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International Law Situations with Solutions and Notes  
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### SITUATION VIII.

During the war between the United States and State X, two war vessels of State X are lying in the harbor of neutral State Y. These vessels go out of the harbor, beyond the jurisdiction of State Y, are damaged severely by war vessels of the United States, and return to the harbor of State Y, where they are abandoned and sink. The crews of these vessels are succored and received on board of neutral war vessels belonging to States A, B, and C, which are within the port. The United States commander claims these crews as prisoners of war.

(a) Is the claim justifiable?

(b) What disposition should be made of the crews if the commanders claim is not allowed?

### SOLUTION.

(a) The claim of the United States commander that the crews are prisoners of war is not justifiable. The crews had at no time been within the power of the United States commander.

(b) The crews should be interned or otherwise disposed so that they may not again take part in the war.

### NOTES ON SITUATION VIII.

(a) The United States war vessels damage two vessels of State X in battle on the high seas. These vessels seek refuge in the neutral port of State Y. There the vessels are abandoned and sink. The crews of the abandoned vessels are received upon neutral war vessels of other States than Y, which vessels chance to be in the port. The United States commander then claims the crews of the vessels as prisoners of war.

The first question which naturally arises is as to the status of the crews of the abandoned vessels of State X.

*Prisoners of war.*—Are they prisoners of war? The definition of the term prisoner of war is fairly uniform.

According to the Instructions for the Government of Armies of the United States in the Field (General Orders, No. 100), article 49—

A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field, or in the hospital, by individual surrender, or by capitulation.

All soldiers of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

The Brussels Convention of 1874, article 23, says:

Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's Government, but not of the individuals or of the corps who made them prisoners.

They should be treated with humanity.

Every act of insubordination authorizes the necessary measures of severity to be taken with regard to them.

All their personal effects, except their arms, are considered to be their own property.

According to the Oxford Manual of the Laws of War on Land, 1880:

ART. 21. Persons forming part of the armed forces of belligerents, on falling into the power of the enemy, must be treated as prisoners of war, conformably to article 61, and those following it.

This rule applies to messengers openly carrying official dispatches, and to civil aëronauts employed to observe the enemy or to keep up communication between different parts of the army or territory.

The Hague Convention, 1899, provides that—

ART. 3. The armed forces of the belligerent parties may consist of combatants and noncombatants. In case of capture by the enemy both have a right to be treated as prisoners of war.

*Reasons why crews are not prisoners of war.*—It will be seen from the Situation under discussion that the provisions requisite for the making of the crews prisoners of war had not been met in the case of the crews of the vessels of State X.

The single ground of failure to capture therefore would be sufficient to vitiate the claim of the commander.

There are various other reasons why the claim of the commander is not correct. (1) The enemy's ships must come within the power of the United States commander before they can be made prisoners of war. In this Situation while the enemy's ships are damaged they had not come under the power of the United States commander, and the crews had not, therefore, been made prisoners of war. At no time had the commander had the power to say what should be the disposition of the crews. Before the crews had deserted the vessels they had been under their own flag, and this was still the case after they had left the vessel, provided they had left in their own boats.

(2) On passing within the limits of neutral State Y, the field of belligerent action was passed. The only relations which the vessels of State X could maintain in the port would be peaceful relations. Hence the commander could not in port take prisoners of war without violating the neutrality of State Y.

(3) On going on board the war vessels of States A, B, and C, the crews of the vessels of State X passed within the jurisdiction of those States, and neither neutral State Y nor the United States could presume to exercise jurisdiction over those vessels because of their reception.

Neutral State Y would not interfere, because the crews of the vessels of State X were apparently under their own flag until they had passed under the flags of A, B, and C. Even if the crews had been compelled to enter the water without boats, and had been obliged to swim to the vessels of A, B, and C, though it might be held technically that while in the water and not under the organized control of their own officers the crews were under the jurisdiction of State Y because State Y was sovereign over the harbor waters, yet when they passed on board the war vessels of States A, B, and C, the crews passed out of the jurisdiction of State Y.

*Public vessels in foreign ports.*—Halleck, speaking of the general privileges of public vessels in foreign ports, says:

Where there are no express prohibitions, the ports of one state are considered as open to the public armed and commissioned vessels of every other

nation with whom it is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under express permission, stipulated by treaty, or a permission implied from the absence of prohibition. This exemption, which is termed "extra-territoriality," extends not only to the belligerent ships of war, privateers, and the prizes of either, who seek a temporary refuge in neutral waters from the casualties of the sea and war, but also to prisoners of war on board any prize or public vessel of her captor. Such vessels, in the command of a public officer, possess in the ports of a neutral the rights of extra-territoriality, and are not subject to the local jurisdiction. But whatever may be the nature and extent of the exemption of the public or private vessels of one state, from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers and crew, in violation of the law of nations against the security of the state in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defense as the security of the state may require. Therefore a public vessel would not hesitate to give up to the local authorities a person accused of a serious crime who might come aboard her, and it is probable that she might even do so in the case of a person evading conscription. (Halleck's *Internat. Law*, vol. 1, p. 215.)

As neutral State Y would not presume to exercise jurisdiction over the war vessels of States A, B, and C, under the circumstances, much less could the commander of a United States war vessel in a neutral port exercise any authority or even claim as prisoners the crews of the vessels of State X, which had never been in his power. This case also differs from a case in which the shipwrecked or wounded are picked up upon the scene of a naval engagement. These crews in the harbor of State Y are removed from the exercise of authority on the part of the United States commander: (1) by the fact that the succor was afforded in a neutral port, and (2) by the fact that the succor was afforded upon neutral vessels of other states temporarily within the neutral port of Y.

*Conclusion.*—The claim of the United States commander that the rescued crews should be delivered to him as prisoners of war could not be sustained.

(b) There next arises the question of the disposition of these crews which have gone on board the war vessels of States A, B, and C.

*Captain Mahan's position.*—Captain Mahan, in a paper before the peace conference at The Hague, on June 20,

1899, argued that some definite provisions should be made for crews shipwrecked in battle. He said:

\* \* \* On a field of naval battle the ships are constantly in movement; not merely the movement of a land battle, but a movement of progress, of translation from place to place more or less rapid. The scene is here one moment; a half hour later it may be five miles distant. In such a battle it happens that a ship sinks; her crew become *naufragés*; the place of action shifts; it is no longer where these men are struggling for life; the light cruisers of their own side come to help, but they are not enough; the hospital ships with the neutral flag come to help; neutral ships other than hospital also arrive; a certain number of *combattants naufragés* are saved on board neutral ships. To which belligerent do these men belong? It may happen that the neutral vessel, hospital or otherwise, has been with the fleet opposed to the sunken ship. After fulfilling her work of mercy she naturally returns to that fleet. The *combattants naufragés* fall into the power of the enemy, although it is quite probable that the fleet to which they belong may have had the advantage.

I maintain that unless some provision is made to meet this difficulty much recrimination will arise. A few private seamen, more or less, a few sub-officers, may not matter, but it is possible that a distinguished general officer, or valuable officers of the lower grade may be affected. This will tend to bring into discredit the whole system for hospital ships; but further, while hospital ships, being regularly commissioned by their own government may be supposed to act with perfect impartiality, such presupposition is not permissible in the case of vessels named in Article 5. Unless the status of *combattants naufragés* saved by them is defined, the grossest irregularities may be expected—the notoriety of which will fully repay the class of men who would perpetrate them.

As many cases may arise, all of which it is impossible to meet specifically, I propose the following additional articles, based upon the single general principle that *combattants naufragés*, being *ipso facto* combatants *hors de combat*, are incapable of serving again during the war, unless recaptured or until duly exchanged.

Captain Mahan embodied his ideas in the following articles, which, however, were not adopted:

1. In the case of neutral vessels of any kind, hospital ships or others, being on the scene of a naval engagement, which may, as an act of humanity, save men in peril of drowning, from the results of the engagement, such neutral vessels shall not be considered as having violated their neutrality by that fact alone. They will, however, in so doing act at their own risk and peril.

2. Men thus rescued shall not be considered under the cover of the neutral flag, in case a demand for their surrender is made by a ship of war of either belligerent. They are open thus to capture or to recapture. If such demand is made, the men so rescued must be given up, and shall then have the same status as though they had not been under a neutral flag.

3. In case no such demand is made by a belligerent ship, the men so rescued, having been delivered from the consequences of the fight by neutral interposition, are to be considered *hors de combat*, not to serve for the rest of the war unless duly exchanged. The Contracting Governments engage to prevent, as far as possible, such persons from serving until discharged. (Holls. Peace Conference at The Hague, p. 504.)

Captain Mahan's first article is very general. It covers "neutral vessels of any kind, hospital or others, being on the scene of a naval engagement, which may, as an act of humanity, save men in peril of drowning from the results of the engagement." In the second article he maintains that "men thus rescued shall not be considered under the cover of the neutral flag, in case a demand for their surrender is made by a ship of war of either belligerent."

These provisions as he mentions would particularly apply to cases involving circumstances similar to those under which the yacht *Deerhound* saved men of the *Alabama*, of which Mr. Seward said to Mr. Adams in a letter of July 15, 1864:

I freely admit that it is no part of a neutral's duty to assist in making captures for a belligerent, but I maintain it to be equally clear that, so far from being neutrality, it is direct hostility for a stranger to intervene and rescue men who had been cast into the ocean in battle, and then carry them away from under the conqueror's guns.

The case under consideration in this situation, however, does not contemplate rescue by a private ship as in the case of the *Deerhound*, but by a ship of war not upon the scene of hostilities, but in a neutral port. The crews are received on board a neutral war vessel, and a war vessel from its very nature can not be subjected to the provisions of the above articles.

*Lawrence's opinion.*—Lawrence, in his "War and Neutrality in the Far East," page 71, which appears as this is written, says:

The Chemulpo incident shows, among other things, that provision will have to be made in future for assistance by neutral ships of war, as well as by neutral hospital ships and ordinary neutral vessels. The nature of such provision is still open to controversy. We may hope to see the rejection of Captain Mahan's idea that neutral rescuers should be bound to give up their unhurt refugees to the first belligerent war ship which demands

them. Another project is that the neutral vessel which has gathered them up should report itself immediately to the belligerent commander controlling the scene of operations and take its orders from him, which would mean in most cases the surrender of the refugees as prisoners of war. This latter plan might sometimes be found difficult in practice. There have been cases when neither party controlled the scene after the action was over. The indecisive conflict between Sir Robert Calder and Villeneuve on July 22, 1805, is a case in point. Another instance may be taken from the battle of the Yalu, fought on September 17, 1894, at the close of which both the Japanese and the Chinese fleets left the waters in which they had contended. But quite apart from the fact that sometimes there may be no commander in control on the spot where the battle was fought, the principle underlying the proposals we have described seems inadmissible. It involves the deneutralization of humanity. If the rescued men are surrendered to their own side, they will again become combatants; if they are surrendered to the other side, they will be made prisoners of war. To assist in bringing about either of these consummations is surely inconsistent with neutrality. There remain the alternatives of "internment"—that is to say, keeping them in honorable detention under neutral guardianship for the rest of the war—or handing them over to their own friends in exchange for a solemn promise that they shall not serve again while hostilities continue. \* \* \*

We interpret the obligations of neutrality and humanity more strictly than our fathers, but we need an international agreement to give symmetry and stability to our views. When it comes to be negotiated the precedent of Chemulpo will undoubtedly make for a very wide right of rescue on the part of neutral vessels, both public and private. But we may hope it will not be pressed in favor of anything approaching a right of interference in the struggle. It is one thing to save the life of a man struggling in the water, quite another to help him in keeping himself and his ship out of the hands of the victor.

*Hague Conference Provisions.*—Article VI of the "Convention Between the United States of America and Certain Powers for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864" (Hague Convention), ratified by the United States in 1900, provides that—

"Neutral merchantmen, yachts, or vessels having or taking on board sick, wounded, or shipwrecked of the belligerents can not be captured for so doing, but they are liable to capture for any violation of neutrality they may have committed."

Article LVII of the "Convention Between the United States of America and Certain Powers, With Respect to the Laws and Customs of War on Land" (Hague Conven-



tion), ratified by the United States in 1902, provides for the internment of the belligerent troops as follows:

Article LVII. A neutral state which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

Article LVIII. Failing a special Convention, the neutral State shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace, the expenses caused by the internment shall be made good.

Article LIX. A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such case, the neutral State is bound to adopt such measures of safety and control as may be necessary for the purpose.

Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral State, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Article LX. The Geneva Convention applies to sick and wounded interned in neutral territory.

If the crews of the abandoned war vessels of State X had gone to the shore of State Y as a portion of the military force of State X they would have been interned during the remainder of the war, according to the provisions of the Hague Convention, to which most of the States of the world are parties; or, even if not a party to the convention, State Y would intern them, in accord with the general international practice.

*Effect of going on board public vessels.*—In going on board of the war vessels of States A, B, and C, the crews of the vessels of State X practically enter the jurisdiction of States A, B, and C. Upon these war vessels of States A, B, and C no other State would claim any jurisdiction unless the peace of the port or the safety of the State was threatened, and even then action would ordinarily extend only to expelling the vessel from the port. Hence neither Y nor the United States would interfere.

As the crews of the abandoned vessels have, by entering the war vessels of States, A, B, and C, entered within the jurisdiction of those States, it may be presumed that they will observe their international obligations. It would not be incumbent upon the commander of the United States war vessel to inform the other commanders as to their obligations or to make claims. He might with propriety confer with them in regard to the disposition of the crews in question and indicate the line of conduct that he thought to be proper.

*Chino-Japanese war of 1894-95.*—During the Chino-Japanese war of 1894-95, certain neutral war ships rescued Chinese soldiers in Korean waters. Of these acts Takahashi says:

As already mentioned, the French war ship *Lion* brought 45 Chinese soldiers to Chemulpo, and a German war ship sent back 120 Chinese soldiers from the islands in the Korean waters to Tientsin. The action of the French man-of-war was very humane in rescuing the Chinese, who were clinging to the masts of the sunken ship, but the act of the German vessel was not admissible from a legal point of view. The Chinese who were on the islands in the Korean waters were not in danger of their lives; on the other hand, it was said that they were displaying their usual lawlessness in plundering the villages of the island. They belonged to the crack regiment of the Chinese army, and it might be expected that they would serve again as soldiers. To send back these soldiers to China was nothing but giving assistance to one of the belligerents. By the law of nations, any belligerent can release prisoners on exacting an oath that they will not take arms again. But there is no precedent for a neutral restoring soldiers to one belligerent without taking the trouble to exact such an oath from them. (International Law during the Chino-Japanese war, p. 51.)

Takahashi admits that the soldiers might have been paroled, but denies the right of a neutral war vessel to restore them.

*Chemulpo affair, 1904.*—The case of the rescue of the officers and crews of the Russian ships *Variag* and *Koriets* in the harbor of Chemulpo, in the Russo-Japanese war affords a valuable precedent. The accounts of the circumstances vary somewhat (Lawrence 67, War and Neutrality in the Far East), but the following seems to be the course of events:

Japan severed her diplomatic relations with Russia on February 6, 1904.

On February 8th Admiral Uriu, of the Japanese navy, demanded of the senior Russian naval officer that he leave with the forces under his command the harbor of Chemulpo before noon of the 9th of February. In case of failure to comply with the demand, Admiral Uriu threatened attack upon the Russians. Admiral Uriu cautioned neutral vessels to keep clear of the field of possible action.

Earlier in the day the Russian gunboat, *Korietz*, had started for Port Arthur from Chemulpo, but seeing the Japanese vessels approaching, had returned to Chemulpo. It appears that by midnight of February 8th the Japanese forces, which had been landed, were in effective possession of Chemulpo. Early in the morning of the 9th the Japanese war vessels steamed out beyond the harbor. Before noon the Russian vessels, *Variag* and *Korietz*, started out. Before 1 o'clock these vessels, after a brief engagement, returned to the harbor of Chemulpo. The *Variag* was abandoned and sank during the afternoon. Boats from neutral war vessels in port received the personnel of the *Variag* and put them on board the British war vessel *Talbot* and the Italian war vessel *Elba*. The crew from the Russian war vessel *Korietz*, which seems not to have been injured in the engagement, later left that vessel in their own boats and went on board the French war vessel *Pascal*. Shortly afterwards, the *Korietz* blew up. The crew of a merchant vessel under the Russian flag, after setting fire to their vessel, also sought refuge in the *Pascal*.

While it has been claimed that the Japanese admiral demanded the Russian refugees as prisoners of war, the following is, upon good authority, asserted to be the fact:

The admiral in command of the Imperial Japanese fleet at Chemulpo did not make any demand for surrender to him of the Russian officers and men rescued from the sunken ships *Variag* and *Korietz*.

The survivors of the above-mentioned ships were temporarily taken on board the French man-of-war *Pascal*, British man-of-war *Talbot*, and Italian man-of-war *Elba*, but the representatives of France, Great Britain, and Italy at Seoul, having asked the views of the Japanese representative there in regard to the mode of sending back the said Russians, the Imperial Government instructed their representative to consent to the proposition on the following conditions:

- (1) That the survivors of the Russian ships would be sent to Shanghai.

(2) That the Russian Government would give assurance that the said survivors would not be allowed to go to any place north of Shanghai.

The French representative addressed an official note to the Japanese representative, transmitting therewith a list of the names of the Russian survivors, signed by the captain of the *Pascal*, and giving assurance that the captain of the said vessel would not hand over the Russians to the authorities of other countries unless he obtained a guarantee from the said authorities to the effect that they would never be allowed to again take part in any act of hostilities. Thereupon the *Pascal* was permitted to sail for Shanghai with 8 officers and 39 petty officers and men from the *Variag* and 9 officers and 160 petty officers and men from the *Korietz* on board.

The British representative also addressed an official note, transmitting therewith a list of the names of the Russian survivors, signed by the captain of the *Talbot*, declaring that until the cessation of hostilities they would be detained within the British dominions. Thereupon the British ship *Amphitrite* was permitted to sail for Hongkong with the chief executive officer and other officers and men from the *Variag* on board, altogether numbering 275.

The Italian representative addressed an official note to the Japanese representative, transmitting therewith a list of the Russian survivors, stating that they would be taken to Shanghai and there instructions from the Italian Government as to the disposition of these men would be asked. Thereupon the Italian man-of-war *Elba* was permitted to leave for Shanghai with 7 officers and 174 petty officers and men from the *Variag*.

This recent example is in accord with the general principles governing in analogous cases.

*Kleen's opinion.*—Kleen gives a conclusion also which would support the action of the neutral war vessels. He says:

Particulièrement difficile est la question de savoir comment traiter des fuyards trouvés par des navires neutres sur mer (sur des îles, des débris, etc.). Une distinction essentielle semble devoir être faite selon qu'il y a, ou non, danger de mort. Dans le premier cas, et quand même les fuyards ne seraient ni blessés ni malades, ils se trouvent dans une situation analogue à de tels, plutôt qu'à celle de simples fuyards sur les territoires et dans les ports, puisqu'ils sont entre la vie et la mort et exposés à la perte à moins d'être secourus. A défaut de stipulation positive, il semble donc juste de les traiter d'après les dispositions de la Convention de La Haye du 29 juillet 1899 (art. 6, 8 et 10), assurant la protection des navires transportants, et des naufragés, blessés et malades, à condition de garanties contre leur rentrée dans la même guerre comme combattants. Si au contraire les fuyards rencontrés sur mer sont hors de danger de mort, la question de savoir si l'humanité exige de donner suite à leurs réclamations de secours, peut dépendre du degré de détresse où ils se trouvent. S'ils sont ramassés par un navire de guerre neutre ou en haute mer, ils sont placés dans la même situation juridique que des fuyards entrés sur un terri-

toire neutre, sujets à l'internement. Que si celui-ci était impossible à cause de l'éloignement de l'État du navire, ils peuvent être remis à l'État convenable le plus proche avec des garanties contre leur rentrée au service belligérant. Si c'est dans des eaux territoriales et par un navire neutre marchand qu'ils sont reçus, ce navire doit les remettre à l'État territorial, à moins que cela n'implique un service de transport interdit pour le compte d'un belligérant, et cet État agira comme envers des fuyards entrés sur son territoire. (Kleen. *La Neutralité*. Vol. II, p. 32.)

*Conclusions.*—As these crews enter upon the vessels of States A, B, and C, those states become officially responsible for their treatment. The practice is such that had they gone ashore in the harbor by putting themselves under the jurisdiction of State Y, they would have been interned. By going on board of the war vessels of States A, B, and C, they put themselves under the jurisdiction of those states and should be interned or otherwise disposed in such manner that they would not again participate in hostilities during the remainder of the war.

It may be said, therefore, that—

(a) The claim of the United States commander was not justifiable, as he had not captured the vessels of State X and could exercise no jurisdiction within the port of neutral State X or upon the neutral war vessels belonging to States A, B, and C.

(b) The proper adjustment of the case under consideration would be the internment of the rescued seamen or other disposition by which they should not again take part in the war.

It may be noted that this case particularly shows the need for further agreement upon the rules of maritime warfare.