Danzig of Polish War Vessels, p. 14.)

The question referred to the Permanent Court of International Justice for an advisory opinion was:

Do the Treaty of Peace of Versailles, Part III, Section XI, the Danzig-Polish Treaty concluded at Paris on November 9th, 1920, and the relevant decisions of the Council of the League of Nations and of the High Commissioner, confer upon Poland rights or attributions as regards the access to, or anchorage in, the port and waterways of Danzig of Polish war vessels? If so, what are these rights or attributions? (Ibid., p. 9.)

*Attitude of Cuba, 1914.*—Cuba, in an early decree in the World War on August 10, 1914, stated, "It is forbidden for a belligerent to make use of a wireless-telegraphy apparatus belonging to the Government."

*Swiss regulation, 1914.*—By an ordinance of August 2, 1914, Switzerland took action at the beginning of the World War to maintain strict neutrality in the use of radio. The ordinance was issued in accordance with proposals of the military department as follows:

ARTICLE 1. The creation of new radio stations is forbidden on all territory of the Swiss Confederation.

ART. 2. The utilization of radio stations which already exist and have obtained a concession is forbidden. The organs of the telegraph and telephone administration will render the stations incapable of use without delay by removing the receiving apparatus, if there is any, or the parts indispensable for their use.

The parts of the apparatus removed are to be preserved by the telegraph and telephone administration.

ART. 3. There are not included in this prohibition stations established by the telegraph and telephone administration, or those which have been established for the needs of the army.

ART. 4. Violations of the present provisions, if there has been a reception or sending of news of any nature whatever, will be proceeded against according to the penal provisions established against those who spread, intentionally or by negligence, news of a military nature. If there has been only the illegal establishment of a station or the maintenance of an existing station, of which it has not been proved that it has been used, the penalty will consist in a fine and the station will be immediately closed. If there is reason to suspect that the station is intended to be used as a means of information for the benefit of a foreign State, proceedings for espionage will be commenced. (1916, Naval War College, Int. Law Topics, p. 68.)

Article 14 of the ordinance of August 4, 1914, laid down explicit prohibitions as to use:

It is absolutely forbidden to the belligerent parties to establish or use on Swiss territory a radio station or any other installation (telephone, telegraph, signal station, optical or other, carrier pigeon station, aviation station, etc.), designed to serve as a means of communication with the belligerent forces on land or sea or to offer facilities for the same in any manner whatsoever. (Ibid., p. 73.)

*Action of United States, 1914.*—An Executive order of August 5, 1914, provided that—

“all radio stations within the jurisdiction of the United States of America are hereby prohibited from transmitting or receiving for delivery messages of an unneutral nature, and from in any way rendering to any one of the belligerents any unneutral service, during the continuance of hostilities.” (1916, Naval War College, Int. Law Topics, p. 87.)

A further order of September 5, 1914, was concerned with high-powered stations capable of trans-Atlantic transmission and it was provided that these “shall be taken over by the Government of the United States and used or controlled by it to the exclusion of any other control.” (Ibid., p. 91.) The Secretary of the Navy was to enforce these orders. Radio installations in the Pan-

ama Canal Zone and waters were to be used only on Canal business. (Ibid., p. 99.)

*Colombian attitude, 1914-15.*—During the World War problems arose as to the use of radio stations already established on Colombian territory. One company was owned by a belligerent, one station was Colombian property, and one was owned by a neutral company. A resolution of July 14, 1915, provided as to these stations which had been the subject of much discussion and negotiation since the outbreak of the World War that—

1. The radio station of Cartagena will continue, subject to the measures previously adopted for preventing its use, under the inspection and supervision of the official Colombian expert and the local political authorities. If these authorities, in accord with the expert, consider new orders or new measures necessary for the better assurance of the neutrality of the Republic, they will decree them on their own authority in urgent cases and in ordinary cases will consult this ministry. The home of the German employees who previously worked in the station will not be troubled, although this home be near the place of the radio apparatus, the use of this apparatus continuing to be absolutely impossible.

2. The station of San Andres will remain closed for a time and in the manner which will be indicated by the competent ministry.

3. The station of Santa Marta can continue to exercise its rights, but subject always to the departmental and national authorities; but it can not have in its service individuals of the nationality of any of the belligerents. (1916, Naval War College, Int. Law Topics, p. 46.)

*Commission of Jurists, 1923.*—The practices and regulations during the World War showed the need for regulation. The Washington Conference on the Limitation of Armament recommended the appointment of a commission to consider new agencies of warfare. This Commission of Jurists, meeting at The Hague, reported February 19, 1923, upon rules in regard to radio and in regard to aerial warfare. Referring to article 8 of the 1907 Hague Convention mentioned above, the Report of the Commission says,

but while article 8 stipulates that a neutral Power is not bound to forbid or restrict the use of wireless installations by a belligerent, and article 9 relates to the restrictive or preventive measures taken by a neutral Power for this purpose, measures which must be applied impartially to the belligerents, article 4 [of the Commission's rules following] imposes on neutral Powers the duty of preventing the transmission by radio of any information destined for a belligerent concerning military forces or military operations.

This article is a compromise. On one side one Delegation pointed out that the 1907 system had stood the test during the war when neutral Governments had taken under article 9 of the 1907 Convention restrictive or preventive measures which were quite satisfactory. On the other side it was pointed out that those measures had been taken precisely for the purpose of complying with the obligation imposed by neutrality, and that it would be well to define this obligation so as to help and protect neutral Powers in preventing the violation of their neutrality and thereby reducing the probability of their becoming involved in the war. Agreement was reached on the basis of a text indicating exactly the character of the messages prohibited, viz., messages concerning military forces and military operations. It is understood that the prohibition would not cover the repetition of news which has already become public.

It has been agreed that the article does not render necessary the institution of a censorship in every neutral country in every war. The character of the war and the situation of the neutral country may render such measures unnecessary. It goes without saying that neutral Governments are bound to use the means at their disposal to prevent the transmission of the information in question.

The second paragraph merely reproduces the first paragraph of article 9 of the Convention of 1907. The phrase "destined for a belligerent" covers all cases where the information is intended to reach the belligerent, and not merely messages which are addressed to the belligerent.

#### ARTICLE 4.

A neutral Power is not called upon to restrict or prohibit the use of radio stations which are located within its jurisdiction, except so far as may be necessary to prevent the transmission of information destined for a belligerent concerning military forces or military operations and except as prescribed by article 5.



All restrictive or prohibitive measures taken by a neutral Power shall be applied impartially by it to the belligerents. (1924, Naval War College, Int. Law Documents, p. 100.)

Article 5 of the Commission's report here referred to is as follows:

ARTICLE 5.

Belligerent mobile radio stations are bound within the jurisdiction of a neutral state to abstain from all use of their radio apparatus. Neutral Governments are bound to employ the means at their disposal to prevent such use. (*Ibid.*, p. 101.)

*Responsibility of a state for radio.*—The responsibility of Canada for radio was raised in a case which went by appeal to the Judicial Committee of the Privy Council. The questions shortly stated were:

(1) Has the Parliament of Canada jurisdiction to regulate and control radio communication? (2) If not, in what particulars is the jurisdiction limited?

(*In re* Regulation and Control of Radio Communication in Canada. (1932) A.C. 304.)

In the course of the decision it was said:

Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. (*Ibid.*, 312.) \* \* \* The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada. (*Ibid.*, 313.)

*Control of communications.*—In time of war a belligerent may control communications within its own area to the extent which it deems essential with due regard for its obligations under international law and treaties. This right has led to various degrees of censorship in recent years and to the resort to practices of doubtful

legality. Even in the Spanish-American War, 1898, the United States maintained the right to prohibit all cipher messages regardless of source or destination.

The control of communications by neutrals must necessarily be commensurate with neutral responsibility, but the 1907 Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Cases of War on Land in article 8 states that:

A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals. (1908, Naval War College, Int. Law Situations, p. 190.)

Neutral powers did, however, restrict the use of radio by belligerents in the World War, 1914-18.

*Basic considerations.*—The *Xane* may follow the *Young* into port of B. Under normal conditions it must refrain from acts which, if knowingly permitted by B, would constitute a nonfulfillment of neutrality—specifically, such as capture or visit and search, or pursuit in the technical sense.

Under abnormal conditions, when the neutral state is admittedly unable to maintain its neutrality, a belligerent must take such measures as are essential to security of its forces, as being the only competent authority in the area.

The Nine-Power Treaty of the Washington Conference, 1921-22, envisages the mutual obligation of the belligerent to respect, and of the neutral to maintain, neutrality:

ARTICLE VI. The Contracting Powers, other than China, agree fully to respect China's rights as a neutral in time of war to which China is not a party; and China declares that when she is a neutral she will observe the obligations of neutrality. (1921, Naval War College, Int. Law Documents, p. 349.)

As the rights and obligations of the neutral are reciprocal, and if the neutral is not able to fulfill its obligations, the belligerent must to that extent be free to take

measures essential to its protection, for in neutral waters, the belligerent obligation to refrain from hostile action is based upon presumption of local protection against belligerent acts on the part of the enemy forces.

Manifestly such action should not be beyond what would be justified upon the high sea where an enemy merchant vessel unarmed and engaged merely in regular commerce would be liable under ordinary conditions to capture only. Within neutral jurisdiction capture would be justified only upon grounds that would imply that the mere presence of the merchant vessel of Y in the port of B endangered the cruiser of X. As the authorities of B are unable to protect the cruiser of X, in case of evident risk the commander of the cruiser is under obligation to take the action that he might otherwise call upon the authorities of B to take. The only method by which the commander can inform himself as to the character of the merchant vessel of Y is by visit and search which would be with view to assuring his safety.

If by visit and search he finds the *Young* is armed and equipped to cruise against state X, he would act accordingly. State B would in no appreciable degree be injured, by taking from one of its ports, where it was impotent, a vessel which might endanger the peace of the port or threaten the safety of a friendly state; while on the other hand interference within its ports with commerce which would disturb the course of its trade would be unjustifiable and a ground for reparation.

The recent development and use of radio at the time of the formulation of the Hague Conventions in 1907 naturally left many matters for regulation by subsequent action. The use of radio in the Russo-Japanese war, 1904-5, had given rise to a few problems for some of which the Hague Conventions made provisions. The 1907 Hague Convention (V) concerning the Rights and Duties of Neutral Powers and Persons in case of War on Land embodies certain prohibitions.

ARTICLE 3. Belligerents are likewise forbidden to:

(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

ARTICLE 8. A neutral power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals.

ARTICLE 9. Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligations being observed by Companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus. (1908, Naval War College, Int. Law Situations, pp. 189-190.)

The 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War also covered certain relations of radio telegraphy:

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea. (Ibid., p. 215.)

During the World War, 1914-18, however, the neutral control of radio became much extended. The United States, by an Executive Order of President Wilson, took over some of the high-power radio stations and placed them under control of the Navy, and regulations were prescribed to assure the Government that messages of an unmistakably neutral character only should be transmitted by these stations.

## SOLUTION

(a) The *Xane* should take no action against the *Young* merely because the *Young* has entered the port of B. In case the *Xane* is convinced that the *Young* is

abusing its privileges in B because of the weakness of the local authorities, the *Xane* may visit and search the *Young* as a basis for determining subsequent action.

(b) If the *Yarrow* remains in port more than 24 hours, unless for the lawful taking on of coal or supplies or making repairs to render the ship seaworthy, the commander of the *Xane* may request the authorities of state B to intern the *Yarrow*.

(c) The commander of the *Xane* should protest against military use of radio and if no competent local authority is present, should take such measures as may be least arbitrary to prevent its use.