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International Law Situations with Solutions and Notes

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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 VIII.

There is war between States X and Y. State Z is neutral. A commander of a war vessel of State X maintains that a private vessel of neutral State Z which has aided State Y by transmitting wireless telegraph messages is liable to capture as guilty of unneutral service. He also maintains that neutral State Z should assume some responsibility for the use of wireless telegraph within its own jurisdiction.

The commander is asked for a brief statement of the restrictions which might well apply to the use of wireless telegraphy in time of war.

Under present conditions, what statement might he make?

SOLUTION.

(a) A belligerent may regulate or prohibit the use of wireless telegraph within the area of hostilities.

(b) A neutral state should use reasonable care to prevent within its jurisdiction the unneutral use of wireless telegraph.

(c) Unneutral use of wireless telegraph on board a vessel makes the vessel liable to the penalty of capture by a belligerent, or to confiscation or sequestration of the apparatus, or of the vessel, or of both by a neutral.

(d) A vessel intentionally aiding a belligerent by the use of wireless telegraph is liable to the penalty until the end of the war.

NOTES ON SITUATION VIII.

Nature of service.—The usefulness of wireless telegraphy, which a few years ago was problematical, is now amply proven. This was shown in the South African war, some of the German wars in Africa, and in the Russo-Japanese war.

The general principle of wireless telegraphy is based on the fact that the oscillation of an electric spark generates ether waves, usually called, from the discoverer,
Hertzian waves. As these waves were discovered in 1887, it is but natural that no extended international law precedents in regard to their use have yet been established. The Hertzian waves may move to a considerable distance in any direction from the generator. They may by proper apparatus be received at any point within this sphere. The present lack of control of the direction in which the waves may move differentiates the service in this respect from that of wire telegraphy.

There are various systems of transmitting and receiving the Hertzian waves. Certain states have given preference to a single system, while other states permit the use of several systems. The Telefunken system is used in Germany and in the German navy. The same system is receiving favorable consideration in Holland, Norway, and South American States, and also Sweden, and has been the subject of experimental use in some of the British dependencies. In Russia the Popoff system is used. The Rochefort and the Ducretet systems have received support in France. The Marconi system has exclusive rights in Italy and extensive use elsewhere. In the United States the Telefunken, Deforest, and Marconi systems are in use. Certain countries have special systems or variations of the above systems in use. The great diversity in control and in operation shows the need of governmental and international regulation.

Control of submarine cables.—The principles of control as stated in the Naval War College lectures on Submarine Cables in 1901 seems to apply in some respects to wireless telegraphic equipment. It was maintained in regard to submarine cables that, “The right to legislate for this form of property is, therefore, in the power of the state, or in case no legislation has been enacted, the legal control is in the proper department of the government.” This position was affirmed by Secretary Fish as early as July 10, 1869, as follows:

It is not doubted by this Government that the complete control of the whole subject, both of the permission and the regulation of foreign intercourse, is with the Government of the United States, and that, however suitable certain legislation on the part of a
State of the Union may become, in respect to proprietary rights in aid of such enterprises, the entire question of allowance or prohibition of means of foreign intercourse, commercial or political, and of the terms and the conditions of its allowance is under the control of the Government of the United States. (Sen. Doc. 122, p. 65.)

President Grant took practically the same position in his message of December, 1875, and since that time the position has often been reaffirmed. All foreign submarine cables having a terminus in the United States have been landed under a distinct condition that the "executive permission is to be accepted and understood by the company as being subject to any future action of Congress in relation to the whole subject of submarine telegraphy." An opinion of the Attorney-General, in accordance with which the President was entitled to act and to order all the departments of executive character to act, sums up the matter as follows:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. * * * The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among nations we get as much as we give. He ought not to stand by and permit a cable to land on our shores under concessions from a foreign power which does not permit our cables to land on its shores and enjoy there facilities equal to those accorded its cable here. * * * The President is not only the head of the diplomatic service, but Commander in Chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the diplomatic and consular service, and in the Army and Navy when abroad. The President should therefore demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message * * * The Executive permission to land a cable is, of course, subject to subsequent Congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an encroachment on our rights or prejudicial to our interests. The unconditional landing of a foreign cable might be both, and therefore to be prohibited, but a landing under judicious restrictions and conditions might be neither, and therefore to be permitted in the promotion of international intercourse. (22 Opin. Atty. Gen., p. 25.)
In a later decision it was held that—

the same restriction applied to the landing of submarine cables in Cuba in the time of military occupation on the island. (Ibid., p. 515.)

There can, then, be no doubt that for the executive branches of the United States Government the principle of control by the President is established in absence of any legislation to the contrary. (Wilson, Submarine Telegraphic Cables in their International Relations, p. 11.)

Agreement between United States and Germany.—The conditions under which submarine cables are permitted to be laid and operated within United States territory are shown in the following memorandum:

MEMORANDUM.

In the matter of the application of the Deutsch-Atlantische Telegraphen-Gesellschaft of Germany for permission to land on the shores of the United States a submarine telegraph cable, to be laid between Germany and the United States.

The President having duly considered said application, hereby consents that said company may lay, construct, land, maintain, and operate telegraphic lines or cables on the Atlantic coast of the United States, to connect Borkum-Emden, in the Empire of Germany, and the city of New York, touching at the Azores.

It is a condition to the granting of said consent that said company first file with its said application, in the Department of State, its written acceptance of the terms and conditions on which said consent is given, to wit:

I.

That neither the said company, its successors or assigns, nor any cable with which it connects, shall receive from any foreign government exclusive privileges which would prevent the establishment and operation of a cable of an American company in the jurisdiction of such foreign government.

II.

That the company has received no exclusive concessions from any government which would exclude any other company or association, which may be formed in the United States of America, from obtaining a like privilege for landing its cable or cables on the shores of Germany, and connecting such cable or cables with the inland telegraph system of said country.
That the said company shall not consolidate or amalgamate with any other line or combine therewith for the purpose of regulating rates.

That the company will, in the transmission of official messages, give precedence to messages from and to the Government of the United States of America and of other governments.

That the rates charged to the Government of the United States shall not be greater than those to any other government, and the said rates and those charged to the general public shall never exceed the present telegraphic rates between said counties, and shall be reasonable.

That the Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, or agreement be granted by said company or its successors or assigns to any other government.

That the citizens of the United States shall stand on equal footing as regards the transmission of messages over said company's lines with citizens or subjects of Germany or any other country with which said cable may connect.

That messages shall have precedence in the following order:
(a) Government messages and official messages to the Government.
(b) Service messages.
(c) General telegraphic messages.

The said line shall be kept open for daily business, and all messages in the order above be transmitted according to the time of receipt.

That no liability shall be assumed by the Government of the United States by virtue of any censorship which it may exercise over said line in the event of war or civil disturbance.
XI.

That the consent hereby granted shall be subject to any future action by the Congress or by the President, affirming, revoking, or modifying, wholly or in part, the said conditions and terms on which said permission is given. (U. S. Foreign Relations, 1899, p. 311.)

The conditions set forth in this memorandum show that the United States retains full power over cables which are permitted to operate within its jurisdiction. This principle of control would involve censorship over or even discontinuance of the service. The control would also involve some degree of responsibility. It may be reasonable to expect, so far as practicable, a corresponding control of wireless telegraphy. The medium of communication is not the same, but the principles involved are to some extent similar.

Report of Inter-Departmental Board.—The conclusions of the Inter-Departmental Board on wireless telegraphy, made to the President of the United States, July 12, 1904, are:

That the maintenance of a complete coastwise system of wireless telegraphy by the Navy Department is necessary for the efficient and economical management of the fleets of the United States in time of peace and their efficient maneuvering in time of war.

That the best results can be obtained from stations under the jurisdiction of one Department of the Government only, and that representatives of more than one Department should not be quartered at any station.

And finally the Board concludes that the Government must take the necessary steps to regulate the establishment of commercial wireless telegraph stations among the States and between nations. (Report, p. 9.)

Report of General Board, Navy.—Some form of effective Government control of wireless telegraphy seems necessary both for commercial and military reasons. It also seems proper that as in the postal service, and in the telegraph service in certain States, Government employees should be placed in charge of the wireless communication. The General Board, Navy Department of the United States, in a report to the Secretary of the Navy,
May 2, 1904, considered the question of control of wireless telegraph.

The report considers specific points. It states:

2. The questions are:

Whether or not all wireless telegraph stations belonging to the Government on or near the seacoast ought to be under a common control?

If so, which Department of the Government can best exercise the control?

What is necessary in order to control private seacoast wireless telegraph stations?

3. In all this discussion the term "seacoast" includes all wireless telegraph stations capable of communicating with ships at sea, whatever their actual distance inland, and includes the Great Lakes and the insular possessions of the United States, as well as the Atlantic, Gulf, and Pacific coasts.

4. The following facts must, in the opinion of the General Board, form the basis of the decision:

5. The principal defect of wireless telegraphy, the liability to interference, renders some central control indispensable to the integrity and effectiveness of any wireless telegraph station. Without control over the placing of other stations, any wireless telegraph station may be rendered absolutely useless either by accident or design.

6. The control of all wireless telegraph stations belonging to the Government can be accomplished by Executive order. In order to control private stations, general legislation by Congress will be required, both because wireless telegraphy bridges the boundaries between States and because it stretches beyond the territorial limits of the nation.

7. The principal use of wireless telegraphy is now, and long will be, at sea—between ship and ship, or ship and shore. On shore other means of communication always exist, often better, always possible substitutes. The common telegraph or telephone, or the heliograph, permanent or portable, is everywhere available to the soldier or meteorologist. Permanent outlying stations can be connected by submarine cables. Although wireless telegraphy may be an added convenience, on shore it never can be indispensable. But from ships at sea, out of sight of flags or lights, and beyond the sound of guns, the electric wave, projected through space, invisible and inaudible, can alone convey the distant message.

8. In the present state of the science, development and experiment must be carried on largely at sea. We know as yet little of the limitations or possibilities of marine and transmarine communication. The Navy is the only Department of the Government that has facilities for this branch of the work, and, irre-
spective of what is done by other Departments, the Navy must, in its own interest, continue to experiment and to communicate between its ships and the shore.

9. To the Navy, wireless telegraphy is absolutely essential. All the battle ships and larger cruisers, perhaps even torpedo boats, are or will be equipped with it—as foreign navies are—to communicate with each other, as well as with the shore.

10. The Navy has already 20 wireless telegraph stations on the seacoast and proposes to establish no less than 60 more. The Navy has already made arrangements to receive at its stations and to transmit over the land telegraph lines wireless messages from passing merchant vessels. The Army has 2 stations in use in Alaska and 2 others for experimenting, and has considered placing 1 at the Golden Gate on the Pacific coast. The Weather Bureau has 2 stations and proposes to erect 7 more. All these stations, except the 2 in Alaska, which are for communicating with each other, are for the purpose of communicating between ships at sea, or in a few cases outlying islands and the mainland. Several of the Army and Weather Bureau stations interfere, or will interfere, with those of the Navy.

11. From these facts it appears clear that it would be in the interest of all to put the seacoast wireless telegraph stations belonging to the Government under the control of one Department. That control must extend to the determination of sites, and probably to the choice of systems, in order to prevent the several Departments from frustrating one another’s efforts. It does not seem to the General Board that there will be much difference of opinion on this question.

14. * * *

(1) It is absolutely necessary in time of war that the observers stationed to receive messages from the fleet should be subject to military law—that is, enlisted men of the Navy. Civilian marine observers, however skillful in reporting merchant ships, could not so well be trusted to distinguish the wireless messages of friendly from hostile men-of-war, or to transmit accurately technical naval signals, and could not be trusted at all with the secret signal codes of the Navy. Whoever mans the seacoast stations in time of peace, the Navy must man them in time of war.

(2) Unless the Navy mans the stations in time of peace it will not have the trained force ready to man them in time of war. Practice with instruments on shipboard alone will not suffice. The man to be trusted at a seacoast station in time of war, alert to detect the unexpected, must be familiar with the usual local business in time of peace. The opportunity for training the signal men is no less important than testing the apparatus.
16. The subject of legislation to control private wireless telegraph stations on the seacoast is of growing importance to the Government because of the increase in the number of them and their liability to interfere, maliciously or accidentally, with the Government's stations. In order to safeguard its own interest, both in peace and war, the Government must have some means to prevent the erection of a private wireless telegraph station within the range of interference of one of its own. It would not be wise, in the opinion of the General Board, for the Government to undertake to manage all the seacoast wireless telegraph business of the country, nor for an industry of such growing commercial utility to be controlled directly by a military branch of the government. The Department of Commerce and Labor, now charged with the administration of the Light-House Service, the Coast Survey, the Inspection of Steamboats, and the jurisdiction over merchant shipping generally, would perhaps be the most natural one to control private wireless telegraph companies. The law should clearly give the Government priority of right and prohibit the erection of any private station without the approval of the Government.

*International agreement, 1903.*—There was an international agreement on certain points between several states at a convention held at Berlin August 4-13, 1903. Austria, France, Germany, Hungary, Russia, Spain, and the United States signed the protocol as follows:

**FINAL PROTOCOL.**

The delegations to the preliminary conference concerning wireless telegraphy designated below:

Germany, Austria, Spain, the United States of America, France, Hungary, Russia, are unanimous in proposing to their Governments to examine the following general bases for an international convention:

**ARTICLE 1.**

Exchange of correspondence between ships at sea and coastwise wireless telegraph station opened to general telegraphic service is subject to the following rules:

Sec. 1. All stations whose field of action extends to the sea are called coastwise stations.

Sec. 2. Coastwise stations are required to receive and transmit telegrams originating on ships at sea without distinction as to the systems of wireless telegraphy employed by said ships.

Sec. 3. The contracting states make public the technical points of nature to facilitate and accelerate communication between coastwise stations and ships at sea.
INTERNATIONAL AGREEMENT, 1903.

However, each of the contracting Governments can authorize stations situated in its territory, under such conditions as it may deem proper, to utilize several installations or special arrangements.

Sec. 4. The contracting states declare their intention to adopt, in order to establish the tariffs applicable to telegraphic service between ships at sea and the international telegraphic system, the following bases:

The total charge to collect for this service is established by the word. It comprises—

(a) The charge for transmission over the lines of the telegraphic system of which the amount is that fixed by the international telegraph regulation in force attached to the St. Petersburg Convention.

(b) The charge pertaining to the marine transmission.

The latter is, as the former, fixed by the number of words, this number of words being counted according to the international telegraphic rule as indicated in the paragraph above (a).

It comprises—

1°. A charge called "charge of the coastwise station," which goes to said station.

2°. A charge called "charge of the ship," which goes to the station installed on the ship.

The charge of the coastwise station is subject to the approval of the state on whose territory it is established, and that of the ship to the approval of the state whose flag the ship carries.

Each of the two charges should be fixed on the basis of equitable renumeration for the telegraphic work.

ARTICLE II.

A regulation which will be attached to the proposed convention will establish rules for the exchange of communications between coastwise stations and those placed on board ship.

The prescriptions of this regulation may at any time be modified by common agreement by the administration of the contracting Governments.

ARTICLE III.

The rules of the telegraphic convention of St. Petersburg are applicable to transmission by wireless telegraphy in so far as they are not contrary to those of the proposed convention.

ARTICLE IV.

Wireless telegraph stations should, unless practically impossible, give priority to calls for help received from ships at sea.
ARTICLE V.

The service of operating wireless telegraph stations should be organized, as far as possible, in a manner not to interfere with the service of other stations.

ARTICLE VI.

Contracting Governments reserve to themselves, respectively, the right to make special arrangements themselves, having for their object to oblige the companies operating wireless telegraph stations in their territories to observe, in all their other stations, the prescriptions of the proposed convention.

ARTICLE VII.

The prescriptions of the proposed convention are not applicable to the wireless telegraph stations of the state not open to general telegraphic service, save in that which concerns the clauses which Articles IV and V are intended to cover.

ARTICLE VIII.

Countries which have not joined the proposed convention will be admitted at their request.

Done at Berlin August 13, 1903.

(Then follow signatures of delegates for Germany, Austria, Spain, the United States of America, France, Hungary, Russia.)

DECLARATION OF THE DELEGATION OF GREAT BRITAIN.

While engaging itself to submit the above bases to the examination of its Government, the British delegation declares that, in view of the situation in which wireless telegraphy finds itself in the United Kingdom, this delegation ought to maintain a general reserve. This reserve relates especially to section 2 of the first article and to the application of the rules of Article V to the stations indicated in Article VII.

Done at Berlin August 13, 1903.

(Signatures follow.)

DECLARATION OF THE ITALIAN DELEGATION.

The delegation of Italy, while agreeing to submit to the examination of its Government the propositions contained in the final protocol of the conference, ought, agreeably with the declarations made by its members in the several meetings, to make on account of the Government the following reservations:

Art. I, Sec. 2. It would accept the proposed text only on condition of the following addition being made: "Provided, that all these systems give a known guarantee for good working in re-
ciprocal correspondence with respect to the range, to the perfection of the organization and to the surety of communications."

Art. I, Sec. 3. It can not accept the first paragraph of this section because in the agreements concluded with M. Marconi the Government engages to keep the details of the installations secret.

Art. VI. It can not accept the text of this article, and it should limit itself to the declaration on the part of its Government that it will endeavor to introduce in the agreements stipulated with M. Marconi some modifications in the desired direction.

Done at Berlin August 13, 1905.
(Signatures follow.)

By Article III of this protocol the rules of the St. Petersburg convention are adopted so far as consistent.

**Berlin Wireless Convention, 1906.**—The following states are parties to the International Wireless Telegraph Convention concluded at Berlin, November 3, 1906: Germany, the United States of America, Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Monaco, Norway, the Netherlands, Persia, Portugal, Roumania, Russia, Sweden, Turkey, and Uruguay.

**ARTICLE 1.**

The High Contracting Parties undertake to apply the provisions of the present Convention at all radiotelegraph stations—coast station and ship stations—open for the service of public correspondence between the land and ships at sea which are established or worked by the Contracting Parties.

They undertake, moreover, to impose the observance of these provisions upon private enterprises authorized either to establish or work radiotelegraph coast stations open for the service of public correspondence between the land and ships at sea, or to establish or work radiotelegraph stations, whether open for public correspondence or not, on board ships which carry their flag.

**ARTICLE 2.**

The term "Coast Station" means any radiotelegraph station which is established on land or on board a ship permanently moored, and which is used for the exchange of correspondence with ships at sea.

The term "Ship Station" means any radiotelegraph station established on board a ship which is not permanently moored.
ARTICLE 16.

Governments which have not taken part in the present Convention shall be allowed to adhere thereto on their request. This adhesion shall be notified through the diplomatic channel to the contracting Government under whose auspices the last Conference has been held, and by it to all the others. Adhesion involves as a matter of right of acceptance of all the clauses of the present Convention and admission to all the advantages stipulated therein.

ARTICLE 17.

The provisions of Articles 1, 2, 3, 5, 6, 7, 8, 11, 12, and 17 of the International Telegraph Convention of St. Petersburg of the 10/22 July 1875 are applicable to international radiotelegraphy.

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a Extract from the International Telegraph Convention signed at St. Petersburg, July 10/22, 1875:

ARTICLE 1.

The High Contracting Parties concede to all persons the right to correspond by means of the international telegraphs.

ARTICLE 2.

They bind themselves to take all the necessary measures for the purpose of insuring the secrecy of the correspondence and its safe transmission.

ARTICLE 3.

They declare, nevertheless, that they accept no responsibility as regards the international telegraph service.

ARTICLE 5.

Telegrams are classed in three categories:

1. State telegrams: those emanating from the head of the Nation, the Ministers, the Commander-in-Chief of the Army and Naval forces, and the Diplomatic or Consular Agents of the Contracting Governments, as well as the answers to such telegrams.

2. Service telegrams: those which emanate from the Managements of the Telegraph Service of the Contracting States and which relate either to the international telegraph service or to subjects of public interest determined jointly by such Managements.

3. Private telegrams.

In the transmission, the State telegrams shall have precedence over other telegrams.

ARTICLE 6.

State telegrams and service telegrams may be issued in secret language, in any communications.

Private telegrams may be exchanged in secret language between two States which admit of this mode of correspondence.

The States which do not admit of private telegrams in secret language upon the expedition or arrival of the same, shall allow them to pass in transit, except in the case of suspension defined in article 8.
GENERAL CONTROL OF MESSAGES.

ARTICLE 21.

The High Contracting Parties retain their full liberty concerning radiotelegraph installations not covered by Article I, and, in particular, concerning naval and military installations, which are subject only to the obligation of Articles 8 and 9 of the present Convention.

Nevertheless, when these installations carry on public correspondence, they shall conform, for the performance of this service, to the stipulations of the Regulations so far as concerns the manner of transmission and the accounting.

ARTICLE 22.

The present Convention shall come into operation on and from the 1st of July, 1908, and shall remain in force for an indefinite period, or until the expiration of a year from the date of denunciation.

Denunciation only takes effect as regards the Government in whose name it is made. The Convention shall remain in force as regards the other Contracting Parties.

General control of messages.—The Supreme Court of the United States stated in 1886 that—

A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce.

ARTICLE 7.

The High Contracting Parties reserve the right to stop the transmission of any private telegram which may appear dangerous to the safety of the State or which may be contrary to the laws of the country, to public order or good morals.

ARTICLE 8.

Each Government also reserves the right to suspend the international telegraph service for an indefinite period, if deemed necessary by it, either generally, or only over certain lines and for certain classes of correspondence, of which such Government shall immediately notify all the other Contracting Governments.

ARTICLE 11.

Telegrams relating to the international telegraph service of the Contracting States shall be transmitted free of charge over the entire systems of such States.

ARTICLE 12.

The High Contracting Parties shall render accounts to one another of the charges collected by each of them.

ARTICLE 17.

The High Contracting Parties reserve respectively the right to enter among themselves into special arrangements of any kind with regard to points of the service which do not interest the States generally.
and their business is commerce itself. They do their transportation in different ways and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits. (Telegraph Co. v. Texas, 105 U. S. Supreme Court Reports, 460.)

The government must necessarily control commerce, and it is thus provided according to the fundamental law. Wireless telegraphy would be a matter of commerce and accordingly properly subject to governmental control. Such control has been quite regularly exercised in regard to telegraphy by means of wires. It is generally recognized that government control may be expedient both from commercial and military reasons. Austria, France, Germany, Hungary, Russia, and Spain control their telegraph lines. If such control is, and it seems to be, both legal and expedient, then government control of wireless telegraphy should be assumed.

In the consideration of wireless telegraphy certain complications arise. The analogy to ordinary telegraphy is not complete. While a message may be sent from a given point, it will not as in the ordinary telegraphy move only in a direction determined by the sender. In ordinary telegraphy the wire upon which the message travels is tangible and may be cut if it can be reached. The destination of the message may be inferred if the course of the wire is known. The apparatus of the ordinary telegraph is practically stationary, even though in land warfare a certain degree of mobility is secured at times. This is, however, very limited and may not extend to maritime movements. There must be wire connection between the sending and receiving stations. Their locations may be known, and hence the jurisdiction may be determined. The transmission of dispatches may thus be controlled. Most governments have maintained some control over land telegraphy and a general control over submarine lines, even when connecting with a foreign state. It is generally admitted that each government may when necessary in war assume control of the wire telegraphy. The uncontrolled use of wireless telegraphy would not long be tolerated by any government which desired to
protect itself. This is particularly the case at present because by present methods the sending of messages from one station may interfere with similar work in another.

Control of telegraph in time of war.—The general principles governing the relations of belligerents and neutral are not changed by the introduction of wireless telegraphy. The burden of the conduct of the war should not be thrown upon neutrals, nor should neutrals participate in the war.

From the nature of wireless messages, they may reach instruments within neutral jurisdiction without any guilty participation on the part of those within neutral jurisdiction. There is no means by which the neutral can prevent the receipt of such messages other than by rendering the station useless. Such action would not be similar to that of sealing a cable connecting with belligerent territory, for the same wireless instrument may receive messages from any source and is not, like the cable, limited to a connecting station easily determinable. It would not be reasonable to demand that a neutral should close a station simply because it might receive dispatches from a belligerent. Nor would it always be possible for a given station to determine the character of a message which it might receive, because its source might be uncertain, or if the source were known the message itself might be apparently innocent in character. The possibility of neutral control of wireless messages within neutral jurisdiction would be quite different from that of control of wire messages.

In the consideration of the treatment of submarine cables in time of war the main question was one of interruption of a material connection between two points. In wireless telegraphy interruption may take place whether intentional or unintentional without possibility of fixing clearly the responsibility for the interruption. Interruption or interference may be no more than temporary and probably could not be permanent. The message transmitted may not be sent in a single direction or to a single point.
The fifth section of the Brazilian neutrality proclamation of 1898 states:

That it is prohibited, citizens or aliens residing in Brazil, to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents or to give to them any order, instructions, or warnings, with the purpose of prejudicing the enemy.

The last clause of this prohibition is of such a character as to render its enforcement difficult, because it would by implication make necessary that hostile intent on the part of the person dispatching the message should be proved. Neutrality does not consist simply in absence of hostile intent or absence of "purpose of prejudicing the enemy." The quality of the act determines its character, and even though there may be no "purpose of prejudicing the enemy," an act may prejudice the enemy. The Treaty of Washington maintained that "due diligence" should be exercised in order that a neutral might not injure a belligerent. The general doctrine of neutrality imposes the obligation upon the neutral state that it shall be of neither party. If the last clause were omitted from the section of the Brazilian proclamation it would be more effective.

Further, it may be said that the prohibition applies to persons resident in Brazil only, if a strict interpretation is to be given to its first clause. It does not prohibit the use of the means of communication for the purposes specified, but prohibits certain persons from using the telegraph for certain purposes. It would apparently leave the telegraph open to the officers of vessels of either belligerent if they chanced to be in a harbor of Brazil, for they certainly could not be brought under the category of "citizens or aliens residing in Brazil" against whom prohibition runs: The Brazilian proclamation of 1898 is, however, indicative of an early attempt of a neutral to regulate the use of the telegraph in time of war.

It is unquestionable that a single message sent from a neutral port may under certain circumstances be of greater service to a belligerent than a vessel equipped
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within and sent from the same port to a belligerent. With the introduction of wireless telegraphy the possibility of use of a wireless station within neutral jurisdiction for belligerent purposes is increased. The method of control is complicated from the fact that wires are not necessary and direct evidence of transmission of messages is not easily obtainable.

In 1898, during the Spanish-American war, the British Government declared that it was "not at liberty to comply with the proposal of the Government of the United States" to allow an American company to land a new cable to connect Manila and Hongkong. This decision has received general approval. If permission to establish a neutral terminal for a cable connecting with a belligerent should be refused, then similarly permission to establish a wireless station should be refused. The fact that the wireless station was within the Russian consulate at Chifu did not make the station at that point set up mainly for war purposes permissible.

The Dutch East Indian authorities during the Russo-Japanese war of 1904–5 made regulations for the refusal at certain stations of telegrams—

the contents of which are unintelligible to the Dutch officials, or telegrams regarding the movements of ships or troops and which are of interest to the belligerent powers—Russia and Japan.

Telegrams in a language agreed upon, the words of which are taken from a commercial or other code, may be admitted, provided the code made use of is submitted to the Dutch officials, and that the text when translated into open language can cause no inconvenience.

Sir John Macdonell, writing in July, 1904, says:

The Institut de Droit International in 1879 adopted a resolution that in time of war cables connecting neutral countries were inviolable. At its meeting in Brussels the Institut passed a series of resolutions which probably express the general understanding as to what is right and proper. After reaffirming the inviolability of cables connecting neutral territories, the Institut added:

"Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre."
“Le câble reliant un territoire neutre au territoire d’un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d’un territoire neutre. En haute mer, ce câble ne peut être coupé que s’il y a blocus effectif et dans les limites de la ligne du blocus, sauf établissement du câble dans le plus bref délai possible. Ce câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d’un territoire ennemi jusqu’à une distance de trois milles marine de la baisse de basse-marée.”

Few of those who discuss the subject dwell sufficiently upon the differences between contraband or quasi-contraband and vessels conveying the same and telegrams and submarine cables. Telegraphic communications may be called quasi-contraband. But you do not seize a vessel because it may be carrying contraband; you do not destroy it if it does; you do not confiscate it if the owner has acted innocently. Transmitting messages to belligerents may be likened to breaking a blockade. But the analogy is faint. You do not destroy vessels which may break it; you do not capture them, unless the blockade is effective. In a maritime war a cable is something sui generis. A belligerent can not exercise over it any right similar to that of search; it may be an instrument of war much more important than a cargo of contraband or a blockade runner; the fact to be recognized is that he may be safe only if he cuts it. The hesitation of States unable to foresee circumstances in which interruption to cable communications might be vital to them is natural. Looking to what may hang upon telegraphic communication—transports intercepted, a fleet destroyed, the fate of a campaign affected—it is too much to expect belligerents always to keep within the four corners of the rules which I have quoted. There will be circumstances, it may be anticipated, in which they will not suffer, if they can help it, a telegraphic cable, no matter who is the owner or what are its termini, to be used to their detriment. To whatever rules they assent will probably be added the sacramental formula, “So far as circumstances permit.” (56 The Nineteenth Century, p. 148, International Questions and the Present War.)

**Liability of vessels transmitting messages.**—The Japanese Regulations Governing Captures at Sea, 1904, give a general list of vessels liable to capture:

**Art. XXXVII.** Any vessel that comes under one of the following categories shall be captured, no matter of what national character it is:

1. Vessels that carry persons, papers, or goods that are contraband of war.
2. Vessels that carry no ship's papers, or have willfully mutilated or thrown them away, or hidden them, or that produce false papers.

3. Vessels that have violated a blockade.

4. Vessels that are deemed to have been fitted out for the enemy's military service.

5. Vessels that engage in scouting or carry information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy.

6. Vessels that oppose visitation or search.

7. Vessels voyaging under the convoy of an enemy's man-of-war.

Later these regulations state:

ART. XLVI. Vessels that are recognized to have been fitted out for the enemy for military purposes, and the goods belonging to the owners of such vessels, shall be confiscated.

ART. XLVII. Vessels ascertained to have scouted or carried information to give benefit to the enemy or to have done any other acts to assist him, and all goods belonging to the owners of such vessels, shall be confiscated.

Section 5 of Article XXXVII makes liable to capture, regardless of nationality, "Vessels that engage in scouting or carrying information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy," and Article XLVII makes such vessels liable to confiscation. These regulations would certainly apply to vessels engaged in transmitting wireless messages of a character to assist the enemy. Such vessels would then be liable to capture and confiscation as would the portion of the cargo belonging to the owners of the vessel, together with the apparatus.

Wireless telegraphy at Chifu.—One of the cases of use of wireless telegraphy during war to which attention has been particularly given is that of the use of the station at Chifu during the Russo-Japanese war. The station at Chifu was within the grounds of the Russian consulate, which, according to the practice in China, was entitled to the right of extraterritoriality. The station communicated particularly with Port Arthur and was apparently mainly used for war purposes.
Professor Woolsey says:

Is the toleration of this practice by China an unneutral act? Precedent or analogy and reason are the lights to guide us in such an inquiry as this. Now the closest analogy is to be found in the international status, during war, of the world's submarine cable system. This, in great part, is equally out of a belligerent's reach; too deep in the sea to be grappled, it equally binds belligerent and neutral together. There is an international agreement concerning submarine cables, but this provides only for their protection in normal times. Article XV reads: "It is understood that the stipulations of this Convention shall in no wise affect the liberty of action of belligerents." What liberty of action does the belligerent claim? Here the only question in dispute relates to the right to cut a neutral-owned cable running between hostile and neutral points beyond the three-mile limit of the neutral state. But this does not bear upon the problem of the wireless, for the new method has no tangible apparatus except at the terminal points, which are by our supposition, the one hostile, the other neutral. As for the cable end in neutral waters or landed on neutral soil, it is absolutely beyond the reach of the belligerent. Though not subject to force, is it not subject to be scaled on demand of a belligerent on the ground of neutral obligation? In other words, is the neutral state bound to prevent one belligerent from using freely for all purposes a cable landed within the former's jurisdiction and which the other belligerent is unable to interrupt?

There seems to be a disposition to impose this burden upon the neutral. Yet to do so is surely at variance with the entire theory of neutral obligation hitherto recognized. To carry hostile dispatches, to serve as a belligerent transport, for instance, are unneutral services on the part of the neutral individual, punished by confiscation of the vehicle of offense. But it is the belligerent, not the neutral, by existing usage, who bears the onus of prevention. The neutral is bound to prevent the use of his territory as a base of operations, to forbid the fitting out of enemy ships of war in his ports, but not to restrain enemy's dispatches or diplomatic agents or financial agents, all having, it may be, a very direct influence upon the conduct of war. The distinction is between direct military preparation on neutral soil, like an armed expedition, and military news or orders, a difference as wide as the poles. Moreover, if the neutral is held bound to prevent a belligerent's use of a submarine cable between the two—already in established use—or to allow it only under censorship, is he not equally bound to limit the belligerent's use of a land telegraph line establishing similar communication, and would not neutral censorship of belligerent mails be a duty also? If the established and safe principle be abandoned, that neutral com-
merce and communications are to be as little interfered with as the needs of war allow, with a presumption in favor of greater rather than less exemption, are we not launched on a path of neutral obligation which speedily and necessarily leads us to an absurd and impossible standard? (Wireless Telegraphy in War, 14 Yale Law Journal, 248.)

Further, Professor Woolsey says of the wireless at Chifu:

If set up and in commercial use before the war, it would be very hard to stop its use—as being an unneutral service—after Port Arthur was beleaguered. But it was not so set up. On the contrary, the wireless connection was devised as the only available means of enabling Port Arthur to communicate with St. Petersburg. By it news was sent out and orders returned. It had especial military value, and no other value. Professor Lawrence states that the wireless service was abolished by China in August, but this, I am informed, is an error. Russia nearly to the end was able to impose her will, in this, as in some other particulars, upon the Chinese authorities. Nevertheless, in the light of reason and by the force of analogy, China should have forbidden this use of her soil to the belligerents from the first. By permitting it, she has committed a breach of neutrality to the detriment of Japan. (Ibid, p. 251.)

Wireless telegraphy as a news-gathering agency.—The words of the correspondent of The Times (London), who conducted the work of the wireless in the Russo-Japanese war, are very suggestive. He says, in part:

It was my lot to be intrusted with the system by which The Times was able on many occasions to publish messages from points of vantage which were not accessible to the representatives of any other journal in the world. This has now come to an end. A combination of adverse circumstances, over which it has no control, has made it necessary for The Times to discontinue its wireless service. Therefore, as wireless telegraphy, as a journalistic adjunct in the operations of war, has probably been used under my direction for the first and last time, it may be interesting to the reading public to note the circumstances under which The Times enterprise was conducted, the success which it attained, and the ultimate reason of its failure.

Before I left England I determined in my own mind that the naval campaign would work out very much as the last few months have proved—that is, I expected that the main interest for the first six months would center in and about the Yellow
Sea and the Gulf of Pe-chi-li. This being the case, the existence of a British possession, situated as is Wei-hai-wei, and connected directly with the land cable service, stood out alone as the spot most suited for a receiving station. I therefore decided upon Wei-hai-wei, although considerable pressure was brought on me to establish the station elsewhere.

The system was brought to working order, when the correspondent says:

On returning to Wei-hai-wei I was faced with the announcement that the British Admiralty at Hongkong had classed our station as a breach of neutrality and had forbidden the navy to have anything to do with us on any condition. I was also led to understand that the home authorities were seriously contemplating an order which would render Wei-hai-wei impossible for us as a base. As soon as the difficulty was presented to me I stated the whole case to the commissioner at Wei-hai-wei, with the result that this officer was satisfied that he could allow the station to remain without embroiling himself in difficulties with either of the belligerents.

Late in March of 1904 the correspondent says:

Our apparatus was now working so well that we were beginning to make other uses of it than merely for transmitting news from the theater of the sea operations. We were now able to receive both Russian and Japanese messages. These messages of course came in cipher, and, as we possessed no key, it was impossible to make any improper uses of messages thus received, but we could easily recognize the difference in the system employed, and by this means—and here another very important thing in favor of our system was proved—we were able, approximately, to tell the distance we were from the various ships. Moreover, our operator, who was extremely expert, began to recognize the notes of various ships; that is to say, he could tell if a Russian ship was at sea by listening for the answering communication from the shore. He could also detect whether the Japanese messages were being transmitted by relay to the naval base or whether the fleet itself was at sea. This of course was to us possibly of more value than if we had been able to decipher the actual messages sent, and during the period that the Haimun was in operation during April our most successful issues resulted from a careful listening for the wireless telegraphy of the opposing fleets. We listened, and came to conclusions which invariably correctly guided us in our movements. For instance, if for a space of six hours on end the Japanese were absolutely silent we knew that Togo had taken to the sea, for invariably when he entered upon some enterprise for the time being all wireless
communication ceased. This being the case, we knew exactly what course to steer, but even at this period we had not fully realized how successfully our system had been installed.

In regard to the use of the apparatus, the correspondent says:

It may be readily understood that we were very careful not to use our wireless telegraphy until the battle ships themselves were engaged with the Port Arthur batteries. The reason for this is obvious. If we had commenced to send news of the position of the rival fleets, we should have at once interfered with the wireless telegraphy of both belligerents. This would certainly have been an unfriendly act, but, although we did not use our own instrument for sending, we listened attentively. The Russians were hard at work. They were just repeating the alphabet over and over again in order to “queer” the Japanese recording instrument. In fact, I am not sure it was not the constant use made by the Russians of their shore stations that prevented Togo from coming up in time to catch Makaroff’s squadron outside.

There is some discrepancy in the times given when the Japanese decoy squadron sent its messages to Togo and when Makaroff decided that he was too far out at sea, and reshaped his course towards Port Arthur. It was only when the Russians stopped their “queering” process in order to receive a message from the Bayan that the Japanese Second Class Cruiser Squadron was able to get an interval in which to send its all important message. We received both messages, the Japanese, of course, being in their own private cipher, that from the Bayan being half in cipher with a few words in French and signed “B. A.” But when once Togo had hoisted his fighting flag and sailed in under the guns of Port Arthur we felt that we were justified in sending just a short message, and so at 9.15 we sent a brief report from within seven miles of Port Arthur, which furnishes the first record of a wireless message reporting a naval engagement being sent direct from the scene of operations to the office of the journal which was to give it to the public.

We were now working so well that there was no necessity for us to return to Wei-hai-wei. Later in the evening when the Japanese had finished sending messages, we were able to send fuller reports of the day’s fighting as we steered a course for Chinampo. It had so happened that early in the morning the British sloop Espiegle, returning after wintering at Niuchwang, saw part of the operations. She arrived in Wei-hai-wei late in the afternoon and she gave to several correspondents who were stationed at the British port some news of the engagement. This was the first news other than that sent via St. Petersburg that
arrived in Europe, with the exception of the short message sent by us. I just mention this to show that by means of our wireless system we saved eight hours, even though the unlucky chance was against us that the Espiegle happened to be passing at that particular time.

The use of the wireless system by The Times correspondent on the Haimun was soon after put under restrictions by both belligerents, and the correspondent concludes his account by saying:

I maintain that The Times has amply demonstrated the value and possibilities of wireless telegraphy in conjunction with journalistic enterprise; in fact, I am inclined to think that it has demonstrated its uses too well and that the success of the system has assisted in its downfall. Moreover, I am convinced that it will ultimately prove that The Times has been the first and last journal to use wireless telegraphy to report naval warfare. Although I am positive that in our hands the system was always put to proper uses, yet the possibilities and the dangers are so great that in future the use of all wireless communications during military and naval operations will be controlled by international law. (The Times, London, August 27, 1904.)

On April 15, 1904, the Russian ambassador sent to Secretary Hay the following communication:

I am instructed by my Government, in order to avoid every possible misunderstanding, to inform your excellency that the lieutenant of His Imperial Majesty in the Far East has just made the following declaration:

"In case neutral vessels, having on board correspondents who may communicate war news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off the coast of Kwantung or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with wireless telegraph apparatus shall be seized as lawful prize."

In reply to the communication, on the same date, Secretary Hay said:

In taking note of this declaration the Government of the United States does not waive any right it may have in international law in the case of any American citizen who may be arrested or any American vessel that may be seized under it. (U. S. Foreign Relations, 1904, p. 729.)
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The British version does not seem to agree with the American. Lawrence mentions this and refers to proper penalties for use of wireless telegraph in forwarding war news:

On April 20, Earl Percy, the under-secretary of state for foreign affairs, in answer to a question in the House of Commons, gave an account of Admiral Alexeiff's order, which differed by a very important word from the American version. He spoke of "correspondents who are communicating information to the enemy;" whereas the phrase in the Washington telegram ran "correspondents who may communicate news to the enemy." There is all the difference in the world between being in a position to do an act and actually doing it. If I am left alone in my neighbor's dining room, I may steal his spoons; but it would be very hard if that fact alone secured my condemnation on a charge of larceny. But let us suppose for a moment that information is actually communicated to the enemy. Then, without reference to espionage, Russia has ample means of punishing any neutral, whether newspaper correspondent or not, who sends to the Japanese from the theater of hostilities news of the dispositions of the Russian fleet. The law of unneutral service applies to him. He is in the same position as if he had carried a dispatch for the enemy, or signaled between two of his squadrons. His ship and apparatus are justly confiscate, together with all cargo that belongs to him or to the owner of the vessel. These severities might surely be deemed sufficient, even if there had been an actual transmission of intelligence direct to the Japanese commanders. (Lawrence, War and Neutrality in the Far East, 2d ed., p. 85.)

The translation as appears in the clause of the Washington telegram cited by Professor Lawrence does not mention the important reservation of the American version, that the prohibition relates to a specific kind of news, viz, war news.

*The original French text as communicated by the Russian representatives to foreign states was as follows:

"Je suis chargé par mon Gouvernement, afin d'éviter tout malentendu possible, de communiquer à Votre Excellence que le Lieutenant de Sa Majesté Impériale en Extrême Orient vient de faire la déclaration suivante:

"Dans le cas où des vapeurs neutres, ayant à bord des correspondants qui communiqueraient à l'ennemi des nouvelles de guerre au moyen d'appareils perfectionnés n'étant pas encore prévus par les conventions existantes,—seraient arrêtés auprès de la côte du Kuantoung ou dans la zone des opérations de la flotte russe,—les correspondants seront envisagés comme espions et les vapeurs, munis d'appareils de télégraphie sans fil,—saisis en qualité de prise de guerre."
According to Scholz, solicitor for the German post-office, the following principle might be laid down in regard to the use of wireless telegraphy:

A belligerent has the right to prohibit, within the zone of hostilities to be defined by him and publicly announced, the dissemination of information as to the whereabouts and movements of his war and merchant vessels, and other warlike measures, by means of wireless telegraphy on board neutral vessels. Violations whereby facts requiring secrecy are divulged with the knowledge or as the result of the negligence of the captain of the ship entail capture and condemnation of the ship, independently of the fact whether the ship intended to render aid to the hostile party. Capture is permissible only within the zone of hostilities, but there during the entire period of the war.

If the transmission by wireless telegraphy is combined with acquisition of the information under the aggravating circumstances of espionage, the guilty persons are subject to the punishment provided for this offense. (Drahtlose Telegraphie und Neutralität, p. 45.)

Of the restriction of the use of wireless equipment by news-gatherers to a given area, Professor Woolsey says:

A restriction as to the locality within which the wireless system of news gathering might operate must also be mutually agreed on by the belligerents, to be of value, unless control of the sea lies absolutely in the hands of one of them. In any case, if respected, this restriction would make it impossible to get anything of value. While if not respected—and could flesh and blood withstand the temptation—there comes about friction, coercion, the need of constant surveillance, leakage of dangerous information.

By process of exclusion we reason, therefore, that news-gathering by sea, with the aid of wireless, is of such a nature as to be inadmissible in warfare, and to require entire prohibition under penalty of confiscation. It is a service bearing an analogy to the dispatch boat, the submarine cable, and the war correspondent, in peculiar combination. The dispatch boat is guilty of unneutral service in behalf of one combatant and can be confiscated by the other; the submarine cable can be cut or worked at the belligerent end under censorship; the war correspondent, by universal usage, is only allowed to accompany an army subject to strict regulations. The wireless news-gatherer, combining the dangerous qualities of all three, should not be permitted at all. (Wireless Telegraphy in War, 14 Yale Law Journal, p. 254.)

Opinions as to wireless service.—The wireless systems are not yet fully perfected. Certain systems have been
exclusively adopted for a period of years in some states. The relations of one method of transmission to another are not yet fully understood. A private individual may possess an equipment with which he may transmit for others messages of great importance, or receive or interrupt government messages of great importance.

It is evident that it may not always be possible to tell the source, the destination, or the significance of a wireless message. The attempt to class such messages under some theory of contraband or violation of blockade would lead to conclusions which it would be difficult to sustain by logical processes.

In military operations wireless telegraphy has, since the South African war, become more and more an established means of communication. By it, different portions of the forces can keep in communication with each other or with headquarters without the danger that wires may be cut and while moving from place to place.

The importance and use of submarine cables in maritime warfare is materially affected by the introduction of the system of wireless telegraphy. The regulations which were growing up in regard to the use of cables cannot in all respects be extended to cover the use of wireless communication.

Many neutral vessels are now equipped with wireless apparatus. Neutral ships are permitted with few limitations to navigate freely. The range of wireless transmission is so extensive that it may usually pass beyond the possible area of belligerent operations over which the belligerent has control. The neutral can in an apparently innocent manner transmit information to a belligerent and may receive certain valuable information without being open to criticism. Unlike messages transmitted by wires, the source and destination of wireless messages are not easily discoverable. Guilt is not easily fixed.

Thonier speaks of the possibility of introducing the principle applicable to contraband, saying:

La récente invention de la télégraphie sans fil va rendre souvent inutile pour le belligérant la destruction des câbles qui relient entre les différents points du territoire ennemi ou le territoire
ennemi et les pays neutres. La situation créée par ce nouveau mode de communication est sans analogue et nécessite, de toute urgence, l'établissement d'une réglementation particulière, afin de déterminer les limites dans lesquelles peut s'exercer les droits des belligérants d'interdire aux neutres certains agissements préjudiciables.

Il paraît d'abord possible d'assimiler les appareils de télégraphie sans fil à des articles de contrebande, mais la ressemblance n'est qu'apparente. Le motif qui pousse le belligérant à capturer les marchandises prohibées est la certitude qu'elles auront entre les mains de l'ennemi une destination hostile, en raison de leur nature et de leur destination. La contrebande n'est de quelque utilité à celui-ci qu'autant qu'il l'a en sa possession. Tel n'est pas le cas des appareils de télégraphie sans fil placés à bord des navires neutres. Ils sont utilisés indirectement par l'ennemi, sans passer par ses mains, sans parvenir même à son territoire, sans perdre leur caractère de propriété neutre et en continuant à faire partie intégrante de l'armement du navire neutre.

Le caractère illicite de ces bâtiments neutres ne peut même pas être déterminé par leur direction ennemie, qui constitue un critérium absolument insuffisant parce que contradictoire et variable. Tantôt, en effet, la direction ennemie est suivie dans le but d'aider l'adversaire à renouer ses communications interrompues, tantôt elle cache l'intention nuisible pour ce même adversaire d'annoncer au monde les mouvements de ses escadres ou de ses troupes et d'intercepter ses dépêches confidentielles.

Ce serait donc plutôt en se fondant d'abord sur le devoir des navires neutres de ne pas aider l'ennemi et de ne pas se mettre à son service, puis sur la faculté pour le belligérant d'empêcher tous les actes des navires neutres de nature à mettre obstacle à l'exercice de son droit de guerre que les belligérants pourraient saisir les navires neutres porteurs d'appareils de télégraphie sans fil. Si les neutres ont le droit de voir respecter leurs propriétés et même leurs transactions avec les belligérants, ils ont, nous l'avons vu, le devoir corrélatif de ne pas entraver les opérations de guerre de ces derniers. Or, ils portent gravement atteinte au droit de libre belligérance des nations en lutte en s'immisçant ainsi directement dans les hostilités. (De la Notion de Contrebande de Guerre, p. 334.)

He further says:

Il nous semble que ce droit de saisie pourrait s'exercer dans deux cas:

1° Lorsque le navire neutre porteur d'appareils de télégraphie sans fil se trouve assez proche du théâtre des hostilités ou du territoire de l'un ou de l'autre belligérant pour pouvoir se servir
de ses appareils à leur profit ou à leur détriment. Le périmètre dans lequel la présence du navire sera considérée comme illicite pourra être déterminé d’après le rayon efficace maximum des belligérants, soit autour du théâtre des hostilités:

2° Lorsque ce navire neutre se dirige vers le lieu des hostilités ou vers le territoire des belligérants. (Ibid., p. 336.)

Scholz maintains that—

A neutral power is bound to watch carefully that through the wireless telegraph installations under its authority war dispatches, in so far as they are to be considered as transportation prohibited by international law, are not transmitted, if the neutral power must assume, in view of the situation of local conditions, that its installations will be used for such dispatches. Generally speaking, the duty to refuse private dispatches written in cipher does not exist. A neutral power is neither authorized nor bound by virtue of its neutrality to subject the official dispatches of another power to censorship.

When a shore or ship station for wireless telegraphy has come into hostile power, a neutral power which knows this to be the case and undertakes to correspond with such station is bound to regulate any censorship going beyond the provisions of the foregoing paragraph in such manner as to have private telegrams in cipher refused. It is further bound to urge any private company in interest which may be established within the territory under its sovereignty to adopt such censorship. (Drahtlose Telegraphie und Neutralität, p. 9.)

In the Naval War College lectures in 1901, after citing some of the bases for interruption of cable service, it is stated that—

Another element in the cable operation is such as to make it possible to bring the act, under certain circumstances, within the limits of what is now termed unneutral service, which includes the knowing carriage or repetition of messages of the enemy by a neutral. If this principle is to be generally recognized, and it doubtless must be if wireless telegraphy becomes widely practicable, then the transmission of messages by cable is one of the means by which unneutral service may be most easily rendered, and provision must be made to check it. The neutral landing place of the cable would be the seat of an act of the nature of an unneutral service as truly as a vessel which, on the high seas, repeats a message of a belligerent at one point to his fellow-belligerent at another point, more or less distant, with a view to aiding him, either for pay or for reasons of friendship. While the neutral landing place of the cable can not be seized any more than can the neutral ship if it be within the neutral jurisdiction, the act in either case can be a subject of protest, and if
continued may be a basis for damages. If the cable be one connecting with the belligerent territory it may, outside of the neutral jurisdiction, be interrupted. Of course a cable between two neutral points can not perform such service, and is therefore not liable to interruption. (Wilson, Submarine Telegraphic Cables in their International Relations, p. 23.)

Rolland discusses certain points in regard to the use of wireless telegraphy.

He says:

Dans l’hypothèse d’une guerre maritime, ces solutions restent vraies mais elles ont besoin d’être complétées. Il convient en effet, ici encore, de donner à chaque belligérant les moyens d’assurer le respect de ses défenses. Il doit, par suite, d’abord lui être possible de visiter les navires neutres de manière à s’assurer qu’ils ne servent pas à correspondre par télégraphie sans fil. Mais faut-il aller plus loin? Lorsqu’il s’agit du transport de correspondances postales, on admet généralement que, si le belligérant trouve sur un navire de commerce neutre des dépêches prohibées, il a le droit de confisquer et les dépêches et le navire. Il n’y a d’exception que pour les paquebots postaux placés dans une situation particulière à cause qu’ils participent à un service public international. Pareillement, lorsqu’il s’agit des dépêches télégraphiques transmises par câble sous-marin, on reconnaît assez généralement au belligérant, sur le territoire duquel le câble vient aboutir, le droit de restreindre ou de couper la communication. On lui permet même de rompre les cables aboutissant chez son adversaire au cas de blocus ou de contrebande de guerre.

Il convient, nous semble-t-il, de poser en notre matière des règles assez voisines. Le navire neutre visité a-t-il enfreint la défense de correspondre par télégraphie sans fil, le belligérant peut d’abord lui interdire de rester dans sa zone d’opérations. Nous pensons même qu’il est en droit de confisquer, tout au moins de mettre sous séquestre, les appareils de télégraphie dont est muni le navire. Par là, il donne une sanction efficace à sa prohibition en même temps qu’il en assure le respect dans l’avenir. Les navires neutres n’ont au surplus rien à dire s’ils ont été avertis de l’interdiction de communiquer. Ceci s’applique, bien entendu, lorsque les dépêches transmises étaient innocentes. Il va de soi que s’il est démontré que les nouvelles transmises par télégraphie sans fil par ce navire neutre étaient destinées à fournir à l’autre belligérant des renseignements relatifs à la conduite des hostilités, on peut aller plus loin. Dans ce cas, le navire neutre s’est mis en quelque sorte au service d’un belligérant. L’autre a le droit de confisquer et le double des dépêches et les appareils et le navire lui-même. Ici encore, cependant, il faut faire une exception pour les paquebots postaux. De ceux-ci,
la participation à un service international a une telle importance qu'elle ne doit point être ralentie. Le belligérant ne peut donc que saisir le double des dépêches et écarter le navire de sa zone d’opérations. (La télégraphie sans fil et le droit des gens. (13 Revue Générale de Droit International Public, 1906, p. 86.)

Rolland also says in case of a station in a neutral state, but not belonging to it, from which wireless messages are sent:

En principe, l’État neutre doit prêsumer que les émissions d’ondes faites soit d’un hôtel d’ambassade, soit d’un navire ancré dans un de ses ports, n’ont pour but que de transmettre des dépêches privées ou les correspondances adressées par l’ambassadeur d’un belligérant à son gouvernement. Toutes ces dépêches sont innocentes, il faut donc les laisser passer. Le principe est hors de doute, mais il ne faut pas oublier non plus que l’État neutre est obligé de s’abstenir de toute immixtion dans les hostilités. Surtout il convient de rappeler qu’il ne doit pas souffrir qu’un belligérant se serve de son territoire comme point d’appui pour ses opérations militaires. À supposer donc qu’il soit démontré qu’un navire neutre ou belligérant, stationné dans les eaux territoriales, communique par télégraphie sans fil des renseignements relatifs à la conduite des hostilités à un belligérant, que l’installation faite d’un appareil de télégraphie sans fil sur un hôtel d’ambassade n’a manifestement d’autre objet que de permettre à une place assiégée de communiquer avec le dehors, l’État neutre se trouvera tenu d’interdire de telles émissions.

Que l’on ne s’exagère pas d’ailleurs la portée de cette dernière conclusion. Elle n’est évidemment admissible que s’il est manifesté que l’installation télégraphique et l’émission d’ondes ont pour objet une véritable participation aux opérations militaires. La chose n’apparaîtra pas, en fait, très souvent clairement. Si dès lors il y a la moindre hésitation soit sur la nature des télégrammes, soit sur leur destination, on doit les prêsumer pacifiques et l’on ne peut plus faire au neutre une obligation de les interdire. Par ailleurs, l’État neutre n’est obligé de formuler une interdiction que si l’émission d’ondes implique réellement l’utilisation de son territoire comme point d’appui. Il en est ainsi quand la communication émane d’un hôtel d’ambassade, d’un navire à l’ancrage dans un de ses ports ou stationné dans sa mer territoriale, d’un ballon captif neutre partant d’un point de son territoire. (13 Revue Générale de Droit International Public, p. 89.)

The general matter of transmission messages is stated as follows:

No overt act could be performed by a neutral in aid of a belligerent more clearly unlawful than the transmission of signals or the carrying of messages between two portions of a fleet engaged in concert in hostile operations, and not in sight of each other. It
makes no difference whether such fleets or squadrons are in ports of their own country, in neutral ports, or on the high seas, or whether such signals are transmitted by the neutral directly or through a repeating neutral vessel. No matter whether such communications be verbal or written, important or unimportant to the general results of the war, as the criminality of the act depends alone upon the nature of the service in which the neutral is engaged. The same principle extends to signaling or bearing of messages between a land force and a fleet, or to the laying of a cable to be used chiefly or exclusively for hostile purposes. (Taylor, International Public Law, p. 754, sec. 670.)

In regard to wireless telegraphy it has been said:

Wireless telegraph communications are to be treated like cables. The belligerents must have the right to interrupt these communications between portions of the opponent's territory, or between points of a hostile and a neutral country, by seizing floating stations—including those belonging to neutrals, which must be returned subsequently—or by establishing intercepting stations. (Commander von Uslar, 181 North American Review, 187.)

Scholz, speaking of the penalty for transmission of wireless messages, says:

Finally, the contraband and blockade law, with its positively formulated legal consequences, can not be applied analogously to cases where it is less a question of commercial traffic than of direct interference with the interests of the belligerents. When such unneutral interference has taken place, the neutrality has been forfeited. It is obvious, therefore, that the ship can not acquire immunity from punishment upon reaching the nearest port, still less upon the transmission of the news; otherwise the doors would be opened wide to violations of neutrality.

On the other hand, unlimited liability to punishment in time of war is not in harmony with the principles of international maritime law. Such unlimited liability would be justified only in cases where intention of aid to belligerents can be plainly established from the ship's behavior. In such cases she acquires the character of a hostile ship, intended for warlike actions. But where such intention does not exist, and these are the only cases to be considered in this connection, the liability of the ship must be more accurately defined under the international maritime law in its present shape. The most expedient solution appears to me to be that according to which the capture of a ship is permissible only within the "zone of hostilities," but there during the entire duration of the war. If a ship could acquire immunity from punishment by leaving this zone, so that she could not be pursued upon reentering it, it would compel the belligerents to extend the zone beyond reasonable bounds. It is true that a
neutral ship which has her home port in the vicinity of this zone—which, of course, can not embrace neutral territorial waters—may be in danger of capture during the whole period of the war. But it should be remembered that a ship which, notwithstanding the prohibition issued, lends herself to the unneutral dissemination of war news is not entitled to the same leniency as a ship engaged in the pursuit of her commercial interests which violates the contraband or blockade law. The unneutral dissemination of war news is much more closely related to the case of “prendre part aux hostilités” than to that of prohibited transportation.

If the solution suggested is not adopted it seems to me that the only other solution could be to consider the arrival at the home port as the point to terminate liability, for it would not be just to the interests of the belligerents if the right of repression were to cease when the ship reaches the nearest (home or neutral) waters. But, under this view, which would again permit “saisie au retour,” such a ship might become liable to warlike acts even in distant oceans. Limitation to the “zone of hostilities” recognizes the idea of the localization of war measures and forms perhaps the most expedient compromise of conflicting interests.

According to the foregoing, the following principles might be laid down:

A belligerent has the right to prohibit, within the zone of hostilities to be defined by him and publicly announced, the dissemination of information as to the whereabouts and movements of his war and merchant vessels, and other warlike measures, by means of wireless telegraphy on board of neutral vessels. Violations whereby facts requiring secrecy are divulged with the knowledge or as the result of the negligence of the captain of the ship entail capture and condemnation of the ship, independently of the fact whether the ship intended to render aid to the hostile party. Capture is permissible only within the zone of hostilities, but there during the entire period of the war.

If the transmission by wireless telegraphy is combined with acquisition of the information under aggravating circumstances of espionage, the guilty parties are subject to the punishment provided for this offense. (Drahtlose Telegraphie und Neutralität. p. 43.)

There can hardly be any doubt as to the correctness of the theory that a neutral power cannot permit its telegraph offices to be used for the purpose of working harm to a belligerent. It is true that a neutral power is not bound, generally speaking, to prevent the exportation of contraband of war by private individuals, although in the most important cases, according to the Three Rules of Washington, the contrary is universal law. In any event a neutral power is bound to watch carefully that it does
not itself become a carrier of contraband. It cannot use con­
siderations of operation, still less of privacy of telegrams, as a
pretext for permitting the transmission of official telegraphic war
dispatches, any more than it could allege, in case of carrying con­
traband on its national ships, that it did not have to concern itself
with the destination of the articles in question. If such were not
the case, a belligerent could use neutral telegraph installations
without restriction for its war dispatches, so that what is strictly
prohibited by the medium of mail on the sea would be permitted
by telegraph. Hence a certain censorship follows from the duty
of neutrality. (Ibid., p. 7.)

While the privilege of free and uncontrolled telegraphic commu­
nication with their home country, even in time of war, is generally
accorded diplomats and consuls, this privilege is based entirely on
the supposition that the information exchanged between a belliger­
ent power and its representative residing in a neutral country re­
lates to the affairs of the neutral country, hence, that the subject
of it is neutral and does not affect the conduct of the war. That
is not the case where the object is to provide for an invested
fortress communication with the outside world, in particular with
a representative of the home government. In the latter case it is
not a furtherance of neutral interests, but constitutes aid to a
belligerent. (Ibid, p. 15.)

The neutral state is also under some obligation.

When a floating telegraph station is in the service of a neutral
telegraph company and conveys to such company important news
bearing on the war or news obtained by way of espionage, and
the company disseminates such news, the neutral state, upon
learning of the case, would be bound to interfere. But what the
state is bound to prohibit is not the unneutral manner of obtain­
ing news outside of its sovereign territory, but the transmission
and dissemination of such news, injurious to the belligerents,
within the territory under its sovereignty. (Scholz, Drahtlose
Telegraphie und Neutralität, p. 12.)

Professor Hershey, in a recent book, concludes:

But in view of the possible injury which may result to belliger­
ents from the use of wireless telegraphy on the high seas or on
neutral territory, some concessions should perhaps be made to
military necessity, provided neutral rights and interests are not
seriously impaired. Interference with wireless messages by neu­
trals on the high seas might, under certain circumstances, be per­
mitted by belligerents, as also the seizure and confiscation of
wireless telegraphy apparatus as contraband of war, and neutrals
should certainly refuse to permit the use of their territory for
military purposes. (International Law and Diplomacy of the
Russo-Japanese War, p. 123.)
Despagnet says:

Mais il semble difficile de ne pas reconnaître aux belligérants, sauf dans les eaux territoriales neutres, le droit de contrôler ou même d'interdire toute communication par la télégraphie sans fil, soit avec l'ennemi, soit avec le territoire qu'ils occupent ou avec leurs navires, puisqu'ils ont le droit de censurer les dépêches venant du théâtre des hostilités ou même d'éloigner tout bâtiment neutre qui gêne leur action militaire. Par analogie avec ce que l'on admet pour les câbles sous-marins que le belligérant peut couper même entre un pays neutre, d'une part, et l'ennemi ou lui-même, de l'autre, on doit reconnaître qu'il peut interdire l'usage de la télégraphie sans fil dans tout le rayon où elle peut être efficace pour saisir des informations venant soit des armées soit du pays adverse. (Droit International Public, 3d ed., p. 548.)

Speaking of the right to restrict the use of wireless telegraph, Kebedgy says:

Le belligérant pourra exercer ce droit sur le théâtre de la guerre; cela comprend, dans la guerre maritime, la mer littorale des belligérants et la pleine mer; cela exclut donc la mer littorale des neutres, ainsi que les parties de la mer conventionnellement neutralisées.

Ceci étant, les mesures que le belligérant peut prendre pour se préserver des inconvenients possibles à son égard de l'emploi de la télégraphie sans fil sont de deux sortes: il peut ou bien l'interdire complètement, ou bien la soumettre à certaines restrictions. (La Télégraphie sans Fil et la Guerre, 6 Revue de Droit International, p. 447.)

There is much difficulty in determining the extent of the area of hostile operations in a manner satisfactory to belligerents and to neutrals. With the increasing range of guns this area has correspondingly enlarged. The speed and endurance of vessels of war has also influenced the extent of effective control. Effective scouting has with the system of wireless telegraphy become much extended. A wireless apparatus may be of great service even though far removed from the immediate area of hostilities. The location of the apparatus is not determinable as are the generally fixed termini of the wire systems. The point at which the wireless equipment may be is not always the important element in the transmission of the message. The nature of the service rendered seems to be the main question. The service may be of as much or possibly of more advantage to a belligerent
if the apparatus is several hundred miles distant rather than near the scene of hostilities, e.g., it may be of greatest importance for a belligerent whose forces are somewhat separated to know a considerable time in advance of the approach of the enemy, in order that the separated forces may be concentrated. To fix an area outside of which wireless service, whatever its character, is free does not seem feasible in actual practice.

It is evident that persons who engage in the transmission of wireless messages cannot properly be regarded and treated as spies. (See Situation VII, International Law Situations, Naval War College, 1904.)

It is also evident from the Chifu incident and from the tendency of opinion that a neutral is responsible to a reasonable extent for the establishment on its territory of stations for the operation of wireless telegraphy. The state can accordingly exercise such control over these stations as may seem expedient.

*Regulations of Institute of International Law.*—At the session of the Institute of International Law in September, 1906, the following regulations in regard to wireless telegraphy were adopted:

**DISPOSITIONS PRÉLIMINAIRES.**

**ARTICLE PREMIER.** L'air est libre. Les États n'ont sur lui, en temps de paix et en temps de guerre, que les droits nécessaires à leur conservation.

Art. 2. À défaut de dispositions spéciales, les règles applicables à la correspondance télégraphique ordinaire le sont à la correspondance télégraphique sans fil.

**PREMIÈRE PARTIE.**

**ÉTAT DE PAIX.**

Art. 3. Chaque État a la faculté, dans la mesure nécessaire à sa sécurité, de s'opposer, au-dessus de son territoire et de ses eaux territoriales, et aussi haut qu'il sera utile, au passage d'ondes hertzciennes, que celles-ci soient émises par un appareil d'État ou par un appareil privé placé à terre, à bord d'un navire ou d'un ballon.

Art. 4. Au cas d'interdiction de la correspondance par la télégraphie sans fil, le gouvernement devra aviser immédiatement les autres gouvernements de la défense qu'il édicte.
SUMMARY.

Seconde Partie.

État de guerre.

Art. 5. Les règles admises pour le temps de paix sont, en principe, applicables au temps de guerre.

Art. 6. Sur la haute mer, dans la zone qui correspond à la sphère d'action de leurs opérations militaires, les belligérants peuvent empêcher les émissions d'ondes, même par un sujet neutre.

Art. 7. Ne sont pas considérés comme espions de guerre mais doivent être traités comme prisonniers de guerre, s'ils sont capturés, les individus qui, malgré la défense du belligérant, se livrent à la transmission ou à la réception des dépêches par télégraphie sans fil entre les diverses parties d'une armée ou d'un territoire belligérant. Il doit en être autrement si la correspondance est faite sous de faux prétextes.

Les porteurs des dépêches transmises par la télégraphie sans fil sont assimilés à des espions lorsqu'ils emploient la dissimulation ou la ruse.

Les navires et les ballons neutres qui, par leurs communications avec l'ennemi, peuvent être considérés comme s'étant mis à son service, pourront être confisqués ainsi que leurs dépêches et leurs appareils. Les sujets, navires et ballons neutres, s'il n'est pas établi que leur correspondance était destinée à fournir à l'adversaire des renseignements relatifs à la conduite des hostilités, pourront être écartés de la zone d'opérations et leurs appareils saisis et séquestrés.

Art. 8. L'État neutre n'est pas obligé de s'opposer au passage au-dessus de son territoire d'ondes hertziennes destinées à un pays en guerre.

Art. 9. L'État neutre a le droit et le devoir de fermer ou de prendre sous son administration l'établissement d'un État belligérant qu'il avait autorisé à fonctionner sur son territoire.

Art. 10. Toute interdiction de communiquer par la télégraphie sans fil, formulée par les belligérants, doit être immédiatement notifiée par eux aux gouvernements neutres. (21 Annuaire de l'Institut, p. 327.)

Summary.—From practice, as shown in various states, from the opinions of the courts and of writers, from the votes of conferences and from international agreements, it is evident that the state within whose jurisdiction a wireless telegraph apparatus is or passes, is and will be authorized to exercise a degree of control over its use. The responsibility resting upon such state will be large.
In order to avoid possible complications in time of war it will be expedient in time of war for states, whether neutral or belligerent, to exercise control over wireless telegraphy as circumstances seem to require. There seems to be good ground for the following general principles of action:

1. All private wireless stations within the jurisdiction of a state shall exist under license and subject to regulation by that state.

2. The private stations within the jurisdiction of a state may be closed, appropriated, or placed under censorship by the government in time of war.

3. Private vessels of any nationality in time of war may be required to render inoperative their wireless apparatus when within or on entering the jurisdiction of a state, whether the state is a neutral or belligerent, and the apparatus shall thus remain while the vessel is within the state's jurisdiction unless otherwise ordered.

4. Private vessels having wireless apparatus and ignorant of the declaration of war are entitled to notification before any penalty shall be inflicted.

General conclusions.—(a) A belligerent may regulate or prohibit the use of wireless telegraph within the area of hostilities.

(b) A neutral state should use reasonable care to prevent within its jurisdiction the unneutral use of wireless telegraph.

(c) Unneutral use of wireless telegraph on board a vessel makes the vessel liable to the penalty of capture by a belligerent, or to confiscation or sequestration of the apparatus, or of the vessel, or of both by a neutral.

(d) A vessel intentionally aiding a belligerent by the use of wireless telegraph is liable to penalty until the end of the war.