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International Law Discussions

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## SECTION II.—BELLIGERENTS.

*Article 9.*

In addition to the armed forces duly constituted for land warfare, the following are recognized as armed forces of the State:

(1) The officers and men of the Navy, Naval Reserve, Naval Militia, and their auxiliaries.

(2) The officers and men of all other armed vessels cruising under lawful authority.

In Article 9 in which the armed forces of a state are enumerated, should other classes of persons be named; if so, what classes and why?

It has been proposed to so amend Article 9 that it shall read "In addition to the armed forces duly constituted for land and naval warfare, the following are recognized as armed forces of the state," and then to omit the word "Navy" from the following clause.

If this is done, it makes the words "land" and "naval" coordinate and respectively coinclusive and coexclusive. This evidently is not the intention of the article at this point, but rather it is the intention to make an enumeration of the forces for naval warfare while mentioning only in general terms the land forces with the statement that they together "are recognized as armed forces of the state."

In other words should the word "Navy" be omitted in clause (1) and the word "naval" be inserted in the introductory sentence, the word "naval" as then used would apply to the regular Navy in the technical sense only and all other branches would be mentioned under (1) and (2). Consequently, the coordinate word "land" would cover the Regular Army, so called, only. This would not be a desirable limitation as it would make necessary an enlargement of the Article 9 so as to enumerate the armed land forces not in the category of the Regular Army, which is not necessary and is even undesirable in the code.

The words "In addition to" in the first line of Article 9 may, however, be unfortunate as implying some disparity in the two branches of the armed service. Should

the word "with" be substituted for the words "In addition to," this possible objection is removed. This introduces the idea of parity and coordination of the two branches.

It was held by the officers of the Conference that Article 9 is not essential to the code and could be left out altogether without injury to the code.

*Article 10.*

In case of capture, the personnel of the armed forces or armed vessels of the enemy, whether combatants or noncombatants, are entitled to receive the humane treatment due to prisoners of war.

The personnel of all public unarmed vessels of the enemy, either owned or in his service as auxiliaries, are liable, upon capture, to detention as prisoners of war.

The personnel of merchant vessels of an enemy who, in self-defense and in protection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war.

(a) Should not Article 10 read: "In case of capture, the personnel of armed vessels of the enemy, whether combatants or noncombatants, become prisoners of war and are entitled to receive the humane treatment due to such prisoners?"

The question has been raised in regard to this article as to whether the "personnel" mentioned in the three clauses are upon different relationships in view of the different wording of closing clauses of each sentence.

One group is "entitled to receive," etc., one group is "liable to detention," etc., one group is "entitled to the status," etc. There would probably be no question that members of the second group would not merely be liable to be detained as prisoners of war, but would be liable to any other treatment allowable for prisoners of war.

Therefore the wording should be so changed as to make all the clauses correspond, as when captured, those of each class become prisoners of war, and are entitled to the treatment due such prisoners. This treatment is very definitely outlined in The Hague Convention and is well understood.

In the first line of Article 10 the words "the personnel of the armed forces" occur. This clause should also be changed or omitted, as "the personnel" by Article 9 constitutes the "armed forces" and it is not clear what is meant when the term is used here; indeed it can not add anything when taken in connection with Article 9.

In view of these points raised on Article 10, the wording would be more clearly and properly made as follows:

"In case of capture the following become prisoners of war and are entitled to the humane treatment due to such prisoners:

"(1) The armed forces duly constituted for land warfare.

"(2) The personnel of duly authorized armed vessels of the enemy whether combatants or noncombatants.

"(3) The personnel of all public or private unarmed vessels engaged in the service of the enemy.

"(4) The personnel of private vessels of an enemy who, for defense or in protection of a vessel placed in their charge, resist attack."

(b) What should be the treatment of newspaper correspondents found on board a captured enemy vessel? Would a foreign naval attaché be entitled to special consideration, and how should he be treated if similarly found?

(1) Newspaper correspondents found on board a captured enemy vessel are (a) there at their own risk, (b) supposed to refrain from participation in the war, (c) liable to be treated as the exigencies of war require, (d) liable to be detained or sent away from the scene of action, or (e) liable to be treated as prisoners of war. "Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying." (Hague Convention, Laws and Customs of War on Land, Article 13.)

(2) A foreign naval attaché is entitled even in time of war to special consideration. He can not demand treatment which would interfere with the course of the war.



He should be treated with the fullest courtesy as a representative of a friendly power, by chance within the jurisdiction of the United States. He would not become a prisoner of war unless he participated in hostilities. He may, however, be denied the privilege of sojourn within the military lines, or be detained, if military necessity requires. He should be given the widest liberty consistent with military necessity. Pillet gives quite fully the status of a military attaché as follows:

On voit aussi assez fréquemment des officiers au service d'une puissance neutre se faire autoriser à suivre les vicissitudes d'une campagne dans l'armée de l'un des belligérants. Il arrive même que des officiers ayant un caractère diplomatique, des attachés militaires, occupent ce poste d'observation. Comme officiers, la situation de ces spectateurs de la guerre n'est pas différente de celle des correspondants de journaux. Ils sont soumis aux mêmes obligations. Ils doivent de plus s'abstenir avec soin de toute participation aux hostilités, car elle aurait pour conséquence de leur faire perdre le bénéfice de leur qualité d'étrangers neutres.

S'ils ont en outre la qualité d'attachés militaires, le régime de droit commun ne pourra plus être le leur. Leur caractère diplomatique leur assure une entière indépendance, ils ne peuvent donc pas être retenus comme prisonniers, même pour un temps fort court. Leur correspondance ne saurait non plus être soumise à aucun contrôle.

Le général ennemi entre les mains duquel ils sont tombés ne possède à leur égard qu'un seul droit, celui de leur interdire tout séjours dans les lignes de son armée. Encore ne doit-il pas, dans l'exercice de ce droit, se départir de la courtoisie toujours en usage à l'égard des personnes investies d'un caractère diplomatique. (Pillet, *Les Lois Actuelles de la Guerre*, 2<sup>d</sup> ed., p. 196, sec. 133.)

(c) Should the last sentence in Article 10 read "The personnel of private vessels of an enemy who for defense or in protection of a vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war?"

This question raised above implies that this article should be modified to include those who, for example, take up arms for the defense of a town or port from attack by launching boats and engaging in its defense. This brings such defenders into a class parallel to the levies en masse in land warfare. They should therefore be treated as lawful belligerents if they respect the customs and laws of war.

The word "merchant" should be changed to "private," in order that such status may not be limited to a single class of "private" vessels, but may extend to all.

The last sentence in Article 10 should therefore read: "The personnel of private vessels of an enemy who, for defense or in protection of a vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war."

#### *Article 11.*

The personnel of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses, or as prisoners of war when by training or enrollment they are immediately available for the naval service of the enemy, or they may be released from detention or confinement. They are entitled to their personal effects and to such individual property, not contraband of war, as is not held as part of the vessel, its equipment, or as money, plate, or cargo contained therein.

All passengers not in the service of the enemy, and all women and children on board such vessels should be released and landed at a convenient port, at the first opportunity.

Any person in the naval service of the United States who pillages or maltreats, in any manner, any person found on board a merchant vessel captured as a prize, shall be severely punished.

(a) One authority says of Article 11: "I have always objected to the idea that noncombatants at sea can be held as prisoners on the far-fetched theory that, being able seamen, if released they might be enlisted, trained, armed, and so become combatants. The fact remains that they have not been enlisted, that they are noncombatants, that therefore they should not be held as prisoners." Should the words, "or as prisoners," etc., to the end of the sentence be stricken out?

The question is whether in the first sentence of Article 11 the words following "as witnesses" shall be omitted. The general rule in regard to capture is that any person whom a belligerent may kill as an enemy becomes on surrender or capture a prisoner of war. This rule is modified by the further qualification that

certain persons who, by special characteristics, are of unusual importance or usefulness to the enemy, while not combatants in the technical sense are, nevertheless, liable to capture and detention as prisoners of war. Such persons are certain officials of the enemy state, certain persons rendering services not directly hostile, but yet of marked service to the enemy as, e. g., contractors, machinists, etc. Also persons who by special training may easily become dangerous enemies. Under this class may come the personnel of private vessels. The rule generally accepted is that sailors on all merchantmen are liable to be treated as prisoners of war.

Article 11 qualifies this general permission by allowing detention as prisoners of war "when by training or enrollment they are immediately available for the naval service of the enemy."

Authorities are very generally agreed upon this point. (Perels, *Seerecht der Gegenwart*, p. 190 f.; Pillet, *Les Lois Actuelles de la Guerre*, p. 152; Hall, *International Law*, p. 421; Rivier, *Principes du Droit des Gens* II, p. 346.) Hall briefly states his conclusion: "Finally, sailors on-board enemy's trading vessels become prisoners because of their fitness for immediate use on ships of war." The *Naval War College Manual of International Law* states: "Officers and seamen of merchant vessels of the enemy may, according to usage, be detained as prisoners of war upon the ground that they can be immediately employed on ships of war." (p. 86, 2d ed.)

The first clause of Article 11 should stand as printed in the code, except as noted in (b) below.

(b) Should the word "private" be substituted for the word "merchant" in the first line of Article 11?

The word "merchant," while possibly covering a large portion of the vessels liable to capture, is not sufficiently broad to cover certain vessels not engaged in trade, which are and must be liable to capture and whose personnel may be equally dangerous if not retained. The word "private" as covering the vessels other than "public" should be substituted.



(c) How should the last two lines of Article 11 read?

The word "merchant" may be omitted, making the last clause read, "Any person in the naval service of the United States who pillages or maltreats, in any manner, any person found on board a vessel captured as a prize, shall be severely punished," if this last sentence is to be retained. It would be better, however, to make No. 17 of the "Articles for the Government of the Navy" and this last sentence of Article 11 of the Naval War Code to correspond by substituting one for the other or by revising both. No. 17 of the "Articles for the Government of the Navy" reads: "If any person in the Navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge." The sentence as it stands in the code does not prescribe how the punishment shall be determined.

#### *Article 12.*

The United States of America acknowledge and protect, in hostile countries occupied by their forces, religion and morality; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

(a) Should not the words, "private property" be inserted before the word "religion" in line 3 of Article 12?

The words "private property" should be inserted in Article 12 because Article XLVI of The Hague Convention provides that in case of hostile occupation "Family honor and rights, individual lives and private property as well as religious convictions and liberty must be respected."

This rule is immediately binding upon the naval force of the United States when constituting the hostile occupying force. Such force would then come without question under the rules of war on land.

(b) Should not the whole article be rewritten and amplified in view of The Hague Convention provisions in regard to occupation of hostile territory? If so, suggest the wording of the article and give reasons therefor.



It would be better in this case to substitute Article XLVI of The Hague Convention with respect to the laws and customs of war on land in place of Article 12 of the Naval War Code. Naval forces thus occupying hostile countries, by the simple fact of occupation become amenable to the rules of The Hague Convention. This Article XLVI with an introductory clause would read: In hostile countries occupied by forces of the United States of America, "Family honor and rights, individual lives and private property as well as religious convictions and liberty, must be respected." There are also other Hague Convention articles that should be inserted here. (See Section III.—On Military Authority over Hostile Territory, p. 155.)

### SECTION III.—BELLIGERENT AND NEUTRAL VESSELS.

#### *Article 13.*

All public vessels of the enemy are subject to capture, except those engaged in purely charitable or scientific pursuits, in voyages of discovery, or as hospital ships under the regulations hereinafter mentioned.

Cartel and other vessels of the enemy, furnished with a proper safe-conduct, are exempt from capture unless engaged in trade or belligerent operations.

(a) Would a vessel flying an enemy flag and carrying supplies to a neutral state where a famine exists be liable to capture and under what circumstances?

"A vessel flying an enemy flag and carrying supplies to a neutral state where a famine exists" might not be liable to capture if the vessel were public and the supplies were of a charitable nature destined for the relief of the famine.

Such a use of supplies could not directly or indirectly aid the enemy, but rather by the amount of the supplies lessen the enemy's resources. Of course, if the supplies were destined for the neutral country simply because a higher price could be secured on account of existence of the famine, the vessel and supplies as engaged in a commercial undertaking would be liable to capture.

The officer must judge, and in case of doubt should send the vessel into a port of his own state.