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.
VI.

Should the Declaration of Paris, 1856, be revised.

**CONCLUSION.**

The Declaration of Paris, 1856, should be revised.

**DISCUSSION AND NOTES.**

*Recognition of rights of those engaged in maritime commerce.*—Neutrality, as now understood, was practically unknown in the Middle Ages. Grotius, in 1625, had only a vague idea of this status. Trade had, however, very early brought about a recognition of the rights of those engaged in commerce. Distinctions were made according to the nature of the goods and the nationality of the vessel carrying the goods.

The States of northern Europe gradually inclined toward the principle of "free ships free goods," which was enunciated in the treaty of Utrecht in 1713, Aix-la-Chapelle, 1748, and supported in the armed neutrality of 1780 and of 1800. Other nations opposed, and practice and profession varied with the times. Many discussions on the status of private property at sea took place in the early days of the United States.

The principle of "free ships, free goods," except contraband of war, has been widely inserted in United States treaties—Algiers, 1815, 1816; Bolivia, 1858; Brazil, 1828; Colombia (New Granada), 1846; Dominican Republic, 1867; Ecuador, 1839; France, 1778; Guatemala, 1849; Haiti, 1864; Italy, 1871; Mexico, 1831, and many others. At the present time the principle is inserted in treaties in

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*For the binding force of this Declaration see notes on Protocol No. 24, p. 110.*
force with Bolivia, 1858; Brazil, 1828; Colombia, 1846; Haiti, 1864; Italy, 1871; Peru, 1856; Prussia, 1785; Russia, 1854; Sweden and Norway, 1783.

The position of Great Britain and France in 1854 was such as to give great weight to any declaration which might be made by these states. Their attitude toward the treatment of neutral property at sea and toward privateering before this time had not been the same. It was necessary, however, that in regard to affairs in southeastern Europe they act together. Discussions in regard to policy of maritime warfare took place, and they gradually approached an agreement upon the treatment of neutral property, privateering, and blockade, which prepared the way for the declaration of Paris in 1856.

The British declaration, with reference to neutrals and letters of marque, March 28, 1854, and the French declaration were practically the same:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

To preserve the commerce of neutrals from all unnecessary obstruction Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war and of preventing neutrals from bearing the enemy's dispatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.

But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel unless it be contraband of war.

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships, and Her Majesty further declares that being anxious to lessen as much as possible the evils of war and to restrict its operations to the regularly organized forces of the country it is not her present intention to issue letters of marque for the commissioning of privateers.

Westminster, March 28, 1854. (46 State Papers, p. 36.)

The Declaration of Paris, 1856.—The rights which France and Great Britain had thus waived by the concurrent declarations of March 28–29, 1854, naturally became the subject of negotiation at the close of the war. At the
conference of Paris in 1856 these matters were brought forward and advanced measures were urged by the French representatives. There resulted the enunciation of the set of rules known as the declaration of Paris of 1856.

The Declaration of Paris as given by Hertslet, "Map of Europe by Treaty" (ii, p. 1282), is as follows:

The Plenipotentiaries who signed the Treaty of Paris of the 30th of March, 1856 (No. 264), assembled in Conference,—Considering:

That Maritime Law, in time of War, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between Neutrals and Belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn Declaration:

PRIVATEERING.

1. Privateering is, and remains abolished.

NEUTRAL FLAG.

2. The Neutral Flag covers Enemy's Goods, with the exception of Contraband of War.

NEUTRAL GOODS.

3. Neutral Goods with the exception of Contraband of War, are not liable to capture under Enemy's Flag.

BLOCKADES.

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the Undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the States which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.
The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

Done at Paris, the 16th of April, 1856.

To this declaration all important States adhered except Mexico, Spain, and the United States. Spain and Mexico agreed, except to the abolition of privateering. The United States desired the exemption of all private property from seizure.

Protocol No. 24.—In addition to the Declaration of Paris of April 16, 1856, there was a protocol numbered 24 containing the following:

On the proposition of Count Walewski, and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, can not hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not at the same time rest on the four principles which are the object of the said declaration.

By the above agreement the powers are bound. As Count Walewski said in a letter to Count de Sartiges in May, 1856:

The plenipotentiaries assembled in the congress of Paris have come to an agreement on the terms of a declaration intended to settle the principles of maritime law in so much as it concerns neutrals during war. Herewith I have the honor to transmit to you a copy of that act, which fully meets the tendencies of our epoch, and at once puts an end to the useless calamities which a custom equally reprobated by reason and by humanity, superadded to those which fatally result from a state of war.

The congress have not overlooked the fact that their work, in order that it may prove complete, must secure the assent of all the maritime powers, since such governments only as shall have acceded to the arrangement can be mutually bound by it. On this score we attach peculiar value to the concurrence of the United States, that will not consent, we confidently trust, to hold off from a concert of action which defines a new and essential progress in international relations.

The determination of the congress of Paris defines the object which it is intended to attain. The clashing constructions given to the rights of neutrals have, up to the last year, proved a source of deplorable conflicts, whilst privateering inflicted on the commerce and navigation of nonbelligerent states an injury so much the more grievous as it gave room for the most calamitous excesses.
These, Count, are the events which, for our part, we are happy in striving to repel, and we feel convinced that the concurrence of the United States will not be withheld in a question every way worthy of the philanthropic spirit of the American people; a question which at once, and in a high degree, concerns the development and the security of commercial transactions.

The plenipotentiaries sent to the congress have, as you may see in protocol No. 24, bound themselves, in the name of their respective governments, to enter, for the future, into no arrangement on the application of maritime law in time of war without stipulating for a strict observance of the four points resolved by the declaration. The concurrence which we solicit at the hands of those governments which were not represented in the Paris conferences can, consequently, apply to those principles only laid down in said declaration, and which are indivisible. (Senate Ex. Doc., 34th Cong., 1st Sess., No. 104, p. 2.)

**Attitude of the United States.**—The attitude of the United States was thus expressed in President Pierce’s message of December 4, 1854:

The proposition to enter into engagements to forego a resort to privateers, in case this country should be forced into a war with a great naval power, is not entitled to more favorable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honor or rights of our country require it to assume a hostile attitude it confidently relies upon the patriotism of its citizens, not ordinarily devoted to the military profession, to augment the Army and Navy, so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending noncombatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing, as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.

The United States Government wished to extend the provision of the Declaration of Paris, saying:

The injuries likely to result from surrendering the dominion of the seas to one or a few nations which have powerful navies arise mainly from the practice of subjecting private property on the ocean to seizure by belligerents. Justice and humanity demand that this practice should be abandoned, and that the rule in relation to such property on land should be extended to it when found upon the high seas.
The President therefore proposes to add to the first proposition in the "declaration" of the congress at Paris the following words: "And that the private property of the subject or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." Thus amended, the Government of the United States will adopt it, together with the other three principles contained in that "declaration."

I am directed to communicate the approval of the President to the second, third, and fourth propositions, independently of the first, should the amendment be unacceptable. The amendment is commended by so many powerful considerations, and the principle which calls for it has so long had the emphatic sanction of all enlightened nations in military operations on land, that the President is reluctant to believe it will meet with any serious opposition. Without the proposed modification of the first principle, he can not convince himself that it would be wise or safe to change the existing law in regard to the right of privateering. (Senate Ex. Doc., 34th Cong., 1st sess., No. 104, p. 13.)

It was well understood, as shown by the discussions, that the principles set forth in the Declaration of Paris were advanced opinions. Protocol No. 22 of the session of April 8, 1856, relates that—

M. le Comte Walewski propose au Congrès de terminer son œuvre par un déclaration qui constituerait un progrès notable dans le droit international, et qui serait accueillie par le monde entier avec un sentiment de vive reconnaissance.

Le Congrès de Westphalie, ajoute-t-il, a consacré la liberté de conscience, le Congrès de Vienne l'abolition de la Traite des noirs et la liberté de la navigation des fleuves.

Il serait vraiment digne du Congrès de Paris de poser les bases d'un droit maritime en temps de guerre, en ce qui concerne les neutres. Les 4 principes suivants atteindraient complètement ce but:

1. Abolition de la course;
2. Le pavillon neutre couvre la marchandise ennemie, excepté la contrebande de guerre;
3. La marchandise neutre, excepté la contrebande de guerre, n'est pas saisissable même sous pavillon ennemi;
4. Les blocus ne sont obligatoires qu'autant qu'ils sont effectifs.

Ce serait certes là un beau résultat auquel aucun de nous ne saurait être indifférent.

The Declaration of Paris certainly does not meet with that general approval which its promoters had anticipated, and as time passes it becomes more and more in need of revision. As Duboc says:
La Declaration de Paris n’établit donc, à tout prendre, qu’un régime précaire, non sans danger pour les belligérants, non sans péril pour les neutres. Aussi beaucoup parmi ses partisans et parmi ses adversaires pensent-ils qu’elle n’est pas définitive. Tandis que ceux-ci demandent qu’on la dénonce, ceux-là prétendent qu’on la complète. Les premiers estiment qu’on aresserré les droits des belligérants dans des limites trop restreintes, les autres, qu’on leur accorde encore des libertés excessives. Ces derniers prétendent parfaire le droit maritime et assurer définitivement la sécurité des neutres en supprimant toute confiscation de la propriété ennemie. (Le Droit de la Guerre Maritime, p. 71.)

There are many differences of opinion in regard to the phraseology of the Declaration of Paris. Some prefer a more explicit definition, others would retain the general terms. (Perels, Seerecht, section 49, I.) Thonier in a recent work says:

Malgré le progrès immense qu’elle a réalisé, en faisant passer de la doctrine dans la pratique la liberté du commerce neutre, la declaration de Paris présente cependant quelques lacunes. Elle n’a pas osé aller jusqu’au bout dans la voie des réformes libérales et déclarer, ainsi que le proposaient les États-Unis, l’inviolabilité de la propriété privée sur la mer.

Elle est même inférieure à la Déclaration russe de 1780, en ce qui regarde le blocus, par l’absence de prescriptions concernant le rapprochement des forces bloquantes, ce qui permet les blocus par croisière.

Enfin, elle garde le silence au sujet de la contrebande de guerre, dont il y aurait eu si grand intérêt à donner une définition précise et énumération. (De la Notion de Contrebande de Guerre, p. 39.)

1. “Privateering is and remains abolished.”—It might with good reason perhaps be contended that in the first place the term “declaration” is not properly applicable to the action taken by the plenipotentiaries on April 16, 1856, and known as the “Declaration of Paris.”

The provisions of the so-called “declaration” are, however, of great importance.

The plenipotentiaries, according to the terms of the Declaration, consider “that maritime law in time of war has long been the subject of deplorable disputes.” To avoid some of the disputed points they hope to establish “a uniform doctrine” and “having come to an agreement” have adopted the “solemn declaration.”

A serious objection was at the time raised against this Declaration, to the effect that of the plenipotentiaries who
signed it, some had no authorization to act in the matter, but as their action was never disclaimed it must be held to be binding. It is held in Great Britain that so far as the Declaration itself is concerned it has never been properly authorized.

The obvious intent of the first clause of the Declaration of Paris, "Privateering is and remains abolished," was that from the date of its adoption war should be confined to the regularly commissioned vessels built for hostile purposes. Debates and discussions of the rule show that it was thus understood by many officials in its early days. Doubtless the opposition to the rule would have been much less marked in the United States if it had been understood to mean merely that from its adoption the use of private vessels for belligerent purposes shall be allowed only when they are under responsible control of one of the belligerents.

T. G. Bowles, writing in 1878 after there had been much discussion on the subject, shows that the effect of the first clause of the Declaration of Paris abolishing privateering is open to differences of interpretation. Of the general provisions of the Declaration he says:

The effect of them upon Great Britain is without doubt and beyond question greater than upon any other power, because Great Britain, being the principal maritime power in the world, must feel more than, any other the effects of any change in the laws of maritime warfare. And the fact that Great Britain has shown herself before the change was made able to resist the whole of Europe in arms, and to come victorious out of the struggle by the very aid of the very principles now declared to be abrogated and reversed, must lead us to conclude in limine that the change made is one fraught with especial disadvantage to her. Let us, however, examine the changes themselves and their effects.

I. "Privateering is and remains abolished," that is to say, is abolished for Great Britain whenever she is at war with any other States than the United States or Spain; but not when she is at war with either of those two. The effect of this is to deprive Great Britain of the services of volunteers at sea, and to preclude her from employing in warlike operations either the vessels or the men of her vast mercantile marine; for a privateer is but a private vessel commissioned by the State. She loses thus not only an offensive but also a defensive weapon; for privateers do not only capture enemy's vessels, but also recapture those of their own nation; and they are to the State navy a
most valuable auxiliary, without which an amount of power proportioned to the size of the mercantile marine of the State remains unemployed in time of war. She loses the power of withdrawing a considerable number of merchant vessels from exposure to the enemy as unarmed merchantmen by turning them into offensive weapons as armed cruisers, and thus at once diminishing the number of vessels liable to be captured and increasing the number of those able to capture. She loses one of the best schools for the formation of daring and adventurous sailors, and with it those traditions of prize money won in conflict, which have always been found the most urgent incentive to daring and adventurous men. (Maritime Warfare, p. 83.)

It may be safely said that prior to the time of the Declaration the first clause, viz, "Privateering is and remains abolished," would have been regarded as a proposition very liable to stir up unnecessary "deplorable disputes." Privateering had been an accepted means of warfare which was supposed to give to a state an opportunity to enlarge its navy. In regard to privateering, Secretary Marcy, in a letter of July 28, 1856, to Count Sartiges, said that for those powers acceding to the Declaration of Paris it would be necessary to "surrender a principle of maritime law which has never been contested—the right to employ privateers in time of war." The first clause of the Declaration can not be properly regarded as one whose introduction removed disputes.

It has been the object of much criticism. In the first place, the Declaration is a convention binding signatory powers only. Many of the leading men in the states which became parties to the Declaration were opposed to this provision. Some maintained that it was not sufficiently definite, but would give rise to action in effect like privateering under another name, or so masked as to avoid condemnation under the letter of the law. Such critics also maintained that what was needed was an agreement as to the use of private or quasi-private vessels in time of war, with such regulations as would avoid the evils of privateering. The truth of this position as to the need of definite regulations for the use of such vessels in time of war has become more and more evident since 1856, and the status of voluntary or auxiliary fleets is at present a mat-
ter of uncertainty, involving grave consequences. Just what was really abolished and remained abolished under the first clause of the Declaration has become an increasingly important question.

The United States were willing to accede to the Declaration when it was thought that it would work to the advantage of the North against the South, at the opening of the civil war.

The French Academy had discussed the question of abolition of privateering in 1860, and the practice of privateering was ably defended. It was not denied that privateering should be regulated, for this was generally admitted. It was not quite clear what the word "privateering" included. The discussion as to the definition of the word was renewed through the action of the Prussian Government in 1870.

It is necessary that the provision in regard to privateering be merged in the question of the regulation of the status of private or quasi-private ships which in time of war are introduced into the military forces of the belligerent.

Mr. F. R. Stark, in his careful study on the "Abolition of privateering," says:

The Declaration of Paris is truly, as Mr. Marcy said, a halfway measure. It is inchoate, unfinished, and, it can not be denied, somewhat faulty, as the first steps of all great reforms have been. But to call it an epoch-making event or a red-letter day in the calendar of the law of nations would be superfluous. Perhaps that which is to come—the abolition of all capture of private property at sea, including the abolition of commercial blockades—is easier than that which has already been accomplished. In international law, as in other things, it is the first step that costs (p. 159).

**Attitude of United States on abolition of privateering.**—

On the clause in regard to privateering, Mr. Marcy, in his letter to Count Sartiges, makes various comments, among which is the following:

If the principle of capturing private property on the ocean and condemning it as prize of war be given up, that property would, and of right ought to be, as secure from molestation by public armed vessels as by privateers; but if that principle be adhered to, it would be
ATTITUDE OF UNITED STATES ON PRIVATEERING.

worse than useless to attempt to confine the exercise of the right of capture to any particular description of the public force of the belligerents. There is no sound principle by which such a distinction can be sustained, no capacity which could trace a definite line of separation proposed to be made, and no proper tribunal to which a disputed question on that subject could be referred for adjustment. The pretense that the distinction may be supported upon the ground that ships not belonging permanently to a regular navy are more likely to disregard the rights of neutrals than those which do belong to such a navy is not well sustained by modern experience. If it be urged that a participation in the prizes is calculated to stimulate cupidity, that, as a peculiar objection, is removed by the fact that the same passion is addressed by the distribution of prize money among the officers and crews of ships of a regular navy. Every nation which authorizes privateers is as responsible for their conduct as it is for that of its navy, and will, as a matter of prudence, take proper precaution and security against abuses.

But if such a distinction were to be attempted, it would be very difficult, if not impracticable, to define the particular class of the public maritime force which should be regarded as privateers. "Deplorable disputes," more in number and more difficult of adjustment, would arise from an attempt to discriminate between privateers and public armed ships.

If such a discrimination were attempted, every nation would have an undoubted right to declare what vessels should constitute its navy and what should be requisite to give them the character of public armed ships. These are matters which could not be safely or prudently left to the determination or supervision of any foreign power, yet the decision of such controversies would naturally fall into the hands of predominant naval powers, which would have the ability to enforce their judgments. It can not be offensive to urge weaker powers to avoid as far as possible such an arbitrament and to maintain with firmness every existing barrier against encroachments from such a quarter.

No nation which has a due sense of self-respect will allow any other, belligerent or neutral, to determine the character of the force which it may deem proper to use in prosecuting hostilities; nor will it act wisely if it voluntarily surrenders the right to resort to any means sanctioned by international law which, under any circumstances, may be advantageously used for defense or aggression. (Senate Ex. Doc. No. 104, 34th Cong., 1st sess., p. 9.)

2. Free ships, free goods.—The second clause of the Declaration of Paris is:

The neutral flag covers enemy's goods with the exception of contraband of war.
This phraseology has given rise to certain misconceptions particularly because some have inferred that contraband of war might be thus affirmed of enemy goods. The probable intent of the clause was to the effect that—

The neutral flag covers enemy’s goods, with the exception of such as would, if neutral, be contraband of war.

If, however, all innocent private property at sea is to be exempt from capture, whether neutral or enemy, the phraseology is correct in the main, because in such event the doctrine of contraband must be extended to enemy as well as to neutral property.

The phraseology also introduces the question of destination, which is essential in contraband. Neutral goods bound for a neutral port, even though consisting of arms and ammunition, are not contraband. Would enemy goods of similar nature bound for a neutral port be exempt from capture under a strict interpretation of the second clause of the declaration?

It may be justly held that if the belligerent is to be bound by the second clause of the Declaration, viz, “The neutral flag covers enemy’s goods, with the exception of contraband of war,” the neutral shall be held to make plain to the belligerent that the flag is truly neutral.

A somewhat full presentation of the effect of this Declaration upon establishing a definition of contraband of war and of the significance of Protocol No. 24 is given by Chief Justice Berkley in the case of the Osaka Shosen Kaisha versus the owners of the steamship Prometheus in 1904:

In my opinion the expression “contraband of war” has a well-known and accepted meaning among the civilized commercial powers of the world. If that were not so we should not, as we do, find that expression used without definition in solemn treaties between the powers. The expression “contraband of war” is used without any definition of its meaning in the Treaty of Paris of the 16th April, 1856. The inference from that fact is, to my mind, irresistible that there was no definition needed, because the expression had the same definite meaning in the minds of all the plenipotentiaries of the powers parties to that treaty.

The Treaty of Paris, to which Russia is a party and to which she still adheres, commences with the following preamble: “Considering
that maritime law in time of war has long been the subject of deplorable disputes, that uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts, that it is consequently advantageous to establish a uniform doctrine on so important a point; that the plenipotentiaries assemble in Congress at Paris can not better respond to the intention by which their Governments are animated than by seeking to introduce into international relations fixed principles in this respect." Then immediately follows this declaration: "The above-mentioned plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object, and having come to an agreement have adopted the following solemn declaration:

(1) Privateering is and remains abolished
(2) The neutral flag covers enemy's goods, with the exception of contraband of war.
(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
(4) Blockades in order to be binding must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

I draw special attention to the fact that the expression "contraband of war" is twice used in this declaration without being in any way defined. This declaration was designed to give effect to the opinion of the plenipotentiaries expressed in the preamble, viz, that it was to the advantage of the civilized world to establish a uniform doctrine on the subject of maritime law in time of war, and with that object in view to introduce certain "fixed principles." At the same sitting of the plenipotentiaries the following resolution was adopted (Protocol No. 24): "On the proposition of Count Walewski, and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, can not hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war which does not, at the same time, rest on the four principles which are the object of the said declaration."

It will be observed that by this Protocol the plenipotentiaries of Russia bind that Power not hereafter to adopt any attitude toward neutrals in time of war which does not rest upon the four principles enunciated in the declaration. This Protocol has an important bearing upon the contention at the Bar that Russia as an independent sovereign State possesses, as a concomitant to the right to make war, the right to declare what shall or shall not be considered contraband of war.

I dwell here upon the fact that the expression "contraband of war" occurs twice in the declaration in the treaty of Paris; that the expressions "privateering" and "blockade" occur each once; and that there
is in that declaration no definition of the meaning of any of those expressions. Why was there this omission to define these expressions? Was it not because they each had in the minds of the plenipotentiaries of the Powers a recognized meaning at the time when the treaty was signed? And because the expression "contraband of war" no more needed definition than the expressions "blockade" or "privateering" did. What, then, was the meaning which it must fairly be assumed the plenipotentiaries attached to the expression "contraband of war," as used by them in the Treaty of Paris? It seems to me that the plenipotentiaries had in their minds the meaning which at that time attached to the expression "contraband of war" resulting from the decisions of the courts of law of the nations of Europe and America; principally, indeed, the decisions in the English courts on cases arising during the Napoleonic war. What, then, is the result of those decisions? What meaning has been thereby attached to the expression "contraband of war?" The result has been to attach to that expression the following twofold meaning: (1) Absolute contraband of war, which includes everything useful for war only; (2) that which is conditional contraband of war, which includes all which, though useful for both peace and war, becomes contraband if destined for the purposes of war, excluding from the meaning of contraband of war such things as are useful for the purposes of peace only. "Provisions," consequently, come within the definition of conditional contraband only if and when destined for the enemy's forces; otherwise they are excluded from the definition. That is, in my opinion, the true meaning to be attached to the expression "contraband of war," and that is the sense which, in my opinion, that expression bears on a true construction of the declaration of the plenipotentiaries who signed the Treaty of Paris of 1856.

The Supreme Court decision in the case of the Peterhoff (5 Wallace Supreme Court Reports, 28) gives an opinion on contraband:

The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable, but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances, and the third, of articles exclusively used for peaceful purposes. Lawrence's Wheat., 772, 776, note; the Commercen, 1 Wheat., 382; Dana, Wheat., 629, note; Pars. Mar. Law, 93, 94. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the
military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of the blockade or siege.

2. Free goods always free.—The third clause of the Declaration of Paris is:

Neutral goods with the exception of contraband of war are not liable to capture under enemy’s flag.

Such matters as the destruction of belligerent vessels having on board neutral cargo may give rise to complications under the third clause of the Declaration. While by this clause the goods are not liable to capture they may under necessity of war be subject to severe treatment.

Hall says of this matter:

In 1872 the French prize court gave judgment in a case, arising out of the war of 1870-71, in which the neutral owners of property on board two German ships, the Ludwig and the Vorwärts, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though “under the terms of the Declaration of Paris neutral goods on board of an enemy’s vessel can not be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;” in the particular case “the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war, the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity.”

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy’s ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case, for example, of a state, the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carrier vessels, the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Decla-
ration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk, than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity. (International law 5th ed. p. 717.)

The reported acts of some of the vessels of Russia during the Russo-Japanese war also show that there is need of further provisions in the Declaration.

4. Blockades.—Mr. Marcy's opinion in regard to the fourth clause of the Declaration, the clause in regard to effective blockade, is one which has received frequent sanction. He said:

The fourth principle contained in the "declaration," namely: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy;" can hardly be regarded as one falling within that class with which it was the object of the congress to interfere; for this rule has not for a long time been regarded as uncertain, or the cause of any "deplorable disputes." If there have been any disputes in regard to blockades, the uncertainty was about the facts, but not the law. Those nations which have resorted to what are appropriately denominated "paper blockades," have rarely, if ever, undertaken afterwards to justify their conduct upon principle; but have generally admitted the illegality of the practice, and indemnified the injured parties. What is to be adjudged "a force sufficient really to prevent access to a coast of the enemy," has often been a severely contested question; and certainly the declaration, which merely reiterates a general undisputed maxim of maritime law, does nothing toward relieving the subject of blockade from that embarrassment. What force is requisite to constitute an effective blockade, remains as unsettled and as questionable as it was before the congress at Paris adopted the "declaration." (Senate Ex. Doc. 54th Cong., 1st Sess., No. 104, p. 6.)

It is evident that the fourth clause in regard to blockade needs further clarifying from the fact that the British Admiralty Manual of Naval Prize Law adds after the clause of the Declaration of Paris the words, "Or, at any rate, to create evident danger to ships attempting ingress or egress." The general statement in regard to valid blockade in the Manual is as follows:

a See also International Law Situation, 1901, Naval War College, pp. 166-175.
108. A Blockade to be valid must be confined to ports and coasts of the Enemy, but it may be instituted of one port, or of several ports, or of the whole seaboard of the Enemy.

109. It may be instituted to prevent ingress only ("Blockade inwards"), or egress only ("Blockade outwards"), though it is generally instituted to prevent both ingress and egress.

110. A Blockade to be valid must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the Enemy, or, at any rate, to create evident danger to ships attempting ingress or egress.

111. It is therefore the first duty of a Commander authorized to institute a Blockade so to dispose his Squadron as to bring about this result. There is then in existence a Blockade de facto.

112. A Blockade, though thus validly instituted, ceases to exist if not effectually maintained. It will accordingly cease to exist if the blockading force—

1. Abandon its position, unless abandonment be merely temporary, or caused by stress of weather; or
2. Be driven away by the Enemy; or
3. Be negligent in its duties; or
4. Be partial in the execution of its duties toward one ship rather than another, or toward the ships of one nation rather than those of another.

113. Should, however, the Commander seize several Vessels at once and find himself unable to detain them all, it will not be an improper act of partiality, nor is it a relaxation of the Blockade if he releases some and detains the rest. (P. 29.)

The doctrine of blockade was not the same among the powers signatories of the Declaration of Paris. The phrase "Maintained by a force sufficient really to prevent access to the coast of the enemy" would mean for France a force which would give notification of the existence of the blockade to each vessel appearing before the port. By Great Britain no such notification is deemed necessary. A general public notification is deemed sufficient. The amount and kind of force is also a matter of much difference of opinion. Can a blockade be established by sinking stones, vessels, or other obstructions in a channel? Does a line of mines or torpedoes constitute a blockade under the definition of the Declaration of Paris? How far shall blockade by cruisers be admitted? What constitutes a sufficient number of cruisers to render a blockade effective?
Many such questions have been discussed and varying answers have been given. It is easily seen that a different course will have to be pursued to render a blockade according to the French theory effective—in e., when notification before a port is necessary—and to render a blockade according to the British theory effective—in e., when only a general public notification is necessary.

Some authorities have maintained that there should be before a blockaded port two lines of vessels, one of which should at a considerable distance from the port notify the approaching merchantman of the blockade and the second inner line should seize the merchantman if he then attempts to enter. Some have even maintained that in order that a blockade may be effective, the vessels of the blockading squadron should not be separated farther than the distance which the range of their guns would cover. Others maintain that the question of effectiveness depends on the amount of commerce entering a given port, and that the blockading squadron should vary in number accordingly.

What is blockade?—Various schemes have been tried by which to obtain the results of blockade for the belligerents without all its consequences.

For many years the doctrine of pacific blockade was held. Of late years this may be said to have been received with less favor. It was regarded as a means of constraint short of war.

In connection with blockade, it should be further recognized that it is a war measure and that it applies only in time of war.

It does not apply generally in time of domestic hostilities of the nature of insurgency even though a single State or even several States may have recognized the belligerency of the insurgent. If an actual state of war does not exist, blockade and its consequences is not admitted. Until the parent State recognizes the belligerency of the insurgent body, "the scale on which hostilities are conducted by the insurgents must be considered."
The position of the United States is stated in a letter of Secretary Hay of November 15, 1902. He says:

Blockade of enemy ports is, in its strict sense, conceived to be a definite act of an internationally responsible sovereign in the exercise of a right of belligerency. Its exercise involves the successive states of, first, proclamation by a sovereign state of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of good prize by a competent court of admiralty of the blockading sovereign. (Recent Supreme Court Decisions and other Opinions and Precedents, U. S. Naval War College, 1904, p. 207.)

That there may be doubt as to what constitutes effective blockade may be seen in the replies to the Venezuelan decree of June 28, 1902. The decree was as follows:

The constitutional President of the United States of Venezuela decrees:

Article 1. In consequence of the occupation of Ciudad Bolivar by insurrectionary forces, navigation in the waters of the Orinoco is prohibited, the extent of the coast line which embraces its mouths is blockaded, and the ports of Guira and Cano Colorado are closed to trade and navigation.

Art. 2. The port of La Vela de Coro is likewise declared to be blockaded.

Art. 3. The necessary naval forces shall be appointed to enforce the said blockade in a real and efficacious manner.

Art. 4. The commanders of the ships appointed to carry out the blockade of the above-mentioned ports shall duly observe the ordinances relating to the corsairs, dated the 30th of March, 1882, now in force, and the following provisions:

1. Ships which have been dispatched for the blockaded ports shall have the following terms, after the present decree has been communicated to their respective Governments, allowed them to enter: Steamships proceeding from Europe, one month; sailing vessels, two months; steamships proceeding from the United States, fifteen days; sailing vessels, one month; ships proceeding from the West Indies and Demerara, whether steamers or sailing vessels, shall have a term of ten days, with the exception of those proceeding from Trinidad and Grenada, which shall have but two days.

2. Merchandise which is destined for any port within the line of blockade may, at the discretion of the owner, be disembarked at any
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other established custom port on payment of the respective customs duties.

3. On any vessel, proceeding from any of the places above mentioned, reaching the line of blockade the commander of the nearest man-of-war shall communicate to him the order against crossing it, and in case he persist he shall be considered to wish to violate the blockade.

Art. 5. The ministers of the interior, foreign affairs, finance, and war and marine are charged to see to the execution of this decree and to communicate it to all whom it may concern.

Given, signed, sealed with the seal of the national executive and countersigned by the ministers of the interior, foreign affairs, finance, and war and marine, at the federal palace at Caracas, this 28th day of June, 1902, year 91 of the independence and 44 of the federation.

CIPRIANO CASTRO.

The United States minister, under date of September 7, 1902, reported to Secretary Hay:

SIR: I have the honor to inform you that I have learned that Germany and Great Britain based their refusal to recognize the blockade decreed by the Venezuela Government as effective on the assertion that the naval force of Venezuela is not sufficiently strong to render it effective. France confined her protest to Carupano and Cumana, stating that French ships had entered those ports without let or hindrance. I decided that, as we have no special interests in the ports blockaded, and as they seem to me likely to be occupied and abandoned from time to time by the revolutionists, it would be sufficient for me to simply remark to the minister for foreign affairs that we could not recognize as effective any blockade that we find to be ineffective. (U. S. Foreign Relations, 1902, pp. 1070, 1071.)

In an extended correspondence with the French Government the President of Venezuela tried to maintain that the blockade was effective if the vessels attempting to enter found it difficult and were in danger from Venezuelan blockaders. He said the blockading fleet was in proportion to the ordinary commerce and that most of the ships were prevented from entering, but this was not regarded as sufficient. It is not that most of the ships should be prevented, but that any ship should be in peril from attempting to enter the blockaded port.

Several cases involving questions of efficiency of blockade are briefly summarized in Atlay’s edition of Wheaton’s International Law:

A question respecting the efficiency of a blockade arose during the last Turco-Russian war. Turkey proclaimed a blockade of the whole
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...of the coasts of the Black Sea, from Trebizond to the mouth of the Danube, and maintained it by a force of cruisers in the Black Sea itself. This force prevented most of the trade with the Russian ports from being carried on, but, besides this, the Porte stationed two cruisers in the Bosphorus, and any vessels which escaped the Black Sea Squadron were captured on arriving there and taken before the Prize Court sitting at Constantinople. A more complete and efficient blockade could not possibly be devised; nevertheless it was argued for the owners of prizes that, being neutral vessels (mostly Greek), as soon as they had escaped the Black Sea Squadron they were free and were no longer liable to capture. The Turkish Prize Court, however, condemned the vessels. This case was peculiarly important from the fact that some of the foreign ambassadors at the Porte had intimated that if these vessels were not condemned the blockade would not be recognized by other countries. To hold that these Greek vessels were not liable to be captured in the Bosphorus would have been tantamount to opening the general commerce of the Black Sea to Greece, and this would have immediately invalidated the whole blockade.

The blockade of Formosa was notified by France in 1884. Great Britain protested, through its ambassador at Paris, alleging that the force at the disposal of the French admiral was insufficient. The blockade was in consequence abandoned till the arrival of reinforcements.

The blockade of insurgent Haitian ports proclaimed by Haiti in November, 1888, having ceased to be effective in the July following, Lord Salisbury notified the Haitian Government that it could not longer be respected, and that British vessels entering or leaving ports in the possession of the insurgents must not be molested by the Government cruisers. (Sections 513 b, c, d.)

The question as to what constitutes an effective blockade was raised in the case of the Olinde Rodrigues in 1898. In an opinion handed down by Chief Justice Fuller in 1899 (174 U. S., 510), the position of the court, with the grounds therefor, was stated as follows:

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but, on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (Apr. 16, 1856), was: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any
force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell, in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades'; that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. * * * The interpretation, therefore, placed by Her Majesty's Government on the Declaration was that a blockade, in order to be respected by neutrals, must be practically effective. * * * It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris on the subject of blockades which is above explained was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two Governments some years before the present war with a view to the accession of the United States to that Declaration." (Hall's Int. Law, paragraph 260, p. 730, note.)

The quotations from the Parliamentary Debates of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on international Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

Later in the same case it is stated:

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position can not be maintained that one modern cruiser, though sufficient in fact, is not sufficient as matter of law.

The definition of effective blockade was not sufficiently clear to all. Fauchille says:

La définition du blocus donnée par le congrès de Paris n'est pas aussi précise qu'elle aurait dû être. Sans doute, elle prohíbe certainement le blocus fictif qu'on appelle blocus sur papier, en vertu duquel, d'un trait de plume, un gouvernement met en état de siège des ports et des côtes entières; mais exclut-elle aussi formellement le blocus par croisière?

and later,

Nous ne croyons point toutefois que cette déclaration ait voulu précisément autoriser les blocus par croisière; elle ne les a pas désavoués
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expressemest, elle les a désavoués d’une façon indirecte seulement. Si la première phrase est indécise et peut permettre à l’Angleterre, dont elle est l’œuvre, de revenir à son ancienne pratique, la dernière phrase est au contraire plus précise et se rapproche d’une définition exacte du blocus effectif: En effet, il faut, d’après elle, que l’accès du littoral ennemi soit interdit réellement, soit rendu impossible par les forces bloquantes; or dans le blocus par croisière ce n’est pas l’abord de la côte qui est défendu, mais des vaisseaux croisant à une grande distance du port bloqué arrêtent les bâtiments qui s’y dirigent.

Quoi qu’il en soit, nous ne pouvons approuver une définition qui prête ainsì à double sens, et nous appelons de tous nos vœux le jour où les puissances, se dépouillant enfin des idées d’intérêt personnel, donneront une définition claire et précise du blocus effectif. (Du Blocus Maritime, pp. 110, 111.)

Wharton says in regard to blockades:

A blockade to be effective need not be perfect. It is not necessary that the beleaguered port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to casus or some rare and exceptional negligence, but to a general laxity or want of efficiency—then such blockade is not valid. (Commentaries American Law, section 233.)

The United States has entered into several treaty agreements in regard to blockade. Among those still in force are the following:

Article XIII of the treaty with Prussia, May 1, 1828, declares:

Considering the remoteness of the respective countries of the two high contracting parties and the uncertainty resulting therefrom with respect to the various events which may take place, it is agreed that a merchant vessel belonging to either of them which may be bound to a port supposed at the time of its departure to be blockaded shall not, however, be captured or condemned for having attempted a first time to enter said port, unless it can be proved that said vessel could and ought to have learned during its voyage that the blockade of the place in question still continued. But all vessels which, after having been warned off once, shall, during the same voyage, attempt a second time to enter the same blockaded port during the continuance of the said blockade, shall then subject themselves to be detained and condemned.

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This article also occurs in the treaty with Sweden-Norway, July 4, 1827.

The treaty with Italy of February 26, 1871, Article XIV, states:

And whereas it frequently happens that vessels sail for a port or a place belonging to an enemy without knowing that the same is besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband of war, be confiscated, unless, after a warning of such blockade or investment from an officer commanding a vessel of the blockading forces, by an indorsement of such officer on the papers of the vessel, mentioning the date and the latitude and longitude where such indorsement was made, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel of either that may have entered into such a port before the same was actually besieged, blockaded, or invested by the other be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof; and if any vessel having thus entered any port before the blockade took place, shall take on board a cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded and discharge the said cargo, and if after receiving the said warning the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port after being warned off by the blockading forces.

This article, omitting "by an indorsement of such officer on the papers of the vessel, mentioning the date and the latitude and longitude where such indorsement was made," appears in the treaty with Brazil of December 12, 1828.

Article 21 of the Japanese regulations relating to capture at sea of March 7, 1904, states that—

Blockade is to close an enemy's port, bay, or coast with force, and is effective when the force is strong enough to threaten any vessels that attempt to go in or out of the blockaded port or bay or to approach the blockaded coast.

Conclusion.—In regard to the question, "Should the provisions of the Declaration of Paris of 1856 be revised?" it may be said that the first clause, "Privateering is and
remains abolished” should be maintained. Regulations should be made, however, for the control of vessels such as those of the auxiliary navy.

In case regulations in regard to the exemption from capture of private property at sea in time of war are adopted the second and third articles, “The neutral flag covers enemy’s goods, with the exception of contraband of war,” and “Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag,” should be modified in such a manner as to coincide therewith.

The fourth clause, “Blockades, in order to be binding, must be effective—that is to say, maintained by a sufficient force really to prevent access to the coast of the enemy,” should receive new statement showing exactly what is meant and to what situations it applies, particularly what constitutes an effective blockade.

Pacific blockades will not affect powers not parties to them. (International Law Situations, 1902, Situation VII, pp. 75–83.)

In fine, the Declaration which is still binding on the signatory powers might well be subject to full consideration, and should before general acceptance be revised.