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.

There is an insurrection in State X, during which the following situations arise:

(a) Certain insurgent troops are pursued by the regular troops of State X. The insurgent troops seek and are granted asylum in the legation of the United States. The minister of the United States becomes alarmed and asks the commander of a United States war vessel in the harbor to receive the insurgents on board his vessel in order to prevent bloodshed, which is imminent.

What should the commander do, and why?

(b) The insurgents seize the Robin, a United States merchant vessel in the harbor, and, promising to compensate the owners, sail away with the vessel. The owners of the Robin request the commander of the United States war vessel to recover the Robin in case he meets the vessel. The commander meets the Robin on the high sea.

What, if anything, should the commander do?

(c) State X charts a United States merchant vessel to transport troops to the seat of the insurrection. When the vessel is about to land these troops it is captured by the insurgents. The captain of the United States merchant vessel appeals for assistance to the commander of a United States war vessel near by.

What action, if any, should he take?

Would he act otherwise if the troops of State X had been landed before the capture of the vessel?

(d) Mr. Smith, a citizen of the United States, is implicated in this insurrection in State X and is sent out of the country. Mr. Smith, as a passenger upon a vessel of State Y, subsequently enters a port of State X. He is thereupon arrested by the authorities of State X. He then appeals to the commander of a United States war vessel to obtain his release, stating that the action of the authorities of State X was illegal and unjustifiable.

What action, if any, should the commander take?

Situation III, (a).
are granted asylum in the legation of the United States. The minister of the United States becomes alarmed and asks the commander of a United States war vessel in the harbor to receive the insurgents on board his vessel to prevent bloodshed which is imminent.

What should the commander do, and why?

SOLUTION.

The commander should reply to the minister that he has no authority to promise to receive or directly or indirectly to invite any refugees on board his vessel, and that he can only judge in regard to the propriety of the reception of any such person or persons when they appear at the vessel requesting asylum.

NOTES ON SITUATION III, (a).

Reception to bodies of men.—This situation again raises the question of interpretation of article 308 of the United States Naval Regulations of 1900, which was somewhat fully discussed under Situation II in 1902. This regulation is as follows:

The right of asylum for political refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum, except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

In Situation II, of 1902, the question of the propriety of a promise of asylum in advance of the emergency was discussed and the propriety of such promise was denied.

The case now under consideration finds certain insurgent troops already granted refuge in the legation of the United States.

Cases of asylum.—The minister of the United States may claim some weight of precedent for his request in the case of the reception of various members of the defeated faction after the battle of Placillas, in Chile, in 1891. The telegram from the United States legation on September 7, 1891, states that a number of the supporters of the Government of Chile, "in order to save
their lives, which certainly would have been sacrificed, took refuge on board the German and United States ships of war.” (U. S. Foreign Relations, 1891, p. 161.) Later refugees from the legation of the United States, and from the Spanish legation, were received on board a United States war ship, and were accompanied to the ship by ministers of the United States, Spain, and Italy.

Brazil, 1894.—In 1894, on the suppression of the Brazilian insurrection, the leaders and some of the other insurgents were received on board a Portuguese man-of-war. Mr. Gresham, at that time Secretary of State, sent the following dispatch to Mr. Bayard:

No. 342.]

Departent of State,
Washington, April 6, 1894.

Sir: You are doubtless aware that the night before the final collapse of the insurgent movement in the bay of Rio de Janeiro, da Gama, the insurgent leader, and some of his subordinate officials, were received on board a Portuguese man-of-war in the harbor. About two weeks ago the British ambassador here informed me that the Brazilian Government had demanded of Portugal the surrender of these men, and that the latter Government had offered to land them somewhere beyond the jurisdiction of Brazil, and there detain them until the fate of the insurrection should be known, when their right of asylum under the circumstances could be determined. Sir Julian was instructed, he said, by his Government to ask the United States to join Great Britain in a friendly suggestion to the Government of Brazil that it accept this offer of Portugal. I submitted the matter to the President and, after full consideration, he instructed me to inform Sir Julian that the United States did not feel inclined to join in the suggestion. A day or two later a substantially similar request was received from the Government of Italy, through Mr. Thompson, our minister at Rio, and answered in the same way, and within the last week a direct request to the same effect from the Portuguese Government, through its minister here, has been declined.

I am, etc.,

W. Q. Gresham.

(U. S. Foreign Relations, 1894, p. 278.)

Korea, 1895.—In Korea, in 1895, certain refugees sought the legation of the United States, and were received within it. At that time the United States representative at Seoul sent the following telegram to the Department of State:

Seoul, December 1, 1895.

Olney, Washington:

Three days ago loyalists made a fruitless attempt to capture royal palace, in consequence of which usurpers are very bold, arresting and killing loyalists. I have 8 refugees. See my dispatch No. 159. No
charge made against them, but if caught they will be tortured and killed by the King's father. A demand may soon be made for them for some reason or other. It is desirable for them to leave. Yorktown will shortly leave for Shanghai. Will you authorize commander in chief to grant them passage?

Sill.

Mr. Sill subsequently explained that his intention was to prevent injury to the refugees. He says in a dispatch of January 20, 1896:

I had at no time supposed that the refugees could be sheltered by me "against officers of the de facto Government charged with apprehending them as violators of the laws of their country." On the contrary, they had been informed by me that I must at any time give them up upon proper demand from the Korean Government; hence my desire to get them out of the way before any demand for them should be served on me.

To the telegram mentioned above, Mr. Olney made a very positive reply, as follows:

Department of State,
Washington, December 2, 1895.

Sill, Minister, Seoul:

Refugees can not be sheltered by you against officers of de facto government charged with apprehending them as violators of the laws of their country. Use of Yorktown in manner suggested is wholly inadmissible. The Department sees with disfavor your disposition to forget that you are not to interfere with local concerns and politics of Korea, but are to limit yourself strictly to the care of American interests.

Olney.

(U. S. Foreign Relations, 1895, pp. 974, 977.)

Development of policy in regard to asylum.—The general attitude toward asylum in legations and upon vessels of war has in recent years become less and less favorable. In some of the early diplomatic correspondence of the United States asylum was regarded with favor. In 1844 Mr. Calhoun wrote to the representative in Brazil that, "The right of asylum in revolutionary times and in revolutionary countries should be indulgently construed." During the latter half of the nineteenth century the policy of the United States has been to discourage the granting of asylum. In countries outside of those in the Western Hemisphere the granting of asylum has been reduced to the narrowest limits and almost prohibited. In Central and South American States, and in the West Indies, there have been, however, frequent instances of the exercise of this means of protec-
tion to refugees. Even in these countries the United States has tried to discourage the practice in late years. This is shown in a dispatch of Mr. Seward to Mr. Hollister, May 28, 1868, in which Mr. Seward says:

The revolutionary condition seemed to have become chronic in many of the South American nations after they had achieved their independence, and the United States, as well as the European nations, recognized and maintained the right of asylum in their intercourse with those republics. We have, however, constantly employed our influence for several years to meliorate and improve the political situation in these republics, with an earnest desire to relinquish the right of asylum there.

Secretary Fish, in a dispatch to Mr. Bassett June 4, 1875, speaking of persons who have sought asylum in the United States legation in Port au Prince in the time of civil disturbances, says:

It is regretted that you deemed yourself justified by an impulse of humanity to grant such an asylum. You have repeatedly been instructed that such a practice has no basis in public law, and so far as this Government is concerned, is believed to be contrary to all sound policy. The course of the diplomatic representatives of other countries in receiving political refugees upon such occasions is not deemed sufficient to warrant this Government in sanctioning a similar step on the part of the representatives of the United States.

Later, in 1883, Mr. Frelinghuysen says of this same correspondence:

The views of this Government as to the right of asylum have long been well known. You will find them in the correspondence of this Department with your predecessor, Mr. Bassett. * * * While indisposed from obvious motives of common humanity to direct its agents to deny temporary shelter to any unfortunates threatened with mob violence, it is proper to instruct them that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice.

(For many references, see 1 Wharton’s Digest, sec. 104.)

Mr. Olney, in 1895, says that it is “the uniform rule of this Government to discountenance asylum in every form, and to enjoin upon its agents the exercise of the utmost care to avoid any imputation of abuse in granting such shelter. It may be tolerated as an act of humanity when the hospitality afforded does not go beyond sheltering the individual from lawlessness. It may not be tolerated should it be sought to remove a subject
ASYLUM GENERALLY DISCOURAGED. 31

beyond the reach of the law to the disparagement of the sovereign authority of the State." (Foreign Relations, 1895, p. 246.)

Mr. Hay, in 1899, says, "It is evident that a general rule, in the abstract, can not be laid down for the inflexible guidance of the diplomatic representatives of this Government in according shelter to those requesting it. But certain limitations to such grant are recognized. It should not, in any case, take the form of a direct or indirect intervention in the internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government." (Foreign Relations, 1899, p. 258.)

From the instances cited above, and from many other instances where the opinion of the Government of the United States has been expressed, it is evident that the attitude of the United States is to discourage the grant of asylum to the utmost, and to limit its grant to cases where mob violence is threatened, or where the ordinary course of government is interrupted. This same tendency of restriction is evident in other countries as well as in the United States.

Attitude toward insurgent troops.—In the case under consideration the insurgent troops have sought the shelter of the legation to escape the consequences of war, which as troops they had waged upon the regular government. In sheltering these troops from the regular troops the minister of the United States has in a measure taken the part of the insurgents against the established government. Such action has repeatedly been disavowed by the United States Government. If these insurgent troops have engaged in hostilities against the established government they are liable to the consequences of their action, and it is not the function of representatives of the United States to protect them from such consequences. As Mr. Fish said, in 1875:

Among other objections to granting such asylum it may be remarked that that act obviously tends so far to incite conspiracies against governments, that if persons charged with offenses can be sure of being screened
in a foreign legation from arrest they will be much more apt to attempt the overthrow of authority than if such a place of refuge were not open to them.

The printed Instructions to the Diplomatic Officers of the United States, issued by the Department of State declare that—

The privilege of immunity from local jurisdiction does not embrace the right of asylum for persons outside of a representative's diplomatic or personal household.

In some countries, where frequent insurrections occur and consequent instability of government exists, the practice of extraterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents and is practically recognized by the local government, to the extent even of respecting a consulate in which such fugitives may take refuge. This Government does not sanction the usage and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its representatives to deny temporary shelter to any person who may be threatened by mob violence, it deems it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.

Asylum to officers of established government.—In 1894 certain refugees were received upon the Bennington while that vessel of the United States Navy was at La Libertad in Salvador. These refugees were officers of the established government which the United States had recognized and when received were fleeing from the revolutionists. Of this event President Cleveland, in his message of December 3, 1894, says:

The Government of Salvador having been overthrown by an abrupt popular outbreak, certain of its military and civil officers, while hotly pursued by infuriated insurgents, sought refuge on board the United States warship Bennington, then lying in a Salvadorean port. Although the practice of asylum is not favored by this Government, yet in view of the imminent peril which threatened the fugitives, and solely from considerations of humanity, they were afforded shelter by our naval commander, and when afterwards demanded under our treaty of extradition with Salvador for trial on charges of murder, arson, and robbery, I directed that such of them as had not voluntarily left the ship be conveyed to one of our nearest ports where a hearing could be had before a judicial officer in compliance with the terms of the treaty.

From this passage of the President's message, and from the correspondence bearing upon the event, it is evident
that the affair was regarded as one of granting temporary shelter to those who were pursued by an irresponsible body of troops. In other cases the United States has made a distinction between the granting of temporary shelter to those in imminent danger and the granting of asylum as a deliberate act. While the first is sometimes allowable, the latter has been uniformly dis­

General consideration of the Situation.—In the case as presented for solution, the troops opposing the established government have received asylum in the United States legation, and from fear lest there may be bloodshed the minister of the United States requests the United States commander to receive the refugees on board his vessel. Presuming that there would be no difficulty in bringing the refugees to the vessel, which would doubtless be contrary to the fact, should he agree to receive the refugees? Of course, the commander would have no right to take any steps to bring the insurgent troops on board his ship or to secure their safety within the jurisdic­tion of State X while they are passing from the legation to the vessel, even if he should grant the requested asylum. The commander could, however, land forces for the protection of American interests. If the legation of the United States is in danger, the landing of forces for its protection is legitimate and such action is not uncom­mon. No violation of the territory of State X by landing a guard to escort the troops of the insurgent party could be held to be a protection of United States interests without the special orders of the Government.

The commander would be justified in affording protection to the legation in case of danger to it or offense against its inviolability.

The commander would not assume to judge of the propriety or impropriety of the action of the United States minister. Nor should he share the responsibility of the minister. The fact that the minister has received these
refugees does not justify the commander in receiving them even upon the minister's request. The position of the Government has been set forth by Secretary Hay, in 1899, when speaking of shelter, "certain limitations to such grant are recognized. It should not, in any case, take the form of a direct or indirect intervention in the internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government."

Conclusion.—Considering the attitude of the Government, the policy toward the limitation of asylum, the fact that the minister may call upon the commander to protect the inviolability of the legation, the commander should reply that he has no authority to promise to receive any persons as refugees, and that the Regulations of the service state that even in the waters of countries where frequent insurrections occur, "officers should refuse all applications for asylum except when required by the interests of humanity in extreme and exceptional cases, such as the pursuit of a refugee by a mob." Under these circumstances, when the pursuit is by the regular troops, the commander would not feel justified in interfering. Should these persons, however, appear at the side of his vessel seeking shelter under exceptional circumstances, he would be forced to decide at the time upon the propriety of receiving them.

**Situation III, (b).**

There is an insurrection in State X.

(b) The insurgents seize the Robin, a United States merchant vessel in the harbor, and promising to compensate the owners sail away with the vessel. The owners request the commander of the United States war vessel to recover the Robin in case he meets the vessel. The commander meets the Robin on the high sea.

What, if anything, should the commander do?

**Solution.**

The commander of the United States war vessel is justified in using such force as is necessary to recover the vessel which has been seized by the insurgents.
NOTES ON SITUATION III, (b).

Insurgents as pirates.—It has been maintained often that insurgents committing an act similar to the one above mentioned are to be treated as pirates.

The statement of the Situation, however, admits the existence of an insurrection which is regarded as "a form of struggle, varying according to circumstances, but usually an armed struggle between two organized groups or parties within a state for public political ends."

(Insurgency, Lectures Naval War College, 1900, p. 3.)

In many cases also the parent state may declare the insurgents to be pirates. This matter was very fully considered by the United States, in 1885, in consequence of the insurrection in Colombia at that time, when the President of the United States of Colombia declared certain vessels "occupied by the rebels to be pirates" and to be "beyond the pale of international law."

In discussing the treatment of these vessels, Mr. Wharton, solicitor for the Department of State, gave an opinion which, since 1885, has been several times affirmed, as follows:

The Government of the United States can not regard as piratical vessels manned by parties in arms against the Government of the United States of Colombia, when such vessels are passing to and from ports held by insurgents, or even when attacking ports in the possession of the National Government. In the late civil war the United States, at an early period of the struggle, surrendered the position that those manning the Confederate cruisers were pirates under international law. The United States of Colombia can not, sooner or later, do otherwise than accept the same view. But, however this may be, no neutral power can acquiesce in the position now taken by the Colombian Government. Whatever may be the demerits of the vessels in the power of the insurgents, or whatever may be the status of those manning them under the municipal law of Colombia, if they be brought by the act of the National Government within the operation of that law, there can be no question that such vessels, when engaged as above stated, are not, by law of nations, pirates; nor can they be regarded as pirates by the United States. (U.S. Foreign Relations, 1885, p. 212.)

It is not denied, of course, that a local government may define what actions and what persons it will regard as piratical, but such local definition has significance only for the state making the definition. Indeed the United States Constitution specifically gives to Congress the
right "‘to define and punish piracies and felonies committed on the high seas and offences against the laws of nations.’" The definition of piracy in the international sense is, however, not dependent on these municipal provisions.

Policy of the United States.—As President Cleveland said, in his Message of December 8, 1885: "‘A question of much importance was presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. To neither of these propositions could the United States assent. An effective closure of ports not in the possession of the government, but held by hostile partisans, could not be recognized; neither could the vessels of insurgents against the legitimate sovereignty be deemed hostes humani generis within the precepts of international law, whatever might be the definition and penalty of their acts under the municipal law of the state against whose authority they were in revolt. The denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents.’"

The declaration by a state that a certain vessel or certain vessels are piratical does not make them such according to international law, nor does it give a foreign state a right to treat them as piratical. Mr. Bayard gave the opinion of the State Department, in 1885:

The principle upon which I based my note of April 24 was, generally, that there can not be paper piracy with international effects and obligations any more than there can be a paper blockade of effective character. In the one case, as in the other, no force or effect can be communicated by a municipal decree which is not inherent in the case itself, and I felt constrained to announce to you that this Government could not deem itself bound in any manner by such a decree, either as entailing any international obligation or as conferring upon it any derived jurisdiction in the premises. The position seemed so self-evident and is so abundantly supported by authority that I deemed it quite unnecessary to enter into argument or collation of precedents to sustain the simple announcement.

It would seem, however, that you have misunderstood that announcement, and you now seek to controvert on the assumption that it recognizes the vessels mentioned in the Colombian decree as legitimate belligerents, thereby divesting them of whatever inherent piratical character they may
possess. Your argument, and the precedent of the Magellan pirates adduced by you, aim to show that vessels of this character, even though ostensibly in the service of a hostile insurrection, may be tainted with piracy to a degree to bring them within the jurisdiction of a foreign state whose forces may have captured them on the high seas.

This position I am not disposed to deny, but I then did feel bound to deny, and do so still, that a municipal decree of a sovereign can communicate to a single vessel, or in comprehensive terms to a class of vessels, a character of piracy which they may not already possess under the circumstances surrounding each particular vessel, or that a foreign sovereign can derive or exercise any power, obligation, or jurisdiction in virtue of such a municipal decree which it does not already possess in the nature of the case under the law of nations. Were any foreign government to exercise such right or jurisdiction in the case of a vessel found committing acts in themselves piratical, a decree of this character could only, by the widest stretch, be deemed an acquiescence in and voluntary confirmation of the power and right so exercised by the law of nations. It could not be held to confer the right to capture and judge an actual pirate any more than, assuming the contrary position by way of hypothesis, it could deny or assume to annul that right in a given case. (U. S. Foreign Relations, 1885, p. 273.)

The declaration by a foreign state that certain vessels in revolt against the established government are piratical is often practically an admission of their insurgency and of the fact that hostilities exist with the faction in control of the ships, for piracy in the international law sense is determined by the intent of the act and not by domestic decree.

Attitude of Great Britain.—The Huascar, a Peruvian ship of war, was seized by its crew in a revolt in 1877. The Government of Peru declined to be responsible for the acts of the rebels. The Huascar boarded British vessels, seized coal, and took off passengers. "On the question being brought before the House of Commons, the attorney-general expressed his opinion that the Huascar was not a belligerent, but a rover committing depredations which made her an enemy of her Britannic Majesty, and therefore it could not be disputed that the admiral could wage war upon her. If she were a belligerent, or the vessel of a belligerent power, to which the representation of the British Government was under an obligation to extend belligerent rights, the proceedings of the admiral might be open to censure. But to make out that she was a vessel belonging to a belligerent power there must
be a rebellion; the rebels also must have established something like a government, to do certain acts upon the high seas against neutral ships. If a cruiser did commit acts of depredation without authority, the neutral states would demand satisfaction. If the Huascar was a belligerent, she would be responsible. In strictness the crew of the Huascar were pirates and might have been treated as such; but it was one thing to say that, according to the strict letter of the law, people have been guilty of acts of piracy and another to advise that they should be tried for their lives and hanged at Newgate. The Huascar was called upon to surrender, and she refused. The admiral took steps accordingly to make her surrender. (Halleck, Baker's ed. International Law, Vol. I, p. 449.)

Piracy according to international law.—Piracy in the international sense is not a political act, but an act implying animus furandi, an act entered upon in a spirit of robbery or marked violence. It is not aimed against any particular state or the citizens of any particular state. Lawrence gives, among the marks of a piratical act, that it be “an act of violence adequate in degree;” “an act done outside the territorial jurisdiction of any civilized state;” and “an act the perpetrators of which are destitute of authorization from any recognized political community;” or, as Lawrence says, in summarizing, “An act to be piracy must be of adequate violence; it must be committed outside the jurisdiction of a civilized State; and it must possess no national authorization.” (International Law, section 122, p. 210.)

Application to the Situation.—It is evident that it is not the policy of the United States to regard insurgent vessels as pirates, and hence this vessel while seizing a vessel within the harbor of State X can not be considered as a pirate from the point of view of international law. The act is committed within the jurisdiction of State X and in derogation of the sovereignty of State X. It is unquestionably a violation of the laws of State X, and for the act State X may prescribe the punishment.

As the act is not piracy in fact or in intent, the United
States commander should not, if he overtakes the vessel on the high seas, treat it as piratical.

By the statement of the situation, the commander of the United States war vessel does meet the seized vessel, the Robin, on the high seas.

He may not treat the case as one of piracy, but it certainly is an offense which comes within his jurisdiction. This is a case of a merchant vessel which needs his protection and the regulation of the service would apply.

U. S. Navy Regulations, 1900, 309, prescribe that,

So far as lies within their power, commanders-in-chief and captains of ships shall protect all merchant vessels of the United States in lawful occupations and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations.

The Robin has been seized within the jurisdiction of the State X and is now upon the high seas. It is evident that State X is not in full control of the port in which the Robin was seized. From the nature of the case, also, the insurgents who seized the Robin, while not pirates, are not a responsible body and can not be dealt with as such by the United States. As they are not belligerents the seizure of the Robin can not be permitted under the right of angary. Nor does the promise to make compensation to the owners in any way change the case, as the insurgents who seized the Robin are not a responsible body at the time and their future responsibility is uncertain. That the seizure is not with the approval of the owners is evident from the request of the owners that the vessel be recovered by the United States war vessel.

In 1885, in Colombia, certain vessels belonging to neutrals were taken by insurgents in a manner somewhat similar to that in the case of the Robin. At this time Mr. Wharton, Solicitor for the Department of State, gave his opinion as follows:

When vessels belonging to citizens of the United States have been seized and are now navigated on the high seas by persons not representing any government or belligerent power recognized by the United States, such vessels may be captured and rescued by their owners, or by United States cruisers acting for such owners; and all force which is necessary for such purpose may be used to make the capture effectual. (U. S. Foreign Relations, 1885, p. 212.)
From the above, which is an accepted precedent, it is evident that the commander of the United States war vessel would be justified in seizing the United States merchant vessel which the insurgents had taken.

Conclusion.—The commander of the cruiser of the United States is justified in making a capture of the Robin. What disposition shall he make of the captured vessel? While the naval officer is justified in making the capture, he has not authority, except in extreme instances, to dispose of or determine the fate of a captured vessel. That authority belongs to another branch of the Government. He should therefore send in the captured vessel, if possible, to a port of his own country with a report of the case. If distance or other circumstances prevent such action, he should take the vessel under his authority to some port near by and obtain instructions from his home Government as to the further disposition of the vessel.

The question of damages from State X on account of seizure of the Robin within that State's jurisdiction is a matter for diplomatic negotiation.

SITUATION III, (c).

There is an insurrection in State X.
(c) State X charters a United States merchant vessel to transport troops to the seat of insurrection. When the vessel is about to land these troops it is captured by the insurgents. The captain of the United States merchant vessel appeals for assistance to the commander of a United States war vessel near by.
(1) What action, if any, should he take?
(2) How would he act if the troops of State X had been landed before the capture of the vessel?

SOLUTION.

(1) The commander of the United States war vessel should reply that “while the United States would not interfere to prevent an American vessel from voluntarily carrying arms and troops in the service of a government trying to put down an insurrection, it would leave the vessel and its crews so voluntarily entering into such service to the consequences of establishing such a relation.”
(2) Provided the merchant vessel has fulfilled its charter contract and is no longer in the service of State X after landing the troops, the commander of the United States war vessel should extend to the merchant vessel full protection.

NOTES ON SITUATION III, (c).

Nature of the relations.—The fact of the insurrection is admitted. State X enters into a contract with the merchant vessel of the United States to transport troops to the seat of the insurrection.

As there is no belligerency from the point of view of international law, this becomes a simple commercial contract in which certain service is rendered under a certain agreement. The nature of the service is a question of importance.

It has been held by the Supreme Court of the United States that a recognition of belligerency is not necessary in order to bring into operation the neutrality laws of the United States. (166 U. S., 49.)

"It may be said to be established that the parties to a conflict that has attained the proportion of an insurrection shall observe, as far as possible, the rules of civilized warfare." (Insurgency, Lectures, Naval War College, 1900, p. 13.)

It is generally admitted at the present time that insurgents are not criminals when pursuing public political ends, and also that insurgents are free to carry on legitimate hostilities, though it is maintained that the conduct of these hostilities should not unduly interfere with neutral commerce. Admiral Benham, at the time of the Brazilian revolt of 1893–94, maintained that while neutral commerce was liable to interruption during the actual continuance of active hostile operations in time of an insurrection, at other times ordinary commerce should not be interrupted because of such internal disturbances.

In case of State X there is no belligerency in the sense in which the word is used in international law. There is, however, an insurrection, which is held to bring into operation certain of the laws applying to a state of belligerency so far as the parties to the struggle are concerned. Just how far third states and the citizens of other states
are affected by the existence of insurrection in a given state is not yet determined.

**Bluefields, 1894.**—An instance somewhat similar to the one under consideration occurred in 1894, at the time of the Bluefields insurrection. The conditions, as shown from the official correspondence, were as follows:

*Mr. Baker to Mr. Gresham.*

**Legation of the United States,**

*Managua, August 8, 1894*—(Received September 4).

Sir: On the evening of August 2 Mr. Gustavo Guzman came to this legation bearing, as he informed me, a verbal message from the President, to the following effect:

First. That this Government had sent a large number of troops to San Juan del Norte, where they had just arrived, on their way to Bluefields.

Second. That this Government had chartered the steamboat *Yulu*, a boat owned by the Emory Company of Boston, flying the United States flag, to transport these troops from San Juan del Norte to Bluefields.

Third. That now the captain and crew of the *Yulu*, all Americans, refuse to carry the soldiers, for the reason that Commander O'Neil, of the U. S. S. *Marblehead*, had issued a proclamation forbidding vessels under the flag of the United States from "carrying bodies of armed men or military supplies" for either "party" to the controversy in the Mosquito territory.

Fourth. The President, therefore, requested that I, as United States minister, issue an order to the captain and crew of the steamer *Yulu*, assuring them that they run no risk in disobeying the warning of Commander O'Neil.

I could not believe it to be my duty to comply with this request; but, at the suggestion of Mr. Guzman, I gave him the accompanying telegram, marked "Inclosure No. 1," which he had liberty to send if he so desired. Inclosure No. 2 is a copy of the proclamation of Commander O'Neil referred to.

I have, etc.,

LEWIS BAKER.

[Inclosure.]

*Mr. Baker to Commander O'Neil.*

**Legation of the United States,**

*Managua, August 2, 1894*.

Commander O'Neil,

U. S. S. *Marblehead*, Bluefields:

The Nicaraguan Government had chartered, as I learn, the steamer *Yulu*, belonging to a company of Americans, to carry troops from Grey Town to Bluefields. The President desires to know if this is contrary to your order commanding the neutrality of American citizens. Please answer, in care of Consul Braida, Grey Town.

LEWIS BAKER,

*United States Minister.*

(Foreign Relations U. S., 1894, p. 321.)
To the owners, agents, and captains of vessels under the flag of the United States trading in these waters:

In view of the fact that there is in effect a revolution going on in the Mosquito Reserve between the chief of the said reserve and his followers and the provisional council, which in a measure through its president represents, or assumes to represent, the Government of Nicaragua, these parties being in hostile attitude to each other, and the former being at present in possession at Bluefields, you are hereby cautioned and counseled not to interfere with nor take part in the affairs of either faction by permitting vessels under your charge to engage in any military operations, that is, not to carry bodies of armed men or military supplies, knowing them to be such, for either party, nor to assist in any hostile demonstration; and should either party attempt to coerce you to do so, or interfere with you in the peaceful pursuance of your legitimate business, you are advised to utter a vigorous protest, to show this notice, and to communicate the facts of the case to me.

CHARLES O'NEIL,
Commander, United States Navy.

(For-eign Relations, U. S., 1894, Appendix I, p. 321.)

It will be observed that Commander O'Neil had not, as was intimated by the Nicaraguan representative, forbidden vessels under the United States flag "to carry bodies of armed men or military supplies, knowing them to be such, for either party, nor to assist in any hostile demonstration." What he actually did was to caution and counsel "owners, agents, and captains of vessels under the flag of the United States" against such action. Subsequent events showed the wisdom of the notice issued as cautionary by Commander O'Neil. The sworn statement of the purser of the steamship Yulu, before Consular Agent Seat, is as follows:

Affidavit of N. L. Latson.

UNITED STATES CONSULAR AGENCY,
Bluefields, Nicaragua, September 22, 1894.

This day, before me, the undersigned authority, personally came and appeared Norman L. Latson, to me known, and on his oath declares that heretofore, to wit, on or about the 3d day of August, 1894, affiant was purser on board the American steamship Yulu, which arrived off Bluefields on the 3d day of August, 1894, having on board 500 or thereabouts Nicaraguan soldiers and officials, among whom were Mr. José Madriz, Nicaraguan minister of foreign affairs; General Portocarrero, judge-advocate, and Carlos
Lacayo, ex-commissioner of the Mosquito Reserve. Affiant further states that upon approaching the U. S. S. Columbia, which was at anchor off Bluefields, the captain of the Yulu signaled that he had on board the above-mentioned troops and soldiers under protest.

He was thereupon ordered by the U. S. S. Columbia to anchor alongside, and was shortly afterwards boarded by Lieut. O. W. Lowry, of said vessel. Lieutenant Lowry refused to allow the captain of the steamship Yulu to disembark the Nicaraguan troops aboard until he had communicated with Captain Sumner, of the steamship Columbia, who was in the town of Bluefields. He directed Captain Johnson to take the steamship Yulu into the harbor of Bluefields and to come to an anchor there. Lieutenant Lowry also placed aboard the steamship Yulu a boat's crew of 11 men, in charge of Ensign Kuenzli, who was to prevent the disembarkation of the Nicaraguan troops until the return of Lieutenant Lowry, who went into the town in the steam launch of the Columbia to receive instructions from Captain Sumner. Lieutenant Lowry offered to convey Minister Madriz and any of his officers into the town in his steam launch, but the proffered offer was refused, whereupon Lieutenant Lowry stated that he would return with Captain Sumner's answer in the shortest possible time, probably two hours.

Affiant further states that the Nicaraguan officials were very indignant at the refusal to allow them to disembark the troops at once, and indulged in strong language against the action of the United States. As time passed the excitement and indignation among them began visibly to increase. The water tanks of the steamship Yulu had been left open by the Nicaraguan soldiers during the night and all the fresh water allowed to escape, and the aforesaid soldiers were clamoring for water during their detention. Finally, some of the officials made signals to the Government wharf, about 50 yards away, at which was stationed a force of Nicaraguan soldiers, and two boats were sent out to the steamship Yulu in response. Affiant further states that in the wheelhouse of the steamship Yulu were Ensign Kuenzli with two men, the remainder at the time of the occurrence being disposed about the roof of the upper deck. There were also present Carlos Lacayo, Ramon Enriques, a merchant from Grey Town, Nicaragua, and the affiant, Norman L. Latson. The latter, leaning out of the window of the wheelhouse, heard Minister Madriz, who was accompanied by Judge-Advocate Portocarrero, order Captain Johnson, of the steamship Yulu, to take his vessel in to the Government wharf at once and discharge the troops. This Captain Johnson refused to do, stating that his vessel was in control of the officer from the U. S. S. Columbia, and therefore not in his power to obey such a demand.

Affiant further states that thereupon Judge-Advocate Portocarrero, closely followed by Minister Madriz, rushed into the wheelhouse of the steamship Yulu. They were both white with anger, and Portocarrero had in his right hand, with his finger on the spring, a clasp knife with a blade about 8 inches long. Ensign Kuenzli sat on a portion of the steering gear of the steamship Yulu, within a few feet of Portocarrero, and with his back toward him. He was reading, but remarked later that he was aware something serious was impending. The two other men from the Columbia were on the opposite side of the wheelhouse, looking out of a window, and with their backs also turned to the Nicaraguan officials. Most of the rifles
belonging to the man-of-war's men were stacked in this wheelhouse, and the Nicaraguans were aware that it would be almost impossible for the men who were on the roof to reach them in case of sudden attack. There were at least 100 Nicaraguans on the upper deck of the steamship Yulu, and completely surrounding the wheelhouse.

When Madriz and Portocarrero rushed into the wheelhouse they gathered around the two doors, which open onto the deck, and, with fixed bayonets and drawn swords, listened to what transpired. Portocarrero commenced a violent and insulting tirade against the United States, claiming, among other things, that her action in refusing to allow Nicaraguan troops to disembark was cowardly and the tyrannical oppression of a small and defenseless country by a large and powerful one. Madriz agreed with him, and stated that he considered this action an insult to Nicaragua through him; he further said that they had agreed to wait two hours for an answer and that nearly three had elapsed. Portocarrero then said, turning to Madriz: "Let us make them take the ship to the wharf and disembark the troops." Affiant then said: "You are making a serious mistake, General Portocarrero, and do not understand the circumstances of this detention."

Portocarrero appeared to lose control of himself, and being seconded by some encouraging exclamations from the crowd around the doors, he raised his knife and, pointing toward the young officer, said to Madriz: "You give the command and I will throw myself upon him, and we will take the ship in to the wharf against any resistance on their part." At this instant, and before Minister Madriz could reply, Captain Johnson, of the steamship Yulu, stepped into the room and said that he saw smoke across the lagoon, and believed that the launch was returning. Madriz then turned to Portocarrero, who still stood, knife in hand, and said: "We will wait and see whether it is the launch; we will give them half an hour more, and if it is not, we will go in anyhow." Both Lacayo and Enriquez endeavored to dissuade Portocarrero from the position he had taken, but they were not listened to. The smoke mentioned by Captain Johnson proved to be from the steam launch of the Columbia, and in due time Lieutenant Lowry reached the steamship Yulu with instructions from Captain Sumner to permit the disembarkation of the Nicaraguan troops.

Affiant further states that from his knowledge of the mood and temper of the Nicaraguan officials, and from the threats he personally heard expressed, he deposes and says that he believes a disaster and massacre aboard the steamship Yulu was only averted by the timely sighting of the Columbia's steam launch.

Affiant further states that he is a native of the United States, born in the State of New York, and for five years a resident of Nicaragua. He also states that he thoroughly understands Spanish, in which language the above remarks were made.

Norman L. Latson.

Sworn to and subscribed before me this September 22, A. D. 1894.

B. B. Seat,

United States Consular Agent.

(Foreign Relations, U. S., 1894, Appendix I, p. 344.)
From this statement it is seen that the troops were allowed to disembark and the captain was permitted to depart with his vessel.

This precedent would seem to indicate that the action of the commander might be limited to the issuing of the notice of caution and council so far as the transportation and landing of the troops may enter into the case.

Effect of charter.—In the situation under consideration, however, as the troops are about to land, the merchant vessel chartered by State X is captured by the insurgents and the captain appeals to the commander of the United States war vessel for assistance. There is no war in the full international sense in State X, yet as was said in the case of *The Three Friends* (166 U. S., p. 63), there is a "distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense." The court further held that the neutrality laws of the United States extended in this time of war in a material sense to prohibition of certain acts forbidden to a neutral in the time of war in a legal sense.

It is affirmed that the merchant vessel here considered is a United States vessel and is consequently entitled to proper protection as such. In general the character of a merchant vessel is determined by its flag and its papers. In this case there is no intimation that the papers of the United States merchant vessel are not correct in all respects. The one fact is that the merchant vessel is engaged under contract with State X in transporting troops to the seat of insurrection when she is seized as the troops are about to land.

The vessel has not completed her contract with State X. The vessel is not captured on the high seas. On this last account the United States war vessel would ordinarily hesitate to exercise jurisdiction because within the three-mile limit the local jurisdiction is supposed to prevail. Under certain circumstances when a state is disturbed by domestic violence a commander would be justified in interfering for the protection of the interests and persons of citizens of his own state.

This vessel, by accepting the charter from State X for
the transportation of troops to that extent, engages in the military expedition against the insurgents and assumes the consequent risks. Halleck (International Law, Baker’s ed., I, p. 438), says: "The national character of ships is, as a general rule, determined by that of their owners. But, as hereafter shown, this rule is subject to many exceptions, a hostile character being not infrequently impressed upon the vessel while its owners are neutrals or friends. Thus, a hostile flag and pass, the carrying of military persons or dispatches of an enemy, trading between enemy's ports, etc., will give to a vessel a hostile character, no matter what may be that of its owners." And again (Vol. II, p. 97) "So, a ship belonging to a neutral owner may acquire a hostile character from the trade in which she engages or some particular act which she may do."

In speaking of several cases where neutral vessels enter belligerent service in time of war Dana, in a note to Wheaton's International Law (note 228, p. 643), says:

If a vessel is in the actual service of the enemy as a transport, she is to be condemned. In such case it is immaterial whether the enemy has got her into his service by voluntary contract, or by force or fraud. It is also, in such case, immaterial what is the number of the persons carried, or the quantity or character of the cargo; and, as to despatches, the court need not speculate upon their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile government, so as to make that government the owner pro tempore, the true ground of condemnation should be as enemy's property.

The quotations apply to a state of war.

Mr. Bayard, in a letter of December 3, 1886, says

"If in that (a foreign) country," said Mr. Webster, "he (a citizen of the United States) engages in trade or business he is considered by the law of nations as a merchant of that country;" and in this and other cases ruled in this Department on this principle, it was held that citizens of the United States who engage in insurrectionary movements in Cuba thereby expose their property to seizure by Cuban authorities, and had no claim on this Government to secure indemnity for them from Spain. Nor can Spanish subjects (under similar circumstances) make claim against the United States for losses incurred by them through confiscation of their goods in the late civil war, such confiscation being in conformity with the laws of war." (III Wharton, International Law Digest, p. 968.)
It has been affirmed that even "by voluntarily remaining in a country in a state of civil war they (subjects of foreign powers) must be held to have been willing to accept the risks as well as the advantages of that domicil."

(Ibid, II, p. 578.)

From such statements it is evident that those who voluntarily come within the range of insurgent military action must assume the responsibility thus incurred.

The United States merchant vessel voluntarily accepted a charter which in its purpose was to bring the vessel as a part of an actual military expedition within the field of what the Supreme Court has called "war in a material sense;" and, more than that, the vessel has distinctly identified itself with the military forces of State X to the extent of transporting its troops to the seat of hostilities.

Under these conditions the vessel is wholly within the jurisdiction of State X for its charter purpose and must look to State X for protection and assistance.

Opinion of Department of State.—The Government of the United States has set forth its position in the correspondence as printed in the Foreign Relations for 1897 (p. 331). This position will be seen to accord with the general line of precedent and argument which has prevailed in the United States.

THE TRANSPORTATION OF CENTRAL AMERICAN TROOPS AND MUNITIONS OF WAR IN UNITED STATES VESSELS.

Mr. Rodriguez to Mr. Sherman.

LEGATION OF THE GREATER REPUBLIC OF CENTRAL AMERICA,
Washington, April 17, 1897.

Sir: Conformably to our conversation of yesterday, I have the honor to address this communication to your excellency.

My Government desires to transport troops and implements of war from a port in Honduras, or from the Confederation, to any port in the same State, on the Atlantic or Pacific, with the object of reestablishing order along the first of the above-named coasts; and in the event of being able to charter, for this purpose, American vessels, it trusts the consuls of the United States at Ceiba and Trujillo, or at any other place along the said coasts, will put no obstacles in the way. My Government solicits this friendly office of your excellency without prejudice to the right which it may have in accordance with international law.

I reiterate, etc.,

J. D. Rodriguez.
Mr. Sherman to Mr. Rodriguez.

DEPARTMENT OF STATE,  
Washington, April 20, 1897.

Sir: I have the honor to acknowledge the receipt of your note of the 17th instant, in which, referring to our conversation of the 16th, you state the desire of your Government to transport troops and munitions in the same State on the Atlantic or the Pacific, with the object of reestablishing order along the Atlantic coast, and that in the event of your Government being able to charter American vessels for this purpose it trusts that the consuls of the United States at Ceiba and Trujillo, or at any other place along the said coast, will put no obstacles in the way.

If, as would appear, the proposed chartering of American vessels by your Government contemplates a regular contract with the owners or agents of such vessels, not compulsory but voluntary on their part, it is not perceived how the consuls of the United States could interpose any valid objections to a legitimate transaction which the representatives of the American owners may be legally competent to effect.

Copy of this correspondence will, however, be sent to the United States minister to Guatemala and Honduras and to the consular officers in the latter country for their information.

Accept, etc.,

John Sherman.

Mr. Sherman to Mr. Coxe.

DEPARTMENT OF STATE,  
Washington, April 21, 1897.

Sir: I inclose herewith for your information copy of notes from and to Señor J. D. Rodriguez, the minister of the Greater Republic of Central America at this capital, in regard to the desire of his Government to charter American vessels for the purpose of transporting troops and munitions of war with object of reestablishing order along the Atlantic coast.

You will observe the Department’s reply that if the proposed chartering of American vessels by his Government contemplates a regular contract with owners or agents of such vessels, not compulsory but voluntary on their part, it can not be perceived how the consuls of the United States could interpose any objections to a legitimate transaction which the representatives of the American owners may be legally competent to effect.

If, however, there should be any appearance of coercion on the part of the employing Government, the consul’s intervention would be justified. The owners of the vessels should also understand that they can not expect the United States to intervene in their behalf should the employing Government fail to pay them for their services, for while the United States would not interfere to prevent an American vessel from voluntarily carrying arms and troops in the service of a Government trying to put down an insurrection, it would leave the vessel and its crews so voluntarily entering into such service to the consequences of establishing such a relation.

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INSURGENTS AND FOREIGN VESSELS.

Should a seaman employed for other services desire to be discharged, he ought not to be compelled to serve in the transportation of arms and troops.

Respectfully, yours,

John Sherman.

(Foreign Relations U. S., 1897, p. 331.)

Conclusion—(1). The commander of the United States war vessel should therefore reply that "while the United States would not interfere to prevent an American vessel from voluntarily carrying arms and troops in the service of a government trying to put down an insurrection, it would leave the vessel and its crews so voluntarily entering into such service to the consequences of establishing such a relation.''

The issue of any such notice of caution and counsel as that issued by Commander O'Neil is not mandatory, though in may be, on occasion, advantageous.

(2) In the situation in which the troops had already been landed before the capture of the merchant vessel the relations may be materially changed, provided the charter provision extend merely to the transportation of the troops to the seat of the insurrection, and provided that the merchant vessel has met the provisions of the contract and is no longer connected with the expedition.

As this is not war in "the legal sense," but only "in the material sense," the vessel has simply performed a mercantile act for the established Government, and upon its completion the vessel resumes its status as a merchant vessel of the United States.

The commander should therefore extend to the vessel the ordinary protection and would not permit capture of the vessel no longer concerned in the insurrection, or if the vessel had been captured after fulfilling its contract he should demand and secure its immediate release. The insurgents are not a responsible body. They have no prize courts or other means of enforcing the laws of war. They are therefore entitled to use force against neutrals only when this is absolutely essential in the actual conduct of active hostilities.

Mr. Hay has clearly enunciated the position in a letter to the Secretary of the Navy of November 15, 1902, in which he says.
But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters, their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. The question of the nature and mode of the redress which may be open to the government of the injured foreigners in such a case hardly comes within the purview of your inquiry, but I may refer to the precedents heretofore established by this Government in the enunciation of the right to recapture American vessels seized by insurgents.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

(International Law Situations, Naval War College, 1902, p. 82.)

SITUATION III, (d).

There is an insurrection in State X.

(d) Mr. Smith, a citizen of the United States, is implicated in this insurrection in State X, and is sent out of the country. Mr. Smith, as a passenger upon a vessel of State Y, subsequently enters a port of State X. While upon the vessel he is arrested by the authorities of State X. He then appeals to the commander of a United States war vessel to obtain his release, stating that the action of the authorities of State X was illegal and unjustifiable.

What action, if any, should the commander take?

SOLUTION.

The commander could not claim the delivery or release of Mr. Smith to him, “but would have to limit his action to the exercise of good offices, so far as possible in conjunction with” other representatives of the United States to secure for Mr. Smith “fair and open process of law, with every opportunity for defense, and if convicted, leniency of treatment.” He should, if possible, warn Mr. Smith of the risk he runs in again entering the jurisdiction of State X. It is a general principle that representatives of the United States in a foreign harbor “can neither assist in nor resist the orderly operation of the law of the port.”

NOTES ON SITUATION III, (d).

Questions suggested by the Situation.—Two questions naturally arise in connection with this situation, (a) the question of asylum for insurrectionists upon merchant
vessels, and (b) the question of intervention for the protection of those involved in insurrection, who, after being sent out of the State, return to its jurisdiction upon a foreign merchant vessel.

The statement by Mr. Smith that "The action of the authorities of State X was illegal and unjustifiable" involves other questions also.

The general position is expressed by the Department of State:

The instructions to diplomatic officers of the United States provide in regard to citizens of the United States that the diplomatic officers should countenance and protect "citizens" before the authorities "of the foreign country" in all cases in which they may be injured or oppressed, but their efforts should not be extended to those who have been willfully guilty of an infraction of the local laws. It is their duty to endeavor, on all occasions, to maintain and promote all rightful interests and to protect all privileges that are provided for by treaty, or are conceded by usage. If representations made to the authorities of the countries fail to secure proper redress the case should be reported to the Department of State.

The vessel upon which Mr. Smith is a passenger belongs to State Y. The commander of the war vessel of the United States has, of course, no jurisdiction over this vessel under ordinary circumstances. He might at any time use his good offices to prevent, so far as possible, injustice to a citizen of the United States. After his arrest Mr. Smith is within the jurisdiction of State X. The question then becomes one between the United States and State X, and if the arrest is illegal there may also be a case between State Y and State X. Whether Mr. Smith, who has been concerned in stirring up opposition against State X, can claim any immunity from the fact that he is on a merchant vessel or a passenger vessel of a foreign state within a port of State X is one of the points to be settled. The commander of the war vessel would be justified in any case in demanding that the ordinary procedure for arrest of offenders against State X be followed, so far as the exigencies of the disturbed condition of State X permitted. Whether he could demand more than this and a fair trial for the offense committed, involves the matter of asylum for political offenders upon private vessels of a foreign state in the time of an insurrection within a given state.
The question of asylum for insurrectionists upon merchant vessels.

The opinions rendered at various times on the subject are not entirely in accord.

The Barrundia case.—The case of General Barrundia has been particularly discussed.

In a long dispatch bearing the date of November 18, 1890, Mr. Blaine discusses the case of General Barrundia, who had been shot while resisting with force arrest on board the Pacific mail steamer Acapulco, sailing under the American flag and plying between Pacific ports. General Barrundia had secured passage for Panama, and had embarked at a Mexican port. He was a political exile from Guatemala. The captain of the Acapulco requested of Mr. Mizner information as to what he should do in reply to the Guatemalan demand for the arrest of General Barrundia when the Acapulco anchored in a Guatemalan port. After a telegram, which the captain of the Acapulco did not regard as sufficient, Minister Mizner sent to the captain of the Acapulco the following letter:

Mr. Mizner to Captain Pitts.

UNITED STATES LEGATION,
Guatemala, August 27, 1890—10.30 p. m.

Sir: If your ship is within 1 league of the territory of Guatemala, and you have on board Gen. J. M. Barrundia, it becomes your duty, under the laws of nations, to deliver him to the authorities of Guatemala upon their demand, allegations having been made to this legation that said Barrundia is hostile to and an enemy to this Republic. Guaranties have been made to me by this Government that his life shall not be in danger, or any other punishment inflicted upon him than for the causes stated in the letter of Senor Anguiano to Consul-General Hosmer, dated yesterday.

I have, etc.,

LANSING B. MIZER,
United States Minister.

Capt. W. G. Piits,
Commanding Pacific M. S. S. Co.'s Steamship Acapulco.

(For. Relations of U. S., 1890, p. 85.)
Commander Reiter had telegraphed to Minister Mizner on August 27, 1890, at 8 p. m., as follows:

**San José de Guatemala,**

**August 27, 1890.**

**Mizner, United States Minister:**

Barrundia expected in steamer. As peace is declared, I suggest that you ask Government to permit *Thetis* to take him to Acapulco, we acknowledging their municipal rights over steamer. Steamer *Acapulco* in sight.

**Reiter.**

On the following day Commander Reiter sent a letter detailing the course of events:

**Commander Reiter to Mr. Mizner.**

**U. S. Ranger,** **August 28, 1890.**

Dear Sir: On receipt of your telegram about 6.30 p. m. yesterday, I went ashore and sent one to you at 7 p. m. I requested the commandant to postpone action until I received a reply, which he declined to do. I waited until after 9 o'clock for a reply from you, and believe that my dispatch did not go or that your reply was delayed, as I did not receive it until 9.30 this morning. Am sorry my reply was too late.

The commandant did not take any action last night, but did to-day. At about 2.30 we thought we heard firing on board the *Acapulco*, and a few minutes after the Guatemalan flag was hauled down from the fore and the United States flag hoisted. I then thought you had come down and were on board, but learned later that it was intended to call assistance. Lieutenant Bartlett soon came on board from the *Acapulco* and reported that the commandant was on board the *Acapulco*, and that promiscuous firing had been going on, and that the captain desired protection. I immediately started, and was followed a few minutes later by Lieutenant Harris with an armed guard of marines. On arrival I found that the commandant had left with the body of Barrundia, and that all was quiet, so I sent Lieutenant Harris back.

The following is as near as I could learn what occurred: When the commandant arrived on board he delivered your letter to Captain Pitts, and they both went to the captain's room, where it was read. The captain then sent the first officer, Mr. Brown, to send all cabin passengers below and to warn the steerage passengers to keep forward. The captain and commandant then went to Barrundia's room. They stood outside, one on each side of the door, while Barrundia was inside smoking a cigarette. The captain then told him of the letter, and he could not afford him further protection. The commandant then said something to him in Spanish, to which Barrundia replied, ‘Bueno,’ when he quickly seized a revolver from the upper berth and fired two or three shots out of the door. The captain and commandant beat a hasty retreat aft and took refuge in a stateroom, followed by Barrundia firing wildly. He passed out to the port side of the deck, then forward across to the starboard side through social hall, then back through social hall, and turned to go forward on the port side, when he fell.
It was impossible to point out just where the detectives were all the time. Some say they were on the starboard side, and first shot and wounded Barrundia when he appeared on that side, but the certain result was that he died where he fell, pierced by several bullets. He must have been terribly excited or scared not to have done any damage to his enemies, for he had everything his own way for a few minutes.

I am sorry you have not been well since your trip to Acajutla, but hope you are all right again.

Commander Stockton returned yesterday. Everything is quiet at La Union and Amapala.

Very sincerely,

Geo. C. Reiter.

Hon. L. B. Mizner,
United States Minister, Guatemala.
(Foreign Relations U. S., 1890, p. 86.)

President’s statement.—The point of view of the United States Government at the time was set forth in the President’s message of December 1, 1890:

The killing of General Barrundia on board the Pacific mail steamer Acapulco, while anchored in transit in the port of San José de Guatemala, demanded careful inquiry. Having failed in a revolutionary attempt to invade Guatemala from Mexican territory, General Barrundia took passage at Acapulco for Panama. The consent of the representatives of the United States was sought to effect his seizure, first at Champerico, where the steamer touched, and afterwards at San Jose. The captain of the steamer refused to give up his passenger without a written order from the United States minister. The latter furnished the desired letter, stipulating, as the condition of his action, that General Barrundia’s life should be spared, and that he should be tried only for offenses growing out of his insurrectionary movements. This letter was produced to the captain of the Acapulco by the military commander at San Jose, as his warrant to take the passenger from the steamer. General Barrundia resisted capture and was killed. It being evident that the minister, Mr. Mizner, had exceeded the bounds of his authority in intervening, in compliance with the demands of the Guatemalan authorities, to authorize and effect, in violation of precedent, the seizure on a vessel of the United States of a passenger in transit charged with political offenses, in order that he might be tried for such offenses under what was described as martial law, I was constrained to disavow Mr. Mizner’s act and recall him from his post.

(President’s Message, December 1, 1890.)

Subsequent statements.—The position of the United States has been officially stated in certain correspondence subsequent to that upon the Barrundia affair. This correspondence implies that the criticism of Mr. Mizner’s
action in the case of General Barrundia was in consequence of his assuming to give the Guatemalan authorities an order for the surrender of the accused, (General Barrundia).

GUATEMALA AND HONDURAS—LOCAL JURISDICTION OVER FOREIGN MERCHANT SHIPS.

Mr. Huntington to Mr. Gresham.

PACIFIC MAIL STEAMSHIP COMPANY, 35 Wall Street, New York, December 13, 1893.

Sir: Referring to our letter of the 11th of November last, we again beg to call the attention of the Department to the request contained in the closing paragraph, reading:

"In view of the fact that it is not the first case on record in which the commanders of our steamers plying on the Central American coast have been called on to deliver to the authorities of the different republics passengers on their steamers (accused of political offenses against said republics), and under their charge and protection of our flag, we would esteem it a favor if some definite action should be taken by the Department, by prompt intervention in this instance, to secure protection in the future for passengers, cargo, and mails carried by our steamers, and that a definite policy be outlined by our Government and communicated to this company, in order that such instructions may be issued to our commanders as will properly secure the protection of our ships and prevent any misunderstanding on the part of our officers which might contravene and confuse the wishes of our Government and involve the Department, as well as this company, in needless complications."

The Department will readily understand that without some such definite indication of the policy of our Government in connection with these cases it is impossible for us to lay down a fixed rule for the governance of our commanders on the Pacific coast under which they shall act intelligently in such emergencies.

We trust, therefore, that, in the light of all the facts in connection with this incident now in the possession of the Department, it may be deemed consistent to comply promptly with our request as above indicated.

I have, etc.,

C. P. Huntington, President.

Mr. Gresham to Mr. Huntington.

DEPARTMENT OF STATE, Washington, December 30, 1893.

Sir: I have given attention to your letter of the 13th instant, in which you refer to the recent firing upon your steamer Costa Rica in the Hondurian port of Amapala, and repeat the suggestion contained in your letter of November 11, 1893, that a definite policy in respect to surrendering accused criminals when claimed by the local authorities in a port of call be outlined for the guidance of your commanders.
It is not practicable to lay down a general fixed rule applicable to the varying conditions in such cases. As a comprehensive principle, it is well established in international law that a merchant vessel in a foreign port is within the local jurisdiction of the country with respect to offenses or offenders against the laws thereof, and that an orderly demand for surrender of a person accused of a crime by due process of law, with exhibit of a warrant of arrest in the hands of the regularly accredited officers of the law, may not be disregarded nor resisted by the master of the ship. On the same voyage when the Amapala incident occurred Captain Dow appears to have acted upon this principle in allowing the arrest at other ports, on proper judicial warrant, of two or three other passengers accused of crime. That the passenger may have come on board at the port where the demand is made or at another port of the same country is immaterial to the right of local jurisdiction.

Arbitrary attempts to capture a passenger by force, without regular judicial process, in a port of call may call for disavowal when, as in the present case at Amapala, the resort to violence endangers the lives of innocent men and the property of a friendly nation. Whether, if force be threatened, the master of the vessel is justified in putting in jeopardy, by his resistance, the interests committed to his care must be largely a question for his discretion. It is readily conceivable that the consequences of futile resistance to overpowering force may be such as to make the resistance itself unwarrantable.

The so-called doctrine of asylum having no recognized application to merchant vessels in port, it follows that a shipmaster can found no exercise of his discretion on the character of the offense charged. There can be no analogy to proceedings in extradition when he permits a passenger to be arrested by the arm of the law. He is not competent to determine whether the offense is one justifying surrender or whether the evidence in the case is sufficient to warrant arrest and commitment for trial, or to impose conditions upon the arrest. His function is passive merely, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest. The diplomatic and consular representatives of the United States in the country making the demand are as incompetent to order surrender by way of quasi-extradition as the shipmaster is to actively deliver the accused. This was established in the celebrated Barrundia case by the disavowal and rebuke of Minister Mizner's action in giving to the Guatemalan authorities an order for the surrender of the accused.

If it were generally understood that the masters of American merchantmen are to permit the orderly operation of the law in ports of call, as regards persons on board accused of crime committed in the country to which the port pertains, it is probable on the one hand that occasions of arrest would be less often invited by the act of the accused in taking passage with a view to securing supposed asylum, and, on the other hand, that the regular resort to justice would replace the reckless and offensive resort to arbitrary force against an unarmed ship, which, when threatened or committed, has in more than one instance constrained urgent remonstrance on the part of this Government.

I am, etc.,

W. Q. GRESHAM.

(Foreign Relations U. S., 1894, p. 296, 297.)
Mr. Bayard's letter of November 3, 1885, implies that "Neither a diplomatic nor consular officer can oppose the taking of a supposed criminal from an American vessel in port," and that of November 7, 1885, says: "Nor can he order the surrender of such criminal." On March 12, 1885, Mr. Bayard states: "Vessels entering foreign ports are, unless exempted by treaty, amenable to the jurisdiction of the country."

Mr. Blaine's position in 1890 was to the effect that "the practice in Spanish-American ports is to seek the consent of the representative of the country to which the vessel belongs." (Letter of November 18, 1890.) In the conclusion of the same letter Mr. Blaine, in speaking of the Government, says: "On more than one occasion it has permitted its legations and ships of war to offer hospitality to political refugees. This it has done from motives of humanity. Its views would not have been less pronounced if, in addition to the humane aspects of the subject, it had also been confronted with the duty of preventing the decks of its merchant vessels from being made the theater of illegal violence, upon groundless and unlawful excuses and without the pretense of legal formality. "For your course, therefore, in intervening to permit the authorities of Guatemala to accomplish their desire to capture General Barrundia I can discover no justification.'"

The criticism of Mr. Mizner's action seems to have been based, therefore, upon his course "in intervening to permit the authorities of Guatemala to accomplish their desire to capture General Barrundia." The precedents cited in the long letter of Mr. Blaine do not all bear upon this point, however.

Later, on December 30, 1893, Mr. Gresham, as shown above, arrives at the conclusion that "right of asylum has no application to merchant vessels; masters, as well as diplomatic and consular officers, can neither assist in nor resist the orderly operation of the law of the port."

*Changes in the Navy Regulations.*—The United States Navy Regulations themselves show to some degree the change in attitude since the Barrundia case. The provisions of the Regulations issued in 1893 are very
different in their tenor from those which have been issued since that time. There has been a marked limitation in the statements in regard to asylum. This may be taken as an indication of a change of attitude on the part of the Government. It is certainly sufficient evidence for the determination of the line of action for a naval officer of the United States.

The clauses relating to asylum are here printed. The difference between the clauses of 1893 and the clause of 1896 is such as to place the whole matter on a very different basis. There is but slight difference in the wording of the clauses of 1896 and 1900. The word "local" is omitted in the issue of 1900.

The clause as issued in 1900 most nearly accords with current opinion, as shown by writers upon international law:


1. In reference to granting of asylum, in the territorial waters of a foreign state, the ships of the United States shall not be made a refuge for criminals.

2. In the case of persons other than criminals they shall be afforded shelter whenever it may be needed, to United States citizens first of all, and to others, including political refugees, as the claims of humanity may require and the service upon which the ships are engaged will permit.

3. The obligation to receive political refugees and to afford them an asylum is in general one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contending factions or their leaders are facilitated. The captain of a ship of the Navy is not to invite or encourage such refugees to come on board his ship, but should they apply to him his action shall be governed by considerations of humanity and the exigencies of the service upon which he is engaged.

4. When a political refugee has embarked, in the territory of a third power, on board a merchant vessel of the United States as a passenger for purposes of innocent transit, and it appears upon the entry of such vessel into the territorial waters that his life is in danger, it is the duty of the captain of a ship of the Navy present to extend to him an offer of asylum.


The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, local usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum except when required by the
interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

Article 308, U. S. Navy Regulations, 1900.

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Article 308 of the United States Navy Regulations, which prescribes the duties of officers in regard to granting asylum, does not sanction any direct or indirect invitation to refugees to accept asylum.

The Government may of course permit, as Mr. Blaine says, its ships of war "to offer hospitality to political refugees," but without such authorization the naval officer is at present forbidden to make such offer.

In other cases where the matter of asylum is in question he is in general to remain passive.

The position taken in the Naval War College Manual of International Law seems to be the one most favored at present. In speaking of a political refugee, the Manual says: "When, instead of preserving the asylum and refuge gained by reaching a foreign country, he deliberately exposes himself to arrest and punishment by entering the territorial waters of the country in which he is considered an offender, he has no claim to the protection of any other State," (p. 30).

Conclusion.—From the above discussion it is evident that in judging of the action of State X the commander should seek to know:

1. Whether the arrest was made in due form, so far as the exigencies of the disturbed condition of State X permitted.

2. Whether any treaty provisions between the United States and State X touched upon the case of Mr. Smith.

3. Whether the trial for the offense, if permitted under the treaty and not otherwise prohibited, would be fairly conducted.
To this extent Mr. Smith is entitled to the good offices of the official representatives of the United States Government.

Beyond this it is a general principle that representatives of the United States in a foreign harbor "can neither assist in nor resist the orderly operation of the law of the port."

(b) The question of intervention for the protection of those involved in insurrection who, after being sent out of the disturbed State, return to its jurisdiction upon a foreign merchant vessel.

The discussion thus far applies in the main to the general subject of asylum upon merchant vessels.

The situation under consideration involves the particular phase of asylum in a case where a United States citizen who has, after being sent out of State X because of implication in the insurrection, returned upon a merchant vessel to a port within the jurisdiction of State X.

Attitude of the Department of State.—In the following quotation from a letter to the Secretary of the Navy from the Secretary of State, dated July 15, 1899, the position is taken that Americans, having been allowed to leave a foreign country in which they have been implicated in revolution, by returning to that foreign country place themselves beyond the power of intervention of their own government in their behalf:

Sir: I have the honor to acknowledge the receipt of your letter of the 12th ultimo, inclosing a copy of one to you from Lieutenant-Commander Kimball, U. S. Navy, commanding officer of the Vixen, at Bluefields, in which he requests general instructions as to the policy of this Government respecting the protection of such American citizens as, having taken part in the recent insurrection at that place, were allowed to leave the country, but who may again return thither and be apprehended and prosecuted by the Nicaraguan authorities.

You request to be advised of the views of this Department on the subject.

In reply, I have the honor to inform you that an instruction, a copy of which is herewith inclosed, was sent to our consul at San Juan del Norte on May 13 last, informing him that Americans who were implicated in that insurrection, and who have returned to Nicaragua, have placed themselves beyond the power of this Government to intervene in their behalf should they be recaptured.
The cases thus foreshadowed do not come under either the Barrundia or the Gomez case referred to by Lieutenant-Commander Kimball. Those persons were natives of the country, in transit, and on board an American ship entering a port of the country without intent to land. The 33 men in question were expelled from Nicaraguan territory, and it is apprehended that they may attempt to reenter Nicaraguan jurisdiction. Many, if not most of them, are understood to be citizens of the United States.

Effort should be made to warn such persons in time of the risk they run in reentering Nicaragua, and, if occasion require, they might be temporarily received on an American vessel before they land and before any process of arrest under due warrant of law be attempted against them. If, however, they actually land, or are arrested by judicial authority on a merchant ship in port before endeavoring to land, the naval commander could not claim their release or delivery to him but would have to limit his action to the exercise of good offices, so far as possible, in conjunction with the consular representatives of the United States, to secure for them fair and open process of law, with every opportunity for defense, and, if convicted, leniency of treatment.

Conclusion.—While from this letter there may be an implication that it applies only to persons who intend to land in the state from which they have been expelled, yet the right to arrest before landing is admitted. It becomes very clear, then, that it is not the province of representatives of the United States Government in foreign ports to interfere to hinder the due process of local judicial procedure.

It is however proper to use good offices to secure fair trial and "leniency of treatment." A naval officer may also receive on board temporarily such persons as Mr. Smith "before any process of arrest under due warrant of law be attempted against them," and "effort should be made to warn such persons of the risk they run in reentering" the state from which they have been sent.

The tendency seems to be toward the limitation of the so-called right of asylum to more narrow limits from year to year, and it may now be said in the language of the Regulations of the United States Navy "the right of asylum for political and other refugees has no foundation in international law."

Its exercise in advanced states is tolerated rarely, and only under very exceptional circumstances, but is somewhat more frequently tolerated in case of disturbed conditions in the less advanced states.