The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
The United States, states X, Y, C, and D have ratified the Washington treaty of 1922 limiting naval armament and the London treaty of 1930. States X and Y are at war. Other states are neutral. The British Secretary of State for Foreign Affairs in a communication to the French, Italian, and Japanese ambassadors, October 7, 1929, stated that the Kellogg-Briand pact of 1928 was "regarded as the starting point of agreement," and that it was hoped that the conference of 1930 would elaborate a text "which will facilitate the task of the League of Nations preparation commission and of the subsequent general disarmament conference."

(a) The commander of an aircraft of state X summons by radio a merchant vessel of a citizen of the United States, the Trader, to lie to and to wait the arrival of a submarine which it is also summoning by radio. The Trader lies to in obedience to these orders. The aircraft leaves before the arrival of the submarine and the Trader then proceeds. The submarine, later meeting the Trader, torpedoes and sinks that vessel without warning.

(b) The commander of the Hail, a cruiser of state X in a port of the state of Panama, desires to test an aircraft that has been delivered to the Hail at another port and proceeds to a trial flight from the Hail, though the authorities of the port protest.

(1) How far in (a) and (b) above is the action of the belligerent lawful; and (2) what, if any, action should be taken by the commanders of cruisers of the United States which chance to be near?
(c) If the commander of the cruiser of the United States in the port of the state of Panama takes no action in regard to the conduct of the Hail, should the authorities of the Panama Canal Zone take any action when the Hail enters to pass through the Canal?

SOLUTION

(a) (1) The action of the submarine is not lawful, and (2) the cruiser of the United States should afford such aid as possible in rescuing the personnel of the Trader and report the circumstances in detail to the proper authority.

(b) The action of the commander of the Hail in proceeding to a trial flight of the aircraft in a port of the state of Panama is not lawful. The commander of the cruiser should report the circumstances in detail to the proper authority and await instructions.

(c) The authorities of the Panama Canal Zone should detain the Hail, not allowing the vessel to enter the canal without instructions from the proper authorities to whom the circumstances in detail should be reported.

NOTES

(a) Law of aerial warfare.

Law of aerial warfare.—Many writers have pointed out that the law of the air may be more nearly analogous to maritime law than to land law and that this may be true both for the time of peace and for the time of war. Some of the writers also properly point out that while there may be analogies these should not be regarded as anything more than analogies. To regard the laws asidentic would lead to serious errors. Even the law of gravity must receive different recognition, and aircraft differ widely from seacraft, whether surface or subsurface. Time and space may also be less important factors. Days of grace for private aircraft of the enemy will
doubtless be taken for granted. Aerial bombardment will not be limited to the coast.

For warfare in and from the air certainly the rules should be no less strict than for maritime warfare.

If war is to continue, aerial warfare will be allowed. In this warfare aircraft will be used against other military air, surface, and subsurface craft, fortifications, etc. The hope that aerial warfare will be prohibited can not be entertained under present conditions. Aircraft have done much to reduce the significance of time and space in the conduct of war, and these factors may often determine the issue. Objection to new means of warfare have always been made, but in time of war the question is one of military effectivity. The means of delivery of an explosive shell, whether by aircraft or by gun, does not constitute the measure of its legality. Whether the projectile acts under the force of gravity in a vertical flight downward or makes a parabolic flight is not a legal question.

_Aircraft in war._—The development of aircraft since 1900 has been so rapid that it is reasonable to assume that it will be an increasingly important factor in war. It may serve as "the eyes of the fleet," "the advance patrol," "the antennae," or in other significant rôles at sea, and on land may introduce revolutionary methods of warfare, while for coast warfare the aircraft may supplement in many ways the land and sea forces.

Commerce may be interrupted in a manner hitherto impossible, and an economic war may become more effective. Some have advocated measures of control by belligerents which would to varying degrees restrict that freedom of the sea of which the United States has long been an advocate.

Aerial commerce makes old rules in regard to contraband, blockades, etc., of doubtful applicability.

_Feasibility of use of aircraft._—It has often been said that owing to the fragile nature of aircraft their use for
visit and search was not feasible. Doubtless this is in great measure true if the aircraft must be self-sufficient for the exercise of visit and search. There were, however, cases reported during the World War in which aircraft did make or aid in making captures, and much that has been said in regard to the nature of aircraft as instruments of war has also been said in regard to submarines.

The Gelderland, a Dutch steamer, was captured by a German aircraft on the high sea, July 23, 1917, and brought to Zeebrugge. The Hamburg prize court declared the Gelderland good prize. Other captures were made and the transfer of prize crews from aircraft to captured vessels were reported.

The problems of visit of a maritime craft by an aircraft would be many and would depend upon the state of the sea and other conditions, and for visit of submarine craft would be more difficult even if possible. Probably visit at the place of summons would be rarely possible.

The French delegation had proposed to the commission of jurists, 1923, that "aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject." Manifestly the visit and search of a submarine by an aircraft would present many difficulties, and it is doubtful if the American point of view of visit where encountered could be followed in cases sufficient to warrant the use of aircraft for such purpose. To a less degree this would be true of surface vessels. Even if the exceptional right of diversion under the proposed British article had been accepted, the nature of aircraft would tend to convert the exception into the rule.

Aircraft may, however, be of great service as auxiliary agencies of a fleet or of a surface vessel of war in locating merchant vessels of the enemy or of neutrals and even in escorting them to a place for visit and search. If this be regarded simply as an extension of the normal range of vision or gunfire of the summoning vessel, it is reasonable to admit that such a case would be action of the surface
vessel of war, and would therefore conform to the laws for surface craft.

_Summons by aircraft._—Summons of a merchant vessel is the means by which the attention of such a vessel is drawn to a vessel of war which desires to communicate with the merchant vessel. The summons may be by signal flag or by any other effective method. There is not any necessary implication that the use of force is contemplated. Visit and search may or may not follow the summons. There seems to be no reason why the use of radio may not be as lawful as any other means of attracting attention or why an aircraft may not summon a merchant vessel as well as any other craft.

_Aircraft as an auxiliary._—It has been proposed that aircraft be used only as auxiliary to land and naval forces and subject to the same rules and limitations. It may be pointed out that land and naval rules are not identical and that many of the differences are due to the inherent differences in land and water. Similarly the differences in the nature of air as compared with land or water will force recognition of different rules for its use, though certain broad principles may be common to the three. That operations of aircraft in time of war should not be inhuman may be admitted, but that the definition of inhuman may be the same for all can not be presumed. Many would press the law of self-preservation as applied to personal safety as analogous to state safety and hold that necessity of self-preservation of a state knows no law, while it may be capable of proof in a given case that the nationals of the state and the world at large would be better off if a named state did not exist or if it should be absorbed by another. Such rules as apply to torpedoes in naval warfare manifestly can not be made to apply without modification to aircraft projectiles. There are many lines in which analogy with land or maritime rules will not hold for war by air.

The cutting off of communications by siege or blockade has been long recognized as lawful warfare on land and
USE OF AIRCRAFT

sea. The same must be admitted for aerial warfare. The destruction of a maritime supply ship of an enemy by a vessel of war of an opponent would be permitted, and it would not be unlawful for an aircraft to destroy such a ship. The capture and destruction of an enemy supply train or ammunition base on land would be lawful for land or air forces.

The significant fact that air forces may operate in spite of and independently of land or naval forces must be evident from experience and from plans which have been developed. That the three may operate most effectively in cooperation under certain conditions is not denied. The life of a nation both on land and sea no longer depends upon strategic fortifications along the coast and land frontier and naval patrols. Indeed an armed enemy convoy may, while offering protection against maritime attack, be specially vulnerable to air attack.

That aircraft may be used as an agent to weaken the civilian as well as the military morale of an enemy seems to require no proof, but in both cases this conduct must be kept within the law. Military objectives as legal objects of attack by land or naval forces, may be fairly easily classified. Objectives of the same nature must be admitted as legitimate for aircraft; e.g., military, naval, and aerial bases, supply bases, ammunition manufac-tories etc., and the location of these, whether inland from the coast or frontier, whether defended or undefended, would for aircraft be a matter of less importance than to other forces.

That aircraft should be considered in legal aspects merely as auxiliary to land and naval agencies and bound by exactly the same rules seems an untenable proposition.

Aircraft attached to vessels of war.—In 1915 the German cruiser Konigsberg was destroyed in a German East African river. Aircraft aided in locating and spotting the shots from the British vessels which were out of sight of the Konigsberg. The aircraft belonged to the Royal Naval Air Service but had been lent to the vessel of
war. When the question of distribution of prize bounty came before the court, it was decided that the pilots and the observers belonging to the two airplanes formed a part of the crews "of the vessels of war and were entitled to shares of the prize bounty. (3 Grant, Br. and Col. Prize Cases, p. 135.)

_Aircraft on vessels of war._—There were examples of the use of aircraft as aids to operations against merchant vessels in the World War. The _Wolf_, a German steamer, had been fitted to prey on enemy commerce in 1916. The _Wolf_ was also to lay mines, which she did in widely separated areas. The aircraft _Wolfchen_ was a part of the steamer's equipment. The _Wolfchen_ was found of great service in scouting and observation, discovering the proximity or absence of other vessels.

On the 27th of May, 1917, when the _Wolf_ was making repairs near an uninhabited island in the South Pacific, the _Wolfchen_ was sent out to bring in a steamer which had been sighted. The _Wolfchen_ dropped orders on the deck of the steamer, the _Waïruna_ of New Zealand, and this steamer was brought to anchor near the _Wolf_.

Later the _Hitachi Maru_, with a valuable cargo, was located by the _Wolfchen_, and the vessel was subsequently taken. (Cruise of the _Wolf_, translated from Rivista Marittima in 67 Jour. Royal United Service Institutions, p. 140.)

_Washington proposals, 1922._—The attempt to elaborate rules in regard to submarines at the Washington Naval Conference, 1921–22, enunciated certain principles that failed of ratification as declaratory of international law. These rules were presented to the conference without reference to the committees to which other conventions were submitted and contained clauses to which objections were made in the meetings of the delegates themselves. Indeed, it is generally admitted that the treaty, if it had become operative, would have been difficult to interpret. In any case this Washington treaty seems to provide for deviation after seizure.
Discussion in 1923.—At The Hague Conference on Rules of Warfare, 1923, there was much discussion of the subject of deviation and visit and search by aircraft. In the Washington treaty of 1922 in regard to submarines and noxious gases there had been inserted a provision to the effect that “A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning or to proceed as directed after seizure.” As Judge Moore said:

From first to last the American delegation consistently declined to enter into the interpretation of the provisions of the Washington treaty relating to submarines. This did not, however, prevent the disclosure, among other things, of the fact that the treaty was interpreted by the British delegation and perhaps by the Italian not only as permitting the deviation of a merchant vessel from its course for the completion of a search which a preliminary visit and search on the spot and seemed reasonably to justify, but also as permitting deviation without any preliminary visit and search or boarding whatsoever. The disclosure of this interpretation, which was elicited by inquiries of the Netherlands delegation, immediately rendered impossible the adoption by the commission of the terms of Article I of the Washington treaty on submarines without some additional safeguard as an appropriate and adequate regulation for aircraft. (Moore, International Law and Some Current Illusions, p. 204.)

American attitude, 1923.—The report of the committee of jurists considering the revision of the rules of warfare and particularly radio and aircraft in 1923 gave considerable attention to the use of aircraft in connection with maritime warfare. The French delegation had maintained that aircraft “should conform to the rules to which surface warships are subject.”

The American delegation considered that a merchant vessel should be boarded when she is encountered, but maintained that, even if a departure from this rule might in exceptional circumstances be permitted in visit and search by surface ships, a similar concession to aircraft, with their limited means of boarding, would readily have the effect of converting the exception into the rule. They stated that they were not advised of anything in the record of the Washington conference showing an intention to authorize-
surface ships or submarines to divert merchant vessels, without boarding them, to a port for examination; but that, were the case otherwise, the Washington conference had decided that the subject of aircraft, which presented difficulties of its own and which might involve questions different from those pertaining even to submarines, should be dealt with separately; and that to permit aircraft, with their rapidity and range of flight, to control and direct by orders enforceable by bombing, and without visit and search, the movement of merchant vessels on the high seas would, in their opinion, give rise to an inadmissible situation.

The American delegation, therefore, proposed the following text:

“Aircraft are forbidden to visit and search surface or subsurface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject.

“In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft can not divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft can not capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested.” (1924 N. W. C., International Law Documents, p. 138.)

British attitude, 1923.—The British attitude was naturally influenced by recent experiences in the World War and by some of the exceptional conditions that had then prevailed. This had been shown in discussions at the Washington Conference in 1921–22, and accordingly at The Hague in 1923.

The British delegation maintained that the problem connected with visit and search of merchant vessels by aircraft was analogous to that of the exercise of such right by submarines, and that the most satisfactory solution of the problem would be to apply mutatis mutandis the wording of article 1 of the treaty signed at Washington on February 6, 1922, for the protection of the lives of neutrals and noncombatants at sea in time of war.

This delegation maintained that by using the language of that treaty, as proposed, the question of the right to oblige a merchant vessel to deviate to a reasonable extent would be solved because the wording adopted at Washington had been modified so as to
admit this right. The British delegates proposed the following text:

"The use of aircraft against merchant vessels must be regulated by the following provisions, which, being in conformity with the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, are to be deemed an established part of international law:

"‘A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

"‘A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.

"‘A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.

"‘Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft can not capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.’" (1924 N. W. C., International Law Documents, p. 139.)

This treaty of 1922 had been the subject of considerable discussion, which led to questions as to its meaning. It had been questioned whether the rules mentioned in the first paragraph had been adopted “for the protection of lives of neutrals and noncombatants at sea in time of war” or rather had been developed through a long period of time primarily for the security of property at sea. Question was raised as to whether a merchant vessel might be seized immediately after being ordered to submit to visit and search without other action on the part of the seizing vessel. Such other questions have arisen as to the words “proceed as directed after seizure” imply a verbal order; is the placing of the crew and passengers of a merchant vessel in safety the sole bar to its destruction; what is a place of safety; are any of the rules as stated universal; does “existing law of nations” contain the requirements mentioned? Some have maintained that the last clause is in contradiction to some of the earlier clauses. In any case it was not possible to reach an agreement on this article either for submarines or for aircraft.
**Italian attitude, 1923.**—The Italian delegation at the Washington Conference had not shared the British view in regard to the place of submarines in war. At The Hague, however, in discussing rules for the use of aircraft for visit and search,

The Italian delegation accepted the British point of view; it maintained that diversion of merchant vessels by surface warships was recognized and that the wording of the Washington treaty should be repeated. To prevent any abusive exercise of the right by aircraft, the Italian delegation proposed to add the following sentences to the paragraphs of the Washington treaty as set out in the British text.

After the first paragraph add:

"Visit must in general be carried out where the merchant vessel is first encountered. Nevertheless, in cases where it may be impossible to alight and there is at the same time good ground for suspicion, the aircraft may order the merchant vessel to deviate to a suitable locality, reasonably accessible, where she may be visited. If no good cause for this action is shown, the belligerent state must pay compensation for the loss caused by the order to deviate."

After the third paragraph add:

"If the merchant vessel is in the territorial waters of the enemy state and not on the high seas, she may be destroyed after previous notice has been given to the persons on board to put themselves in a place of safety and reasonable time has been given them for so doing." (1924 N. W. C., International Law Documents, p. 140.)

**Japanese attitude, 1923.**—The Japanese were not so closely concerned with the narrower legal aspects of visit and search, though their courts had, when called upon, usually followed generally accepted rules. The operation of any rules that might be proposed was, however, to them a matter of grave importance. The report of the commission says:

The Japanese view was based on the practical difficulty in the way of exercise of the right of visit and search by aircraft. Visit and search is a necessary preliminary to capture, and unless an aircraft is physically capable of carrying it out, the recognition of the right of military aircraft to conduct operations against.
merchant vessels may lead to a recurrence of the excesses practiced against enemy and neutral merchant vessels in the submarine campaign initiated during the recent war. Therefore, the Japanese delegation preferred not to recognize the right at all. But in the end, as the amended American text removed the greater part of their fear of possible abuse, they expressed readiness to accept it, and suggested at the same time that the text had better be completed by the addition of the last sentence of the British text. (1924 N. W. C., International Law Documents, p. 139.)

Report of committee of jurists, 1923.—The committee of jurists considering the rules for aircraft in time of war particularly referred to The Hague Convention of 1907 and the report of the committee of jurists specifically supports the right of a neutral to prescribe the use of its aerial space under penalty of internment. In general the proposed rules prohibit the entrance of belligerent aircraft to the jurisdiction of a neutral state, but the report says:

While they remain on board the warship they form part of it, and should be regarded as such from the point of view of regulations issued by the neutral states. They will therefore be allowed to enter the neutral jurisdiction on the same footing as the warship on board which they rest, but they must remain on board the warship and must not commit any act which the warship is not allowed to commit. (1924 N.W.C., International Law Documents, p. 132.)

Article 42 of the proposed rules states:

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

A neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any. (Ibid., p. 133.)

Division of opinion, 1923.—The commission of jurists in 1923 recognized the importance of rules in regard to visit and search by aircraft, and strove to reach an agreement, yet it was impossible to agree.
When put to the vote the American proposal was supported by the Japanese and Netherlands delegations and opposed by the British, French, and Italian. The French proposal was opposed by the American, British, Japanese, and Netherlands delegations. The British and Italian delegations explained that they could only support it if it was amplified in the way indicated in the British and Italian amendments.

Although all the delegations concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and noncombatants, the commission, by reason of a divergence of views as to the method by which this result would best be attained, was unable to agree upon an article dealing with the exercise of belligerent rights by aircraft against merchant vessels. The code of rules proposed by the commission, therefore, leaves the matter open for future regulation. (1924 N. W. C., International Law Documents, p. 141.)

The American proposal had prohibited diversion, while under the British it had not been prohibited. The requirement which might be read into the words "proceed as directed after seizure" was not settled.

Aircraft and deviation.—The changing relations of neutral commerce in time of war owing to changes in instruments and methods of war has been particularly marked since 1900. Submarines and aircraft are among the new agencies. Of the effect of aircraft Spaight says:

Deviation is likely to become the rule, not the exception, in future. Visit and search at sea by aircraft will always probably be difficult. The ransacking of a liner will certainly be a practical impossibility. Even if visit sur place is declared obligatory, it is unlikely to be anything but perfunctory. But most probably there will be no visit at all. Ships will be ordered to named ports, and if they take the risk of disobeying the order and persist in disobeying it, they will be attacked and perhaps sunk. The conditions of 1915–1918 may be reproduced in an aggravated form.

The position of neutral commerce will indeed be well-nigh intolerable. Freedom of the sea will be dead and gone. Neutral shipping will be policed and dragooned as it never has been before. It was scourged with whips in 1914–1918; it will be scourged with scorpions in a future war. Because the complete interruption of all neutral trade beneficial to the enemy will be more
important than ever, because the grip on that trade will be tighter than ever and evasion more difficult, the conflict of belligerent and neutral interests will be sharper, the consequent disputes more bitter, and the danger of actual war with neutral states greater than in the past. (Aircraft and Commerce of War, p. 52.)

Referring to the unratified treaty, Washington Conference of 1922, on submarines and noxious gases, Spaight said in 1924:

The second paragraph of Section I of Article I prohibits attack upon a merchant vessel unless she refuses (a) to submit to visit and search after warning, or (b) to proceed as directed after seizure. The apparent implication of this provision is that she may not be attacked if she refuses to proceed as directed before seizure. But such a deduction would not be a justifiable one to draw. According to a statement made by the British delegation at The Hague in 1923 and recorded in the report of the commission of jurists, the original wording of the article was modified for the express purpose of allowing a warship to compel a merchant vessel to proceed to a designated place for visit and search; that is, to “proceed as directed” before seizure. The right to impose a reasonable degree of deviation before ever the vessel was boarded was fully recognized and was preserved, according to the British view, in Article I of the treaty. (Air Power and War Rights, p. 468.)

Discussion in 1927.—In the discussions at the Naval War College in 1927 the subject of visit and search received considerable attention (International Law Situations, pp. 48–72), and the conclusion reached was that—

Under existing international law the movements of neutral vessels on the high seas are subject to belligerent direction only when under belligerent control by a prize crew or escorting vessel. (Ibid. p. 72.)

It was shown that there had been many new practices during 1914–1918, but in the résumé it was said:

If there is a right of visit and search, and that is at the present time admitted, there must be conceded the opportunity and conditions making its exercise possible. This would imply the right to take the visited vessel to smooth or safe water, or to escort it to such a place, or to retain the custody of the visited vessel till arrival of a force adequate to exercise visit and search.
The sending of a vessel into port under a prize crew or escort presupposes a suspicion of liability to prize proceedings based on information in possession of the visiting vessel at the time. Suspicion that all vessels may be found liable is not sufficient ground for indiscriminately sending in of merchant vessels. (Ibid, p. 71.)

Preparatory disarmament conference.—In a draft convention for the preparatory disarmament conference in article 19 the provisions of article 14 of the Washington treaty limiting naval armament received some attention, repeating article 14. The draft convention reads:

Art. 19. No preparation shall be made in merchant ships in time of peace for the installation of warlike armament for the purpose of converting such ships into vessels of war, other than the necessary stiffening of decks for the mounting of guns not exceeding 6.1 inches (155 mm.) in caliber.

[134. Article 19 gave rise to a short discussion. This article, which provides that no preparation shall be made in merchant ships for the installation of warlike armaments for the purpose of converting such ships into vessels of war, nevertheless authorizes the stiffening of decks for the mounting of guns not exceeding 6.1 inches (155 millimeters) in caliber. This exception to the rule as stated was finally adopted. The Japanese delegation, however, reserved the right to raise the question of the limitation of aircraft equipment on merchant vessels, possibly at the conference itself. The Soviet delegation emphasized the importance of laying down that no preparations shall be made in merchant ships with a view to converting such ships in war time into fighting units.] (U. S. Treaty Information Bulletin No. 16, January, 1931, p. 20.)

Deviation for visit and search.—A certain degree of deviation for visit and search has always been admitted as lawful. Such deviation has been common when, because the state of the sea made it impossible to visit and search when the summoned vessel has come to, the vessel is escorted to a safer place. This is not an arbitrary act of the visiting vessel. The ordering of a neutral vessel to go to a port for examination as has been proposed at times is an exercise of authority which a belligerent craft does not possess.

A surface or submarine vessel of war is not to be allowed to deviate a merchant vessel from its course un-
less a prize crew is put on board or an escort is furnished. A mere order is of no effect, as the merchant vessel is not subject to the orders but may be under the physical control of a vessel of war so long as that is effective. Until other rules are accepted, this principle would apply to aircraft. The physical presence of the aircraft or of a prize crew would therefore be necessary for control of the Trader.

The submarine, according to article 22 of the London naval treaty, must "conform to the rules of international law to which surface vessels are subject," must place the "passengers, crew, and ship's papers in a place of safety" unless there has been "persistent refusal to stop on being duly summoned" or "active resistance to visit or search."

**Résumé.**—The American delegation, according to the report of the commission of jurists in 1923, took a position somewhat different in principle from that proposed at Washington in 1922, while the British delegation followed more closely the principles in the proposed Washington treaty. There was much difference of opinion as to the right of visit and search by aircraft, and not even a majority of votes of the delegations could be secured for any rule. There was, however, a general consensus that the use of aircraft against merchant vessels should be regulated. It was admitted that under present conditions it would be in most cases necessary to direct the merchant vessel to some place suitable for visit by aircraft or where visit and search could be otherwise conducted. It might be necessary for a merchant vessel to go far from her course at great loss and inconvenience to obey orders of an aircraft which had no well-grounded suspicion warranting interference. The delegations were not in agreement as to whether vessels of war had any recognized right to cause a merchant vessel to change her course in absence of evidence at the time in possession of the commander of the vessel of war; and not merely that a vessel in regard to which he had no evidence might be more ef-
fectively overhauled to discover whether she might be liable to visit and search. Grave extensions of the accepted rules in regard to the right of visit and search had been resorted to in the World War and extreme views were entertained by some in 1923.

The French delegation at The Hague in 1923 submitted a rule which was indefinite and left many of the debatable questions unsettled because it merely affirmed that the rule for surface craft in regard to which there was disagreement should be applicable to aircraft.

The proposed French text was:

Aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject. (1924 N. W. C., International Law Documents, p. 138.)

The American draft would specifically forbid the diversion of a merchant vessel prior to the boarding, though, as in case of a surface ship, a merchant vessel might be detained temporarily till conditions made boarding possible.

To allow an aircraft or a submarine exceptional privileges in the conduct of visit and search because of weakness or incapacity does not seem logical. A surface vessel of war is allowed to use shell fire against a merchant vessel which disregards a summoning blank shot, and in general the vessel of war is under obligations as to the safety of the passengers and crew. In similar circumstances an aircraft could rarely make provisions for the safety of passengers and crew after summons. Granting that aircraft construction remains relatively as at present, to admit some of the claims made as to aircraft rights in time of war would be to assume that the right of an instrument of war would be in inverse ratio to its capacity to carry out such rights or that disability gave exceptional rights.

Some of the arguments put forward during the World War in regard to taking or sending in merchant vessels for visit and search may equally apply to submarines and
aircraft, and if generally accepted would make possible almost unlimited interference with neutral maritime commerce.

Application of principles.—In the situation as stated, the Trader has come to in response to summons and has not refused to stop nor has the Trader offered any resistance. Effective control ceased when the aircraft departed. The order to lie to and wait is not an effective control, and the Trader is not more bound by it than by an order to go to a designated port without a prize crew or escort. The submarine has no right to sink the Trader, as it has not violated any of the provisions of article 22 of the London naval treaty and the submarine has not conformed in its action to the obligations of that treaty.

Obligation of neutral cruiser.—When a neutral cruiser is in the vicinity of any action involving a merchant vessel of its flag, it should endeavor to assure the observance of law by the merchant vessel and to protect it from any violation of law which would injure the merchant vessel. In case of need, it should render such assistance as possible. In this situation (a) the Trader has been sunk and the cruiser should rescue the personnel and convey them to a place of safety, reporting in detail the circumstances to the proper authority.

SOLUTION

(a) (1) The action of the submarine is not lawful, and (2) the cruiser of the United States should afford such aid as possible in rescuing the personnel of the Trader and report the circumstances in detail to the proper authority.

(b) Canals in war time.

Suez Canal treaty.—The treaty of October 29, 1888, signed by nine powers, including Turkey, in the preamble indicated the wish “to establish by a conventional act a definite system destined to guarantee at all times
and for all the powers the free use of the Suez Maritime Canal." Among the articles of the convention for this purpose were the following:

ARTICLE I. The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently the high contracting parties agree not in any way to interfere with the free use of the canal in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

Art. IV. The maritime canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers.

Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed 24 hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of 24 hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile power.

Art. V. In time of war belligerent powers shall not disembark nor embark within the canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

Art. VI. Prizes shall be subjected in all respects to the same rules as the vessels of war of belligerents. (British Parliamentary Papers, Commercial No. 2 (1889), C-5623, p. 5.)

Comments on draft in 1887.—In 1887 the Marquis of Salisbury, in commenting on the clauses of the draft
treaty, which were, save for slight changes for clarity, identical with the treaty of 1888, said of some of the differences of opinion:

A second point upon which considerable controversy has arisen is the extent to which the contracting powers, for the purpose of securing the neutrality of the canal, should renounce their natural liberty in respect to acts of war or preparations for war. The project of treaty presented at the last sitting of the commission by Great Britain prohibited the "stationing" of any ships of war in the canal or its ports by a belligerent or the stationing of more than two by any power in time of peace. But it was contended, not only on the part of the French Government but of the large majority of the commission, that all acts of war and all acts directed immediately to the preparation of an operation of war should be forbidden not only in the canal but in the ports of access, in the approaches to it, and in the territorial waters of Egypt; and the fifth article of the project of treaty protocolled at the closing session as representing the views of the majority of the powers runs in those terms. As the result of discussions which have taken place subsequently, I believe the Government of France are willing to admit material modifications of this article. To Her Majesty's Government any reference to the "approaches" of the canal (which would include the Red Sea), or to the territorial waters of Egypt, independent of the canal, appears to be open to grave objections. It is not necessary for the neutralization of the canal that these waters should be in any way affected by the provisions of the treaty. Her Majesty's Government must also adhere to the objection expressed by my predecessor to the inclusion among the list of acts prohibited in the "ports of access" of "acts having for their object the direct preparation of an operation of war," even in time of peace. Such a provision might operate as a material hindrance to the preparations required for the defense of Egypt.

Similar considerations affected the sixth article of the project sanctioned by the majority of the powers in 1885, to which strong objection was taken by the British delegates. It consisted of a prohibition of the embarkation or debarkation of troops, munitions, or material of war, either in the canal or its ports of access, in time of war or in time of peace. This article appears to Her Majesty's Government now, as it did to the British delegates, to be far too wide in its application. The prohibition should be confined, in the first place, to times of war and to actual belligerents. The British delegates further contended that it should only apply to the canal, and not to the "ports of access." To this
contention it is replied that if the landing of armies for hostile purposes was going on at the mouth of the canal, efforts would certainly be made by the other belligerent to prevent the debarkation, and the prohibition of hostilities in the canal would become illusory. The difficulty felt by Her Majesty's Government in assenting to the inclusion of the ports of access in this prohibition arises not from any desire to see them used for belligerent purposes, but because it might in time of war be a serious impediment to the transit across the isthmus of reliefs for India, if the canal happened to be temporarily blocked. (Br. Parl. Paper, Egypt No. 1 (1888), C. 5255, p. 41.)

On November 4, 1887, a circular of the Marquis of Salisbury to the British representatives at Berlin, Vienna, Madrid, Rome, The Hague, St. Petersburg, Constantinople, and Cairo, contained a copy of a letter of October 26, 1887, to the British representative at Paris, in which was renewed the reservation made by Sir Julian Pauncefote at the close of the sittings of the commission of 1885. It was to the following effect:

Les Délégués de la Grande-Bretagne, en présentant ce texte de Traité comme le régime définitif destiné à garantir le libre usage du Canal de Suez, pensent qu'il est de leur devoir de formuler une réserve générale quant à l'application de ces dispositions en tant qu'elles ne seraient pas compatibles avec l'état transitoire et exceptionnel où se trouve actuellement l'Egypte, et qu'elles pourraient entraver la liberté d'action de leur Gouvernement pendant la période de l'occupation de l'Egypte par les forces de Sa Majesté Britannique. (Ibid, p. 36.)

Of this, Prof. T. E. Holland, of Oxford, writing to the London Times on October 9, 1898, said:

1. It is certainly my opinion, for what it is worth, that the full operation of the convention of 1888 is suspended by the reserves first made on behalf of this country during the sittings of the conference of 1885. These reserves were textually repeated by Lord Salisbury in his dispatch of October 21, 1887, inclosing the draft convention which three days later was signed at Paris by the representatives of France and Great Britain, the two powers which, with the assent of the rest, had been carrying on the resumed negotiations with reference to the canal. Lord Salisbury's language was also carefully brought to the notice of each of the other powers concerned in the course of the some-
what protracted discussions which preceded the final signature of the same convention at Constantinople on October 29, 1888.

2. All the signatories of the convention having thus become parties to it after express notice of "the conditions under which Her Majesty's Government have expressed their willingness to agree to it," must, it can hardly be doubted, share the view that the convention is operative only sub modo.

3. Supposing the convention to have become operative, and supposing the territorial power to be neutral in a war between States which we may call A and B, the convention would certainly entitle A to claim unmolested passage for its ships of war on their way to attack the forces of B in the eastern seas. (Letters on War and Neutrality, 3d ed., 1881–1920, p. 54.)

British Government attitude, 1898.—In July, 1898, questions were raised in regard to sojourn of Spanish vessels of war at Port Said and involving the Suez Canal convention. Mr. Curzon, Under Secretary of State for Foreign Affairs, replied:

The provisions of the Suez Canal convention to which the honorable member refers have never been brought into operation. The question of the duration of stay of foreign vessels at Port Said is one primarily for the decision of the Egyptian Government, and there has doubtless been good reason for the course adopted in this case.

Mr. Davitt. Can the right honorable gentleman state what these reasons were?

Mr. Curzon. I am not in the immediate councils of the Egyptian Government, so I can not inform the honorable member.

Mr. Gibson Bowles (Lynn Regis). Did I understand the right honorable gentleman to say that the convention of 1888 is not in actual operation?

Mr. Curzon. Yes; the honorable member did understand me to say so. (60 Parliamentary Debates, 4th series, p. 800.)

Later on Mr. Gibson Bowles said on July 12, 1898:

I beg to ask the Under Secretary of State for Foreign Affairs whether the convention between Great Britain, Austria, France, Germany, Italy, the Netherlands, Russia, Spain, and Turkey, which was signed at Constantinople on October 29, 1888, and the ratifications whereof were deposited at Constantinople on December 22, 1888, and whereof the first article declares that the Suez Canal shall always be free and open in time of war as in time of peace to every vessel of commerce or of war without distinc-
tion of flag is still in existence and in operation; and, if not, whether he can say when and under what circumstances that convention ceased to exist or to operate?

Mr. Curzon. The convention in question is certainly in existence, but, as I informed the honorable member in reply to a question some days ago, has not been brought into practical operation. This is owing to the reserves made on behalf of Her Majesty's Government by the British delegates at the Suez Canal Commission in 1885, which were renewed by Lord Salisbury, and communicated to the powers in 1887. They will be found at page 292 of the Parliamentary Paper, Egypt, No. 19, 1885.

Mr. Gibson Bowles. Do these reserves made in 1887 override the treaty of 1888?

Mr. Curzon. I do not express any definite opinion as to the word "override," but they are no doubt responsible for the fact, as I have already twice stated, that the terms of the convention have not been brought into practical operation. (61 Ibid., p. 667.)

Hay-Pauncefote treaty, 1901.—The treaty of 1901 between the United States and Great Britain settled many long-standing differences between the two states in regard to transisthmian rights. By the treaty a "canal may be constructed under the auspices of the Government of the United States." In article 3 of the treaty it was provided that—

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed October 28, 1888, for the free navigation of the Suez Canal; that is to say:

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

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

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary.

1 It is apparently the convention of October 29, 1888, to which reference is made.
and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

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

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

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

6. The plant, establishment, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof for the purposes of this treaty, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal. (32 U. S. Stat., pt 2, p. 1903.)

British opinion on Panama Canal.—J. H. Hall, in his book on the Law of Naval Warfare, of which the second edition appeared in 1921, after discussing the status of the Suez Canal, turns his attention briefly to the Panama Canal, saying:

The Panama Canal is governed by the terms of the Hay-Pauncefote treaty made between Great Britain and the United States of America in 1901. The canal is permanently neutralized and the maintenance of that status is insured by the terms of article 3, in which is laid down a series of rules substantially the same as those embodied in the Suez Canal convention. The canal was formally opened on August 16, 1914. Under the terms of their treaty with the Panama Republic the United States Government a fortnight later took over the control of all wireless telegraph stations, fixed or movable, in the Republic, and on October 10 the two Governments signed a protocol agreeing that during a war in which their respective countries were neutral hospitality to a belligerent warship, transport, or fleet auxiliary accorded in the territorial waters of the Panama Republic should
serve to deprive such vessel of like hospitality in the Canal Zone for the ensuing three months and vice versa. On November 13 the United States Government issued neutrality regulations for the Canal Zone which conform in general with the rules of the Thirteenth Hague convention in regard to the use of neutral ports by belligerent warships and similar vessels. Two points, however, are deserving of special notice. The normal rule admitting only three warships of a belligerent at one time is modified by allowing three to be in the terminal ports of the canal as well as three on passage, making it permissible for there to be a total maximum of six in the Canal Zone at one time. The rules of priority of departure and 24 hours interval as between the vessels of opposing belligerents are modified in the case of a belligerent warship which returns within a week of her previous departure by depriving such vessel of precedence of departure over enemy vessels, which arrive after her return and before the expiration of a week subsequent to her previous departure; the canal authorities are empowered to regulate the departure of such a vessel as they think fit with a view to preventing a constant reappearance in this manner, resulting in practice in a blockade of the canal against the vessels of the opposing belligerent (p. 181).

The Suez Canal.—During the World War the status of the Suez Canal naturally became a subject of change owing to the relations of Turkey and of Egypt as well as the relation of other political entities to the war. In January, 1915, questions came before the British prize court in Egypt in regard to the German steamship Gutenfels, which had on August 5, 1914, arrived at Port Said. A “décision” of the Egyptian Government of August 5, 1914, gave permission to German vessels to leave Egyptian ports up to sunset August 14. The Gutenfels remained at Port Said till “On October 13, she was boarded by an officer of the Egyptian Army, and her master was informed that the Egyptian Government had taken possession of her, and that a new master and crew would be sent on board. On October 16, with the Egyptian authorities still on board, she proceeded to sea, and when 3 or 4 miles out was formally seized by H. M. S. Warrior and brought to Alexandria.” (1 Trehern, Br. and Col. Prize cases, p. 102.) The German owners maintained that the court should take under consideration all
the circumstances involved and not merely the capture by the *Warrior*, and this the court admitted and says:

Having established this point in their favor, the owners pray restoration of their vessel on the ground that Port Said is a neutral port, whose neutrality has been guaranteed by the Suez Canal convention; and it becomes our duty to consider what is the position of enemy ships which have taken refuge in the port. Are they entitled to immunity from capture while lying at anchor having no intention to pass through the canal, or does immunity only extend to them for such reasonable time as may be necessary to enable them to make a passage through it? (Ibid., p. 108.)

After considering the arrangements between the canal company and the Egyptian Government, the court finds nothing in the arrangements which can give rights to third parties like the German owners, and the case continues:

But there is another aspect of the question which has been brought about by the international convention of October 29, 1888, guaranteeing the free use of the Suez Canal, and commonly referred to as the Suez Canal convention. To this convention all the great European powers and the Sultan of Turkey were parties:

"Article 1 declares that—

"The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace. The canal shall never be subjected to the exercise of the right of blockade."

Article 4, which is the special article upon which the claimants rely, reads as follows:

"The maritime canal remaining open in time of war as a free passage even to the ships of war of belligerents, according to Article I of the present treaty, the high contracting parties agree that no right of war shall be exercised, nor shall any act of hostility, or any act having for its object to obstruct the free navigation of the canal, be committed in the canal and its ports of access, nor within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers"; and special provision is made as to the passage and victualing of vessels of war. (Ibid., p. 110.)
Other articles provide for oversight and protection of the canal and that in other respects the sovereign rights of the Sultan of Turkey and the Khedive of Egypt "are not to be affected." Of this the court says:

In view of these provisions there is a grim touch of humor about the present situation, seeing that the Ottoman Government, under German direction, is at this moment seeking to destroy the canal, while a German ship taken by the Egyptian Government asks in a British prize court for a declaration of release on the ground that the canal precincts are absolutely inviolable.

The passages that I have cited are all that, in my opinion, are material to the issue. Can it be said that this convention gives the right to any ship to shelter itself indefinitely, or at all, in the ports ancillary to the canal because they happen to be within the limits of the operations of the canal company? I think not. In my opinion, the sole object of the treaty, as expressed both in its preamble and operative articles, is to insure a free and uninterrupted passage of the canal at all times to all ships of all nations of the world; and if in the unlikely event of a German ship now entering Suez or Port Said and demanding a free passage, I think it would be the plain duty of the British Government (after taking proper precautions to prevent damage to the canal itself) to allow such ship to pass through and sail out at the other end; and I have no reason to suppose that the British Government would fail in its duty. But that is the limit of its obligation; and if a ship enters Suez or Port Said without any intention of going through the canal, or, being in either of those ports, abandons any intention it may have had of passing through. I am of opinion that she ceases to have any rights whatever under the convention. The object of the convention is to insure a free passage through the canal, and nothing else, and all prohibitions against acts of hostility within the canal precincts are framed with that object and that alone. (Ibid., p. 111.)

Suez Canal and Port Said.—In 1914 several German merchant vessels which entered Port Said claimed protection under that part of article 4 of the Suez Canal convention of 1888, which is as follows:

The maritime canal remaining open in time of war as a free passage, even to the ships of war of the belligerents, according to the terms of article 1 of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal,
shall be committed in the canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers. (Grant, Br. and Col. Prize Cases, p. 148n.)

These vessels were by persons employed by the Egyptian authorities taken outside territorial waters, where they were immediately captured by British vessels of war and taken before a prize court, where they were condemned as good prize. The case of the *Pindos* making "a round voyage from Antwerp to eastern Mediterranean ports," the *Helgoland" bound with general cargo from Singapore to Rotterdam and Bremen," and the *Rostock* came at the same time before the judicial committee of the Privy Council on appeal, and in dismissing the appeal their lordships in part said:

The *Rostock* was a steamship of 4,957 tons gross which belonged to the Deutsche-Australische Dampfschiffsgesellschaft, of Hamburg. She came through the Suez Canal from eastern ports with general cargo bound, no doubt, for a home port, and arrived at Port Said on July 31 and began to discharge such part of her cargo as was deliverable there. While doing so her captain received a cablegram from his owners at Hamburg to wait further orders. His log records on August 1: "In order to protect ship and cargo from the attacks of the enemy shall remain until further notice in Port Said, as the harbor is neutral." On August 17 to 19 the ship discharged her cargo of frozen meat. After July 31 the captain received no further communication from his owners. He was treated by the Egyptian authorities in respect of the offer of a pass, the actual delivery of a valid pass subsequently, and the removal of his ship outside Egyptian territorial waters, exactly as the captains of the *Pindos* and the *Helgoland* were treated. He behaved in the same way and for the same reasons. The *Rostock* was captured by the *Warrior* on October 15 and was condemned as prize on February 17, 1915.

The claimants in their petitions formally relied on what in each case were substantially the same defenses—namely, first, the benefit of the Sixth Hague Convention of 1907, articles 1 and 2; secondly, the benefit of article 4 of the Suez Canal convention of 1888, confirmed by article 6 of the Anglo-French agreement of 1904; thirdly, the formal invalidity and the practical inefficiency of the passes which were offered by the Egyptian authorities; and fourthly, considerations of equity and natural justice arising
out of the circumstances under which the ships were ejected from Egyptian waters.

Of these points the first has already been dealt with sufficiently by their lordships in the case of The Gutenfels [1916] (ante, p. 36; 85 L. J. P. C. 140), and the third in that of The Achaja [1916] (ante, p. 45: 85 L. J. P. C. 155). Of the second all that need be said is this: Whatever question can be raised as to the parties to and between whom the Suez Canal convention, 1888, is applicable, and as to the interpretation of its articles, one thing is plain, that the convention is not applicable to ships which are using Port Said, not for the purposes of passage through the Suez Canal or as one of its ports of access, but as a neutral port in which to seclude themselves for an indefinite time in order to defeat belligerents' rights of capture after abandoning any intention which there may ever have been to use the port as a port of access in connection with transit through the canal. Those responsible for the ships took their course deliberately, and took it before August 14. The captains appear, as was only natural, to have consulted together and to have acted in concert. In the case of the Helgoland her owners in Bremen, doubtless well-informed persons, as early as Thursday, July 30, 1914, if not earlier, were so assured, though no ultimatum had then been issued, that Germany would shortly be at war, and England and Egypt would be neutral; that they ordered her captain to stop in Port Said instead of trying to reach a Turkish, a Greek, an Italian, or an Austrian port. It is no light responsibility to stop a ship of over 5,000 tons with general cargo in mid-voyage for an indefinite period, and thus to imperil insurances alike on ship and cargo, and to incur heavy expenses and probably heavy claims from cargo owners as well; but this responsibility was taken. Their lordships are of opinion that the evidence amply justified the decision of the prize court in each case; that the ships were using Port Said simply as a port of refuge, and therefore without any right or privilege arising out of the Suez Canal convention, 1888. Hence their expulsion by the Egyptian authorities when it had become plain that they would not leave of themselves affords no answer to the claim for condemnation in natural justice, or equity, or law. (Ibid., p. 148.)

Case of the "Derflinger."—The Derflinger was a German vessel which by its build showed that it was intended for conversion into a vessel of war. Coming from the east, she passed through the Suez Canal, arriving at Port Said August 2, 1914. The Hague convention in regard to days of grace does not apply to vessels whose build
shows they are intended for conversion into vessels of war. The log of the Derfflinger had the following entries:

1914, August 2: Arrived Port Said. The journey can not be continued on account of the war.
August 3: Passengers and baggage landed. (2 Grant, Br. and Col. Prize Cases, p. 36.)

The judgment of the judicial committee of the Privy Council stated:

Under the International Suez Canal convention of 1889, she was entitled to use the canal for the purposes of passage. She had used it, and the above entries show that her voyage of passage was over; that her journey was, in her view, rendered abortive by reason of the war, and that she had accordingly landed her passengers and cargo. Port Said was, on August 2 and 3, a neutral port. The war which caused the discontinuance of the ship's voyage was the war between Germany and France and that between Germany and Russia. When war broke out on August 4 between Germany and Great Britain the vessel was lying in Port Said, not in exercise of a right of passage but by way of user of the port as a port of refuge.

Under these circumstances the canal convention had ceased to be operative and she was not entitled to any protection. The ship was a German ship lying in an enemy port, and was a ship to which the Hague convention did not apply. (Ibid, p. 44.)

*Kiel Canal.—*Article 380 of the treaty of Versailles June 28, 1919, provided that that canal should be open to vessels of commerce and of war in terms somewhat similar to those used in the Suez and Panama conventions:

Art. 380. The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

Questions arose in regard to this clause in 1921. The Wimbledon, a British vessel, chartered by a French company, carrying munitions loaded at Salonica bound for Poland via Danzig, had been refused permission by Germany to pass through the Kiel Canal on March 21, 1921. The German neutrality in the war between Russia and Poland was given as the reason for the refusal.
This action of Germany came before the Permanent Court of International Justice and was the subject of its first judgment commonly known as the case of the 

Wimbledon. The judgment was rendered August 17, 1923, and in addition to Germany the parties were Great Britain, France, Italy, Japan, and Poland.

Sir Cecil Hurst, speaking before the court for Great Britain, said:

In each of the international instruments, therefore, which fix the régime for the Suez Canal and for the Panama Canal, respectively, words are employed which are identical with those used in article 380 of the treaty of Versailles with regard to the Kiel Canal. I think it is reasonable to ask the court to draw the inference that if the framers of the treaty of Versailles used identical language with regard to the Kiel Canal to that which had been used in regard to the Suez and Panama Canals, they intended to establish for the Kiel Canal a régime analogous to that which existed in regard to those other great maritime waterways. (Publications of the Permanent Court of International Justice, series C, No. 3, vol. 1, p. 254.)

Now, what really is the régime which has been created for these other waterways at Suez and Panama? They have been constituted into highways open for all kinds of navigation, not merely the navigation of commerce, but also for the more serious navigation of war. They have been constituted in this way into great international highways by instruments which operate not merely as between the parties to those instruments, but which operate for the benefit of all nations. (Ibid. p. 256.)

After discussing the obligation of neutral states to refuse to belligerent vessels of war the use of their inland waterways, Sir Cecil Hurst further says:

Does that principle apply to these great international waterways which I have mentioned—the Suez Canal, the Panama Canal, and the Kiel Canal? In the instruments regulating the régime for those waterways, you will find in several places that the passage of warships is provided for, and it is provided for in terms which enable those warships to pass even when they are the warships of a belligerent power and when the territorial sovereign of the area in which the canal is situated remains neutral.

Consequently, I think it is clear that the régime established for these great international waterways is, in matters relating to-
neutrality, a very special régime, and that the normal principles which obtain with regard to the obligations of neutrality do not attach to these waterways at all.

I have mentioned the case of ships of war, but that is not the only way in which the question arises. There is not merely the question of ships of war; there is the case of vessels which are assimilated to vessels of war—storeships, prizes, and so on. There is also the case of the ordinary transportation of contraband. (Ibid., p. 258.)

In referring to arguments as to the analogy of the Suez and Panama Canals and the Kiel Canal, the German representative before the court said:

They argue that these various articles, having the same wording have the same object, and involve the same rights and obligations.

Let us proceed to a comparison.

The Suez Canal act, Article I, paragraph 1, runs:

"The Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."

The Panama Canal act, Hay-Pauncefote treaty of November 18, 1901, says:

"The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality."

The provisions referring to the Kiel Canal (article 380 of the treaty of Versailles) say:

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

So it is true that the article relating to the Kiel Canal begins by a similar phrase to that used in the corresponding article in the Suez Canal convention; but the sense of the text as regards the Kiel Canal is narrower. It will be observed that the words "in time of war as in time of peace" are lacking in the Kiel Canal article and the Panama Canal convention; they only appear in the Suez Canal convention.

With regard to the Kiel Canal, the article limits freedom of passage to nations "at peace with Germany"; and the Pananía Canal convention has the words "observing these rules," subjecting the user of the canal to a series of regulations which are to be drawn up. In the French text of the Kiel Canal article the word "toujours" appears, but the word "always" does not appear in the English text. "Always" appears both in English and French
in the Suez Canal convention, where it does not at all appear in the Panama convention.

Article I, paragraph 1, of the Suez Canal convention, relating to freedom of passage, is followed by paragraph 2, which says:

"Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal in time of war as in time of peace."

No such paragraph is found in the Kiel article, nor does it appear in the Panama Canal convention.

Also paragraph 3 of Article I of the Suez Canal act relates to the impossibility of blockading the canal, so that it must be considered as neutralized. Provisions to this effect are to be found in the Panama Canal convention, but not in the articles relating to the Kiel Canal.

The provisions of article 381, paragraph 2, are not to be found either in the Suez or the Panama convention.

As regards the question of defense, whilst article 10 of the Suez convention admits the right to establish defenses on the Canal, Article II adds, "but not in such a way as to hinder the free passage of ships." Article 23 of the Hay-Pauncefote convention of 1903 admits the right of defense, unhindered by this restriction. (Ibid., p. 345.)

In its decision the court considered that the Kiel Canal, had "ceased to be an internal and national waterway" and had become an "international waterway" open to vessels of states at peace with Germany, even if at war with each other. The court also recognized that the rules were not the same for the Suez, Panama, and Kiel Canals, but that their intent was to establish international waterways of which the use by belligerents might not be incompatible with neutral obligations of the authority having jurisdiction along the route of the canal. The court says in the decision:

The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperiled if her authorities had allowed the passage of the Wimbledon through the Kiel Canal, because that vessel was carrying contraband of war consigned to a state then engaged in an armed conflict. Moreover they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world such
waterway is assimilated to natural straits in the sense that even
the passage of a belligerent man-of-war does not compromise the
neutrality of the sovereign state under whose jurisdiction the
waters in question lie. (Idem., series A, p. 28.)

SOLUTION

(b) The action of the commander of the *Hail* in proceeding to a trial flight of the aircraft in a port of the state of Panama is not lawful. The commander of the cruiser should report the circumstances in detail to the proper authority and await instructions.

(c) Panama Canal Zone.

*Treaties with Panama.*—The treaties between the United States and Panama since 1903 have shown a close relationship between the two states. The existence of the Panama Canal under the management of the United States and the control of the Canal Zone have made this essential to both states. Article I of the convention of 1903 reads:

The United States guarantees and will maintain the independence of the Republic of Panama. (33 U. S. Stat., pt. 2, p. 223-1.)

Panama's neutrality, 1914.—The necessity of joint action by the United States, and sometimes control in Panama has been seen in many acts. This is evident in Decree No. 130 of 1914:

The President of the Republic, in the exercise of his legal powers, and considering:

That by the terms of the Bunau-Varilla-Hay treaty the Republic of Panama is obliged to assist the United States by all necessary and suitable measures for the conservation, protection, and defense of the interoceanic canal constructed across the Isthmus:

That the said Government considers it indispensable to this end that it shall assume from now on permanent and complete control of the wireless telegraphic stations, fixed and movable, in all the territory, and territorial waters of the Republic of Panama; and

That it is to the interest and for the safety of the Republic of Panama that wireless communication be controlled and regulated by the nation which by a solemn pact has guaranteed its independence:
It is decreed: From this date the radiotelegraphic stations, fixed and movable, and everything relating to wireless communications in the territory and territorial waters of Panama shall be under the complete and permanent control of the United States of America; and to attain that end said Government will take the measures which it deems necessary.

Let it be communicated and published.
Done at Panama this 29th day of August, 1914.

BELISARIO PORRAS.

The Secretary of Government and Justice:
JUAN B. SOSA.

(1914 U. S. For. Rel., p. 1051.)

On October 10, 1914, an agreement was entered into between the United States and Panama:

The undersigned, the Acting Secretary of State of the United States of America and the envoy extraordinary and minister plenipotentiary of the Republic of Panama, in view of the close association of the interests of their respective Governments on the Isthmus of Panama, and to the end that these interests may be conserved, and that when a state of war exists the neutral obligations of both Governments as neutrals may be maintained, after having conferred on the subject and being duly empowered by their respective Governments, have agreed:

That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and vice versa.

In testimony whereof, the undersigned have signed and sealed the present protocol in the city of Washington this 10th day of October, 1914.

ROBERT LANSING.
EUSEBIO A. MORALES.

(38 U. S. Stat, pt. 2, p. 2042.)

The proclamation of the United States, November 19, 1914, in regard to the neutrality of the Canal Zone, contained rules as to aircraft.

Rule 15. Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United
States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

Rule 16. For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities. (38 U. S. Stat., pt. 2, p. 2039.)

Swiss ordinance, 1914.—The geographical location of Switzerland, surrounded by belligerents, made it essential that so far as possible the Swiss neutrality regulations should be clear. A somewhat detailed ordinance was issued on August 4, 1914, soon after the outbreak of the World War. This ordinance provided for aviation in prescription 17.

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

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

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

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

In the notification to the French Government, August 8, 1914, it was said:

The Swiss Federal Government has notified the Government of the Republic under date of August 8, 1914, that in view of the maintenance of the neutrality of Switzerland it is forbidden to all balloons and aircraft coming from a foreign country to pass in the aerial space above the Swiss territory. All means will be taken, if necessary, to prevent this passage. (Ibid. 77.)
Delivery of aircraft in neutral ports.—Article 18 of Thirteenth Hague Convention, 1907, provides:

Belligerent ships of war can not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament or for completing their crews. (Hague and Geneva Conventions, 1911, p. 124.)

This article in effect embodies a part of article 5 of the treaty of Washington, 1871, as applied to belligerents.

At the present time aircraft may be and are often an essential part of the armament of a vessel of war, and a neutral is justified or under obligation to assume that aircraft are a part of the armament. The delivery of the aircraft to the Hail in this situation is therefore in contravention of the principles of The Hague Convention.

Cruiser of X in neutral ports.—The Hail, a cruiser of State X, has acted in a manner contrary to article 18 of Thirteenth Hague Convention, 1907, and accordingly not in accord with the treaty of Washington of 1871. The principle embodied in article 18 is one of the most widely accepted in preventing increase of armament in a neutral port. In the neutral port in the State of Panama the testing of an aircraft would likewise be contrary to the spirit of Thirteenth Hague Convention, 1907, which in article 1 enjoins respect for the rights of neutral States, among which is that to determine the use of aerial space above its territory.

The authorities of the port of the State of Panama are justified in protesting against the trial flight of the aircraft from the Hail and may take such action as may be necessary to prevent the flight or may intern the Hail.

The commander of the cruiser of the United States, not being under the authority of Panama, should report the facts to the proper authorities of the United States and await instructions.

Panama and the Panama Canal.—As under the terms of the treaty of 1903, the United States guarantees and will maintain the independence of Panama, it is not
necessary for Panama to support forces for this purpose. The United States and Panama took action in cooperation during the World War for the maintenance of their rights. The agreement of October 10, 1914, made provision for reciprocal hospitality to belligerent vessels of war. The Hail had violated the neutrality of Panama, and entering the Panama Canal Zone comes within an area in which the flight of belligerent aircraft had in 1914 been specifically prohibited. Under the relations existing between the United States and Panama, and in view of the previous acts of the Hail, Panama might properly look to the United States for some action in support of its protest against a violation of its neutrality. Accordingly it would seem that the least that the authorities of the Panama Canal Zone could do would be to detain the Hail pending instructions from the proper authorities, to whom the circumstances in detail should be reported.

SOLUTION

(c) The authorities of the Panama Canal Zone should detain the Hail, not allowing the vessel to enter the canal without instructions from the proper authorities to whom the circumstances in detail should be reported.