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International Law Situations

With Solutions and Notes

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Situation II.

PROTECTION TO NEUTRAL VESSELS.

There is war between States X and Y. The United States and Germany are neutral. A United States cruiser is convoying six United States merchant vessels and when 100 miles at sea is overtaken by two German merchant vessels having papers from a Prussian port. The German vessels are going on the same course and request the protection of the convoy, offering to give the same evidence of their neutral character as that offered by the United States merchant vessels. Shortly afterwards a cruiser of State X approaches and claims that she has the right to visit and search the German vessels forthwith, while the German masters claim the protection of the United States cruiser.

How should the captain of the United States cruiser act?

SOLUTION.

The captain of the United States cruiser should, in accord with special treaty provision and Navy Regulations afford to the German vessels "protection and convoy, so far as it is within his power."

NOTES.

Historical.—The question of right of convoy became a matter of controversy in 1653, when Sweden asserted the right of its merchant vessels to exemption from search if sailing under the escort of a vessel of war. Great Britain generally opposed this contention, and in the Admiralty Manual of Prize Law of 1888 said:

> No vessel is exempt from the exercise of these powers (visit and search) on the ground that she is under the convoy of a neutral public ship.

From 1653 the continental States gradually came to favor the doctrine of convoy.

The acceptance by a neutral vessel of convoy of a belligerent vessel has been regularly held by the American and British courts as equivalent to resistance to visit and search, and that such a neutral vessel is liable to the consequences. The Armed Neutrality League of 1780 and 1800 emphasized the demand of neutral commerce for protection. The resort to paper blockades and other arbitrary methods during this period and the early years of the nineteenth century prompted the negotiation of liberal treaties among the neutral States. Russia, Sweden, Denmark, and Prussia, in 1800, agreed by the terms of the league:

> Que la déclaration de l'officier, commandant le vaisseau ou les vaisseaux de la Marine Royale ou Impériale, qui accompagneront le convoi d'un ou de plusieurs bâtiments marchands, que son convoi n'a à bord aucune marchandise de contrebande, doit suffire pour qu'il n'y ait lieu a aucune visite sur son bord ni à celui des bâtiments de son convoi.

The British position was uniformly against the acknowledgment of the right of convoy, though early in the nineteenth century some modifications of the previous British contentions were made. The rules of the continental States usually provide that the declaration of a convoying officer shall be accepted.

Spanish-American War, 1898.—In the Spanish-American War of 1898 the Spanish war decree provides:

> Merchant vessels sailing under convoy, under charge of one or more ships of the navy of their nation, are absolutely exempt from the visit of the belligerents, being protected by the immunity enjoyed by the warships.
>
> As the formation of a convoy is a measure emanating from the Government of the State to which belong the vessels protecting the convoy, as well as the vessels under convoy, it must be taken as certain that the Government in question not only will not allow fraud of any kind but has employed the strictest measures to avoid fraud being committed by any of the vessels under the convoy.
>
> It is therefore useless for the belligerent to inquire of the chief officer of the convoy whether he guarantees the neutrality of the ships sailing under his charge, or of the cargo they carry. (U. S. Foreign Relations, 1898, p. 778.)

Japanese Regulations, 1904.—Article XXXIII of the Japanese Regulations Governing Captures at Sea, 1904, is:

A neutral vessel under convoy of a war vessel of her country shall not be visited or searched if the commanding officer of the convoying war vessel presents a declaration signed by himself stating that there is on board the vessel no person, document, or goods that are contraband of war, and that all the ship's papers are perfect, and stating also the last port which the vessel left and her destination. In case of grave suspicion, however, this rule does not apply.

Russian Regulations, 1904.—Russia in 1904 republished the Prize Regulations of March 27, 1895, which provided that—

Merchant vessels sailing under military convoy of an allied or neutral power are not subjected to examination, provided the commander of the convoy furnishes a certificate as to the number of vessels being convoyed, their nationality, and the destination of the cargoes, and also as to the fact that there is no contraband of war on the vessels. The stoppage and examination of these vessels is permitted only in the following cases: (1) When the commander of the convoy refuses to give the certificate mentioned; (2) when he declares that one or another vessel does not belong to the number of those sailing under his convoy; and (3) when it becomes evident that a vessel being convoyed is preparing to commit an act constituting a breach of neutrality. (U. S. Foreign Relations, 1904, p. 736.)

The right of convoy of merchant vessels of a neutral by warships of the same flag was generally recognized in practice at the end of the nineteenth century, though Great Britain in theory opposed.

Treaty provisions as to visit.—There are several treaties to which the United States is a party which contain provisions in regard to the visit of vessels under convoy somewhat similar to or exactly identical with the following Brazilian treaty of 1828:

Art. 22. It is further agreed that the stipulations above expressed relative to the visiting and examining of vessels shall apply only to those which sail without convoy; and when said vessel shall be under convoy the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries,

and when they are bound to an enemy's port that they have no contraband goods on board shall be sufficient. (Treaties and Conventions, 1776–1909, vol. 1, p. 140.)

Treaties with Columbia, 1846 (art. 23), and Italy, 1871 (Art. XIX), contain the same regulation. This regulation corresponds to article 218 of the Italian Mercantile Marine Code.

The treaty with Haiti of 1864, terminated 1905, was somewhat more detailed:

Art. 25. It is expressly agreed by the high contracting parties that the stipulations before mentioned relative to the conduct to be observed on the sea by the cruisers of the belligerent party toward the ships of the neutral party shall be applicable only to ships sailing without a convoy; and when the said ships shall be convoyed, it being the intention of the parties to observe all the regards due to the protection of the flag displayed by public ships, it shall not be lawful to visit them, but the verbal declaration of the commander of the convoy that the ship he convoys belongs to the nation whose flag he carries and that they have no contraband goods on board shall be considered by the respective cruisers as fully sufficient; the two parties reciprocally engaging not to admit under the protection of their convoys ships which shall have on board contraband goods destined to an enemy. (Ibid., p. 928.)

It will be observed that the declaration which the commander of the convoy is usually called upon to make is that the vessels under his escort have no contraband on board. With the modern extension of the possibilities of unneutral service such a declaration might shield a vessel which the visiting commander could properly seize. The articles in these treaties make no mention of blockade.

Treaty provisions as to convoy.—The United States very early made provision by treaty for the use of convoy in time of war. One of the earliest of these treaty agreements was with Sweden in 1783, a provision which is still in force, and is as follows:

Art. 12. Although the vessels of the one and of the other party may navigate freely and with all safety, as is explained in the seventh article, they shall nevertheless be bound at all times, when required, to exhibit as well on the high sea as in port their passports and certificates above mentioned; and not having

contraband merchandise on board for an enemy's port they may freely and without hindrance pursue their voyage to the place of their destination. Nevertheless, the exhibition of papers shall not be demanded of merchant ships under the convoy of vessels of war, but credit shall be given to the word of the officer commanding the convoy. (Ibid., vol. 2, p. 1729.)

Article IV of the treaty with Morocco of 1787 was renewed by the United States in the treaty of September 16, 1836:

Art. IV. A signal, or pass, shall be given to all vessels belonging to both parties, by which they are to be known when they meet at sea; and if the commander of a ship of war of either party shall have other ships under his convoy, the declaration of the commander shall alone be sufficient to exempt any of them from examination. (Ibid., vol. 1, p. 1213.)

Franco-British treaty, 1655.—A treaty between Great Britain and France of November 3, 1655, provided in Article XVI:

All ships of war, meeting any merchant ships of either party, shall protect them, while they keep the same course, against all who shall offer them any violence. (Du Mont. Corps Diplomatique, Tome VI, Pt. II, p. 121.)

Article XXVIII of the treaty between Great Britain and the States-General of July 31, 1667, was to the same effect.

Obsolete clause of Swedish treaty.—A separate article of the treaty of 1783 between the United States and Sweden which was not renewed in 1816 and 1825, when other portions of that treaty were renewed, provided as follows:

Art. III. If, in any future war at sea, the contracting powers resolve to remain neuter, and as such to observe the strictest neutrality, then it is agreed that if the merchant ships of either party should happen to be in a part of the sea where the ships of war of the same nation are not stationed, or if they are met on the high sea, without being able to have recourse to their own convoys, in that case the commander of the ships of war of the other party, if required, shall, in good faith and sincerity, give them all necessary assistance; and in such case the ships of war and frigates of either of the powers shall protect and support the merchant ships of the other: *Provided, nevertheless*, That the ships claiming the assistance are not engaged in any illicit commerce contrary to the principle of the neutrality.

Treaty with Prussia.—Article 22 of the treaty of 1785 between the United States and Prussia was practically identical with the similarly numbered article of the treaty of 1799. The treaty of 1785 expired by its own limitations in 1796. The treaty of 1799 expired by its own limitations in 1810. The provisions of article 22 were, however, among those revived by article 12 of the treaty of 1828, which was to be terminated only by regular notification. This article 22, which had been thus continued since 1785, appears in the Compilation of Treaties in Force, 1904, as follows:

> When the contracting parties shall have a common enemy, or shall both be neutral, the vessels of war of each shall upon all occasions take under their protection the vessels of the other going the same course, and shall defend such vessels, as long as they hold the same course, against all force and violence in the same manner as they ought to protect and defend vessels belonging to the party of which they are. (Treaties in Force, 1904, pp. 641–642; Treaties and Conventions, 1776–1909, vol. 2, p. 1493.)

Article 14 of the treaty of 1785 with Prussia was renewed, with explanations in the treaty of 1799, and revived by the treaty of 1828.

> Art. XIV. To insure to the vessels of the two contracting parties the advantage of being readily and certainly known in time of war, it is agreed that they shall be provided with the sea letters and documents hereafter specified.
>
> 1. A passport; expressing the name, the property, and the burthen of the vessel, as also the name and dwelling of the master, which passport shall be made out in good and due form, shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the vessel be under convoy of one or more vessels of war belonging to the neutral party the simple declaration of the officer commanding the convoy that the said vessel belongs to the party of which he is shall be considered as establishing the fact and shall relieve both parties from the trouble of further examination. (Treaties in Force, p. 638; Treaties and Conventions, 1776–1909, vol. 2, p. 1491.)

Treaties in time of war.—While it is often held that war terminates treaties between belligerents, this is evidently not the fact, as many treaties are merely suspended by the existence of war. These revive on the reestablishment of peace. Many conventions have been

negotiated in recent years which would become operative only in case of war between the contracting States and which are designed to meet such contingencies, as in the Hague Convention with respect to the Laws and Customs of War on Land—

intended to serve as a general rule of conduct for the belligerents in their relations with each other and with the inhabitants.

There are other treaties and conventions in which the contracting powers make agreements which shall become operative when one of the parties is neutral and the other a belligerent, as the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War.

Ordinarily, however, the relations of a State, which is not a party to the war, to another State which is not a party to the war, are not changed by the existence of war between other States. As regards one another, they in general assume no new obligations or liabilities because of war foreign to both. New obligations may of course be assumed by conventional agreements, treaty or other.

When a State actually ceases to exist, the treaties by which it was bound are no longer effective. When Madagascar lost its separate entity and was absorbed by France in 1896, the United States and Great Britain readily admitted that their treaties with Madagascar were no longer binding. Similarly, when Hanover was incorporated in the Prussian Kingdom in 1866, treaties with Hanover were regarded as terminated. The complete extinction of a State will extinguish, so far as it is concerned, the treaties to which it is a party.

Renunciation of treaty rights with Tunis.—By a treaty of 1797 the United States and Tunis agreed—

Art. V. If the corsairs of Tunis shall meet at sea with ships of war of the United States having under their escort merchant vessels of their nation, they shall not be searched or molested; and in such case the commanders shall be believed upon their word to exempt their ships from being visited and to avoid quarantine. The American ships of war shall act in like manner toward merchant vessels escorted by the corsairs of Tunis. (Treaties and Conventions, 1776–1909, vol. 2, p. 1795.)

By the treaty of Bardo, May 2, 1881, France assumed a protectorate over Tunis. It is evident that the assumption of this protectorate did not without further act terminate the treaty relations between the United States and Tunis. In order to provide for these relations certain articles were agreed upon by the United States and France on March 15, 1904:

The President of the United States of America and the President of the French Republic, acting in his own name as well as in that of His Highness the Bey of Tunis, desiring to determine the relations between the United States and France in Tunis and desiring to define the treaty situation of the United States in the Regency * * *

The Government of the United States declares that it renounces the right of invoking in Tunis the stipulations of the treaties made between the United States and the Bey of Tunis in August, 1797, and in February, 1824, and that it will refrain from claiming for its consuls and citizens in Tunis other rights and privileges than those which belong to them in virtue of international law or which belong to them in France by reason of treaties in existence between the United States and France. (Ibid., vol. 1, p. 544.)

Decisions in regard to treaties.—In 1874, In re Hermann Thomas (12 Blatchford, Circuit Court Reports, p. 370), it was claimed that the extradition convention between the United States and Bavaria "was abrogated by the absorption of Bavaria into the German Empire." The decision of the court states that—

An examination of the provisions of the constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire and foreign countries were annulled or to be considered as abrogated. Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to rupture. (Federal Cases, No. 13887.)

In the case of Terlinden *v.* Ames, decided in February, 1902, Mr. Chief Justice Fuller said:

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided in substance that it should continue in force until 1858 and thereafter until the end of a 12 months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly other treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties can not be regarded as avoided because of impossibility of performance. (184 U. S. Supreme Court Reports, p. 270.)

This decision further says of the constitution of the German Empire:

Article 11 read: "The King of Prussia shall be the president of the confederation and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries; accredit ambassadors, and receive them. * * * So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union." but this is not material, for, admitting that the constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the amour propre of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obliga-

tions have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed. (Ibid.)

Opinion of Attorney General.—In case of deserters from a public vessel of the North German Confederation in 1868, the Attorney General of the United States gave an opinion that the provisions of the treaty with Prussia of May 1, 1828, relating to such matters would be operative. Mr. Evarts, the Attorney General, said:

In regard to naval vessels of the North German Union, I am clearly of opinion that they are ships of war of Prussia within the meaning of the treaty of 1828.

He further says:

The relations of the States of North Germany to one another and to the United States have been so considerably modified by the confederation of 1867 that many perplexing questions of reciprocal rights and obligations are likely to arise under those various treaties, and those questions it may be deemed the part of good statesmanship to avoid by new treaties adapted to the present condition of the North German States. (12 Opinions Attorneys General, p. 463.)

Opinion of J. C. B. Davis.—Mr. Davis in his notes on United States treaties says:

The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It can not be said that any fixed rules have been established.

Where a State has lost its separate existence, as in the case of Hanover and Nassau, no question can arise.

Where no new treaty has been negotiated with the Empire, the treaties with various States which have preserved a separate existence have been resorted to. (Treaties and Conventions between the United States and Other Powers, 1776–1887, p. 1234.)

Rule of the Declaration of London, 1909.—As a result of the deliberations of the International Naval Conference at London in 1908 and with the approval of Great Britain, hitherto unfavorable to the doctrine of convoy, the following rule was adopted:

Art. 61. Neutral vessels under the national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all the

information as to the character of the vessels and their cargoes which could be obtained by visit and search. (Naval War College, International Law Topics, 1909, p. 139.)

This article, like most treaty stipulations, applies to convoy of neutral ships by a war vessel of their own nationality. It might be very difficult for a commander of a ship of war to furnish the required information in regard to neutral vessels of another nationality, vessels over which he would have no authority.

Relation of treaty provisions to naval officer.—As the naval officer is frequently brought into contact with the persons, property, authorities, and laws of foreign States, it is necessary that, so far as possible, his duties be plain. His conduct, if he is not to involve his State in difficulties with foreign States, must have respect to the treaty obligations between the States. This is evident in the "Instructions to blockading vessels and cruisers," General Order No. 92, issued by the United States on June 20, 1898:

> Vessels of the United States, while engaged in blockading and cruising service, will be governed by the rules of international law as laid down in the decisions of the courts and in the treaties and manuals furnished by the Navy Department to ships' libraries and by the provisions of the treaties between the United States and other powers.

Since the naval officer is bound by the treaties in force between the United States and other States, it is essential that where these treaties are doubtful, or where they are inconsistent with the understood policy of the United States, every effort should be made to inform the naval officer of such special provisions of treaties.

Of the treaties of the United States those with about 20 powers contained provisions in regard to convoy and others contained provisions in regard to protection. Some of these treaties have been terminated, but many remain in force, as Bolivia, 1858, article 23; Brazil, 1828, article 22; Colombia, 1846, article 23; Italy, 1871, article 19.

Discussion of treaty provision with Prussia.—Article XXII of the treaty between the United States and Prus-

sia of July 11, 1799, as stated, binds the two States when they "shall have a common enemy or shall both be neutral." In either case—

> vessels of war of each shall upon all occasions take under their protection the vessels of the other going the same course, and shall defend such vessels as long as they hold the same course against all force and violence in the same manner as they ought to protect and defend vessels belonging to the party of which they are.

While it may not be necessary for a ship of war engaged in convoying certain merchant vessels of her own nationality to receive on the high sea other vessels of her own nationality to the convoy if they request such protection, yet there would seem to be a strong obligation to do this if the vessels offered the same evidence of neutral character as afforded by those already under convoy. The article of the treaty with Prussia is, however, of such form as to leave to the naval officer little discretion, as it does not specify convoy, but provides for protection of vessels going on the same course, apparently providing for falling in with such vessels at sea. The provision is also made very comprehensive by the insertion of the words "upon all occasions." The only limitations upon the agreement to grant this protection are that the parties "shall have a common enemy or shall both be neutral," the vessels shall be "going the same general course," so long as the vessels "hold the same course," and be extended "in the same manner" as to the party's own vessels. In other words, this agreement binds each party to give to the vessels of the other when they have a common enemy or are both neutral the same degree of protection.

United States Navy Regulations.—The degree of this protection is indicated in the United States Navy Regulations for 1909, which provide as to the commander in chief:

> Art. 333. He shall afford protection and convoy, so far as it is within his power, to merchant vessels of the United States and to those of allies.
>
> Art. 334. During a war between civilized nations with which the United States is at peace he and all his command shall

observe the laws of neutrality and respect lawful blockade, but at the same time make every possible effort that is consistent with the rules of international law to preserve and protect the lives and property of citizens of the United States wherever situated.

From article 333, which makes it incumbent that the commanding officer "afford protection and convoy, so far as it is within his power, to merchant vessels of his own State," the manner of protection to be afforded to the German merchant vessels can be determined.

Protection by one neutral of vessels of another.—While the right of a neutral warship to take vessels of her own nationality under convoy gradually came to be generally admitted, the right of one warship to take under similar protection vessels of other neutral States was a different matter. This had been claimed in the last quarter of the eighteenth century, and many treaties implying such right had been made.

Even if the right should be admitted, the obligation of a war vessel of one neutral State to afford such protection to merchant vessels of another neutral State would be a different question. There would seem to be, in such case, lack of sufficient knowledge on the part of the commander of the war vessel as to the neutral vessel requesting protection and lack of sufficient authority over the merchant vessel of a foreign State.

The attitude of the United States on this matter was shown in the Navy Regulations of 1876, article 11:

> Vessels of war are not to take under their convoy the vessels of any power at war with another with which the United States is at peace, nor the vessels of a neutral unless ordered to do so or some very particular circumstance render it proper, of which they are to advise the Navy Department at the earliest opportunity.

The regulations of 1909, article 333, state among the duties of the commander in chief:

> He shall afford protection and convoy, so far as it is within his power, to merchant vessels of the United States and those of allies.

The degree of protection which a captain of a United States cruiser would give to an American merchant

vessel would depend somewhat upon the merchant vessel herself. If the vessel were guilty of violation of some law of neutrality, the captain would not be under obligation to protect her from the consequences. Even if the vessel were under his convoy, the commander of the cruiser of State X might make known to the American commander his suspicion that the merchant vessel was liable to capture, though the American captain, according to the Declaration of London, would alone be able to investigate such a charge. If the charge were found true, the merchant vessel might lose the protection of the convoy. In any case the captain of the American cruiser is free to protect or withdraw protection. If he protects the merchant vessel, the matter may become the subject of subsequent diplomatic adjustment, while, if he withdraws his protection without sufficient ground, his action may involve serious consequences to himself, his convoy, and his Government.

SOLUTION.

The captain of the United States cruiser should, in accord with special treaty provision and Navy Regulations, afford to the German vessels "protection and convoy, so far as it is within his power."