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International Law Topics and Discussions

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The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.
Topic II.

(a) What should be regarded as absolutely contraband?
(b) What should be regarded as conditional contraband?
(c) What are "the circumstances under which food stuffs and coal, and raw material, such as cotton, can be declared to be contraband?" (Question of Lord Reay in House of Lords, April 13, 1905, The London Times, April 14, 1905.)

CONCLUSION.

1. Absolute contraband.—When within or destined for the territory within the enemy's jurisdiction or for his military or naval use the following articles are absolutely contraband:
   (a) Military materials, such as weapons, ammunition, etc.
   (b) Instruments solely for use in warlike purposes, as machinery for the manufacture of military materials.
   (c) Any other articles solely for use in war.

2. Conditional contraband.—When destined for the enemy's military or naval use the following articles are contraband:
   Means of subsistence, fuel, means and material for transportation and communication on land or sea, money, and other articles, such as cement, cotton, lumber, etc., of use either for warlike or for peaceful purposes.

DISCUSSION AND NOTES.

The nature of contraband—Early opinions.—The above three questions are so closely related that they may most advantageously be considered together under a general discussion of contraband.

While the term contraband does not occur in early codes like "Il Consolato de Mare," yet the idea was understood. Grotius does not use the word contraband, though before his time it seems to have been used somewhat in domestic law. There is mention of contraband in a treaty between
England and Holland in 1625, the year of the publication of Grotius's great work. From this time contraband became more and more a subject of definition in public international law. Grotius, however, gives a clear classification of articles of commerce, even though not using the term contraband. He enumerates:

1. Those things which have their sole use in war, such as arms.
2. Those things which have no use in war, as articles of luxury.
3. Those things which have use both in war and out of war, as money, provisions, ships, and those things pertaining to ships. (De Jure Belli et Pacis, III, I, 5.)

Grotius further says, in regard to the conditions under which articles of the third class may come:

In the third class, objects of ambiguous use, the state of the war is to be considered. For if I can not defend myself except by intercepting what is sent, necessity, as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the execution of my rights, and if he who sends them may know this—as if I were besieging a town or blockading a port, and if surrender or peace were expected, he will be bound to me for damages; as a person would who liberates my debtor from prison, or assists his flight to my injury; and to the extent of the damage his property may be taken, and ownership thereof be assumed for the sake of recovering my debt. If he have not yet caused damage, but have tried to cause it, I shall have a right by the retention of his property to compel him to give security for the future by hostages, pledges, or in some other way. But if, besides, the injustice of my enemy to me be very evident, and he confirms him in a most unjust war, he will then be bound to me not only civilly, for the damage, but also criminally, as being one who protects a manifest criminal from the judge who is about to inflict punishment, and on that ground it will be lawful to take such measures against him as are suitable to the offense, according to the principles laid down in speaking of punishment; and therefore to that extent he may be subjected to spoliation. (Whewell's translation, Grotius, De Jure Belli et Pacis, III, I, 5.)

Destination was early recognized as an important factor in determining the character of goods in time of war. This was recognized in treaties and in proclamations. This principle seems to have been recognized in some form certainly so early as the time of Josephus. The provision is inserted in a treaty between France and England in 1303. An English proclamation of 1625 enumerates as prohibited articles of commerce with the enemy "any
manner of graine, or victualls, or any manner of provi­sions to serve to build, furnish, or arme any shipps of warr, or any kind of munition for warr, or materials for the same, being not of the nature of mere merchandize.”

(December 30, 1625.) Gradually the enumeration becomes more detailed. On March 4, 1626, a proclamation speaking of things prohibited says “His Majestie” regards the following as such, “ordinance, armes of all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kinds, hempe, faile, canvas, danuce pouldavis, cables, anchors, mastes, rafters, boate ores, baleks, capraves, deale board, clap board, pipe staves, and vessels and vessel staffe, pitch, tarr, rosen, okam, corne, graine, and victualls of all sorts, all provisions of shipping, and all munition of warr, or of provisions for the same, according to former declarations and acts of state, made in this behalfe in the tyme of Queen Elizabeth, of famous memorie.”

This same proclamation extends the penalty for carrying contraband to the return “in the same voyage.” This practice did not, however, continue in favor, and by the end of the eighteenth century the penalty for carrying contraband was generally considered to be deposited with the cargo.

Opinions of United States Courts.—In the case of The Commercial, in 1816, the decision rendered by Story, it is stated that—

By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of their destination. If destined for the ordinary use of life in the enemy’s country they are not, in general, contraband; but it is if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. (1 Wheaton, U. S. Supreme Court Reports, 387.)

The decision rendered by Chief Justice Chase in the case of The Peterhoff, in 1866, has been regarded as stating the general principles in regard to contraband from the point of view of the United States:

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. 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 blockade or siege. (5 Wallace, U. S. Supreme Court Reports, 49.)

Mr. Balfour’s opinion in 1904.—Even at present a satisfactory classification of contraband does not seem to be established. Mr. Balfour, in a reply to the Shipping Deputation on August 25, 1904, said:

I could not give a list of things which are or are not contraband of war, nor could any international lawyer fulfill any such demand. But the principle we have laid down as, we believe, in absolute conformity with the laws and practice of nations is that warlike stores carried to a belligerent are undoubtedly contraband of war; that coal carried to a belligerent for the purpose of aiding him in his warlike operations is undoubtedly contraband; that food stuffs carried to an army in the field or to a beleaguered fortress, or carried to a foreign country to aid the troops or fleet are contraband; but we do not accept the doctrine which is apparently laid down—and I lay stress on the word “apparently”—because there is some ambiguity about it. We do not accept the doctrine apparently laid down in the Russian notification that coal, food stuffs, cotton, and many other things are absolutely contraband of war, and that the mere fact that they are found on board ship justifies the seizure of the goods and, in certain circumstances, the capture and retention and confiscation of the vessel. (The Times, August 26, 1905.)

Treaty specifications in regard to contraband.—The United States has certain specific treaty agreements in regard to contraband. The treaty with Bolivia, 1858, article 17, provides that under the name contraband shall be comprehended:

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuses, rifles, carbines, pistols, pikes, swords, sabers, lances, spears, halberds and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms.

2d. Bucklers, helmets, breastplates, coats of mail, infantry belts, and clothes made up in the form and for a military use.
3d. Cavalry belts, and horses with their furniture.

4th. And, generally, all kinds of arms offensive and defensive, and instruments of iron, steel, brass, and copper, or any other materials, manufactured, prepared, and formed expressly to make war by sea or land. (Compilation of Treaties in Force 1789-1904, p. 93.)

The treaties with Brazil in 1828, with Haiti in 1864, and with Italy in 1871 are practically identical. So also is that with Colombia of 1846, except that it has an additional category, "5th. Provisions that are imported into a besieged or blockaded place." Some of the earlier treaties show the development of lists. The treaty with Sweden in 1783 enumerates the following:

**ART. 9.** Under the name of contraband or prohibited goods shall be comprehended arms, great guns, cannon balls, arquebuses, musquets, mortars, bombs, petards, granadoes, saucisses, pitch balls, carriages for ordnance, musquet rests, bandoleers, cannon powder, matches, saltpetre, sulphur, bullets, pikes, sabres, swords, morions, helmets, cuirasses, halberds, javelins, pistols and their holsters, belts, bayonets, horses with their harness, and all other like kinds of arms and instruments of war for the use of troops. (Compilation of Treaties in Force 1789-1904, p. 746.)

The treaty with Prussia in 1799 provides that—

All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles, and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel or passenger ought to have, and in general whatever is comprised under the denomination of arms and military stores, of what description so ever, shall be deemed objects of contraband. (Compilation of Treaties in Force 1789-1904, p. 639.)

**Declarations in regard to contraband.**—The following declarations have been made in recent years in regard to contraband:

**United States.**—The term contraband of war comprehends only articles having a belligerent destination, as to an enemy's port or fleet. With this explanation, the following articles are, for the present, to be treated as contraband:

**Absolutely contraband.**—Ordnance; machine guns and their appliances, and the parts thereof; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or
sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accouterments and equipments of all sorts; horses.

Conditionally contraband.—Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged. (General Order, No. 492, Navy Department, June 20, 1898.)

Spain.—Under the denomination contraband of war, the following articles are included:

Cannons, machine guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpeter, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles, and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of war ships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband. (Article VI, Spanish Decree of April 23, 1898.)

The continental position has usually been to maintain two classes of goods only, i.e., contraband and non-contraband.

The Japanese proclamation of February 10, 1904, follows the British and American practice of making a distinction between absolute and conditional contraband:

Art. XIII. The following goods are contraband of war when they are destined to the enemy's territory or to the enemy's army or navy:

Arms, ammunition, explosives, and materials (including also lead, saltpeter, sulphur, etc.), and machines for manufacturing them; cement; uniforms and equipment for army and navy; armor plates; materials for building ships and their equipments; and all articles to be used solely for hostile purposes.

Art. XIV. The following goods are contraband of war in case they are destined to the enemy's army or navy, or in case they are destined to the enemy's territory and from the landing place it can be inferred that they are intended for military purposes:

Provisions and drinks; clothing and materials for clothing; horses; harnesses; fodder; wheeled vehicles; coal and other kinds of fuel; a

a The words in italics were added to the regulations by an amendment of February 9, 1905.
RUSSIAN RULES.

timber; currency; gold and silver bullion; materials for telegraph, telephone, and railroad.

Art. XV. The destination of a vessel is generally considered as also the destination of her cargo.

The Russian rules in regard to maritime prizes were approved by the Emperor on March 27, 1895. These rules are full, containing 93 articles. The general provisions are as follows:

DISPOSITIONS GÉNÉRALES.

Art. 1. Les dispositions du présent règlement sont applicables à tous les cas de prises, sauf ceux qui sont régis par des règles spéciales résultant de traités passés avec la Russie.

Remarque.—Des règles spéciales sont applicable à la saisie des objets appartenant à l'ennemi lorsqu'ils se trouvent sur la côte.

Art. 2. En vertu de la déclaration de Paris du 4/16 avril 1856, les règles suivantes sont observées dans l'application du présent règlement: 1° des lettres de marque ne sont pas délivrées au nom des particuliers; 2° le pavillon neutre couvre le chargement ennemi, sauf la contrebande de guerre; 3° les marchandises neutres, sauf la contrebande de guerre, ne peuvent être confisquées sous pavillon ennemi; 4° le blocus, pour être considéré comme obligatoire, doit être effectif, c'est-à-dire appuyé de forces militaires suffisantes pour empêcher l'accès de la côte ennemie.

Art. 3. Pour la validité de la prise, il faut qu'elle ait eu lieu par la force ouverte ou par une ruse de guerre licite, mais jamais par trahison.

Art. 4. Le gouvernement impérial, tout en admettant l'application du principe de réciprocité aux dispositions du présent règlement limitatives du droit d'arrêter, de visiter, de saisir et de confisquer les bâtiments appartenant à un État ennemi ou neutre ou à ses ressortissants, se réserve le droit d'y déroger à l'égard de ceux de ces États de la part desquels on ne peut en espérer l'observation, et il réglera sa manière d'agir en cette matière suivant les circonstances de chaque cas particulier.

Art. 5. Sont considérés comme prises: 1° les navires et chargements appartenant à l'ennemi, ainsi que les navires et chargements appartenant aux neutres et 2° les navires et chargements russes, alliés ou neutres repris à l'ennemi, au cas où la capture ou reprise a eu lieu conformément aux dispositions du présent règlement.

In regard to neutral ships it is provided:

Art. 11. Les navires de commerce de nationalité neutre sont susceptibles de confiscation à titre de prise dans les cas suivants: 1° quand ils sont surpris transportant à l'ennemi ou au port ennemi: (a) Des armes à feu et des munitions ainsi que des explosifs en n'importe quelle quantité, (b) d'autres objets de contrebande de guerre en
quantité dépassant la moitié du volume ou du poids du chargement, (r) des détachements de troupes ennemies, si, dans tous les cas, il n’est pas prouvé que la déclaration de guerre était restée ignorée du capitaine; 2° quand ils sont surpris en violation du blocus et qu’il n’est pas prouvé que l’établissement du blocus était resté ignoré du capitaine, 3° quand ils résistent à main armée à l’ordre d’arrêt, à la visite ou à la capture; 4° quand ils ont participé aux actes d’hostilité de l’ennemi.

Art. 12. Le chargement des navires de commerce de nationalité neutre est susceptible de confiscation à titre de prise: 1° quand ce chargement consiste en contrebande de guerre portée à l’ennemi ou dans un port ennemi et qu’il n’est pas prouvé que la déclaration de guerre est restée ignorée du capitaine; 2° quand le chargement se trouve à bord d’un navire susceptible de confiscation en vertu des paragraphes 2-4 de l’article 11 et qu’il n’est pas prouvé qu’il appartient à des sujets ou à des neutres étrangers aux actes entraînant la confiscation.

Art. 13. La liste des objets réputés contrebande de guerre est portée à la connaissance du public par une déclaration spéciale. Sont exemptes de confiscations ceux de ces objets qui font partie de l’armement et de l’approvisionnement du navire de nationalité neutre.

In accord with the above article 13, Russia issued the following rules early in the war with Japan in 1904:

6. The following articles are deemed to be contraband of war:

(1) Small arms of every kind, and guns, mounted or in sections, as well as armor plates;

(2) Ammunition for firearms, such as projectiles, shell fuses, bullets, priming, cartridges, cartridge cases, powder, saltpeter, sulphur;

(3) Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes;

(4) Artillery, engineering, and camp equipment, such as gun carriages, ammunition wagons, boxes or packages of cartridges, field kitchens and forges, instrument wagons, pontoons, bridge trestles, barbed wire, harness, etc.;

(5) Articles of military equipment and clothing, such as bandoliers, cartridge boxes, knapsacks, straps, cuirasses, intrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, etc.;

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

(7) Boilers and every kind of naval machinery, mounted or unmounted;

(8) Every kind of fuel, such as coal, naphtha, alcohol, and other similar materials;
(9) Articles and materials for the installation of telegraphs, telephones, or for the construction of railroads;

(10) Generally, everything intended for warfare by sea or land, as well as rice, provisions, and horses, beasts of burden, and other animals, which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy.

7. The following acts, forbidden to neutrals, are assimilated to contraband of war: The transport of the enemy's troops, of his dispatches and correspondence, the supply of transports and war ships to the enemy. Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be seized and even confiscated. (Rules of February 14, 1904.)

This Russian declaration in regard to contraband has called forth definite statements in regard to the position which certain neutral Governments proposed to assume. Various protests against the extreme position of Russia were lodged with that Government.

*Prize court decisions.*—Decisions have been made in accord with the Russian enumeration. These decisions of the Russian prize courts in some instances have been called in question. In some quarters this questioning of the decision of a prize court has been regarded as contrary to international comity if not to law. Such statements have been quoted as that of Walker's in regard to the regular prize court:

That prize court can, by the nature of the case, be only the prize court of the captor, since, on the one hand, no independent belligerent will submit the legality of his conduct to the determination of third powers, and, on the other hand, no neutral third power can consistently with neutrality interfere between captor and captured. It has accordingly become well-recognized law that, in general, the jurisdiction of the prize court of the captor is in prize questions exclusive and the judgment of that court on a point within its competence is conclusive against the world. (Manual of Public International Law, p. 151.)

Prize courts, however, are not supposed to be prejudiced, though undoubtedly the local conditions may sometimes influence judgments.

Sir William Scott, in the case of the *Maria*, in 1799, declared the purpose of the prize court to be—

to administer with indifference that justice which the law of nations holds out, without distinction to independent States, some happening to be neutral and some to be belligerent. The seat of judicial author-
ity is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. (1 C. Robinson's Admiralty Reports, 340.)

In supporting the position that a neutral nation is not bound to abide by the decision of a prize court, if such court is not properly constituted and does not respect international law, Mr. Balfour, in the House of Commons on August 11, 1904, said:

I must traverse the doctrine that when any prize court has given a decision, if the decision is contrary to the law of nations, it is to be accepted by the neutral. No neutral, doubtless, would desire to quarrel with the decision of a perfectly constituted prize court of a belligerent country dealing with these matters; but if it be found that those prize courts do habitually condemn as contraband of war things which the law of nations says are not unconditional contraband of war, I do not think it would be possible for the neutral to sit down absolutely quiescent under a decision of that character.

Great Britain also acted in accord with this principle in asserting that she could not recognize as binding the decision of a prize court which should attempt to maintain the declaration of France in 1885 that rice bound for north China ports would be regarded as contraband. (Parliamentary Papers, France, No. 1, 1885.)

It must be observed that this position does not completely accord with the position taken in Holland's British Admiralty Manual of Prize Law, which asserts that—

It is a part of the prerogative of the Crown during the war to extend or reduce the lists of articles to be held absolutely or conditionally contraband, subject, however, to any treaty engagements binding upon Great Britain. (No. 65.)

Nor does this clause of the Admiralty Manual accord with the position taken by other States during the Russo-Japanese war in 1904. The States protesting against the classification of contraband made by Russia asserted that such classification could not be arbitrarily extended, but should be in accord with international law.

At the meeting of the Institute of International Law at Edinburgh, in September, 1904, the Lord Chancellor set forth the position which has met with growing favor. He said:
Because two nations go to war they have no right to interrupt and interfere with the commerce of the world. They must recognize that people who are not engaged in the quarrel have a right to carry on their commerce.

Protests against Russian attitude, 1904–5.—Protests and representations of various degrees of directness were made in consequence of Russia's attitude on contraband in the Russo-Japanese war of 1904–5.

The Government of the United States sent the following communication:

DEPARTMENT OF STATE,
Washington D. C., June 10, 1904.

To the Ambassadors of the United States in Europe:

GENTLEMEN: It appears from public documents that coal, naphtha, alcohol, and other fuel have been declared contraband of war by the Russian Government. These articles enter into general consumption in the arts of peace, to which they are vitally necessary. They are usually treated, not as "absolutely contraband of war," like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as "conditional contraband," that is to say, articles that may be used for or converted to the purposes of war or peace, according to circumstances. They may rather be classed with provisions and food stuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military or naval forces of the enemy.

In the war between the United States and Spain the Navy Department General Orders, No. 492, issued June 20, 1898, declared in article 19, as follows:

"The term contraband of war comprehends only articles having a belligerent destination." Among articles absolutely contraband it declared ordnance, machine guns, and other articles of military or naval warfare. It declared as conditional contraband "coal, when destined for a naval station, a port of call, or a ship or ships of the enemy." It likewise declared provisions to be conditionally contraband "when destined for the enemy's ship or ships, or for a place that is besieged."

The above rules as to articles absolutely or conditionally contraband of war were adopted in the naval war code promulgated by the Navy Department June 27, 1900. (Withdrawn February 4, 1904.)

While it appears that the documents mentioned that rice, food stuffs, horses, beasts of burden, and other animals which may be used in time of war are declared to be contraband of war only when they are transported for account of or destined to the enemy, yet all kinds of fuel, such as coal, naphtha, alcohol are classified along with arms, ammunition, and other articles intended for warfare on land and sea.
The test in determining whether articles auriipitis usus are contraband of war is their destination for military uses of a belligerent. Mr. Dana in his notes to Wheaton's International Law, says:

"The chief circumstance of inquiry would naturally be the port of destination. If that is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which military expedition is fitted out, the presumption of military use would be raised more or less strongly according to circumstances."

In the wars of 1859 and 1870 coal was declared by France not to be contraband. During the latter war Great Britain held that the character of coal depended upon its destination and refused to permit vessels to sail with it to the French fleet in the North Sea. Where coal or other fuel is shipped to a port of a belligerent, with no presumption against its specific use, to condemn it as absolutely contraband would seem to be an extreme measure.

Mr. Hall, International Law, says:

"During the West African conference in 1884 Russia took occasion to dissent vigorously from the inclusion of coal among articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition as such."

We are also informed that it is intended to treat raw cotton as a contraband of war. While it is true raw cotton could be made into clothing for military uses of a belligerent, a military use for the supply of the army or garrison might possibly be made of foodstuff of every description which might be shipped from neutral ports to the non-blockaded ports of a belligerent. The principle under consideration might, therefore, be extended so as to apply to every article of human use which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.

Coal or other fuel and cotton are applied for a great many innocent purposes. Many nations are dependent on them for the conduct of inoffensive industries, and no sufficient presumption of an intended warlike use seems to be afforded by the mere fact of their destination to a belligerent port. The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent States of all articles which could be finally converted to military uses. Such an extension of the principle, by treating coal and all other fuel and raw cotton as absolute contraband of war simply because they are shipped by a neutral to a nonblockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce.

I am your obedient servant,                                               

John Hay.
Later in 1904 there was an exchange of views on the subject of the declaration of Russia between the Governments of Great Britain and the United States.

* * *

**Mr. Choate to Lord Lansdowne.**

AMERICAN EMBASSY,

London, June 24, 1904.

MY LORD: Referring to our recent interviews, in which you expressed a desire to know the views of my Government as to the order issued by the Russian Government on the 28th of February last, “making every kind of fuel, such as coal, naphtha, alcohol, and other similar materials, unconditionally contraband,” I am now able to state them as follows:

These articles enter into great consumption in the arts of peace, to which they are vitally necessary. They are usually treated not as “absolutely contraband of war,” like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as “conditionally contraband;” that is to say, articles that may be used for or converted to the purposes of war or peace according to circumstances. They may rather be classed with provisions and foodstuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military and naval forces of the enemy.

The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent states of all articles which could be finally converted to military uses. Such an extension of the principle, by treating coal and all other fuel and raw cotton as absolutely contraband of war simply because they are shipped by a neutral to a non-blockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce.

I shall be glad to receive and transmit to my Government the views of His Majesty’s Government on the same question as soon as your lordship shall have formulated them.

I have, etc.,

JOSEPH H. CHOATE.

Lord Lansdowne replied:

FOREIGN OFFICE, July 29, 1904.

YOUR EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 24th ultimo, containing the views of the United States Government with regard to the Russian regulations of the 28th February last, in which every kind of fuel, such as coal, naphtha, alcohol, and other similar materials is declared to be absolutely and unconditionally contraband of war.

I have the honor to inform Your Excellency, in reply to your request to be furnished with the views of His Majesty’s Government on
this subject, that the views of the United States Government, as expressed in Your Excellency's note, are generally in accord with those which have been held and acted upon from time to time by His Majesty's Government. With reference, however, to the statement made in paragraph 7 as to the attitude of Great Britain in 1870 in regard to coal, I would observe that Her late Majesty's Government refused in that year to permit vessels to sail with coal to the French fleet, not merely because they held that the character of the coal depended upon its destination, but because they held that steamers engaged to take out cargoes of coal to the French fleet in the North Sea would be in reality acting as storeships to that fleet.

It is, however, right that I should add that in the altered conditions of modern maritime warfare and the ever increasing importance of the part played therein by coal, His Majesty's Government propose to submit the whole question to careful and exhaustive examination at an early date, with the question of determining whether and in what respects the British rules, as hitherto acted upon, are in need of revision.

In these circumstances His Majesty's Government do not propose to make any formal protest at the present stage against the Russian declaration in so far as the question of coal is concerned. They have, however, already entered a protest against the treatment of foodstuffs as absolutely contraband, and they have pointed out that they observe with great concern that rice and provisions will be treated as unconditionally contraband, a step which they regard as inconsistent with the law and practice of nations.

In that protest it was stated that His Majesty's Government does not contest that in particular circumstances provisions may acquire a contraband character, as, for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying, or if facts should exist raising the presumption that they are about to be employed in victualing the fleet or forces of the enemy. In such cases it is not denied that the other belligerent would be entitled to seize the provisions as contraband of war, on the ground that they would afford material assistance toward the carrying on of war-like operations.

They could not, however, admit that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they must, on that ground alone, be of necessity regarded as contraband of war.

In the view of His Majesty's Government the test appeared to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.

His Majesty's Government further pointed out that the decision of the prize court of the captor in such matters, in order to be binding on neutral states, must be in accordance with recognized rules and principles of international law and procedure.

They therefore felt themselves bound to reserve their rights by pro-
testing at once against the doctrine that it is for the belligerent to
decide that certain articles or classes of articles are, as a matter of
course and without reference to the considerations above referred to, to
be dealt with as contraband of war regardless of the well-established
rights of neutrals; nor would they consider themselves bound to rec-
ognize as valid the decision of any prize court which violated these
rights, or was otherwise not in conformity with the recognized princi-
pies of international law.

I have, etc.,

LANDSDOWNE.

The position of Great Britain was also clearly stated in
a communication to the British representative in Russia:

It has been held by this country, and our officers have been so
instructed, that the term "contraband of war" includes only articles
having belligerent destination and purpose. Such articles have been
classed under two heads—

1. Those that are primarily and ordinarily used for military pur-
poses in time of war, e. g., arms and munitions of war, military mate-
rial, etc.; articles of this kind being usually described as absolutely
contraband.

2. Those that may be, and are, used for peaceful or warlike
purposes according to circumstances; such articles being usually described as
conditionally contraband. (Marquess of Lansdowne to Sir C. Hard-
inge, August 10, 1904. Parliamentary Papers, Russia, No. 1 (1905),
p. 13.)

On August 30, 1904, the United States Government
made known to its ambassador at St. Petersburg its posi-
tion on certain questions relating to contraband. The
letter is as follows:

No. 143.] DEPARTMENT OF STATE,
Washington, August 30, 1904.

His Excellency Robert S. McCormick, Etc.,
St. Petersburg.

SIR: I have the honor to acknowledge the receipt of your No. 176,
of the 10th instant.

The Department has carefully considered the note of the Russian
minister of foreign affairs, dated July 27 last, a copy of which is in-
closed with your dispatch, with reference to the decision of the prize
court in the case of the steamship Arabia, containing American cargo,
seized by the Russian naval forces and sent to Vladivostok for adjudica-
tion.

As communicated to you by the minister the decision of the court
was "that the steamer Arabia was lawfully seized, that the cargo,
composed of railway material and flour, weighing about 2,360,000
livres, destined to Japanese ports and addressed to different commer-
cial houses in said ports, constitutes contraband of war; * * *
that the cargo bound for Japanese ports should be confiscated as being lawful prize.''

In communicating the said decision the minister observed, in response to the request of this Government for the release of the non-contraband portion of the cargo, that the question could only be decided through judicial channels on the basis of a decision of the prize court.

This is the first authentic information which the Department has received of the precise grounds on which the prize court decided to confiscate the railway material and flour in question. The judgment of confiscation appears to be founded on the mere fact that the goods in question were bound for Japanese ports and addressed to various commercial houses in said ports. In view of its well-known attitude it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment, which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war. If the judgment and the communication accompanying its transmission are to be taken as an expression of the attitude of His Imperial Majesty's Government, and as an interpretation of the Russian imperial order of February 29 last, it raises a question of momentous import in its bearing on the rights of neutral commerce.

The Russian imperial order denounces as absolutely contraband of war telegraph, telephone, and railway materials, and fuel of all kinds, without regard to the question whether destined for military or for purely pacific and industrial uses.

Clause 5, article 10, of the imperial order denounces as contraband of war "all articles destined for war on land or sea, as well as rice, provisions, and horses, beasts of burden, and others (autres) capable of serving a warlike purpose, and if they are transported on account of or to the destination of the enemy."

The ambiguity of meaning which characterizes the language of this clause, lending itself to a double interpretation, left its real intendment doubtful. The vagueness of the language, used in so important a matter, where a just regard for the rights of neutral commerce required that it should be clear and explicit, could not fail to excite inquiry among American shippers who, left in doubt as to the significance attributed by His Imperial Majesty's Government to the word "enemy"—uncertain as to whether it meant "enemy government or forces" or "enemy ports or territory"—have been compelled to refuse the shipment of goods of any character to Japanese ports. The very obscurity of the terms used seemed to contain a destructive menace, even to legitimate American commerce.

In the interpretation of clause 10 of article 5, and having regard to the traditional attitude of His Imperial Majesty's Government, as well as to the established rule of international law, with respect to goods which a belligerent may or may not treat as contraband of war, it seemed to the Government of the United States incredible that the
SECURLARY HAY ON RUSSIAN POSITION.

word "autres" or the word "l'ennemi" could be intended to include, as contraband of war, food stuffs, fuel, cotton, and all "other" articles destined to Japanese ports, irrespective of the question whether they were intended for the support of a noncombatant population or for the use of the military or naval forces. In its circular of June 10 last, communicated by you to the Russian Government, the Department interpreted the word "enemy" in a mitigated sense, as well as in accordance with the enlightened and humane principles of international law, and therefore it treated the word "enemy," as used in the context, as meaning "enemy Government or forces" and not the "enemy ports or territory."

But if a benign interpretation was placed on the language used, it is because such an interpretation was due to the Russian Government, between whom and the United States a most valued and unbroken friendship has always existed, and it was no less due to the commerce of the latter, inasmuch as the broad interpretation of the language used would imply a total inhibition of legitimate commerce between Japan and the United States, which it would be impossible for the latter to acquiesce in.

Whatever doubt could exist as to the meaning of the imperial order has been apparently removed by the inclosure in your dispatch of the note from Count Lamsdorff, stating tersely and simply the sentence of the prize court. The communication of the decision was made in unqualified terms, and the Department is therefore constrained to take notice of the principle on which the condemnation is based and which it is impossible for the United States to accept, as indicating either a principle of law or a policy which a belligerent State may lawfully enforce or pursue toward the United States as a neutral.

With respect to articles and material for telegraphic and telephonic installations, unnecessary hardship is imposed by treating them all as contraband of war, even those articles which are evidently and unquestionably intended for merely domestic or industrial uses. With respect to railway materials, the judgment of the court appears to proceed in plain violation of the terms of the imperial order, according to which they are to be deemed to be contraband of war only if intended for the construction of railways. The United States Government regrets that it could not concede that telegraphic, telephonic, and railway materials are confiscable simply because destined to the open commercial ports of a belligerent.

When war exists between powerful States it is vital to the legitimate maritime commerce of neutral States that there be no relaxation of the rule—no deviation from the criterion—for determining what constitutes contraband of war lawfully subject to belligerent capture, namely, warlike nature, use, and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use are contraband of war if destined to enemy territory; but articles which, like coal, cotton, and provisions, though of ordinarily innocent,
are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.

This substantive principle of the law of nations can not be overridden by a technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature, and it can not be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise all neutral commerce with the people of a belligerent State would be impossible; the innocent would suffer inevitable condemnation with the guilty.

The established principle of discrimination between contraband and noncontraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness and destination has been adopted by the common consent of civilized nations after centuries of struggle in which each belligerent made indiscriminate warfare upon all commerce of all neutral States with the people of the other belligerent, and which led to reprisals as the mildest available remedy.

If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by His Imperial Majesty's Government is acquiesced in, it means, if carried unto full execution, the complete destruction of all neutral commerce with the noncombatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principle of the Declaration of Paris set forth in the imperial order of February 29 last that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and noncontraband goods, and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State.

You will express to Count Lanslorff the deep regret and grave concern with which the Government of the United States has received his unqualified communication of the decision of the prize court; you will make earnest protest against it and say that the Government of the United States regrets its complete inability to recognize the principle of that decision and still less to acquiesce in it as a policy.

I have the honor to be, sir, your obedient servant,

John Hay.

The American ambassador on September 21 sent the following reply:

No. 186.]

American Embassy,
St. Petersburg, September 21, 1904.

Sir: I have the honor to confirm my cablegram of the 19th with reference to the attitude of the Russian Government on the subject of contraband of war and to transmit to you a copy of a memorandum
handed me by Count Lamsdorff practically reiterating what he had said to me on former occasions with reference to any discussion of the facts or of the principle involved in the seizure and condemnation by the prize court at Vladivostok of that part of the cargoes of these two ships which were consigned to merchants in open Japanese ports.

Count Lamsdorff was not prepared to take any issue with me on the declarations and principles contained in your circular note (circular of June 10, 1904, printed ante) and your instructions No. 143, of August 30 (printed ante), a copy of the former having been handed to him, and the contents of the latter having been transmitted to him practically in extenso as well as the contents of your instruction on the subject of the seizure of the cargo of the Arabia.

Count Lamsdorff said, in addition to what I have already transmitted to you by cable, that to unconditionally accept as noncontraband all merchandise not universally accepted or described in their own rules as such would open the door to contractors in Japan to import food stuffs and other merchandise without limit for account of the Japanese Government; that is, on account of or in destination of the enemy. That the Russian Government could not but consider as contraband a cargo of flour consigned to a port at which was quartered a large body of troops, and that, extending this principle, the ultimate destination of the cargo had to be taken into consideration, although its direct consignment might be to a merchant in an open port.

This statement, with a copy of the aide-memoire which is herewith inclosed, will enable you to understand the position of the Russian Government at this time.

My only reply was that it meant, practically, abrogation of the principle "that the blockade, in order to be obligatory, must be effective," and relieved Russia of the necessity of maintaining one. To this he replied that nobody would be so naive as to consign merchandise not prima facie contraband, although intended for the enemy, to the destination of the enemy, substituting therefor a middleman in the shape of a merchant in the open port. He added here, as he repeated several times, that we would see that in the future there would be less ground for complaint and that it was far from the desire of the Russian Government to place any obstacles in the way of legitimate commerce with Japan, but that they would be compelled to take such steps as would be necessary to prevent supplies of any character ultimately intended for the use of the enemy from reaching their destination. He added that the several notes I had written on the subject, as well as your circular note of June 10, had been handed to Professor Martens, who would consider the representations made therein when the cases of the Arabia and Calchas came before the admiralty court of St. Petersburo.

The Russian Government admitted that provisions might be regarded as conditionally contraband.
The British Government expressed its approval and commented on the matter.

Sir C. Hardinge to Count Lansdorff.

ST. PETERSBURG, September 28 (October 11), 1904.

M. le Comte: I duly reported to His Majesty's Government that Your Excellency had informed me that the Russian Government have, in consequence of the decision of the Commission appointed by Imperial Order under the Presidency of Professor Martens, to study the question of contraband of war, issued supplementary instructions to Naval Commanders and Naval Prize courts, defining the interpretation of section 10 of Article 6 of the Regulations of the 27th February last. According to the supplementary instructions, the conditionally contraband nature of rice and provisions, used for peaceful or warlike purposes according to circumstances, is admitted by the Russian Government.

I am now instructed by the Marquess of Lansdowne to inform Your Excellency that His Majesty's Government desire to acknowledge the friendly spirit in which their representations in this matter have been met by the Russian Government. They learn with satisfaction that it is not intended to treat rice and provisions as unconditionally contraband of war, and they trust that Your Excellency's anticipation (which I mentioned to Lord Lansdowne), that the decision arrived at will tend to avoid difficulties in the future, may be realized.

His Majesty's Government note that, in the view of the Russian Government, such articles are not necessarily free from seizure and condemnation as contraband of war merely because they are addressed to private firms or individuals in the enemy's country, the Russian Government holding that they may, nevertheless, be in reality intended for the military or naval forces of the enemy.

While His Majesty's Government do not contend that the mere fact that the consignee is a private person should necessarily give immunity from capture, they hold, on the other hand, that to take vessels for adjudication merely because their destination is the enemy's country would be vexatious and constitute an unwarrantable interference with neutral commerce. To render a vessel liable to such treatment there should, in the opinion of His Majesty's Government, be circumstances giving rise to a reasonable suspicion that the provisions are for the enemy's forces, and it is in such a case for the captor to show that the grounds of suspicion are adequate and to establish the fact of destination for the enemy's forces before attempting to procure their condemnation.

In bringing these views to Your Excellency's notice I am to state that, for the reasons mentioned, His Majesty's Government trust that the instructions now issued will be interpreted in a liberal and considerate spirit by the Naval Commanders and the Prize Courts to whom they are addressed.

I am to add, at the same time, that His Majesty's Government can not refrain from expressing their regret that the same principle has,
so far, not been admitted in the case of certain other commodities enumerated in the Regulations issued in February last—such, for example, as coal and raw cotton, which clearly appear to be susceptible of use for other than warlike purposes. They cherish, however, the hope that the views which His Majesty's Government have already expressed on this subject may receive favorable consideration at the hands of the Russian Government and that the principle of conditional contraband, which has been admitted by the Russian Government, may receive still further extension in its application.

I avail, etc.,

(Signed) CHARLES HARDINGE.

(Parliamentary Papers, Russia, No. 1 (1905), p. 26.)

In consequence of the questions and protests, interpretations and modifications of the rules were made.

In the Journal de Saint Petersbourg of September 30, 1904, the following appeared:

In consequence of doubts which have arisen as to the interpretation of article 6, section 10, of the regulations respecting contraband of war, it has been resolved, as we are in a position to announce, that the articles in regard to which no decision has been taken shall be considered as contraband of war if they are destined for:

- The government of the belligerent powers;
- Their administrations;
- Their army; or
- Their purveyors.

In cases where they are addressed to private individuals these articles shall not be considered as contraband of war.

Vessels shall only be confiscated in cases where prohibited merchandise forms more than half of the cargo.

In the contrary case only the cargo shall be confiscated. All possible measures have thus been taken to insure freedom of commerce to neutral powers.

It is to be hoped that the Powers will appreciate the considerable latitude which is at present allowed to the free movement of their commerce and will not give occasion to reproach them with abuses relative to the Regulations on Contraband of War. (Parliamentary Papers, Russia, No. 1 (1905), p. 23.)

The Russian rules relating to conditional contraband received further consideration by the British Government. The following letter indicates the position taken:

Sir C. Hardinge to Count Lansdorff.

ST. PETERSBURG, October 9, 1904.

M. LE COMTE: On the 16th August I had the honour to communicate to Your Excellency the substance of a despatch which I had received from the Marquess of Lansdowne, in which the views of His Majesty's
Government were very clearly expressed on the subject of the treatment by the Russian Government as unconditional contraband of an extensive category of articles enumerated under sections 8 and 10 of Rule 6 of the Regulations published by the Russian Government on the 14th February of this year. In this statement of the views of His Majesty's Government, Lord Lansdowne explained the grounds upon which it was impossible to admit the claims of the Russian Government, and he defined the measures which His Majesty's Government would be reluctantly compelled to take in the event of the interests of British subjects suffering by the application of these rules.

It was with much satisfaction that I received on the 16th ultimo a verbal communication from Your Excellency to the effect that the principle of conditional contraband was admitted by the Russian Government, and that all the articles mentioned in paragraph 10 of article 6 of the Rules of the 14th February, 1904, with the exception of horses and beasts of burden, had been recognized as articles of a conditionally contraband nature.

I have since had the honor to point out to Your Excellency that the principle of conditional contraband having been admitted by the Russian Government, the application of this principle could not be logically withheld from coal, which, though essentially contraband when used for warlike objects, has a much wider use for peaceful purposes, and being a commodity of primary necessity for heating, cooking, and manufactures, enjoys when so employed a perfectly innocent character.

In reply to my representation, Your Excellency has been so good as to inform me that the conclusions of the Ministry for Foreign Affairs upon the question of principle raised by me have been communicated to the Ministry of Marine for their consideration, and I can only hope that a solution of this question may be arrived at in accordance with international usage, and that the instructions already issued to Naval Commanders and Prize Courts may be extended so as to include as conditionally contraband all articles of dual use when not destined for the belligerent forces of the enemy.

The new doctrine, which is in complete contradiction to the law and practice of nations sanctioned by international usage, and which is entirely contrary to the former views of the Russian Government, viz, that coal and fuel of every kind are contraband, irrespective of their destination, and that the seizure of cargoes, or the vessels containing them, upon the ground that they included such articles is justifiable in international law, is one which it is impossible for His Majesty's Government to admit. It has been suggested to me by Your Excellency that in view of the fact that Russian war ships proceeding to the Far East are not allowed to purchase coal in British ports it could hardly be claimed that British merchant vessels should have the right to carry coal to the ports of the enemy, even if it is not destined for warlike purposes. The reply to this suggestion is obvious. An article of commerce may be so essential for hostile purposes that
no war ship should be supplied with it in neutral waters, and yet so essential for the ordinary purposes of civil life that it should not be prevented from reaching the peaceful inhabitants of belligerent countries. The dual character of coal, as contraband of war, forms a very apt illustration of the above.

There is another aspect of this question to which I would invite Your Excellency’s attention. From the enormous quantities of coal which arrive daily in Russia from Great Britain, for both peaceful and warlike purposes, it is evident that the British trade in coal is of very great importance. It is equally certain that the importance of this trade is not confined to exports to Russia, and that very large exports of coal to Japan, for purposes both of peace and war, take place. Your Excellency will, I am confident, admit that the fact of the Governments of Russia and Japan being at war is not in itself a sufficient reason why the peaceful commerce between Great Britain and commercial houses in Japan should be treated with such severity as to render commerce both dangerous and even prohibitive.

So, also, as regards raw cotton, which, by Imperial Order on the 21st April, was declared to be absolute contraband of war. Your Excellency may not be aware that British India is by far the largest importer of raw cotton into Japan, the quantities imported in 1901 and 1902 being more than double those imported from the United States of America or from any other country, while the value of raw cotton sent to Japan from India in each of the above-mentioned years amounted to nearly 40,000,000 rubles and one-half of the total value of all the cotton imported into Japan. The quantity of raw cotton that might be utilized for explosives would be infinitesimal in comparison with the bulk of the cotton exported from India to Japan for peaceful purposes, and to treat harmless cargoes of this latter description as unconditionally contraband would be to subject a branch of innocent commerce which is specially important in the Far East to a most unwarrantable interference.

As I have already had the honor of explaining to Your Excellency, His Majesty’s Government have no desire to place obstacles in the way of a belligerent desiring to take reasonable precautions in order to prevent his enemy from receiving supplies, but they can not admit that the right of adopting such precautions implies a consequential right to abolish by a stroke of the pen the long-established distinction between articles which are conditionally and those which are absolutely contraband of war, and to intercept at a distance from the scene of operations and without proof of their ultimate destination a numerous category of articles in themselves of an innocent description and largely dealt in by neutral Powers, but which that belligerent may have announced his intention of regarding as unconditional contraband of war.

The principle of conditional contraband has already been recognized by the Russian Government, and it only remains to extend its application to coal, cotton, and other articles which may be used for peace-
ful or warlike purposes according to circumstances. Such a measure would be consistent with the law and practice of nations and with the well-established rights of neutrals. While maintaining the rights of a belligerent, the rights of neutrals would be respected, and the source of a serious and unprofitable controversy would be removed.

In making these representations to Your Excellency in accordance with the instructions which I have received from the Marquess of Lansdowne, I am convinced that you will give this matter the very serious consideration which is its due, and I trust that Your Excellency will be in a position to inform me shortly that a solution has been arrived at which may prove satisfactory to both Governments.

I avail, etc.,

Charles Hardinge.

(Parliamentary Papers, Russia, No. 1 (1905), p. 24.)

In reply to the British ambassador's request the following interpretation was given by Russia:

In consequence of doubts which have arisen as to the interpretation of Article 6, section 10, of the Regulations respecting Contraband of War, it has been resolved by the Imperial Government that the articles capable of serving for a warlike object, and not specified in sections 1 to 9 of Article 6, as well as rice and foodstuffs, shall be considered as contraband of war, if they are destined for—

The Government of the belligerent Power;
For its administration;
For its army;
For its navy;
For its fortresses;
For its naval ports; or
For its purveyors.
In cases where they are addressed to private individuals these articles shall not be considered as contraband of war.

In all cases horses and beasts of burden shall be considered as contraband of war. (Parliamentary Papers, Russia, No. 1 (1905), p. 27.)

In interpreting a contract entered into just before the Russo-Japanese war and involving the definition of contraband, the following statement was made by Chief Justice Berkley:

The contract was made in Hongkong, and therefore in the absence of evidence to the contrary which I could act upon the parties must be taken to have used the expression "contraband of war" in the sense in which it is understood in British courts of law, which is its sense in international law. It can not be successfully contended that provisions would be regarded by British courts of law as unconditional contraband of war, or that there is any likelihood that they will ever take that view. Had this court been asked at any time between the
signing of the charter party on the 10th of February, 1904, and the issuing of the Russian declaration to construe the meaning of the words "contraband of war" it can not be doubted that it would have excluded provisions from the category of unconditional contraband. It is contended, however, that the court ought to place a different meaning on that expression, after, and in view of, the terms of the Russian declaration, inasmuch as Russia, being a sovereign independent Power, has a prerogative right to declare whatever she pleases to be contraband of war in any war in which she may be engaged, and that the effect of the Russian declaration may be to make provisions unconditionally contraband, the master of the ship *Prometheus* was excused from loading them on his ship. In this contention I am unable to concur. In the view which I take of the effect of the Declaration under Treaty of Paris of 1856, and of the agreement undertaken by the several powers signatory thereto given in the Protocol No. 24 not to depart from the principles enunciated in the Declaration, I think that Russia was not at liberty to declare provisions unconditionally contraband of war, and that her declaration in that respect could not affect the contract between the parties to this charter party, even supposing it could be held that contraband of war means, as used in the charter party, whatever Russia may consider as such, for Russia, having been a party to the solemn declaration of "fixed principles" under the Treaty of Paris, was not at liberty to disregard those principles and was therefore bound to recognize and act upon the generally accepted rule of international law that provisions are not unconditional contraband. (*The Osaka Shosen Kaisha v. The Prometheus.*)

It is evident that no unvarying list of articles contraband of war can be made. The progress of invention may make an article previously entirely innocent exceedingly dangerous to the belligerent if he allows it to be freely transported. The question always is, How essential is the article for carrying on the war? If it is essential, it may be declared contraband, e. g., in many wars sulphur and saltpeter have led the list of contraband because essential in the making of gunpowder and not readily obtained in all places. Charcoal, on the other hand, while essential, is readily obtainable and not classed as contraband.

The change in the method of warfare has made treatment of coal a matter of much moment. France did not regard coal as contraband in 1859 or in 1870, and other States took the same position. It may, however, easily become contraband by destination under the regulations of these States.

Certain coals, such as the *Cardiff* and Pocahontas, which
are peculiarly adapted for use on war vessels, will naturally be more liable to be treated as contraband than ordinary domestic coals.

G. G. Phillimore has recently said of the position of Russia in the Russo-Japanese war:

The Russian attitude with regard to coal is in direct conflict with her declaration of 1884, at the West African Conference, that she would never recognize coal as contraband. While no doubt a State may define contraband differently on different occasions, to suit the particular circumstances of the warfare it is engaged in, it can not expect other States to acquiesce in its refusal to recognize the general rules governing the subject which it has formerly accepted and which stand on a basis of general acceptance in practice. (30 The Law Magazine and Review, p. 79.)

The Russian prize court at Vladivostok in 1904 condemned flour and railway materials consigned to merchants at Japanese ports on board the German vessel Arabia, and took similar action in regard to the British steamer Calchas. The goods on these vessels were consigned by United States merchants.

Secretary Hay protested against the seizure and condemnation, saying that—

In view of its well-known attitude it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war. (Note August 30, 1904, Foreign Relations, p. 760.)

Two days earlier the British Government had stated that proof is necessary "that the goods are intended for the belligerent's naval or military forces before they can be considered as contraband."

The appeal in the case of the decision on the steamer Calchas was taken to the High Admiralty Court at St. Petersburg. That court handed down its decision on June 13, 1905. The decision does not directly recognize the category of conditional contraband; but, in justifying the seizure of the cotton and timber, maintains by an extended argument that there was fair evidence that the cotton was destined for the arsenal at Kobe, and that the timber was destined for Japanese military railways and telegraph,
thus introducing the principle of destination for enemy military use as a ground of condemnation.

In the recent report of the British Royal Commission on Supply of Food and Raw Material in Time of War is enunciated the following opinion formulated by Professor Holland:

Provisions in neutral ships may be intercepted by a belligerent as contraband only when, being suitable for the purpose, they are on their way to a port of naval or military equipment belonging to the enemy, or occupied by the enemy’s naval or military forces, or to the enemy’s ships at sea, or when they are destined for the relief of a port besieged by such belligerent. (p. 24, sec. 101.)

Conclusions.—The position taken in the above extended discussions showing recent opinions as well as early decisions recognize the categories of absolute and conditional contraband and regard destination as the factor determining the innocent or belligerent character of certain goods. The recognition of such principles seems reasonable as regards belligerents and neutrals.

The following regulations in regard to contraband are therefore proposed:

CONTRABAND.

1. Absolute contraband.—When within or destined for the territory within the enemy’s jurisdiction or for his military or naval use, the following articles are absolute contraband:
   
   (a) Military materials, such as weapons, ammunition, etc.
   
   (b) Instruments solely for use in warlike purposes, as machinery for the manufacture of military materials.
   
   (c) Any other articles intended solely for use in war.

2. Conditional contraband.—When destined for the enemy’s military or naval use, the following articles are contraband: Means of subsistence, fuel, means and material for transportation and communication on land or sea, money and other articles, such as cement, cotton, lumber, etc., of use either for warlike or for peaceful purposes.