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INTERNATIONAL LAW SITUATIONS.

Situation I.

During a war between the United States and State X, a cruiser of the United States overtakes and visits a neutral merchant vessel bound, with no evidence of hostile intent and with innocent cargo, for an unblockaded port of State X.

The merchant vessel seems well adapted for conversion into an auxiliary cruiser. The officer of the United States cruiser mentions this fact to the captain of the merchant vessel. The captain points out that he is upon a regular voyage to a port of State X.

What action, if any, should the commander of the United States cruiser take?

Solution.

From the statement of the situation there is no evidence that the vessel itself is engaged in unneutral service, is carrying contraband, or is about to attempt to run a blockade. Owing to the nature of its construction the vessel may easily be transformed into an enemy cruiser. Such a vessel is liable to seizure if destined to be sold or handed over to the enemy. The United States commander is therefore justified in making such inquiries as shall satisfy him that the vessel is bound upon an innocent voyage. If the evidence seems to show that the vessel is intended for sale to the enemy or for enemy service, the commander should send the vessel in for adjudication by the proper authorities.

Notes on Situation I.

General attitude toward neutral commerce.—It is evident from the statement of the conditions under which the merchant vessel was sailing that the vessel could not be seized on the ground of attempt to break a blockade,
and also that the vessel is not guilty of carrying contraband or at the time engaged in unneutral service. If no question is raised in regard to the construction of the vessel itself, the commander of the United States cruiser would without hesitation allow the neutral merchant vessel to proceed to her destination.

The merchant vessel, however, seems well adapted for conversion into an auxiliary vessel for war purposes. The officer of the United States is, therefore, obliged to consider whether on that account such a vessel should be detained when upon a regular voyage to a port of an enemy.

War upon the sea is becoming less and less an attempt to destroy innocent commerce. To capture all neutral vessels bound for enemy ports, provided they are so constructed that they might be converted into vessels which could be used for hostile purposes, would be an unduly severe blow to neutral commerce. The traditional policy and the recent practice of the United States would seem to discountenance such action. The general attitude of the United States has been to interfere as little as possible with the freedom of neutral trade. It would seem that a liberal position should be taken in regard to seizure of neutral vessels, even when such vessels may be converted into naval vessels.

Question of contraband.—On the other hand the value to the enemy of the vessels which are so constructed as to be easily adapted to serve for hostile purposes is very great. The classification of contraband of war, as set forth in declarations and other statements during the nineteenth century, does not cover the case of merchant vessels of the class under consideration except by a forced interpretation. The term "contraband of war" includes those articles only which have a belligerent destination and purpose. Such articles have been described as follows:

1. Articles that are primarily and ordinarily used for military purposes in time of war, such as arms and munitions of war, military material, vessels of war, or instruments made for the immediate manufacture of munitions of war.
2. Articles that may be and are used for purposes of war or peace, according to circumstances.

"Articles of the first class, destined for ports of the enemy or places occupied by his forces, are always contraband of war.

"Articles of the second class, when actually and especially destined for the military or naval forces of the enemy, are contraband of war."

This classification is in accord with the best opinion and regular practice. It would not be possible to claim that this merchant vessel, bound for a regular destination, falls under the designation of an article "primarily and ordinarily used for military purposes in time of war," unless further proof could be found than is evidenced in the situation as stated.

Vessels of the class under consideration are of comparatively recent development. They differ in status from other vessels on account of their adaptability to war purposes under certain circumstances. They also differ from the auxiliary or volunteer navy in that they have no direct relationship to the Government through contract or other agreement.

Contraband of war has been viewed in recent years as consisting almost solely of articles carried upon vessels. Grotius, in 1625, gives three general classes:

"1. Those things which have their sole use in war, such as arms.

"2. Those things which have no use in war, as articles of luxury.

"3. Those things which have use both in war and out of war, as money, provisions, ships, and those things pertaining to ships." (De Jure Belli et Pacis. Bk. III, ch. 1, 5.)

"Grotius regards articles of the first class as hostile, of the second as not a matter of complaint, and of the third as of ambiguous use (usus ancipitis), of which the treatment is to be determined by their relation to the war.

"While the general principle may be clear, the application of the principle is not simple. Those articles whose sole use is in war are without question contraband. Articles exclusively for peaceful use are not contraband. Between these two classes are many articles in regard to
which both practice and theory have varied most widely. The theorists have endeavored to give the neutral the largest possible liberty in commerce on the ground that those who were not parties to the war should not bear its burdens. This has been the opinion most approved by the jurists of Continental Europe. Great Britain and the United States have been inclined to extend the range of articles which might on occasion be classed as contraband.” (International Law, Wilson and Tucker, p. 303.) Even the Supreme Court in the frequently cited case of the Peterhoff, says, “The classification of goods as contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable.” (5 Waialce, 28.) It is evident from the study of the history of contraband that the classification of contraband changes as the methods and instruments of warfare vary. The main question is whether the article is or is not intended for military use. The term “contraband” is usually applied to cargo of ships and merchandise transported upon ships. There is no reason why the ship itself may not become itself merchandise when an object of sale for warlike purposes. That it may move under its own power makes no difference; it may become an object of trade, and as such its character may be determined by the use which it is to serve.

This merchant vessel is, as the officer of the United States cruiser points out, adapted for conversion into an auxiliary cruiser and is bound for an enemy port. The vessel is therefore capable of a double use, and may easily become a greater source of injury to the United States than many objects of conditional contraband.

There is no question that the vessel will come under the belligerent control on arrival at its destination. This being the case there can be no objection raised to the sale of the vessel itself or even to its seizure in an extreme case. It may not be the intent of the owner of the merchant vessel to sell it on arrival at its destination, but as Dana says of contraband, “The truth is, the intent of the owner is not the test. The right of the belligerent to prevent certain things getting into the mili-
tary use of the enemy is the foundation of the law of contraband, and its limits are, as in most other cases, the practical result of the conflict between this belligerent right on the one hand and the right of the neutral to trade with the enemy on the other.” Dana also says, “I am inclined to the opinion that an actual intent to deliver articles capable of military use directly into military hands condemns the articles, at all events, as a voluntary intervention of their owner in the war; and that, whether there be or be not such an intent, the belligerent may capture certain articles because of their destination to a place where they will come under the enemy’s control and so may be used by the enemy in direct military operations.” Later, speaking of goods that are capable of a double use, Dana says, “Although nothing be developed as to the owner’s intent, yet if the condition of the port of destination, or the character and state of the war, make it satisfactorily appear that they will, in all probability, go directly into military use, or directly tend to relieve an enemy from hostile pressure, the right of the belligerent to intercept them may be exercised solely for those reasons.” (Dana’s Wheaton’s International Law, n. 226, pp. 633, 634; also Kleen, La Neutralité, I, sec. 92.)

Grounds for commander’s judgment.—The intent of the owner may not be known to the captain of the merchant vessel, and in the case under consideration it is not such as to determine the action of the United States officer. His action must be determined by the nature of the thing itself, not by intent of the owner or person in control, for the intent is not capable of definition and determination. The intent of the owner or captain is a fact that, while significant, is not the final test. The nature of the vessel is, however, capable of determination. The simple fact is that the vessel which is adapted for conversion is bound for an enemy port. The vital question is, will this vessel, if permitted to continue her voyage without restraint, become an instrument of hostility against the United States? The nature of its construction makes this a possible or even a probable event, unless there be some guaranty to the contrary. It is
plainly the duty of the officer to consider what would be the condition with respect to the successful continuance of hostilities after this vessel has arrived within the enemy port. There is no doubt that there would be potentially an increase in the possible naval resources of the enemy, for this vessel may be purchased or seized even if necessary. This being the case, under present conditions it is the duty of the United States officer to guard against such increase. Such a vessel may be contraband even under the classification of contraband made so early as in the days of Grotius. (De Jure Belli et Pacis, Bk. III, ch. 1, 5.)

"The law as regards the sale of ships to belligerents is in a state of transition, and, as was to be expected, the most severe restrictions in this respect are placed upon British shipbuilders and owners. Recently the state of law was summed up as follows: 'An international usage prohibiting the construction and outfit of vessels of war is in course of growth, but it is not yet old enough, or quite wide enough, to have become compulsory on those nations which have not yet signified their voluntary adherence to it.' The difficulty with regard to ships not built primarily as men-of-war lies in the fact that few fast steamers are altogether unfitted to receive an armament of some kind. The extremes of practice with regard to Russia and Japan are to be found in the action of Great Britain and Germany. This country, having men-of-war under construction for Japan, has publicly announced in her declaration of neutrality that no ships will be allowed to be delivered until after the war. Germany, on the other hand, has sold to Russia one of the large and fast mail steamers of the Hamburg-American line, a ship fitted by her construction to be used as an 'auxiliary' cruiser, as well as other ships of less importance." (L. G. Carr Laughton, "Belligerents and neutrals," The United States Service Magazine, June, 1904, p. 231.)

Such vessels are of a comparatively late form of construction. Consequently, their status has not been settled by many precedents.
From the nature of the construction the indications are that the vessel under consideration is fitted with a view to hostile use in case that it is advisable to so use the vessel. There is, therefore, evidence sufficient to warrant the commander of the cruiser in demanding further proof than the simple statement of the captain of the merchant vessel that he is upon his regular voyage. The burden of proof of innocent intent may properly be placed upon the merchant captain and should be thus placed in cases of this kind. This is not an undue hardship upon neutrals, as the vessel is of a character easily approximating contraband.

"As a general rule a neutral has a right to carry on such trade as he may choose with a belligerent. But the usages of war imply the assumption that the exercise of this right is subjected to the condition that the trade of the neutral shall not be such as to help the belligerent in prosecuting his own operations or in escaping from the effects of those of his enemy. When neutral commerce produces this result the belligerent who suffers from the trade is allowed to put it under such restraint as may be necessary to secure his freedom of action." (Hall, International Law, 5th ed., p. 505.)

The commander in protecting his country, if he has any ground for belief that sale might be made, could demand further evidence or even a guaranty that the vessel is not proceeding to the port of X for sale, or even might allow the vessel to proceed only on condition that it would not be sold to the enemy. This would not be an interruption of the peaceful commerce of the enemy, but only a proper measure to guard against the increase of the fighting power of the enemy. Should the captain of the merchant vessel be unwilling to give such guaranty as he is competent to give that the vessel will not be sold to the enemy at port X, this may be a ground for sending the vessel in for adjudication by a prize court.

It is certain that such vessels as are under hostile government contract or subsidy can not be allowed the same freedom as is allowed to ordinary commercial vessels.
It is also certain that there is a point at which the ordinary commercial vessel will merge into the vessel easily adapted for conversion into an auxiliary cruiser.

Some special considerations.—The commander of the visiting war vessel must decide on each case upon the evidence from all points of view, and in case of doubt it is safer to allow the courts to decide. He should take into consideration not only the construction of the vessel, but also such matters as the need of State X for such vessels, the practice of the State in regard to purchase and seizure of such vessels, the need for such vessels for warlike purposes in the port to which the vessel in question is sailing, the number of times this vessel has made this voyage to the port of X since the outbreak of hostilities, the responsibility and sincerity of the owners of the vessel, and the like.

In many instances it is wiser to incur the risk that the United States may have to pay indemnity for the delay of such a vessel rather than to incur the risk which would come from the addition of such a vessel to the navy of an enemy.

It is certain that such vessels will become a subject for consideration and that they can not be regarded as other than contraband in some instances. When so regarded, an officer would be justified by international law in seizing the vessel as itself contraband. Whether it will be the policy of the United States to place such vessel in its list of contraband, and what the decisions of courts will be in regard to goods, etc., upon such vessels, is not here considered.

Russian declaration, 1904.—The position of Russia makes such vessels contraband, as shown in the “Rules which the Imperial Government will apply during the war with Japan,” 1904.

VI. Sont considérés comme contrebande de guerre les objets suivants: . . .

(6) Les bâtiments se rendant dans un port ennemi même sous pavillon de commerce neutre, si d’après leur construction, leur aménagement intérieur et d’autres indices, il y a évidence qu’ils sont construits dans un but de guerre et se dirigent vers un port ennemi pour y être vendus ou remis à l’ennemi.
This clause has been translated in the Official Notice of the British Board of Trade, March 18, 1904, as follows:

The following articles are deemed to be contraband of war:

(6) Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes and are proceeding to an enemy's port in order to be sold or handed over to the enemy.

From the above it is evident that Russia would regard a vessel sailing, as is the vessel under consideration in the Situation, for its regular post of call, as free unless there is evidence that she is "proceeding to an enemy's port in order to be handed over to the enemy."

Doctor Lushington earlier took practically the same position in stating that British commanders are directed to detain as contraband a vessel "If she is fitted for purposes of war as well as commerce, and it appears that she is destined for the enemy's government to be used as a vessel of war." (Naval Prize Law, par. 207.)

Conclusion.—If this vessel is destined to be sold to the enemy for warlike purposes, it is plainly the duty of the commander to seize the vessel. There is evidence that it may easily be converted to such purpose. The commander should therefore take such measures as will give to him reasonable assurance that the vessel, though easily adaptable to warlike uses, will not come into the hands of the enemy for such uses.