

International Law Studies—Volume 6

International Law Topics

TOPIC VI.

What regulations should be made in regard to subsidized, auxiliary, or volunteer vessels in time of war?

CONCLUSION.

1. When a subsidized, auxiliary, or volunteer vessel is used for military purposes it must be in command of a duly commissioned officer in the military service of the government.

2. When subsidized, auxiliary, or volunteer vessels, or vessels adapted for or liable to be incorporated into the military service of a belligerent, are in a neutral port in the character of commercial vessels at the outbreak of hostilities, the neutral may require that they immediately furnish satisfactory evidence whether they will assume a military or retain a commercial character.

3. Subsidized, auxiliary, or volunteer vessels, or vessels adapted for or liable to be incorporated into the military service of a belligerent, on entering a neutral port after the outbreak of hostilities, may be required by the neutral immediately to make known whether their character is military or commercial.

4. Until publicly changed in a home port, such vessels as have made known their character must retain as regards neutrals the character assumed in the neutral port.

5. The exercise of belligerent authority toward a neutral by subsidized, auxiliary, or volunteer vessels is sufficient to establish their military character.

DISCUSSION AND NOTES.

General.—As a general proposition it may be maintained that a state should be allowed to use its resources to protect itself in time of war and to preserve its existence. On land ^{the} a militia is regarded as a perfectly legitimate aid to the regular army, and in extreme cases the levies *en masse* are recognized as legitimate hostile forces. It is not reasonable to suppose that the resources of the belligerent on the sea will not be summoned to aid in the preservation of state existence. These resources are liable to attack. They will so far as possible be called into

service. Horses, wagons, railroads, cars, telegraphs, etc., are called into service on land; corresponding agencies will be called into service on the sea.

The objection to the continuance of privateering was largely due to the lack of government control over those engaged in the practice. This control is easily exercised over those aiding in military operations on land because a representative of the government is usually at hand to direct the movements.

An equal degree of control may be exercised in the case of auxiliary, volunteer, and subsidized vessels maintained by a government, officered and manned by the paid servants of that government, and operated under its direction. The use of such vessels is a matter of great importance, and there seems to be no reasonable objection to their employment for any and all purposes of naval warfare, provided that the proper degree of government control is maintained.

By the first division of the declaration of Paris, 1856, which, however, is only binding on the states parties thereto, "privateering is and remains abolished." Some writers hold that the use of auxiliary vessels, to cruise against an enemy's commerce, amounts to a practical abrogation of this provision. For example, Funk-Brentano in 1894 maintained that the first article of the declaration of Paris is practically obsolete. Speaking of the Turco-Russian war of 1877 and the Russian volunteer navy he said:

Depuis, tous les autres États maritimes encouragent leurs grandes sociétés de navigation à construire des paquebots susceptibles d'être transformés en croiseurs en temps de guerre. C'est en fait l'abolition de l'article 1^{er} de la déclaration de Paris, qui lui-même abolissait la course. Les noms seuls sont changés; la guerre maritime privée prendra le nom de guerre maritime publique, les corsaires s'appelleront des croiseurs, les lettres de marque seront remplacées par des patentes de commission et les capitaines corsaires deviendront des capitaines commissionnés. (1 Revue générale de droit international public, p. 328.)

To hold with Funk-Brentano, and those who take more or less the same view, is to lose sight of the essential characteristic of a *privateer*; to wit, a vessel not maintained

by the government but operating for private gain; sanctioned by the government, it is true, but subject to only a limited degree of governmental control.

Recent British discussion.—In April, 1903, a British royal commission on supply of food and raw material in time of war was appointed by King Edward:

To inquire into the conditions affecting the importation of food and raw material into the United Kingdom of Great Britain and Ireland in time of war, and into the amount of the reserves of such supplies existing in the country at any given period; and to advise whether it is desirable to adopt any measures, in addition to the maintenance of a strong fleet, by which such supplies can be better secured and violent fluctuations avoided. (Report of Commission, Vol. I, p. ix.)

Professor Holland, in the report of this commission (App. XXVIII, Vol. III, p. 265), says:

Under the term “privateers” are, however, not included commissioned vessels, commanded by naval officers, under such conditions as would apply, e. g., to the Russian “volunteer fleet,” or to the specially constructed liners which are subsidized, with a view to war, by Great Britain and other powers.

In question 6717 of the commission, Lord Balfour raises the point of difference between a privateer and a vessel of the volunteer fleet. He says:

The essence of that distinction is this, is it not, that although a private person may fit out a ship, or a merchant ship may be fitted out as a privateer, they must go to sea under the orders and by the instructions, and on the authority, of the government, whose subjects they are?

Professor Holland replies:

It must be a little more than that. They must have naval officers on board, and it is not a private venture for private gain as the old privateer used to be. The old privateer had a government commission, but their object was private gain, whereas the modern volunteer fleet and the modern subsidized ships really become part of the navy when war breaks out.

Of privateering, Professor Westlake, in his reply to the royal commission on food supply, says:

The second point mentioned in your letter of 14th August was “whether the practice of privateering is likely to be revived.”

A privateer was a privately owned ship, furnished with a commission of war empowering her to act in all warlike operations,

but usually confining herself to action against commerce, and usually acting not under state command but independently, though subject to state control. The declaration of Paris in abolishing privateering (*la course*) does not state against what parts of this description it is directed, but the regulations for the Russian volunteer fleet and those for the mail steamers subsidized by France and England testify to an understanding that the employment of privately owned ships in war under state command is not unlawful. The regulations for the Prussian volunteer fleet in 1870 contemplated independent action by privately owned ships against the enemy's ships of war, and Lord Granville declared himself unable to object to the plan. If a privately owned ship acts under state command, it seems impossible to deny to her state the right to order her to attack or visit a merchantman as well as to attack a ship of war. There remains the independent action of a privately owned ship against commerce, and this appears to be what the declaration of Paris intended to abolish. I do not think it at all likely to be revived. (Report, Vol. III, App. XXIX, p. 270.)

In the report—

Sir John Colomb asks Professor Holland if—

the mere fact of giving commissions to the officers of merchant ships excludes them from being treated as privateers if they take part in war?

Professor Holland replied:

“Their officers must be naval officers, not merely officers with commissions *ad hoc*, I conceive; they must have been antecedently naval officers, or in the naval reserve, or something of that sort.”

6821. Q. Then they must have been previously officially connected with the naval service?—A. Yes, I conceive so; that is, before the war. It has never been laid down anywhere, but that I think is the supposition.

6822. Q. It would be a questionable proceeding, at all events, to give commissions to men not naval officers?—A. Yes.

6823. Q. Although they were captains of the mercantile marine?—A. That would not, I think, satisfy opinion at all.

The position of Professor Holland seems to be one which few governments would care to assume. It would seem to imply that some outside authority can properly deny the validity of a commission issued by a state and can determine the amount and character of the prior training or service requisite for the holding of a commission. If, as Professor Holland holds, it is necessary that

the commissioned officers in command of such vessels as may be included in the auxiliary navy be officially connected with the naval service before the war, evidently in a long war it might become impossible to officer such vessels. It also might be questioned whether an officer of the mercantile marine or a commander of a great ocean liner might not be a person more fit in every way to command an auxiliary vessel than a much less experienced man whose training had been in the naval reserve or similar force.

The fact seems to be that what is to be demanded is not some particular qualification or experience in the officer, but absolute responsibility on the part of the government which gives him a commission. In other words, his acts must be acts of his government because his government has given him a commission.

There seems to be, however, no valid objection to the employment in war of vessels of the mercantile marine, provided that they shall have been duly incorporated into the belligerent navy, that their officers hold naval commissions, and that they are under naval orders and discipline. (Report Royal Commission on Supply of Food, 1905, Vol. I, p. 22.)

Prussian plan, 1870.—The following decree formed the basis of extended discussion at the time of the Franco-Prussian war:

Royal Prussian decree of the 24th July, 1870, relative to the constitution of a voluntary naval force—

On your representation I have approved the formation of a voluntary naval force under the following form:

1. To issue a summons to all German seamen and shipowners to place themselves, and their forces and ships suitable thereto, at the service of the Fatherland, and under the following conditions:

(a) The vessels to be placed at the disposition of the service will be examined and taxed by a commission composed of two naval officers and one naval contractor as to their capabilities for the intended purpose. In this case the owner receives one-tenth of the price taxed as deposit, whereupon he has to hire the necessary volunteer crews.

(b) Officers and crews enrolled in this way enter into the federal navy for the continuance of the war, and wear its uniform and badge of rank, acknowledge its competency, and take oath to the articles of war. The officers receive a patent of their rank, and the assurance that, in case of extraordinary service

rendered, they can, at their request, be permanently established in the navy. Officers and men who are rendered, by this service, unfit to acquire a livelihood, without any fault on their side, receive a pension calculated at the standard of the royal federal navy.

2. The hired ships sail under the federal flag.

3. These will be armed by the federal royal navy, and fitted out for the service allotted to them.

4. The ships destroyed in the service of their country will be paid for to their owners at the price taxed. If at the end of the war they can be restored to the owners uninjured, the sum paid as deposit is reckoned as hire.

5. A premium will be paid to such ships as capture or destroy ships of the enemy, according to the following standard: For an iron-plated frigate 50,000 thalers, an iron-plated corvette or ram 30,000 thalers, an iron-plated battery 20,000 thalers, a large screw-vessel 15,000 thalers, a screw-vessel 10,000 thalers. These premiums will be paid the owners of the ships, to whom will be confided the distribution in proper proportions amongst the crew.

6. The authorities for all communications on the subject are those of—

(a) The docks of Wilhelmshaven, Kiel, and Danzig;

(b) The Marine depots at Geestemünde and Stralsund, and

(c) The sea captain Weickmann, at Hamburgh.

Further details must be hereafter elaborated.

WILHELM.

Countersigned:

VON BISMARCK.

VON ROON.

BERLIN, *July 24, 1870.*

The French ambassador requested the opinion of the British Government on “la création de cette prétendue marine auxiliaire,” maintaining that it was contrary to the declaration of Paris. The following was the British reply:

FOREIGN OFFICE, *August 24, 1870.*

M. L'AMBASSADEUR: Your excellency, in your letter of the 3d of August, requested to be made acquainted with the opinion that the law officers of the Crown might give on a notification issued by the Prussian Government on the 24th July last, for engaging ships privately armed in the war service of the North German Confederation.

At that time I was not in possession of a copy of that notification, and I informed you that I would call upon Her Majesty's ambassador at Berlin to procure one.

In the meantime, however, and indeed on the same day, namely, the 20th of this month, that your excellency left at this office a

note verbale on the same subject, one of the members of the diplomatic body at this court gave me a copy of the notification, and I thereupon referred the matter without delay to the law officers of the Crown.

I have now received their opinion, of which, in compliance with your request, I have the honor to state to you the substance.

They advise me that there are, in their opinion, substantial distinctions between the proposed naval volunteer force sanctioned by the Prussian Government and the system of privateering, which, under the designation of "la course," the declaration of Paris was intended to suppress.

The law officers say that, as far as they can judge, the vessels referred to in the notification of the 24th July will be for all intents and purposes in the service of the Prussian Government, and the crews will be under the same discipline as the crews on board vessels belonging permanently to the federal navy.

This being the case now, and as long as it continues to be so, the law officers consider that Her Majesty's Government can not object to the decree of the Prussian Government as infringing the declaration of Paris.

Her Majesty's Government will, however, with reference to the Prussian notification, call the attention of the Prussian Government to the declaration of Paris, and will express their hope and belief that Prussia will take care to prevent by stringent instructions any breach of that declaration. I am, etc.

GRANVILLE.

(61 British State Papers, pp. 692, 694.)

Hall's opinion of the Prussian plan for a volunteer navy in 1870 shows that the safeguards of that plan were not sufficient. Reviewing the matter, he says:

A measure taken by Prussia during the Franco-German war of 1870 opens a rather delicate question as to the scope of the engagement not to employ privateers by which the signatories of the declaration of Paris are bound. In August of that year the creation of a volunteer navy was ordered by decree. The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services; the vessels were to sail under the flag of the North German navy. The French Government protested against the employment of private vessels in this manner as an evasion of the declaration of Paris,

and addressed a dispatch on the subject to the Government of England. The matter was laid before the law officers of the Crown, and they reported that there were substantial differences between a volunteer navy as proposed by the Prussian Government and the privateers which it was the object of the declaration to suppress. Lord Granville in consequence declared himself unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered. Nevertheless it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organized in the above manner would necessarily be always of a kind to prevent the two from being identical in all important respects. In both the armament is fitted out by persons whose motive is wish for gain; in both the crews and officers are employed by them, and work, therefore, primarily rather in their interests than in those of the nation. The difference that in the particular case of the Prussian volunteer navy attacks upon men-of-war were alone contemplated was accidental and would have been temporary. At the beginning of the war Prussia announced her intention not to capture private property at sea in the hope of forcing France to spare the commerce which she was herself unable to protect. If the war had been continued for any length of time after January, 1871, when this announcement was withdrawn, and if a volunteer navy had in fact been formed, it would of course have been authorized to capture private property; and there is no reason to suppose that any state acting upon the custom of seizing private property would make a distinction between public and private vessels in the powers given to its volunteer navy. The sole real difference between privateers and a volunteer navy is, then, that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it. It can not be supposed that the declaration of Paris was merely intended to put down the use of privateers governed by the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief is well founded or not is another matter. If the organization intended to be given to the Prussian volunteer navy did not possess sufficient safeguards, some analogous organization no doubt can be procured which would provide them. If so, there could be no objection on moral grounds to its use; but unless a volunteer navy were brought into closer connection with the state than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the declaration of Paris. (International Law, 5th ed., p. 527.)

Verraes, after explaining some of the earlier discussions and considering particularly the Prussian proposition of 1870, offers the following opinion:

Le caractère légal d'une marine volontaire dépend comme celle d'une troupe armée, du lien plus ou moins étroit qui l'unit au gouvernement et des garanties qu'elle présente pour l'observation des lois de la guerre, sous l'autorité d'un commandant à même de se rendre compte de sa responsabilité et de remplir ses devoirs. Il faut reconnaître que les navires de la "freiwillige Seewehr" répondent à la définition généralement donnée du navire de guerre; celui qui appartient à flotte est soumis à un commandant militaire et possède un équipage organisé militairement. Les propriétaires des navires fournissent ceux-ci; mais les bâtiments une fois entrés au service, ils n'ont plus le droit d'en disposer: ils reçoivent seulement comme loyer la prime convenue préalablement et dédommagement en cas de perte des navires. En principe, toute force de guerre commissionnée au service de l'État fait partie de ses forces militaires, sans avoir égard à la condition antérieure du navire et de son équipage, au fait qu'ils ont ou non appartenu auparavant à la flotte marchande, qu'ils sont attachés actuellement à la flotte de guerre, à temps ou pour toujours. (I Les lois de la guerre et la neutralité, p. 103.)

Later plans.—Several states have volunteer, auxiliary, or subsidized vessels at the present time. The conditions under which these vessels are bound to the respective states vary and the obligations resting on the vessels also vary.

Russia, fearing a possible conflict in consequence of the situation in the East in 1877-78, considering that her regular fleet would not be adequate and that her merchant marine did not possess vessels readily convertible into vessels suitable for warlike purposes, readily adopted the plan of incorporating into the naval force certain vessels purchased by a private association of patriotic citizens. These vessels were to be under the control of the naval authorities and to be officered by naval commanders. The captain and at least one other officer on each ship is a regular imperial commissioned officer. These vessels are equipped so as to be convertible at once into vessels for warlike use. In time of peace these vessels are principally engaged in public service, though they fly the merchant flag and are privately owned.

Speaking of the difficulties in determining the purpose for which vessels are intended, Hall says:

Experts are perfectly able to distinguish vessels built primarily for warlike use; there would, therefore, be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce. Perhaps few fast ships are altogether incapable of being so used as to inflict damage upon trade; and there is at least one class of vessels which, on the principles urged by the Government of the United States in the case of the *Georgia*, might fix a neutral state with international responsibility in spite of the exercise by it of the utmost vigilance. Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient caliber to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralyzing the whole shipbuilding and ship-selling trade of the neutral country. (Hall's International Law, 5th ed., p. 616.)

Pradier Fodéré explains the idea of the volunteer or auxiliary navy as follows:

La marine volontaire ou flotte auxiliaire.—*La marine volontaire, ou flotte auxiliaire, se compose de navires appartenant à des particuliers, fournis librement par eux, incorporés pendant une guerre dans la flotte militaire, ou s'y rattachant étroitement, et versés momentanément dans les forces navales de l'État. Elle est dite volontaire, parce que il est fait appel, pour sa création, aux particuliers possesseurs de bâtiments aptes à être utilisés comme navires de guerre, ou comme transports. Ces particuliers mettent librement leurs navires à la disposition du gouvernement, mais en conservent la propriété et en recrutent les équipages, selon les règles applicables au recrutement de la marine de commerce. Elle est appelée aussi flotte auxiliaire, parce que les navires privés dont elle se compose sont destinés à renforcer et à compléter la flotte militaire de l'État, dont ils sont considérés et traités comme faisant partie intégrante.*

Les *marines volontaires, ou flottes auxiliaires*, qui augmentent ainsi les forces navales des États par contribution des particuliers, paraissent réservées, aujourd'hui, à remplacer, en temps de guerre, les corsaires et si les belligérants qui les organisent sa-

vent éviter dans cette organization les justes griefs qui ont fait condamner les armements en course, elles constituent une mesure irréprochable, qui concilie le droit de la défense des faibles et la sécurité de la navigation pacifique. (VIII Droit international public, sec. 3102.)

France has a direct arrangement with certain companies whereby vessels are constructed on plans approved by the admiralty which make possible the conversion of these vessels into vessels for warlike use. The vessels are commanded by officers of the navy. At the opening of hostilities they may be incorporated in the war fleet.

Great Britain in 1887 concluded agreements with several important steamship companies. In return for an annual subsidy these companies agree in time of war to turn over certain fast vessels at an appraised valuation and to build ships on plans approved by the admiralty. As the law officers of the British Crown were consulted in regard to the legality of the plans of Prussia for a volunteer navy in 1870 it may be supposed that the agreement made in 1887 by the British Government does not fail to meet the requirements of legality.

By the act of the United States of May 10, 1892, after specifications in regard to registration, tonnage, speed, ownership, etc., it is provided in section 4 as follows:

That any steamship so registered under the provisions of this act may be taken and used by the United States as cruisers or transports upon payment to the owners of the fair actual value of the same at the time of the taking, and if there shall be a disagreement as to the fair actual value at the time of taking between the United States and the owners, then the same shall be determined by two impartial appraisers, one to be appointed by each of said parties, who, in case of disagreement, shall select a third, the award of any two of the three so chosen to be final and conclusive. (27 U. S. Statutes at Large, p. 27.)

United States court decisions.—The general position of a subsidized Spanish vessel is set forth in the opinion rendered in regard to the *Panama* in 1900. There was a contract running between the owners of the vessel and the Spanish Government.

By that contract, concluded between the Spanish Government and the Compania Transatlantica on November 18, 1886, and drawn up and printed in Spanish, the company bound itself to

establish and to maintain for twenty years various lines of mail steamships, one of which included Havana, New York, and other ports of the United States and of Mexico; and the Spanish Government agreed to pay certain subsidies to this company, and not to subsidize other steamship lines between the same points. Among the provisions of the contract, besides article 26, above quoted, were the following:

By article 25, new ships of the West Indian line must be of iron, or of the material which experience may prove to be the best; must have double-bottomed hulls, divided into water-tight compartments, with all the latest improvements known to the art of naval construction; and "their deck and sides shall have the necessary strength to support the artillery that they are to mount." All the ships of that line must have a capacity for 500 enlisted men on the orlop deck, and a convenient place for them on the main deck. The company, when beginning to build a new ship, shall submit to the minister of the colonies her plans as prepared for commercial and postal service. "The minister shall cause to be studied the measures that should be taken looking to the rapid mounting in time of war of pieces of artillery on board of said vessel; and may compel the company to do such strengthening of the hull as he may deem necessary for the possible mounting of that artillery; said strengthening shall not be required for a greater number than six pieces whose weight and whose force of recoil do not exceed those of a piece of 14 centimeters." The plans of ships already built shall be submitted to the minister of marine, in order that he may cause to be studied the measures necessary to adapt them to war service; and any changes that he may deem necessary or possible for that end shall be made by the company. But in both old and new ships the changes proposed by the ministry must be such as not to prejudice the commercial purposes of the vessels.

By article 35, the vessels, with their engines, armaments, and other appurtenances, must be constantly maintained in good condition for service.

By article 41, the officers and crews of the vessels, and, as far as possible, the engineers, shall be Spaniards.

By article 49, the company may employ its vessels in the transportation of all classes of passengers and merchandise, and engage in all commercial operations that will not prejudice the services that it must render to the state.

By article 60, when by order of the Government munitions of war shall be taken on board, the company may require that it shall be done in the manner and with the precautions necessary to avoid explosions and disasters.

By article 64, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's ships, the Government may take possession of them with their equipment and supplies, having a valuation of

the whole made by a commission composed to two persons selected by the Government, two by the company, and a fifth person chosen by those four; at the termination of the war, the vessels with their equipment are to be returned to the company, and the Government is to pay to the company an indemnity for any diminution in their value, according to the opinion of the commission, and is also, for the time it has the vessels in its service, to pay 5 per cent on the valuation aforesaid. By article 66, at the end of the war the Government may relieve the company of the performance of the contract if the casualties of the war have disabled it from continuing the service. And by article 67, in extraordinary political circumstances, and though there be no naval war, the Government may charter one or more of the company's vessels, and in that event shall pay an indemnity estimated by the aforesaid commission. (176 U. S. Supreme Court Reports, 535.)

In 1898 the Spanish steamship *Rita* was captured by the United States converted auxiliary cruiser *Yale*, prior to April 30, 1898, the International Navigation Company steamship *City of Paris*, which was under charter by the United States and by terms of the contract "under the entire control of the senior officer on board." The *Yale's* company consisted of two regular officers of the United States Navy and a marine guard of 25 enlisted men, and 269 officers and men doing duty on board and borne on the books of the ship but not commissioned by or enlisted in the service of the United States. The regularly enlisted officers and men made claim that the officers and crew of the *Yale* borne on the books but not enlisted were not entitled to a share of the prize money.

Judge Brawley, in the district court, district of South Carolina, October 13, 1898, held that the *Yale* was, according to the act of 1862, in the class "any armed vessel in the service of the United States" not of the regular navy and not a privateer, and that, as in all cases falling in this class, the statute prescribes that "the whole amount decreed to the captors shall be divided among the ship's company," and further, the judge declares in regard to the non-enlisted portion of the ship's company that—

If they were not "in the service" of the Government while performing that mission, they incurred the hazard of being considered as pirates.

and—

that, by fair interpretation of the statute, all of the ship's company doing duty on board and borne upon the books are entitled as of right to share in the prize money in proportion to their pay, and a decree will be entered accordingly. (89 Federal Reporter, 763.)

Japanese court decisions.—In a judgment before the higher prize court at Sasebo, Japan, on a protest in the case of the steamer *Argun*, April 25, 1905, an opinion is given on certain subsidized vessels.

In considering the nature of the vessels belonging to the Chinese Eastern Railway Company it is to be noted that the managers of the navigation department of the said company are naval officers or other government officials. One manager at Vladivostock is a commander in the navy, and the other a special service official of the department of finance. A perusal of that part of the statistical work entitled "River Vessels in Russian Asia," published by the Russian department of communications, which gives the statistics of vessels in the waters of the Amur region, shows that there are in all 163 steamers and 198 other vessels. It is stated that of these, 45 steamers and 66 other vessels are owned by the Government. Considering now the several owners of these steamers and other vessels, we can not get the total number of Government vessels mentioned above unless the 19 steamers and 60 other vessels belonging to the Chinese Eastern Railway Company are included among the Government vessels. The indemnity for damages caused the Chinese Eastern Railway Company by the Bóxer troubles in China in 1900 was claimed, not as due to Russian subjects, but as due to the Russian Government itself. Considering the above facts, a vessel like the steamer in question which belongs to the said company must be recognized as a Government vessel, the property of the Russian Government. Such being the case, although the imperial ordinance No. 20 of 1904, superficially considered, appears to exempt from seizure Russian merchant vessels in general, it was promulgated chiefly to prevent the distress which would be caused by the seizure of merchant vessels owned by Russian subjects which were anchored in the ports of the Empire of Japan, and those which before the enforcement of the ordinance had left foreign ports bound for ports in Japan, which could not have known of the fact that war had begun. There is no need, therefore, of argument to show that a vessel like this which is owned by the Government is not entitled to benefit by the clemency of the imperial ordinance.

Method of commissioning.—In Great Britain, during the Russo-Japanese war, it was claimed that auxiliary

vessels could be commissioned only within the ports of the belligerents.

It is generally held that jurisdiction over the status and internal economy of a vessel is according to domestic law. The belligerent has a right to capture his enemy's ships, whether or not commissioned as war vessels. The vessels subsidized, or belonging to the volunteer or auxiliary navy, being liable to military service *in futuro* are certainly liable to capture *in presenti*. When such vessels shall attack the enemy is not a matter for international law to determine. They are liable to capture at any time after the outbreak of hostilities. They may correspondingly defend themselves from attack. The main restriction, so far as the belligerents are concerned, is that the vessels shall be under full responsible control.

In an interview during the warm agitation in regard to the action of the *Smolensk* and *Peterburg*, of the Russian volunteer fleet, in July, 1904, M. Neratoff, of the Russian foreign office, was reported as saying of the commissioning of these vessels:

The questions as to the place where this transformation should be made had not been settled when certain ships passed the Dardanelles as merchantmen, otherwise the Turkish authorities would not have let them through. The commanders of the *Peterburg* and *Smolensk* were wrong in stopping neutral vessels without waiting for further orders. They erred from excess of zeal, but we can understand the state of mind of our officers on seeing ships pass that were no doubt going to carry out documents and ammunition to Japan. In any case, we shall make apologies if it turns out that our suspicions were unfounded. As regards the question of principle involved in the passage of the Dardanelles by auxiliary cruisers, this is a matter for discussion. We have consulted Professor Martens, who is here. But legal considerations will play a secondary part in this affair. The incident is rather political than diplomatic. We shall continue to display a conciliatory spirit, but our auxiliary cruisers will not be withdrawn from the Red Sea. (*The Times*, London, July 26, 1904.)

At the same time the Russian foreign office gave assurance that the volunteer fleet would not again "be utilized for visitation and seizure of neutral ships in the Red Sea."

If Russia maintained that these vessels, the *Smolensk* and *Peterburg*, were not war vessels, then they had no right to make captures but had full right under treaty to

pass the Dardanelles. If they were war vessels only after raising their flag after passing the Dardanelles, then it might be equally proper for vessels of the volunteer navy of another state to pass in through the Dardanelles under a merchant flag and raise the war standard after entering the Black Sea. Doubtless Russia would be reluctant to admit this practice.

Mr. Balfour, in the House of Commons, on July 28, 1904, explaining the attitude of Great Britain, said of the action of the Russian vessels which passed the Dardanelles and captured the Malacca:

We took the strongest possible exception to that course on the ground that no ship of war could issue from the Black Sea, and that in our judgment the members of the volunteer fleet, if they issued from the Black Sea and took belligerent action, either had no right to issue or no right to take that action.

In the same speech he said:

We have received assurances that the volunteer ships are to be withdrawn from the Red Sea; and I have little doubt that there will be no further desire on the part of the Russian Government to employ them as cruisers.

The sale of a vessel strictly as a commercial transaction by a neutral citizen may be made by any party to any party. The government must not, however, be involved. In a conference between Mr. Balfour, the prime minister, and the London Chamber of Commerce, on August 25, 1904, Mr. Angier observed that—

the Germans had sold to the Russians a considerable number of fine trading ships, and one of them had been converted into a war vessel, and had actually stopped one of our ships. That was a case of the Alabama over again.

Mr. BALFOUR. No; this has been carefully considered by the law officers and the Government. There can be no doubt that merchant ships may be sold by neutrals to any government, and that that government may turn these ships into cruisers if they please. I do not believe, in this respect, that we can complain of a breach of international law. (*The Times*, London, August 26, 1904.)

Commander von Uslar, of the German navy, says of the use of auxiliary war ships:

Concerning the hitherto undisputed right of belligerents to equip trading steamers as auxiliary war ships everywhere, except in

territorial waters, England has, during the present war, endeavored to enforce her view that the belligerent can legally commission auxiliary war ships only in his own harbors and not on the high seas. That the general acceptance of this principle would be very beneficial to English interests, but prejudicial to states with small colonial possessions, is very evident; but it does not accord with the principle of international law that the state has unlimited power and jurisdiction on the high seas over all vessels sailing under its flag. In the interests of all the demand is justified that an auxiliary war vessel shall not change its character during the war. (181 North American Review, August, 1905, p. 184.)

The auxiliary navy has been put by some writers in the same category as the militia on land and has been regarded as subject to similar regulations. Some maintain that it should be enrolled for state service under responsible officers, be paid from the public treasury and not in proportion to the captures made, and that the vessels should also be paid for fixed periods and not in proportion to the captures made by them. In case of loss of a vessel in war a liberal price should be paid therefor.

It has been suggested that a distinction might be made according to the service rendered. If a vessel of the volunteer navy confined its services to the transport of troops, coal, and the like, its action would be legitimate; if it pursued and captured private property, it would be engaged in privateering forbidden by the first article of the treaty of Paris, 1856 (4 *Revue Générale de Droit International Public*, 1897, p. 696). The above is not the generally accepted view. It has been maintained also that the private ownership of vessels which are to engage in war should not be permitted. The distinction between the transport by one vessel of fuel which would enable another vessel to pursue and capture an enemy vessel and the pursuit of the enemy vessel by the transport is not the point to be considered in distinguishing a privateer from a public war vessel, but rather the conditions under which the act takes place. The question is rather one of governmental naval control and conformity to the usages of war. That a vessel used by a belligerent for hostile purposes must be owned by the state is not a matter of great importance and is not easily determined in time of war. It

would not be contended that horses or other means of warfare might not be loaned by private persons for service in war on land.

Hall gives a somewhat full statement of the English attitude in regard to what constitutes a public vessel:

Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or storeships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law. The character of a vessel professing to be public is usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimacy of her claim, the statement of the commander on his word of honor that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by the competent authority within the state itself. A fortiori attestation made by the government itself is a bar to all further inquiry. (International Law, 5th ed., p. 161.)

The act of commissioning a vessel is an act of sovereignty, and no act of sovereignty can be done within the dominions of another sovereign without his express or tacit permission. Without such leave a commission can only acquire value as against the state in which a vessel has been bought, or has been built and fitted out, at the moment when she issues from the territorial waters. Up to that time, though invested with minor privileges, she is far, if she be a ship of war, from enjoying the full advantages of a public character. It is needless to say that, on the other hand, if the vessel reenters the territorial waters five minutes after she has left them she does so with all the privileges of a public vessel of her state. It is to be noted that tacit leave to commission a ship can not be lightly supposed. A state must always be presumed to be jealous of its rights of sovereignty, and either strong circumstances implying recognition in the particular case, or the general practice of the state itself, must be adduced before the presumption can be displaced. (Ibid, p. 163.)

Need of established character.—It is necessary that there should be some mark by which the character of a

vessel may be established so far as a neutral may be concerned. It is not in any way reasonable to expect that a vessel may one day fly a merchant flag and the next day that of a ship of war and the following day that of a merchant vessel again. If it is proper for a vessel to sail from a port as a merchant vessel and on the high sea to assume the character of a war vessel, would it not be possible to reverse the process and make such changes as frequently as might serve a belligerent's purpose.

It is certain that acts of war on the sea should be confined to war vessels and that merchant vessels should not visit, search, or capture merchant vessels of an enemy or of a neutral. Under certain conditions a war vessel may, however, do these things. A merchant vessel is subject to the jurisdiction of the port in which it may be, so far as the local regulations require. A vessel of war is to a large extent exempt from local jurisdiction. There is little restriction upon the nature of articles which a merchant vessel may take on board. A war vessel of a belligerent in time of hostilities may not in a neutral port do certain acts or take certain articles on board which would be allowed in time of peace or to a merchant vessel in time of war.

If no restrictions are made, the neutrals may through ignorance of the character of a vessel furnish it with supplies of a forbidden amount or character. A vessel which could change its character at will might enter a neutral port repeatedly as a merchant vessel and after each departure again assume a warlike character, thus making of a neutral port a base. Of course, it is not reasonable to expect that such acts would be tolerated.

Summary.—There seem to be certain general considerations which should guide in the regulation of the use of subsidized, auxiliary, or volunteer vessels:

1. Such vessels should be during the war public vessels under regularly commissioned officers in order that the principle of Article I of the declaration of Paris, 1856, may be regarded. They should be incorporated in the navy.

2. The neutral in whose port such vessel may be or within whose port such vessel may come is entitled to

know the character of the vessel in order that the laws of neutrality in furnishing supplies, etc., may be observed.

3. The character once assumed should not be changed except under adequate restrictions in order that reasonable security may be given to the neutral in his relation to the vessel.

Conclusions.—From the foregoing it is evident that the use, for all purposes of naval warfare, of auxiliary, subsidized, or volunteer vessels, regularly incorporated in the naval forces of a country, is in accord with general opinion and practice, and that this addition to their regular naval forces in time of war is contemplated by nearly all if not all the principal maritime nations. In fact auxiliaries have been so used in all recent naval wars. To secure for subsidized, auxiliary, and volunteer vessels the proper status in time of war, the following regulations are proposed:

1. When a subsidized, auxiliary, or volunteer vessel is used for military purposes it must be in command of a duly commissioned officer in the military service of the government.

2. When subsidized, auxiliary, or volunteer vessels, or vessels adapted for or liable to be incorporated into the military service of a belligerent, are in a neutral port in the character of commercial vessels at the outbreak of hostilities, the neutral may require that they immediately furnish satisfactory evidence whether they will assume a military or retain a commercial character.

3. Subsidized, auxiliary, or volunteer vessels, or vessels adapted for or liable to be incorporated into the military service of a belligerent, on entering a neutral port after the outbreak of hostilities, may be required by the neutral immediately to make known whether their character is military or commercial.

4. Until publicly changed in a home port, such vessels as have made known their character must retain as regards neutrals the character assumed in the neutral port.

5. The exercise of belligerent authority toward a neutral by subsidized, auxiliary, or volunteer vessels is sufficient to establish their military character.