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.
SITUATION III.

Two countries, on the verge of war, summon home all their military and naval officers. When war is declared, an officer of one of the belligerents, of high rank, whose presence is specially desired for important service, is on the high seas, as a passenger on a neutral ship, bound to an intermediate neutral port, where he intends to take passage by another vessel for a port in his own country, or to enter upon active service on one of its men-of-war, should any call.

May the ship on which the officer is sailing be captured as prize by a cruiser of the enemy, or may the officer be taken out and the ship be permitted to proceed?

SOLUTION.

The answer to the foregoing question involves the consideration (1) of the right of a belligerent to prevent the transportation by a neutral ship of persons in the military service of the enemy and (2) of the destination of the officer in the case stated.

1. Right of the belligerent.—It is admitted that a neutral vessel engaged in the carriage of persons in the service of a belligerent becomes liable to condemnation either when the belligerent has so hired it that it has become a transport in his service and that he has entire control over it, or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war."1 This rule leaves open the question as to the carriage of persons in the service of a belligerent by a neutral vessel in the ordinary course of trade. The view has been expressed that if such persons may be classed as contraband the vessel may be seized and brought in for adjudication: but that if they may not be so classed the vessel in which they are traveling remains a ship under neutral

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1 Hall, International Law, 4th ed., p. 701.
jurisdiction which has not been brought by the conduct of the persons having control over it within the scope of those exceptional rights in restraint of trade which belligerents have been allowed to assume. 1 On the other hand, the view has been expressed that "it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different." 2 Apparently the great majority of writers treat the transportation of persons in the military service of the enemy either as a carriage of contraband or as an act analogous thereto. It is probable, however, that too much importance has been given to this somewhat technical aspect of the matter, since it seems to be generally agreed that the carriage of such persons to a military destination is an enemy service far more important than the carriage of contraband. From the belligerent's point of view the importance of the act consists not in the manner or in the motive with which it may be done, but in the aid rendered to the enemy. Whether the circumstances of the transportation may or may not be such as to render the vessel liable to confiscation, it is reasonable to hold that it is a right of the belligerent to take proper measures to prevent the enemy from receiving military aid under the protection of a neutral flag. As to the number of military persons necessary to subject the vessel to confiscation no rule can be laid down. "To carry a veteran general under some circumstances might be a much more noxious act than the conveyance of a whole regiment." 3

2. Destination.—Upon the facts stated, the destination of the officer in question, though he is immediately bound to a neutral port, appears to be in reality belligerent. It has been declared that even provisions which, although destined to the enemy's country, are not in general contraband, are to be deemed such "if destined for the army or navy of the enemy or for his ports of naval or

1 Hall, International Law, 4th ed., p. 705.
3 Lawrence's Wheaton, edition of 1863, p. 802.
military equipment." The destination of the officer in question for "military use" is, in the case stated, evident.

Conclusion.—Although the case of the Trent related to persons in the diplomatic and not in the military service of the enemy, a considerable majority of the authorities seem to concur in the opinion that the discussion which then took place resulted in a general understanding that in the absence of a treaty it is no longer allowable to take persons out of a neutral ship, but that the ship herself, with the noxious persons on board, must be brought in for judicial examination. In the case stated, therefore, the ship should be seized and brought in with the officer on board. The fact that he embarked before the declaration of war doubtless would be taken into consideration by the prize court in making up its judgment. While such a circumstance might materially affect the question of the ship's culpability, it would not appear to destroy, any more than in the case of contraband, the right of the belligerent to prevent his enemy from receiving military aid under cover of a neutral flag.

NOTES ON SITUATION III.

The "Instructions to blockading vessels and cruisers," issued by the Navy Department during the war with Spain, contained the following clause:

"16. A neutral vessel in the service of the enemy, in the transportation of troops or military persons, is liable to seizure."

Stockton's Naval War Code contains a similar but amplified provision as follows:

"Art. 16. Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction."

It is to be observed, however, that in this clause nothing is expressed as to the transportation of troops or military persons, the design appearing to be to class as a punishable act the performance by a neutral vessel of military or naval services for the enemy, perhaps under the latter's immediate employment or control.

1 The Commerce, Wheaton, 382.
2 General Orders No. 492, June 20, 1898.
TREATY CLAUSES.

Another provision of the code which may be cited here reads as follows:

"Art. 35. Vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy are liable to seizure and detention, unless treaty stipulations otherwise provide."

This clause would cover the carriage of military persons, should such persons be admitted to fall within the category of contraband.

In numerous treaties running back to the seventeenth century, a provision may be found in connection with the subject of contraband to the effect that the persons of enemies shall not be taken out of free ships unless they are military persons in the actual service of the enemy. Such a clause may be found in various treaties entered into by the United States with foreign powers. Article XXIII of the treaty of amity and commerce with France of February 6, 1778—the first treaty concluded by the United States—stipulated that free ships should make free goods, and in connection therewith that the same liberty should be extended to persons on board such ships, so that, "although they be enemies to both or either party, they are not to be taken out of that free ship unless they are soldiers and in actual service of the enemy." A similar clause may be found in Article XIV of the treaty with France of September 30, 1800; in Article XI of the treaty with the Netherlands of October 8, 1782; in Article VII of the treaty with Sweden of April 3, 1783, and in various other early treaties, most of which have ceased to be in force. A similar provision has, however, been included by the United States in various recent or comparatively recent conventions. It may be found in Article XV of the treaty with New Granada (Colombia) of December 12, 1846; in Article XVI of the treaty with Bolivia of May 13, 1858; in Article XIX of the treaty with Hayti of November 3, 1864; in Article XVI of the treaty with Italy of 1871; in Article XVII of the treaty with Peru of August 31, 1887. The usual form of the clause in these later treaties is that the freedom of the ship shall extend to persons on board, even if they be enemies, "unless they are officers or soldiers in the actual service of the enemy."
These clauses obviously imply that officers and soldiers in the actual service of the enemy may be taken out of a neutral ship without judicial proceedings. In this respect they bear the trace of their origin in a time when the authority and necessity of prize adjudication were not so well settled and understood as now; and when the claims of belligerents to interdict neutral intercourse with their enemies, and neutral carrying trade of persons and goods, were almost unlimited, and their practices loose and irregular.\(^1\) Although they must be conceded to possess, in existing treaties, the force of law as between the contracting parties, their perpetuation is perhaps to be ascribed rather to the habit of employing ancient forms than to intelligent design, and it would therefore be unsafe to assume that the act which they authorize would be admitted to-day in the absence of an express treaty stipulation. Nevertheless, they clearly exemplify the opinion that the transportation on the high seas of military persons in actual service is an act the consummation of which the adverse belligerent has a right to prevent.

Frequent reference is made to certain decisions of Sir William Scott in cases involving the carriage of military persons or of official dispatches. These cases are reviewed by Dana, in a note to his edition of Wheaton (pp. 640–643). His summaries are generally accurate, but in a few particulars they do not appear to be borne out by the printed record, while in the cases relating to official dispatches he fails to disclose certain points of crucial importance.

The principal cases decided by Sir William Scott in relation to the carriage of military persons are those of the Carolina, 4 C. Rob., 256, April 30, 1802; the Friendship, 6 C. Rob., 420, August 20, 1807; and the Orozemo, 6 C. Rob., 430, September 24, 1807. In each of these cases the vessel was condemned as a transport of the enemy, engaged, either under contract or under duress, in the carriage of military persons. In the case of the Friendship, Sir William Scott said: "It is asked, Will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding

\(^1\) Bernard, Case of The Trent, 14–20, cited by Dana, Note to Wheaton, 657.
his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this court, nor any other British tribunal, has ever laid down the principle to that extent. This is a case differently composed."

The question of a military officer in the service of the enemy “finding his way home in a neutral vessel” was thus expressly reserved. In the same case, however, Sir William Scott, referring to the transportation of military persons for a belligerent, observed: “Shall it be said then that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps to renew their activity on our shores?” Discussing, in the case of the Orozombo, the question of the number of the persons carried, he declared: “Number alone is an insignificant circumstance *, * *, since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish.”

With regard to Sir William Scott’s decisions as to the carriage of official dispatches, it is to be observed (1) that, in cases in which the vessel, or the vessel and cargo, were condemned, he proceeded not upon the ground of governmental employment, but simply upon that of the aid rendered, knowingly or fraudulently, to the enemy; and (2) that, in cases in which, knowledge or fraud not being proved, the vessel was restored, the claimants were required to pay the captors’ expenses. Thus, in the case of The Rapid, Edward’s Adm. 228, 1810, Sir William Scott, in pronouncing sentence of restitution, declared that “in this, as in every other instance in which the enemy’s dispatches are found on board a vessel,” the master had, “by failing to exercise the utmost jealousy,” and in spite of
the fact that his voyage was to terminate in a neutral country, "justly subjected himself to all the inconveniences of seizure and detention, and to all the expenses of those judicial inquiries which they have occasioned." Moreover, in reference to the nature and importance of the act in question, Sir William Scott on another occasion said: "The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature: but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerents in that quarter of the world." ¹

The practical futility of attempting to base a final solution of the question under consideration upon the mere form of the agreement under which military persons in the service of the enemy are transported—whether they are carried under a contract with the government or merely as "passengers"—may be vividly illustrated by a correspondence which took place during the revolution in Chile in 1891.

In a dispatch to Lord Salisbury of Aug. 12, 1891, Mr. Kennedy, British minister at Santiago, reported that on the 26th ultimo he had learned from the agent of the Pacific Steam Navigation Company, a British concern, at Valparaiso, that the company's steamer Iberia had been detained by the authorities two days at Coronel, in order to embark soldiers for the Government, and that the company's agent at Coronel, in explanation of his action, which was contrary to his instructions, stated that his objections were overruled by the governor of Coronel, who satisfied him that the soldiers were embarked under Mr. Kennedy's authority and by his orders. On August 3rd Mr. Kennedy wrote to Señor Zañartu, the minister for foreign affairs, and requested an explanation of this statement of the governor, at the same time denying that he had given any orders or authority in the matter.

Accompanying the dispatch there was a note of Mr. Kennedy to Señor Zañartu, of July 15, 1891, acknowledg-

¹The Atalanta, 6 C. Rob. 440, March 4, 1808. See also The Caroline, 6 C. Rob. 461, April 1, 1808; The Constantia, ibid.; The Susan, ibid.; The Hope, ibid.; The Madison, Edward's Adm., 224 (1810); The Rapid, Edward’s Adm., 228 (1810).
ing the receipt of a note of the latter, stating that the Government desired immediately to ship, by the Iberia, 400,000 silver dollars to Montevideo, and also a certain number of individuals, not possessed of any special character, to Punta Arenas, and inquiring whether the money and the passengers could count, in case of seizure by the revolutionary squadron, on the protection of the British flag, in the sense of exacting the release of the individuals and the restitution of the specie. Mr. Kennedy, in reply, referred to similar assurances given by him in regard to British vessels carrying wheat to Europe, and to the concurrence of Her Majesty's senior naval officer on the station in them.

There was also a letter of Mr. Prain, the company's agent at Valparaiso, to Mr. Kennedy of July 25, 1891, expressing surprise at the reports from Coronel, especially as Mr. Kennedy had warned him in a private letter not to receive "fighting men" on board as passengers, since by so doing the steamers would run the risk of getting into trouble in which Her Majesty's representatives would not be able to help them.

In a letter to Mr. Prain of August 3, 1891, Mr. Kennedy said:

"I privately conveyed to you, in the interests of your company, the opinion expressed to me by Admiral Hotham on the general question of conveyance of troops, stores, etc., but I abstained from concurring officially in that opinion as regards the Pacific Steam Navigation Company."

In his dispatch of August 12, Mr. Kennedy, referring to this correspondence, said:

"As regards the alleged illegality of the above shipments as asserted by the Oppositionists and their sympathizers, I beg to state that the Pacific Steam Navigation Company are bound under their contract to carry soldiers, military stores, etc., excepting in the case of war between two republics on this coast; but, as the Chilean Government are now engaged in the suppression of a rebellion, the above exemption, I venture to think, does not apply. It is true that in reply to Mr. Prain's private and confidential inquiry I privately reminded him that Admiral Hotham had given a general opinion against the transport
of soldiers and stores by British ships; but I did this to help Mr. Prain in his efforts to induce the authorities to send their soldiers on board his ship as private passengers, so as not to compromise his position with the Opposition, for whom he has strong sympathies, and in the success of whose cause he is an enthusiastic believer. But, as your lordship will perceive, I decline to commit myself officially to the opinion that the Pacific Steam Navigation Company would, under present circumstances, commit a breach of neutrality in transporting troops for the Chilean Government.\footnote{Chile, No. 1 (1892), 236–242.}

The purport of Mr. Kennedy’s suggestion appears to be that, if the persons in question were transported as “troops for the Chilean Government,” the act might be considered culpable; but that if the same persons, who were in fact soldiers in the service of that Government, were taken on board as “private passengers,” the ship would not be “compromised” by their transportation. Perhaps a touch of irony may be detected in Mr. Kennedy’s suggestion, since it was not entirely harmonious with the private advice which he gave on the strength of Admiral Hotham’s opinion.

In the neutrality proclamation issued by the British Government April 23, 1898, in respect of the war between the United States and Spain, the acts against which British subjects were warned as being in derogation of their duty as neutrals, or in contravention of the law of nations, comprised the “carrying” of “officers, soldiers, dispatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usages of nations, for the use or service of either of the said powers.”\footnote{Proclamations and Decrees during the War with Spain, 35.}

In the late controversy between Germany and Great Britain growing out of the seizure and detention by British cruisers of the German East African mail steamers \textit{Bundesrathe, General}, and \textit{Herzog} it appears that one of the grounds on which the steamer first mentioned was seized was that she carried “twenty Dutch and Germans and two supposed Boers, three Germans and two Austrians
believed to be officers, all believed to be intending combatants, although shown as civilians." In reply to the request of the German Government for the vessel's release Lord Salisbury stated, among other things, that she "had on board a number of passengers believed to be volunteers for service with the Boers." It was subsequently stated that the search of the ship was expected to disclose "arms among baggage of Germans on board, who state openly they are going to the Transvaal." The German Government declared that it had no knowledge of more than two of its officers having proceeded to the Transvaal, where they were unable to obtain commands. The British Government subsequently directed that every facility for proceeding to his destination should be afforded "to any passenger whom the court considers innocent." The steamer and her cargo were afterwards discharged. In the case of the Herzog it was alleged, among other things, that she had on board "a considerable number of male passengers, many in khaki, apparently soldiers." It turned out that she had among her passengers three Red Cross expeditions. The General was said to have on board a considerable number of Dutch and German passengers for the Transvaal in plain clothes, but "of military appearance," some of whom were believed to be trained artillerymen. Lord Salisbury afterwards stated that "there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."

In none of these cases was it alleged that the suspected persons were soldiers in the actual service of the enemy. They seem rather to have been looked upon as contraband, as material immediately useful in war. In this relation it is to be observed that Count von Bülow, in a speech in the Reichstag, January 19, 1901, laid down certain propositions of international law, one of which was that by the term contraband of war, "only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents." By this definition Count von Bülow seems to have concurred in the opinion apparently entertained by Lord Salisbury, that the transportation of persons suited for war
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and destined for a belligerent may be dealt with as a case of contraband, without regard to the question whether such persons are in the actual service of the enemy.

This opinion accords with that of Bluntschli, who says:

"§ 815. The transportation of troops or of general officers forming part of belligerent armies, on neutral ships, is assimilated to the transportation of materials of war and is regarded as contraband. The troops or officers may be made prisoners."

By troops he means not only a large force, but a small number of soldiers with an underofficer, for example; and he considers the same principle applicable to a military general officer without his command.¹

Perels considers as prohibited the transportation of subjects of a belligerent power who are in the actual military service or who are liable to such service. (Das internationale öffentliche Seerecht, Berlin, 1882.)

Marquardsen thinks it an essential condition of seizure that the persons are in the actual military service of the enemy; and he holds that if Mason and Slidell had been military persons the question of the legality of their capture would have been one for the determination of the prize courts, although the Trent was not under contract with any government.²

Rivier, in his late work, says:

"Another application of the principles laid down concerns the transportation at sea, by neutral ships, of soldiers and sailors destined to a belligerent. According to a just opinion this transportation is forbidden to the neutral state, but not to its private citizens. The latter undertake it at their peril and risk. If, as we assume, the owner or the master of the ship is cognizant of the nature of the transportation, and that it is of sufficient importance, which is a question of fact, the injured belligerent may seize and confiscate the ship.³

See also Fiore, Droit International Public, III, 514, § 1602; Field, International Code, § 853; Creasy, First Platform of International Law, §§ 595, 596.

² Der Trent-Fall, 1862, chap. 10.
³ Principes du Droit des Gens, II, 388.
The question of the transportation of military persons has been discussed and has formed the subject of resolutions by the Institute of International Law, not as a question of contraband, but as a question of prohibited transportation. In accordance with this view, the Institute, at its session in Venice in 1896, adopted the following resolutions:

"§6. It is forbidden to attack or oppose the transportation of diplomats or diplomatic couriers: 1st, neutrals; 2nd, those accredited to neutrals; 3rd, navigating under the neutral flag between neutral ports, or between a neutral port and the port of a belligerent.

"On the contrary, the transportation of the diplomats of an enemy accredited to his ally is, except it be in the course of regular and ordinary traffic, prohibited: 1st, on the territories and waters of the belligerents; 2nd, between their possessions; 3rd, between the allied belligerents.

"§7. The transportation of troops, military men, or military agents of an enemy is forbidden: 1st, in the waters of the belligerents; 2nd, between their authorities, ports, possessions, armies, or fleets; 3rd—when the transportation is made on account of or by the order or mandate of the enemy, or to conduct to him (pour lui amener) either his agents with a commission for the operations of the war, or military persons already in his service, or auxiliaries or troops enrolled in violation of neutrality—between neutral ports, between those of a neutral and those of a belligerent, from a neutral point to the army or the fleet of a belligerent.

"The prohibition does not extend to the transportation of individuals who are not yet in the military service of a belligerent, even though their intention is to enter it, or who make the voyage as simple passengers without manifest connection with the military service.

"§ 8. The transportation of despatches (official communications between official authorities), between two authorities of an enemy, who are on land or ships belonging to or occupied by him, is prohibited, save in regular or ordinary traffic.
"The prohibition does not extend to transportation either between neutral ports or from or to some neutral territory or authority."  

In connection with the resolutions of the Institute, reference should be made to the work of M. Kleen, entitled "De la Contrebande de Guerre et des Transports Interdits aux Neutres." Paris, 1893, which he prepared especially for the elucidation of the questions before the Institute.

While the controversy between Germany and Great Britain, as to the seizure of the German mail steamers, was in its early stages, Prof. T. E. Holland, editor of the British "Admiralty Manual of the Law of Prize," in a letter dated Jan. 2, 1900, and published in the London Times of the next day, said:

"The carriage by a neutral ship of enemy troops, or of even a few military officers, as also of enemy dispatches, is an 'enemy service' of so important a kind as to involve the confiscation of the vessel concerned, a penalty which, under ordinary circumstances, is not imposed upon carriage of 'contraband' properly so called. See Lord Stowell's luminous judgments in Orozembo (6 Rob., 430) and Atalanta (id., 440). The alleged offense of the ship Bundesrath would seem to be of this description."

When this letter was written, the facts in the case of the Bundesrath had not been definitely ascertained; but, without regard to any particular case, it is obvious from the passage quoted that, where the transportation of military persons is in question, Professor Holland considers the carriage of the persons, and not the special letting out of the ship to a belligerent government for that purpose, as the gravamen of the charge of "enemy service," and that he interprets the decisions of Sir William Scott as authority for this view.

1 Annuaire, XV, 231-232.