States X and Y are at war. Other states are neutral. State X is a party to the Washington treaty limiting naval armament of 1922. State Y is not a party to this treaty.

(a) The Swan, a merchant vessel lawfully flying the flag of state X enters a port O of the United States where it remains one week discharging and loading cargo. The decks of the Swan have been strengthened for the mounting of 5-inch guns, and the Swan from time to time communicates by radio with a division of the fleet of state X to the north and with a division of the same fleet to the south of port O.

(b) The Sparrow, a merchant vessel lawfully flying the flag of state Y enters port O of the United States and the owner contracts with a shipbuilder for the strengthening of the decks of the Sparrow so that she might mount a 5-inch gun and the same shipbuilder has, since war was declared, made contracts with a citizen of state X and with a citizen of state Y to build for each a merchant vessel with decks of such strength as to mount a 5-inch gun and also to build for each a merchant vessel of such construction as to make easy the transformation of these vessels to aircraft carriers.

(c) Merchant vessels of state X and of state Y having decks strengthened to mount 5-inch guns and adapted for
launching aircraft appear at opposite ends of the Panama Canal for the purpose of passing through and maintain that even if regarded as vessels of war they would have the same privileges as in the Suez Canal; and vessels of war of state X enter the Gulf of Fonseca and without going within 3 miles of land await several days the arrival of other vessels of war and auxiliaries. Meantime aircraft from vessels of war of state X fly regularly over the state of Panama between the fleet of state X in the Caribbean Sea and the vessels in the Gulf of Fonseca.

State Y protests against the sojourn of the *Swan* at port O. (Under (a) above.)

State X protests against the carrying out of the contract on the *Sparrow* at port O and the shipbuilder is in doubt as to the lawfulness of fulfilling his contracts with the citizens of states X and Y. (Under (b) above.)

The authorities at Panama desire to conform to the laws of neutrality. (Under (c) above.)

What should be done in each case? Why?

SOLUTION

(a) The *Swan* may, as a merchant vessel, lawfully enter port O of the United States and discharge and load cargo, but the communication by radio with divisions of the fleet of state X is a violation of the neutrality of the United States and thereupon the radio apparatus should be dismantled and the *Swan* should be interned.

(b) The contract for stiffening the decks of the *Sparrow* should not be executed because it would be in part an adaptation for use in war, and the contracts with states X and Y should not be executed.

(c) The vessels appearing at opposite ends of the Panama Canal have not the same privileges as in the Suez Canal and should be allowed to pass through but each should, after passing through, be detained till the other has passed through in order that the departure of one may not be delayed by the passage of the other.
The Gulf of Fonseca is a territorial gulf and therefore not open to the vessels of state X.

The aircraft from vessels of war of state X may not lawfully fly over Panama.

NOTES

General.—States X and Y being at war are under obligation to observe the law of war and the treaties to which they are parties. Other states being neutral are under similar obligations to observe the laws of neutrality and the treaties to which they are parties.

The plenipotentiaries at the Washington Conference on the Limitation of Naval Armament, 1921–22, state in the preamble of the treaty, signed February 6, 1922, and subsequently ratified by the five powers, that—

Desiring to contribute to the maintenance of the general peace, and to reduce the burdens of competition in armament;

Have resolved, with a view to accomplishing these purposes, to conclude a treaty to limit their respective naval armament. (43 U. S. Stat., Part II, p. 1655.)

Chapter I contains the general provisions relating to the limitation of naval armament, and these are set forth in Articles I to XX. It may therefore be presumed that the contractual articles of the treaty are for the purpose stated in Article I:

The contracting powers agree to limit their respective naval armament as provided in the present treaty. (Ibid. p. 1657.)

The categories mentioned in articles which follow are capital ships, aircraft carriers, noncapital ships, merchant ships, fortifications, and naval bases.

(a) Use of radio.

Sojourn in neutral port.—In situation I the Swan enters a neutral port as a merchant vessel of state X and proceeds to discharge and load cargo. The decks of the Swan have been stiffened for mounting 5-inch guns. This, according to Article XIV, is of the nature of
preparation “for the installation of armaments for the purpose of converting” such a vessel into a vessel of war and is permitted in time of peace. While the United States might make inquiry to ascertain at what time the stiffening of the decks of the Swan took place, the United States is under no obligation to do this nor does it necessarily know the strength of the decks. The stiffening of the decks or other equipment of a vessel may be for the purpose of conversion of the vessel into a vessel of war, but the vessel is not yet converted and for the United States is a merchant vessel engaged in lawful commerce.

*General regulation of radio.*—The Swan from time to time communicates by radio with a division of the fleet of state X. There arises, therefore, questions as to the legality of such act.

During the World War the prohibition of the use of radio while not by identic rules was usually by rules based upon articles 3, 5, 8, and 9 of Hague Convention V, 1907, and article 5 of Hague Convention XIII, which are as follows:

**Hague Convention V**

**Art. 3.** Belligerents are likewise forbidden:

\(a\). To erect on the territory of a neutral power a wireless telegraph station or any apparatus for the purpose of communicating with belligerent forces on land or sea;

\(b\). To 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.

**Art. 5.** A neutral power must not allow any of the acts referred to in articles 2 to 4 to occur on its territory.

It is not bound to punish acts in violation of neutrality unless these acts have been committed on its own territory.

**Art. 8.** A neutral power is not bound to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to companies or private individuals.

**Art. 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 the belligerents.
USE OF RADIO

A neutral power shall see to the observance of the same obligation by companies or private individuals owning telegraph or telephone cables or wireless telegraph apparatus.

HAGUE CONVENTION XIII

Art. 5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and, in particular, to erect wireless telegraph stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.

The rules were, in part, the result of events which had taken place during the Russo-Japanese War, 1904, which had shown the necessity of regulating the use of wireless telegraphy. The principles upon which the rules are based have, however, been recognized for a long time.

While freedom is allowed in some respects in the use of neutral waters greater than in the use of neutral land, the belligerent is equally bound to refrain from acts which, if knowingly permitted, would constitute a non-fulfillment of neutrality.

Article 25 of Hague Convention XIII, 1907, provides that—

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 in its ports or roadsteads or in its waters.

And article 26 provides:

The exercise by a neutral power of the rights laid down in the present convention can never be considered as an unfriendly act by one or the other belligerent who has accepted the articles relating thereto.

United States radio order, August 5, 1914.—President Wilson on August 5, 1914, issued the following order in regard to the use of radio:

Whereas proclamations having been issued by me declaring the neutrality of the United States of America in the wars now existing between various European nations; and
Whereas it is desirable to take precautions to insure the enforcement of said proclamations in so far as the use of radio communication is concerned;

It is now ordered, by virtue of authority vested in me to establish regulations on the subject, 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.

The enforcement of this order is hereby delegated to the Secretary of the Navy, who is authorized and directed to take such action in the premises as to him may appear necessary. (1916 N. W. C. Int. Law Topics, p. 87.)

By a further Executive order of September 5, 1914, high-powered radio stations were taken under Government control in order that neutrality might be maintained.

Action of other states.—Norway and some other states had general rules relating to radio and published in time of peace. Other states issued regulations after the outbreak of war.

Norway had, in the Rules of Neutrality established in 1912, stated:

Chap. IV. (1) It is forbidden belligerent powers to use ports or waters of the kingdom as bases for naval operations against their enemies.

It is especially forbidden to establish on the territory or in the territorial waters of the kingdom radio stations or any apparatus designed to serve as a means of communication with the belligerent forces whether on land or sea. (1917 N. W. C., Int. Law Documents, p. 186.)

While in August, 1914, the Argentine Government forbade vessels of belligerent powers to use their radio in jurisdictional waters except in case of distress, in October it was found necessary to make an additional order directing that "from the time they enter the jurisdictional waters of the Republic until they leave them, vessels of the belligerent powers shall keep their radio-telegraphic poles lowered and their stations closed." Later orders covered other details.
Dismantling radio apparatus.—As radio upon merchant vessels was, at the outbreak of the World War, a comparatively new equipment, the regulations for its use were not well established. States recognized the general obligations to maintain neutrality, but the specific responsibilities for radio were not defined.

On August 14, 1914, Chile issued rules concerning the surveillance of vessels in territorial waters of which paragraph 8 referred to radio:

The use of radiotelegraphy is forbidden to all merchant vessels during their sojourn in the Chilean waters. To render this prohibition effective it will be convenient to dismantle the apparatus designed for this system of telegraphy. (1916 N. W. C., Int. Law Topics, p. 17.)

The instructions issued by Chile, October 14, were as follows:

1. All vessels provided with radio apparatus, without distinction of nationality, which navigate in our territorial waters or are at anchor in our ports are forbidden to use the said apparatus.

2. When arriving in a port or roadstead, these vessels ought to dismantle their antennae, breaking their connection with the gear and apparatus, as soon as they have been received by the maritime authorities, who will personally see to the strict accomplishment of this order, by proceeding immediately to affix their seals and stamps on the doors, windows, skylights, and other ways of access to the place in which this apparatus is located.

3. All national or foreign vessels which remain in a port more than four days will remove their antennae, which will be kept in the same place as the apparatus of the radio station, observing the same instructions for sealing the ways of access to this place.

4. The maritime authorities will report to the office of the director of maritime territory on the accomplishment of the present instructions, not forgetting that their nonaccomplishment may compromise the neutrality of the country. (Ibid., p. 18.)

An order of October 15, 1914, was somewhat more explicit:

In addition to sealing and stamping the places in which radio apparatus is located, please order the lowering and disconnecting of the antennae from the halyards and radio apparatus of all steamers with radio installations, upon arriving at Chilean ports.
Steamers that remain more than four days in port ought to deliver their antennae to the maritime authorities until the day of their departure, giving account by telegraph to the office of this director. Simpson. (Ibid., p. 18.)

Colombia on July 14, 1915, took action to the following effect in regard to vessels:

The vessels belonging to belligerent States and lying in Colombian waters will continue to be subject to the supervision and to the inspection of the authorities of the Republic, and their apparatus will remain incapable of operation and paralyzed in a manner believed to be effective; and, if necessary, they will be transported to land, in whole or in part, as will be prescribed. (Ibid., p. 46.)

Guatemala on September 1, 1914, decreed:

That from this date all merchant vessels of the belligerent nations when in the territorial waters of Guatemala or upon entering into them shall dismantle their wireless installations during such time as they shall remain in these waters. Vessels not complying with these regulations shall be considered as armed ships, and orders shall be given them to leave Guatemalan waters in conformity to convention No. 13 of The Hague, 1907. (Ibid., p. 58.)

Uruguay made regulations in regard to the use of radio from time to time and on October 20, 1914, prescribed:

No use can be made of apparatus installed on vessels lying in the ports or territorial or jurisdictional waters of the Republic, except in accord with the orders of the national authority. (Ibid., p. 113.)

Radio in Colombia.—In the early days of the World War complaints were made by the belligerents in regard to the use of radio stations in Colombia and in other South American States. The United Fruit Co. had before the war a station at Santa Marta, erected under a contract of July 19, 1911. By the terms of this contract the station was to be neutral, and might in case of foreign or domestic war be placed under Government supervision and censorship. The station at Cartagena was subject to like control. Owing to complaints and owing to the difficulty of securing expert censorship a resolution of September 11, 1914, stated:
The service of the radio station of Cartagena is temporarily suspended until by virtue of the cooperation of suitable experts the supervision and preventive censorship of the local authorities may be realized in the service of the station and in the transmission and delivery of its dispatches. As soon as suitable experts can be employed, who will render possible the preventive censorship and in this manner the neutrality of the Republic will in a measure be clearly guaranteed, the station can resume its service by submitting to the obligatory censorship and supervision. (1916 N. W. C., Int. Law Topics, p. 39.)

Later the Colombian Government wrote to its legation in Washington, as complaints had been received in regard to possible use of radio in different parts of Colombia:

We have no wireless stations on the Pacific coast.

As for the Atlantic, Cartagena radio station that belongs to a private company, the Government has a contract giving it full rights of inspection and censorship in case of war.

The British Legation made reclamations on the ground that there was no characterized expert, and the Government to comply with the legation's wishes closed the station.

Afterwards, the Government entered into an agreement with a professional expert, paid by the Government and put him at the head of the station, which was again opened.

The British Legation after some days asked the dismissal of the German employees in the station, and although the Government's expert is the only one who receives or transmits radiograms, it decided to dismiss and did dismiss foreign employees, and since then operates the station, handing its net produces [proceeds] to the company.

No codes are admitted.

Now the British Legation considers that even plain words and phrases are suspect as they may be used with a conventional secret sense and on that new ground has asked the Government to close again the station.

But as the company has rights not to be overlooked, the Government can not comply with the Legation's wishes, still less when it has its own expert operating the station. This is the only pending question.

The British Legation informed that it feared Germans may be hidden in Urabá using occult stations. The Government made investigations at Cartagena, at Turbo and at Quibdó and found
an abandoned ship, the Oscar, of the Compania Bananera, with wireless apparatus out of use. A special official was sent to bring back the apparatus.

The British Legation tendered its thanks to the Government for its zeal. (1914 U. S. For. Rel. Sup. p. 686.)

Secretary of State to chairman Senate Committee on Foreign Relations.—The attitude of the Secretary of State of the United States as to control of radio was set forth in reply to a letter of Senator Stone which raised question as to censorship of radio messages. The Secretary said:

The reason that wireless messages and cable messages require different treatment by a neutral government is as follows:

Communications by wireless can not be interrupted by a belligerent. With a submarine cable it is otherwise. The possibility of cutting the cable exists, and if a belligerent possesses naval superiority the cable is cut, as was the German cable near the Azores by one of Germany’s enemies and as was the British cable near Fanning Island by a German naval force. Since a cable is subject to hostile attack, the responsibility falls upon the belligerent and not upon the neutral to prevent cable communication.

A more important reason, however, at least from the point of view of a neutral government, is that messages sent out from a wireless station in neutral territory may be received by belligerent warships on the high seas. If these messages, whether plain or in cipher, direct the movements of warships or convey to them information as to the location of an enemy’s public or private vessels, the neutral territory becomes a base of naval operations, to permit which would be essentially unneutral.

As a wireless message can be received by all stations and vessels within a given radius, every message in cipher, whatever its intended destination, must be censored; otherwise military information may be sent to warships off the coast of a neutral. It is manifest that a submarine cable is incapable of becoming a means of direct communication with a warship on the high seas. Hence its use can not, as a rule, make neutral territory a base for the direction of naval operations. (1914 For. Rel. Sup., p. viii.)

Commission of Jurists, 1923.—While the rules drawn up by the Commission of Jurists in 1923 in regard to radio and aircraft have not been ratified and probably will not be ratified in their present form, they do enunciate the principles which may be expected to prevail.
Article 2 of these rules is as follows:

Belligerent and neutral powers may regulate or prohibit the operation of radio stations within their jurisdiction. (1924 N. W. C., Int. Law Documents, p. 100.)

In their report on this article the commission said:

Article 17 of the radio-telegraphic convention of 1912 enables states to regulate or prohibit the use of radio stations within their jurisdiction by rendering applicable to radiotelegraphy certain provisions of the international telegraphic convention of 1875. In particular it is articles 7 and 8 of that convention which enables such measures of control or prohibition to be taken. The object of article 2 is to make it clear that such rights subsist equally in time of war. (Ibid., p. 99.)

This report further says:

The legislation of a large number of powers, for instance, that of the powers represented in the commission, already provides for the prohibition of the use of radio installations on board vessels within their jurisdiction. In harmony with articles 5 and 25 of the convention concerning the rights and duties of neutral powers in maritime warfare (No. XIII of 1907), article 5 enacts the continuance of this régime in time of war and makes it obligatory for all mobile radio stations. (Ibid., p. 101.)

Upon these principles article 5 is based:

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.)

Use of radio.—While the use of radio by a merchant vessel may at times during war be essential for its safe and convenient navigation, it may at times be used for other purposes. In the case of the Swan, a merchant vessel of a belligerent in a neutral port, such use for safe navigation could not be affirmed. Communication with the fleet from a neutral port would be analogous to the use of the port as a base and would place the neutral under obligation to dismantle the radio and intern the Swan. The fact that the decks of the vessel are strengthened does not place the neutral under other obligations
than to use ordinary diligence, and the Swan, conducting itself in accord with neutral regulations, should be treated as a merchant vessel entitled to usual trading privileges.

SOLUTION

(a) The Swan may, as a merchant vessel, lawfully enter port O of the United States and discharge and load cargo; but the communication by radio with divisions of the fleet of state X is a violation of the neutrality of the United States, and thereupon the radio apparatus should be dismantled and the Swan should be interned.

(b) Strengthening of decks, structural changes.

Fitting out by neutral.—The laws of the United States, mindful of the treaty of 1871 with Great Britain, provide:

SEC. 11. Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be fined not more than $10,000 and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States.

SEC. 12. Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war or cruiser or armed vessel, in the service of any foreign prince or state or of any colony, district, or people, or
belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel or by changing those on board of her for guns of a larger caliber or by adding thereto any equipment solely applicable to war, shall be fined not more than $1,000 and imprisoned not more than one year. (35 U. S. Stat., p. 1089.)

**Departure of vessel.**—It has been maintained that the burden of the conduct of war should not be shifted to neutrals but the principle of the exercise of “due diligence” by a neutral is at the same time admitted.

The British proclamation of neutrality of October 21, 1912, provided a penalty for any person who:

3. Equips any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state. (105 British and Foreign State Papers, [1912], pp. 163, 166.)

The proclamation also provided for the forfeiture of the ship.

**Neutrality proclamation, 1914.**—The neutrality proclamation of the United States of August 4, 1914, in paragraph 8, provided against—

Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents. (38 U. S. Stat., p. 1999.)

**Memorandum of September 19, 1914.**—The State Department memorandum of September 19, 1914, gave the rules that the Government of the United States would follow in determining the status of armed merchant vessels. Admitting that merchant vessels might carry armament when guns were not more than 6-inch caliber and not in the forward part of the vessel, with usual personnel and service as before the war, these rules prescribe that the speed of the ship be slow, and rule E, by implica-
tion, did not grant privileges to a vessel which might, by
evidence available at the time, be converted into a ship
of war.

E. The conversion of a merchant vessel into a ship of war is a
question of fact which is to be established by direct or circumstan-
tial evidence of intention to use the vessel as a ship of war.

This memorandum of the Department of State is in
regard to defensively armed merchant vessels, and the
British had assured the United States that these would
not be used for attack.

No. 289.]  

BRITISH EMBASSY.


(Received August 26.)

SIR: With reference to Mr. Barclay's notes, Nos. 252 and 259
of the 4th and 9th of August, respectively, fully
explaining the
position taken up by His Majesty's Government in regard to the
question of armed merchantmen, I have the honour, in view of the
fact that a number of British armed merchantmen will now
be visiting United States ports, to reiterate that the arming of
British merchantmen is solely a precautionary measure adopted
for the purpose of defense against attack from hostile craft.

I have at the same time been instructed by His Majesty's Prin-
cipal Secretary of State for Foreign Affairs to give the United
States Government the fullest assurances that British merchant
vessels will never be used for purposes of attack, that they are
merely peaceful traders armed only for defense, that they will
never fire unless first fired upon, and that they will never under
any circumstances attack any vessel.

I have, etc.,

CECIL SPRING RICE.

(1914 For. Rel. Sup., p. 604.)

Note to Germany, 1914.—In a note to the American
ambassador in Germany, November 7, 1914, the Acting
Secretary of State said:

The practice of a majority of nations and the concensus of
opinion by the leading authorities on international law, including
many German writers, support the proposition that merchant
vessels may arm for defense without losing their private character
and that they may employ such armament against hostile attack
without contravening the principles of international law.
The purpose of an armament on a merchant vessel is to be determined by various circumstances, among which are the number and position of the guns on the vessel, the quantity of ammunition and fuel, the number and sex of the passengers, the nature of the cargo, etc. Tested by evidence of this character the question as to whether an armament on a merchant vessel is intended solely for defensive purposes may be readily answered and the neutral government should regulate its treatment of the vessel in accordance with the intended use of the armament.

This Government considers that in permitting a private vessel having a general cargo a customary amount of fuel, an average crew, and passengers of both sexes on board, and carrying a small armament and a small amount of ammunition, to enjoy the hospitality of an American port as a merchant vessel, it is in no way violating its duty as a neutral. Nevertheless it is not unmindful of the fact that the circumstances of a particular case may be such as to cause embarrassment and possible controversy as to the character of an armed private vessel visiting its ports. Recognizing, therefore, the desirability of avoiding a ground of complaint, this Government, as soon as a case arose, while frankly admitting the right of a merchant vessel to carry a defensive armament, expressed its disapprobation of a practice which compelled it to pass upon a vessel's intended use, which opinion, if proven subsequently to be erroneous, might constitute a ground for a charge of unneutral conduct.

As a result of these representations no merchant vessels with armaments have visited the ports of the United States since the 10th of September. In fact, from the beginning of the European war but two armed private vessels have entered or cleared from ports of this country, and as to these vessels their character as merchant vessels was conclusively established. (9 A. J. I. L., Spec. Sup., p. 239.)

United States law, 1917.—By an act of June 15, 1917, the United States made provision for the enforcement of neutrality under Title V.

Sec. 2. During a war in which the United States is a neutral nation the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge
of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas. (40 U. S. Stat., pp. 217, 221.)

General provisions.—After the Alabama case was decided the principle of obligation to use due diligence to prevent the outfitting of vessels for use in war came to be more and more strictly interpreted. It has become customary to insert in proclamations of neutrality the rules of the treaty of Washington, 1871, as follows:

Art. VI. 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 the 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. (17 U. S. Stat., pp. 863, 865.)

There may be an offense under the Criminal Code of the United States, article 11, even if the vessel be not "armed or manned for the purpose of committing hostilities before she leaves the United States, if it is the intention that she be so fitted subsequently." (The City of Mexico (D. C. 1886), 28 Federal Reporter 148.)
Armed merchant vessels.—Few practices in naval warfare have been the subject of more diverse opinions in recent years than the arming of merchant vessels. For a time after privateering was declared abolished in the declaration of Paris, 1856, it was thought that the practice was at an end. Auxiliary vessels were soon suggested as avoiding the evils of privateering, as they would be under government control in time of war. Systems of subsidies established a measure of government right, which might extend to appropriation in time of war.

The general arming of merchant vessels would, however, make effective government control through trained naval personnel impracticable, unless the regular naval personnel should be greatly reduced. Without such control the use of armament would be by private direction. It would be difficult for private persons to distinguish between offensive and defensive acts. A powerful gun might in itself be a temptation for a patriotic private citizen to try it upon an enemy public vessel which he deemed inferior. Sometimes the arms have been furnished by the government, but the responsibility for the use of the arms has not been assumed. It is not always easy to argue that the arming is to prevent or in anticipation of an unlawful attack by an enemy vessel of war, for the vessel of war is under the same obligation to observe the law as is the merchant vessel. The old arming against privateers, pirates, sea marauders, etc., is not supported as necessary at present. Practically, the only purpose would be arming against submarines, and the effectiveness of this is now questioned by some, and by others the arming regarded as an evidence of an intent to engage in hostile operations, which should place the armed vessel in the category of vessels of war, even though the intent is to engage only a particular class of vessel. For though a small vessel of war with guns of short range does not intend to engage a capital vessel of
war of long-range guns, this intent does not remove the small vessel from the category of vessels of war. It is therefore maintained with considerable force that intent can not be determined, while armament is an ascertainable fact, which being present only in time of war must be for purposes of war, and that the size of the projectile or the part of the vessel from which it is fired should not protect the vessel or give it special privileges.

In spite of such arguments the practice in the World War, 1914–1918, sanctioned the arming of merchant vessels, and neutrals with few exceptions accorded armed merchant vessels privileges in their ports.

The submarine had for some time before the outbreak of the war of 1914–1918 formed an integral part of the naval forces of many states; it is a vessel used for military offense and comes under the general term of a “ship of war.” The functions and duties of warships in belligerent operations had been settled by the customary law of nations, and there can be no doubt that these principles should apply to submarine as to surface ships. (Higgins in eighth edition, Hall, Int. Law, p. 627.)

Hall had said:

By some writers it is asserted that a noncommissioned ship has also a right to attack. If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it, there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument. There is no such reason at sea as there is on land for permitting ill-regulated or unregulated action. On the common ground of the ocean a man is not goaded to leave the noncombatant class, if he naturally belongs to it, by the peril of his country or his home. Every one’s right to be there being moreover equal, the initiative in acts of hostility must always be aggressive; and on land irregular levies only rise for defence, and are only permissible for that purpose. It is scarcely necessary to add that noncommissioned ships offer no security that hostilities will be carried on by them in a legitimate manner. Efficient control at sea must always be more difficult than on land; and if it was found that the exercise of due restraint upon privateers was impossible, a fortiori, it would be impossible to prevent excesses from being indulged in by noncommissioned captors. (Ibid., p. 630.)


**Article XIV.**—The treaty of 1922 limiting naval armament in Article XIV prohibits preparation for "installation of warlike armament for the purpose of converting" merchant ships into vessels of war "other than the necessary stiffening of decks." The French form of Article XIV might be somewhat more liberally interpreted than the English form which was the original form proposed to the conference. It was not intended to modify that form and the meaning of the French and English may be considered as the same, particularly as in Article XI the English expression "other than" is translated into French as "en dehors" while in Article XIV the same English expression is translated "toutefois."

Further, these preparations mentioned in Article XIV are preparations which by terms of that article are limited to the "time of peace," and certainly if made in time of war, the preparation would be presumed for war purposes.

It should also be noticed under Article XI that while limitation to 10,000 tons is prescribed for construction or acquisition of vessels of war other than capital ships and aircraft carriers, no such tonnage limitation is prescribed for auxiliary vessels "not taken in time of peace under government control for fighting purposes." Article XIV, however, provides for preparation of the merchant marine in time of peace for mounting guns, not exceeding 6-inch caliber, without regard to the tonnage, speed, or other character of the merchant ship. There is no limitation upon the number of guns or their location. Similarly, there is not provision that these guns shall be used for defensive purposes only, but on the other hand, the equipment is stated to be for "converting such ships into vessels of war;" the sole limitation being that the preparation "in time of peace" be for "guns not exceeding 6-inch caliber." Additional stiffening of decks would undoubtedly be possible during war and a fast and large
merchant marine might become a very effective naval auxiliary force as vessels of war.

This Article XIV implies that the arming of merchant ships for conversion is to be continued in practice and raises question as to the obligation of a neutral when a vessel having its decks strengthened for 6-inch guns is within its ports.

Article 17 of Hague Convention XIII relates to ships of war, but in time of war might be regarded as applying equally to vessels which would evidently be ships of war.

In neutral ports and roadsteads belligerent ships of war can carry out only such repairs as are absolutely necessary to render them seaworthy, and can not add in any manner whatsoever to their fighting force. The neutral authorities shall decide what repairs are necessary, and these must be carried out with the least possible delay.

**Neutral obligation.**—The rules of the treaty of Washington, 1871, have strongly influenced the attitude toward neutral obligation. These rules were before The Hague peace conferences and article 8 of Convention XIII of the 1907 conference is a modification of the rule of 1871, as follows:

A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of every vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted, entirely or in part, for use in war.

While the implication is that the neutral must weigh the intent, "the fitting out and arming" or the adapting for use in war would be the evidence first considered. In this article 8, vigilance is to be displayed to prevent the "departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted, entirely or in part for use in war."
Article 8 of Hague Convention XIII specifically prohibits against "fitting out or arming" of a vessel of war "entirely or in part" and enjoins the neutral government to use "the means at its disposal" to prevent the departure of any vessel intended for use in war.

Article XIV clearly implies that in time of war the stiffening of the decks of a merchant vessel of a belligerent for the "installation of warlike armaments" would probably be regarded as with purpose of converting such vessel into a vessel of war and there is no reservation which would limit the use of such vessel to defensive purposes. This Article XIV states that "the necessary stiffening of decks for mounting of guns not exceeding 6-inch caliber" is as an exception among the preparatory installations which in time of peace may be made for conversion of merchant vessels into vessels of war.

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(b) The contract for stiffening the decks of the Sparrow should not be executed because it would be in part an adaptation for use in war, and the contracts with states X and Y should not be executed.

(c) Passage of Panama Canal, aircraft over Panama.

Report of Commission of Jurists, 1923.—The Commission of Jurists appointed under the provision of the resolution of the Conference on the Limitation of Armament, February 4, 1922, reported on February 19, 1923. Article 12 of this report was as follows:

In time of war any state, whether belligerent or neutral, may forbid or regulate the entrance, movement, or sojourn of aircraft within its jurisdiction. (1924 N. W. C., Int. Law Documents, p. 113.)

Of this article the report says:

In time of peace many states are subject to treaty obligations requiring them to allow aircraft of other states to circulate in the air space above their territory. In time of war a state must
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possess greater freedom of action. Article 12, therefore, recognizes the liberty of each state to enact such rules on this subject as it may deem necessary. (Ibid., 113.)

Further this same report says:

To avoid any suggestion that it is on the neutral government alone that the obligation is incumbent to secure respect for its neutrality, article 39 provides that belligerent aircraft are under obligation to respect the rights of neutral powers and to abstain from acts within neutral jurisdiction which it is the neutral’s duty to prevent.

Other rules embodying principles analogous to those for war on land or on sea were drafted but these have not been ratified.

*Treaties on Panama Canal.*—By the treaty of 1901 between the United States and Great Britain it was provided in Article III:

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 the 28th October, 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; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

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

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

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

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

Panama in the treaty of 1903 with the United States agreed in Article XVIII that—

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901. (33 U. S. Stat., Pt. II, pp. 2234, 2239.)

Neutrality proclamation, November 13, 1914.—The rules in regard to neutrality of the Canal Zone define "vessel of war":

Rule 1. A vessel of war, for the purposes of these rules, is defined as follows: A public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy. (38 U. S. Stat., p. 2039.)

It was provided in rule 2 that the same treatment should be given to a vessel "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; but such treatment shall
not be given to a vessel fitted up and used exclusively as a hospital ship."

Rule 9 prescribed the same treatment for vessels of rule 1 and of rule 2, and rule 11 reads:

When vessels of war or vessels falling under rule 2, belonging to or employed by opposing belligerents, are present simultaneously in the waters of the Canal Zone, a period of not less than 24 hours must elapse between the departure of the vessel belonging to or employed by one belligerent and the departure of the vessel belonging to or employed by his adversary.

Gulf of Fonseca, 1917.—The Bryan-Chamorro treaty of 1914, by which a right to establish a naval base in the territory of Nicaragua bordering on the Gulf of Fonseca was granted to the United States, came up for consideration before the Central American Court of Justice in 1917. The court, consisting of 5 jurors, considered 24 questions. Among these, several relate to the status of the Gulf of Fonseca.

Ninth question.—Taking into consideration the geographic and historic conditions, as well as the situation, extent, and configuration of the Gulf of Fonseca, What is the international legal status of that gulf?

The judges answered unanimously that it is an historic bay possessed of the characteristics of a closed sea.

Tenth question.—As to which of those characteristics are the high parties litigant in accord?

The judges answered unanimously that the parties are agreed that the gulf is a closed sea.

Eleventh question.—What is the legal status of the Gulf of Fonseca in the light of the foregoing answer and the concurrence of the high parties litigant, as expressed in their arguments, with respect to ownership and the incidents derived therefrom?

Judges Medal, Oreamuno, Castro, Ramírez, and Bocanegra answered that the legal status of the Gulf of Fonseca, according to the terms of the question, is that of property belonging to the three countries that surround it; and Judge Gutiérrez Navas answered that the ownership of the Gulf of Fonseca belongs, respectively, to the three riparian countries in proportion.

Twelfth question.—Are the high parties litigant in accord as to the fact that the waters embraced in the inspection zones that pertain to each, respectively, are intermingled at the entrance of the Gulf of Fonseca?
The judges answered unanimously that the high parties are agreed that the waters which form the entrance to the gulf intermingle.

*Thirteenth question.*—What direction should the maritime inspection zone follow with respect to the coasts of the countries that surround the gulf?

Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra answered that the zone should follow the contours of the respective coasts, as well within as outside the gulf; and Judge Gutiérrez Navas that, with respect to the Gulf of Fonseca, the radius of a marine league zone of territorial sea should be measured from a line drawn across the bay at the narrowest part of the entrance toward the high seas, and the zone of inspection extends 3 leagues more in the same direction.

*Fourteenth question.*—Does the right of coownership exist between the Republics of El Salvador and Nicaragua in the nonlittoral waters of the gulf, and in those waters also, that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defense?

Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra answered that such right of coownership does exist, without prejudice, however, to the rights that belong to Honduras in those nonlittoral waters; Judge Gutiérrez Navas answered in the negative.

*Fifteenth question.*—Wherefore, as a consequence, and conformably with their internal laws and with international law, should there be excepted from the community of interest or coownership the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands, respectively, and in which they have exercised, and may exercise, their exclusive sovereignty?

Answered in the affirmative by Judges Medal, Oreamuno, and Castro Ramírez; and in the negative by Judge Gutiérrez Navas, on the ground that in the interior of closed gulfs or bays there is no littoral zone; Judge Bocanegra answered in the affirmative on the ground that the high parties litigant, having accepted the Gulf of Fonseca as a closed bay, the existence of the marine league of exclusive ownership becomes necessary since the gulf belongs to three nations instead of one. (11 A. J. I. L., 1917, p. 693.)

*Aerial navigation convention, 1919.*—During the World War many questions had arisen in regard to the use of the air. In the convention for the regulation of aerial
navigation of 1919 certain general principles were set forth. In article 38 it was stated that the convention did not affect the freedom of action of the contracting states, either as belligerents or as neutrals. It is not to be assumed that belligerents would have greater freedom in time of war in neutral aerial space than in time of peace.

The following are some of the articles which seemed to be generally accepted:

**ARTICLE 1**

The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present convention the territory of a state shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

**ARTICLE 3**

Each contracting state is entitled, for military reasons or in the interest of public safety, to prohibit the aircraft of the other contracting states, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting states, from flying over certain areas of its territory.

In that case the locality and the extent of the prohibited areas shall be published and notified beforehand to the other contracting states.

**ARTICLE 32**

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

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire
no right to the privileges referred to in the above paragraph. (Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States and Other Powers, vol. III, pp. 3768, 3772.)

*Panama cities, 1914.*—In the proclamation of the United States relating to the neutrality of the Panama Canal Zone, November 13, 1914, it was provided, 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. p. 2039.)

The agreement of October 10, 1914, had provided:

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. (Ibid. p. 2042.)

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(c) The vessels appearing at opposite ends of the Panama Canal have not the same privileges as in the Suez Canal, and should be allowed to pass through; but each should, after passing through, be detained till the other has passed through, in order that the departure of one may not be delayed by the passage of the other.

The Gulf of Fonseca is a territorial gulf, and therefore not open to the vessels of state X.

The aircraft from vessels of war of state X may not lawfully fly over Panama.