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International Law Situations with Solutions and Notes
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SITUATION VII.

During the war between the United States and State X, the senior officer of the United States fleet in a certain region discovers that newspaper correspondents are sending messages by wireless telegraphy. He has not authorized the use of the wireless telegraph by the newspaper correspondents, and its use may interfere with his military plans.

(a) What treatment should these correspondents receive?

(b) Granting that newspaper correspondents will be allowed in the field of operations, what regulations should govern them?

SOLUTION.

(a) In the absence of any prohibition the newspaper correspondents are entitled to use such legitimate means as the wireless telegraph for the transmission of news and are entitled to the ordinary treatment given to newspaper correspondents.

(b) If newspaper correspondents are allowed within the field of operations, the correspondents and the agencies of transmission of news should be under the absolute control of the commanding officer in that military area.

(For general scope of regulations see p. 115.)

NOTES ON SITUATION VII.

(a) What treatment should the correspondents described in this situation receive?

Russian Declaration, 1904.—During the Russo-Japanese war in 1904, in April, there was issued by Admiral Alexieff a circular in regard to the use of new means of communication by newspaper correspondents. This was particularly aimed at certain neutral press boats which were using wireless telegraph in transmitting news of the war. The circular handed by the Russian diplomatic agents to the foreign offices of various states was reported as follows:

“I am instructed by my Government, in order that there may be no misunderstanding, to inform your excellency

that the lieutenant of His Imperial Majesty in the Far East has just made the following declaration: In case neutral vessels, having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwangtung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes."

It should be observed that the Russian Government merely informs other governments that Admiral Alexieff has issued this Declaration. The Russian Government does not assert that it proposes permanently to support the position taken by its lieutenant.

The French text of the Declaration was as follows:

Dans le cas où des vapeurs neutres, ayant à bord des correspondants qui communiqueraient à l'ennemi des nouvelles de guerre au moyen d'appareils perfectionnés n'étant pas encore prévus par les conventions existantes—seraient arrêtés auprès de la côte du Kwantoung où dans la zone des opérations de la flotte russe—les correspondants seront envisagés comme espions et les vapeurs, munis d'appareils de télégraphie sans fil—saisis en qualité de prise de guerre.

Treatment of vessels using wireless telegraph.—Considering the provisions of this circular in the reverse order of their statement, the first matter is the treatment of the vessels. The implication is that the equipment with wireless telegraphic outfit by a neutral vessel "within the zone of operations" is sufficient ground for the seizure of the vessel as lawful prize. If this means that the ordinary rules of prize courts hold for such a vessel, it is difficult to understand how an adjudication can be made. If the circular means that such vessels, when actually engaged in communicating information of a military character to the enemy, are guilty of unneutral service and are liable to the penalties consequent upon such service, the provision is clear, for such would be the offense, and the regular penalty would be confiscation of vessel and equipment.

The attempt to bring under the rules of contraband and violation of blockade many forms of action in time of war which have only a remote relation to either has led to confusion, which shows the need of further elucidation

of the principles of unneutral service which involves actual participation by service in behalf of the enemy.

Spies.—The treatment of the correspondents using wireless telegraphy as spies raises further questions.

The treatment of a captured spy is usually summary and extreme, and while article 30 of the Hague Convention respecting the Laws and Customs of War on Land prescribes that "a Spy taken in the act can not be punished without previous trial," yet, the penalty is usually extreme. If, then, the proclamation of the Russian admiral is admitted as in accord with practice, the position of a newspaper correspondent would be exceedingly dangerous when news is communicated to the enemy, since he might become liable to treatment as a spy.

Both Russia and Japan are, however, parties to the above-mentioned convention, which defines the term "spy," in article 29, as follows:

An individual can only be considered a spy if, acting clandestinely, or on false pretenses, he obtains, or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not in disguise, who have penetrated into the zone of operations of a hostile army to obtain information, are not considered as spies. Similarly the following are not considered as spies: Soldiers or civilians, carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory.

This rule is in accord with general practice, both for land and naval warfare. There is no basis upon which an officer in the military service can set up a new definition. The fact that a news correspondent uses in transmitting communications "improved apparatus not yet provided for by existing conventions" does not constitute him a spy. It is not the means of communication but the nature of the act which determines the status of a spy. The nature of the act is clearly set forth in the Hague Convention above quoted, and any person, whether newspaper correspondent or other, guilty of such an act, whatever the means used, is a spy without further proclamation or discussion.

Conclusion as to Russian declaration.—The conclusion would be, therefore, that a vessel is not liable to seizure as prize merely from the fact of having on board “improved apparatus” for communicating news, and that correspondents using such “improved apparatus” are not liable from the simple fact of its use to treatment as spies.

On the other hand, newspaper correspondents who act in such manner as to bring themselves under the definition of spies are liable to treatment as such without special notification in the same manner as any other person. The vessel concerned in transmitting such information, together with its equipment for such purpose, is undoubtedly liable to the penalty of unneutral service, which is confiscation.

It is not possible to defend the position assumed in the Russian circular in its present extreme form. As Kebedgy says,

L'emploi de la télégraphie sans fil par des correspondants de journaux à la guerre a posé une question qui mérite d'être étudiée de près. Mais nous ne pensons pas qu'on pourra jamais approuver la décision de traiter ces correspondants comme des espions. (Revue de Droit International, VI, p. 451.)

The manifest intent of the circular to control the action of press agents and press boats within the zone of hostile operations is, however, proper in view of the danger to the belligerent which may follow unrestricted communications.

Control of newspaper correspondents.—Various regulations have from time to time been issued which affect newspaper correspondents.

The Hague Convention respecting the Laws and Customs on Land, provides:

ARTICLE XIII. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

Instructions for the Government of Armies of the United States in the Field provide:

ARTICLE 50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured may be made prisoners of war and be detained as such.

Article 34 of the Brussels Rules of Military Warfare, 1874, provides that—

Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, vivandiers, contractors, etc., may also be made prisoners of war.

These persons should, however, be furnished with a permit, issued by a competent authority, as well as with a certificate of identity.

and article 23 defines prisoners of war as “lawful and disarmed enemies.”

The Oxford Manual of the Laws of War on Land of 1880 gave to such persons a more lenient treatment, as is shown in article 22:

Persons who follow an army without forming a part of it, such as correspondents of newspapers, sutlers, contractors, etc., on falling into the power of the enemy, can only be detained for so long a time as may be required by military necessity.

The rules of the Hague Convention of 1899 do not define prisoners of war, but do provide for their treatment, and provide that newspaper correspondents and reporters shall have like treatment when captured.

Certification of newspaper correspondents.—The implication of the last clause of Article XIII, viz, “provided they (newspaper correspondents, etc.) can produce a certificate from the military authorities of the army they were accompanying,” is that in the future such correspondents are to be regularly certified by the commander of the forces with which they for the time being are.

According to the Hague Convention, the right to grant certificates to correspondents is in the hands of the commander. The commander, in the absence of orders to the contrary, would be authorized to prescribe the regulations under which certificates would be granted and by implication would be able to exclude from the field of his authority those not properly certified.

Further, there is implied in the right to grant the certificate the right to withhold, which would be a means by which the character of the correspondents could be in a measure controlled:

There would also be implied the right to make such rules for the government of correspondents as might at the time seem good.

The rule of the Hague Convention would also seem to indicate that persons not having a proper certificate would not necessarily be entitled to the treatment of a prisoner of war. If this be the case, the military commander would properly insist that correspondents should, if with the forces, be provided with proper certificates.

A plan making a certificate a compulsory prerequisite for accompanying military forces would accord with the spirit of the Hague Convention, and would put the control of correspondents in the hands of the commander of the forces.

The rules of the Hague Convention were drawn with reference to warfare upon land, and have been accepted by practically all the states of the world. The United States authorities would, therefore, be fully justified in demanding that those correspondents only should be allowed with its army who were properly certified.

If it is generally accepted that the military authorities of forces on land should control correspondents, it is even more important that such control should be extended to correspondents in the neighborhood of naval operations, for the disclosure of movements of a fleet or of a war vessel may be even more serious than a similar disclosure in regard to forces upon land.

Right-minded newspaper men ask for fair treatment only and would regard regulations which would give equality of opportunity to all correspondents as in every way desirable; otherwise they would not be fit persons to accompany a military force on sea or land.

The control should not, of course, be limited to the correspondents and reporters alone, but should be extended to the whole personnel and all agencies concerned in gathering and forwarding news of the war.

Such control of the personnel and agencies for gathering and forwarding news could be justly demanded, even the Red Cross personnel and agencies must submit to control of the commanding military authority.

The naval commander has a right to control hospital ships according to the Hague Convention, 1899, for the

Adaptation to Maritime Warfare of the Principles of the Geneva Convention, which provide that hospital ships—must not in any way hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents will have the right to control and visit them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them if important circumstances require it.

As far as possible, the belligerents shall inscribe in the sailing papers of the hospital ships the orders they give them.

The naval commander has full right to demand equal control of correspondents, press boats, dispatch boats, and the like, whose mission may be from its nature far more dangerous than the mission of hospital ships to the success of the military plans.

Regulations somewhat similar in spirit to those for the government of hospital ships and personnel would give to the commander sufficient control without unduly limiting the freedom of action of press boats and press correspondents.

It is on its face far more necessary for a state that its commanders should be unhampered in the prosecution of their military operations in order that they may bring them to a successful issue than that the people of a state should know from hour to hour exactly what the military force is doing. This is what the enemy desires particularly to know.

War is not ordinarily undertaken to give an opportunity for the display of journalistic enterprise, and no commander would be justified in unnecessarily sacrificing resources or men to such enterprise. This being axiomatic, it may also be said that the people are entitled to such knowledge of the course of the war as may not interfere with military operations. The commanding officer in a given area is the best judge as to what information shall be published.

This natural conclusion leads to the further one that the commanding officer must control the news sent from the field of operations. This can be done by the common means of censorship of dispatches and news. This censorship may extend to the entire prohibition of the send-

ing of any dispatches or to the determination of what shall be sent and of the form in which it shall be sent.

From what has been said, it is evident that newspaper correspondents, though using wireless telegraphy, are not therefore spies. If guilty of acts of spying, then they are of course liable to the consequences. The simple sending of messages in regard to the war does not in itself constitute spying. It is an act commercial rather than military in its nature.

After newspaper correspondents have been forbidden within a given area or after they have been notified not to communicate any news in regard to military affairs, the sending of dispatches would constitute an offense with which the commanding officer would have full power to deal.

Conclusion.—Without previous notice in regard to or regulation of the agencies by which newspaper correspondents may send news, it is presumed that all agencies which may not involve perfidy are legitimate. As the correspondents in this instance had not disobeyed any regulation, but had merely, as would be expected, used the most modern means of communication, they are not therefore liable to any penalty. It would be presumed that the agency of the wireless telegraph would be open to them in absence of prohibition and unless forbidden no authorization would be necessary.

The correspondents would therefore be acting in a proper manner and would not be liable to any penalty for the use of the agency of the wireless telegraph when such use is not prohibited.

This conclusion shows the emphatic necessity of the regulation of news gathering and transmission on and from the field of military operations.

(b) Granting that newspaper correspondents will be allowed in the field of operations, what regulations should govern them?

Japanese regulations, 1904.—The Regulations for War Correspondents issued by the Japanese Government to hold during the Russo-Japanese war accord with the principles set forth above. These regulations are as following:

REGULATIONS FOR WAR CORRESPONDENTS.

ARTICLE 1. Newspaper correspondents who wish to follow the army are required to make application to the department of war, together with a sketch of their antecedents and a document of personal guaranty signed by the proprietor of the newspaper to which they belong.

In case of foreign correspondents, their application shall be sent through their respective ministers or consuls and the department of foreign affairs.

Foreign correspondents need only mention in their application the name of the newspaper to which they belong and dispense altogether with the presentation of sketches of antecedents and papers of personal guaranty.

ART. 2. The applicant must have been engaged in journalistic work for not less than a year as a member of a newspaper staff.

ART. 3. Foreign correspondents who can not understand the Japanese language may take with them one interpreter each into the field.

Any correspondent requiring an interpreter may engage one himself and present an application on the interpreter's behalf, accompanied by a paper of personal guaranty for the same.

ART. 4. A foreign correspondent, in addition to his interpreter, may engage one or more servants when circumstances demand it, the procedure of engagement to be in accordance with the foregoing article.

ART. 5. The authorities, when they consider it necessary, may cause the selection of one person to act as joint correspondent for several newspapers.

ART. 6. In case any person is allowed to accompany the Japanese forces an official permit shall be given him.

ART. 7. The applicants allowed as stated shall be attached to a "kōtō shireibu" (higher commanding officer).

ART. 8. Correspondents shall always wear foreign clothes, and to their left arms shall be attached a white band, measuring about 2 inches in width, on which the name of the newspaper offices which they represent shall be written in Japanese with red ink.

ART. 9. Correspondents shall always carry with them the official permit, and shall, when asked, show it to officers and officials belonging to the Japanese forces.

ART. 10. Correspondents shall always observe the rules and orders to be issued by the kōtō shireibu so long as they remain with the Japanese forces. In case they disregard the above rules and orders, the authorities of the kōtō shireibu may refuse to allow them to accompany the Japanese forces.

ART. 11. The war correspondent will not be allowed to dispatch his communications (whether they be correspondence for publication or private letters or telegrams, etc.) until after their examination by the officer appointed for the purpose by the higher commanding officer. No communication containing cipher or symbols will be permitted to be dispatched.

ART. 12. The army and its officers will accord, as far as circumstances permit, to the war correspondent suitable treatment and facilities, and, when in the field and in case of necessity, give him food, etc., or, at his request, give him transportation in vessels or vehicles.

ART. 13. In case the war correspondent is guilty of violation of the criminal law, military criminal law, law for the preservation of military secrets, etc., he may be adjudged and punished by the court-martial according to the military penal code.

ART. 14. Article 6 to 13 are applicable to interpreters and servants. (Daily Consular Reports, 1904, No. 1912, p. 2.)

Naval regulations.—The regulations particularly applying to naval war correspondents are:

REGULATIONS GOVERNING NAVAL WAR CORRESPONDENTS.

ARTICLE 1. A newspaper war correspondent desirous to accompany the navy shall make application to the naval staff, imperial headquarters, for permission.

ART. 2. A newspaper war correspondent shall obey all orders of the commanding officer of the fleet which he accompanies.

ART. 3. No communications concerning war shall be sent until after they have been examined by officers nominated for the purpose by the commanding officer of the fleet which he accompanies.

ART. 4. The commanding officer of the fleet may cancel the permission granted to a newspaper war correspondent.

ART. 5. Necessary regulations concerning the treatment of a newspaper war correspondent shall be fixed by the commanding officer of the fleet.

ART. 6. A newspaper war correspondent shall wear European dress and put on a low round-shaped cap, with a visor, and attach on his left arm a strip of white woolen cloth 1 sun (1.193 inches) wide, with the characters * * * (paper correspondent) on it.

ART. 7. A newspaper correspondent shall always carry his permit, mentioned in article 1, with him, and shall show it when asked by army or navy authorities. (Daily Consular Reports, 1904, No. 1912, p. 4.)

Effect of Japanese rules.—The effective control of the news relating to military movements during the Russo-Japanese war by the Japanese authorities fully justifies the rules enunciated by Japan. It is doubtless true that some of the correspondents have found it hard not to be upon the field of operations, but war is not undertaken for the sake of gratifying the curiosity of the public which reads the accounts of battles and military movements. Provided the correspondents have had fair treatment, there is no reason for complaint. The state must determine the general policy in regard to war correspondents, and the commanding officer in a given region must determine the particular application of this policy.

Russian regulations.—The following, according to the

Agence télégraphique russe, are the regulations for the conduct of foreign correspondents allowed within the field of operations:

Les étrangers doivent produire une recommandation de leur gouvernement auprès du ministère russe des affaires étrangères. Chaque correspondant doit s'engager, par écrit, à ne propager aucune nouvelle contenant des critiques, des dispositions ou des personnes, à représenter les faits conformément à la vérité et à supprimer les nouvelles qui ne peuvent se contrôler. La violation de ces dispositions, les indiscretions, le manque de tact entraînent des observations, et, suivant les cas, l'éloignement du théâtre de la guerre. Pour tous les correspondants sans exception, l'entrée de l'amirauté, les docks et autres installations de la marine, ainsi que l'emploi de vapeurs sur les rades de Port Arthur et de Vladivostock, sont interdits. Les correspondants doivent s'engager à ne pas demander d'exceptions à ces dispositions. A leur arrivée sur le théâtre des opérations, ils doivent se rendre au quartier général et prouver leur identité par une photographie; l'état-major général les dirige alors sur l'état-major dont ils dépendent. Ils sont responsables de leurs domestiques. Comme insigne, ils doivent porter un brassard au bras gauche. Les dépêches chiffrées sont interdites. La censure des informations a lieu au quartier général, auprès de l'état-major de l'armée de Mandchourie, et à l'administration militaire de Kharbin, Niou-Chouang, Port Arthur et Vladivostock. (Quoted in *Revue de Droit International*, VI, p. 448.)

General scope of necessary regulations.—These rules should be such as—

1. To place the correspondents under the control of the naval commander.
2. To place the control of the news sent in the hands of commander.
3. To enable the commander to prohibit absolutely the sending of any information from the field of operations.
4. To place the agencies by which news are sent under control of the commander.
5. To enable the commander to inflict penalties for violations of any regulations he may make.

The commander should therefore control the correspondents themselves, determine the news to be sent, or prohibit communications entirely, control the means of sending by the establishment of proper regulations and penalties.

Conclusion.—From these conclusions it is manifest that correspondents must obtain a quasi-official standing,

and in order that control may be effective, that the agencies by which communication is had shall also be official to the extent of being under absolute military control.

Private, irresponsible persons or agencies would therefore be forbidden within the field of operations or the strategic area.

NOTE.—Since the above was printed, and too late for further reference, an article by Professor T. S. Woolsey supporting many of the positions herein taken has appeared in the Yale Law Journal for March, 1905, p. 247.