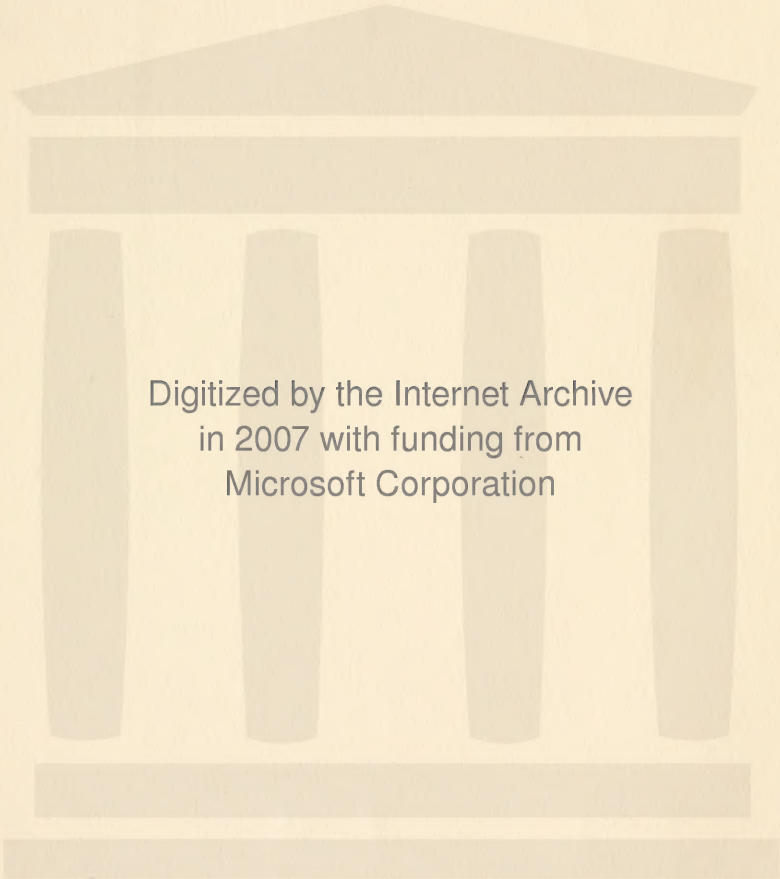

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Publications of the
Carnegie Endowment for International Peace
Division of International Law
Washington

27d

The Declaration of London February 26, 1909

A COLLECTION OF OFFICIAL PAPERS AND DOCUMENTS RELATING TO THE INTERNATIONAL NAVAL CONFERENCE HELD IN LONDON DECEMBER, 1908—FEBRUARY, 1909

WITH AN INTRODUCTION BY

ELIHU ROOT

EDITED BY

JAMES BROWN SCOTT

Director of the Division of International Law of the Carnegie Endowment for International Peace

150-270
11/6/20

NEW YORK
OXFORD UNIVERSITY PRESS
AMERICAN BRANCH: 35 WEST 32ND STREET
LONDON, TORONTO, MELBOURNE, AND BOMBAY
1919

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Prefatory Note

There are several causes tending to make the Declaration of London the object of vital interest to students of international relations and international law. The possibility of achieving the establishment of an international court of appeal in prize matters, an achievement which would be of substantial effect in the field of maritime law itself and which would, moreover, provide an international institution of more direct and concrete action than almost all other such institutions hitherto established, depends upon the success with which the nations agree upon the code to be applied in such a court. The equitable solution of that problem, which, because of the strategic importance of the seas in the life of the nations, lies at the heart of the effort for a fruitful international reorganization, the problem of the freedom of the seas, depends in its most acute phases, upon the proper writing of the laws of war at sea. Finally, there is in debate a considerable body of law with a long history behind it and a complicated and rich technical content which presents in itself a fascinating study in legal science.

For all these reasons the subject claims attention. That the Declaration was not ratified and officially sanctioned in its own right and that it has finally been abandoned even in substance does not, it would seem, detract from the value of the collection which follows. The Declaration constitutes the best statement of the laws of war at sea as they stood in 1914, and it marks the high tide, historically, of the liberalization of those laws. The proposals in preparation for and in course of the conference and the eventual compromises attained embody in written form all those perplexing conflicts between sea and land, island and continent, navy and army, belligerent and neutral, and, to a certain extent, war and peace, which have emerged into public attention since August, 1914.

Mr. Root gathered this historical process, and the place of the Declaration in that process, into a pointed summary in an address delivered in Washington in 1912; that address is here used as an introduction to the texts.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
December 1, 1918.

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THE DECLARATION OF LONDON
FEBRUARY 26, 1909

The Real Significance of the Declaration of London[1]

The principal achievement of the Hague Conference of 1907 was the Convention for an International Prize Court. That Convention provided for a real and permanent court composed of judges who were to be appointed by the contracting Powers for terms of six years, were required to be "jurists of known proficiency in questions of international maritime law and of the highest moral reputation," and were to be paid a stated compensation from a fund contributed by all the Powers.

Jurisdiction was conferred upon the court to review on appeal all judgments of national prize courts. By a subsequent agreement, for the purpose of avoiding difficulties presented by the constitutions of some of the signatory Powers, an alternative procedure was authorized under which the new court might pass upon the question involved in the case of prize *de novo,* and notwithstanding any judgment of the national prize court, instead of passing upon it by way of appeal from that judgment. Article 7 of the Convention provides:

> If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.
>
> In the absence of such provisions the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

In estimating the value of such an agreement among the civilized Powers it is worth while even for a student of international law to recall the wide range and critical importance of the questions to be included within the jurisdiction of the new court.

When war breaks out between two considerable maritime Powers the commerce of the whole world is immediately affected. Each bel-

[1] Opening address by Elihu Root as President of the American Society of International Law at the sixth annual meeting of the Society in Washington, April 25, 1912.

ligerent nation undertakes, so far as it can, to cripple its enemy both by direct military and naval operations and by cutting off supplies, interfering with sources of income, and generally weakening the enemy's national power to maintain an army and navy.

The liability of enemy merchant ships to capture tends to throw the commerce formerly carried on by the belligerent nations into the hands of neutrals while the necessary policy of each belligerent urges it to circumscribe and prevent so far as it can the neutral commerce with the other belligerent. Blockades and searches and seizures for carrying contraband goods are familiar methods of giving effect to this policy. Added to this is the necessity of constant watchfulness by belligerents to prevent neutral vessels from rendering direct service to the enemy's forces, such as the transportation of officers and troops or messengers, or the transmission of intelligence. In this way belligerents fall into an attitude of suspicion toward neutral vessels and unfriendliness toward neutral commerce, and the peaceable commerce of the world falls into an attitude of resenting what it regards as unwarranted interference.

The most striking illustration of this tendency is to be found in the tremendous conflicts of the Napoleonic wars, when Pitt and Napoleon waged war not merely with armies and navies but with British orders in council and Continental decrees. The Prussian decree which began the series at the instance of Napoleon, on the 28th of March, 1806, declared the coast of the North Sea closed against Great Britain. On the 8th of April, 1806, Great Britain retaliated for that decree by the first order in council, which declared the blockade of the Ems, the Weser, the Elbe, and the Trave. On the 16th of May, 1806, came the second order in council declaring a blockade of the whole coast of the Continent from the Elbe to Brest. On the 14th of October, 1806, Napoleon retaliated with the famous Berlin Decree, which prohibited all commerce with England. On the 7th of January, 1807, another British order in council declared all neutral trading with France, or from port to port with any possession of France, or with any of the allies of France anywhere, to be ground for condemnation. On the 17th of December, 1807, Napoleon's Milan Decree declared a sentence of outlawry upon England and all English ships. It was impossible that such a process should not involve all Europe in a universal war; and an aftermath of England's enforcement of her policy upon the neutral shipping of the United States was the War of 1812.

The Civil War in the United States gave rise to a multitude of controversies between the United States and Great Britain, arising on one side from the seizure by the United States of numerous vessels charged with directly or indirectly attempting to violate the blockade of the southern coast, or with carrying contraband, and arising on the other side from the fitting out of Confederate cruisers in the neutral ports of Great Britain. The negotiations which led to the settlement of both classes of these claims by arbitration under the Treaty of Washington involved no slight strain upon the temper and good sense of both nations, and the result was reached against most violent protest on the part of many who preferred war to concession.

In the recent war between Russia and Japan a feeling of strong resentment was created in England by Russia's course in sinking the British merchantmen, the *Knight Commander,* the *Saint Kilda,* the *Hipsang,* and the *Allenton,* and in the capture of the *Malacca* by Russian vessels which had passed the Dardanelles and the Suez Canal as merchantmen and then converted themselves into cruisers.

There is no more fruitful source of international controversy, of international resentment and dislike, than in the great multitude of questions relating to the rights and wrongs of neutrals and of belligerents in a war between maritime Powers. The tendency always is for the war to spread through these controversies and exasperated feelings, and the adjudication of questions by national prize courts naturally fails to allay the irritation. Provision for the international judicial determination of such questions is adapted not only to preserve the substantial rights of neutral commerce and of belligerents, but also to prevent the spread of war much as municipal ordinances are framed to check the spread of fire, and sanitary regulations to prevent the communication of infectious disease. Considered by itself, the concurrence of the major part of the civilized world in the project of this Convention was an event of the first importance in the development of international peace.

When Great Britain, however, came to consider the ratification of the Prize Court Convention she found herself confronted by practical considerations arising from her insular position, her dependence upon foreign food supplies, the wide extension of her colonial empire, her enormous merchant marine, and the relation between the effectiveness of her great navy and her national existence. The effect of these considerations upon the Government of Great Britain is best stated in the

words of a communication which that Government addressed on the 27th of February, 1908, to the other principal maritime Powers. In that communication Sir Edward Grey said:

> Article 7 of the Convention provides that, in the absence of treaty stipulations applicable to the case, the court is to decide the appeals that come before it, in accordance with the rules of international law, or if no generally recognized rules exist, in accordance with the general principles of justice and equity.
>
> The discussions which took place at The Hague during the recent Conference showed that on various questions connected with maritime war divergent views and practices prevailed among the nations of the world. Upon some of these subjects an agreement was reached, but on others it was not found possible within the period for which the Conference assembled, to arrive at an understanding. The impression was gained that the establishment of the International Prize Court would not meet with general acceptance so long as vagueness and uncertainty exists as to the principles which the court, in dealing with appeals brought before it, would apply to questions of far-reaching importance affecting naval policy and practice.
>
> His Majesty's Government therefore propose that another conference should assemble during the autumn of the present year, with the object of arriving at an agreement as to what are the generally recognized principles of international law, within the meaning of paragraph 2 of Article 7 of the Convention, as to those matters wherein the practice of nations has varied, and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the court should observe in dealing with appeals brought before it for decision.

That is to say, the realization of the International Prize Court must be postponed until an agreement can be reached upon the rules of law and the principles of justice and equity which the court is to apply to international controversies. No dissent from this view appears to have been expressed and, pursuant to the British invitation, Austria-Hungary, France, Germany, Italy, Japan, Russia, Spain, the Netherlands, and the United States, sent their delegates to the proposed Conference in London. The Conference met on the 4th of December, 1908, and continued to the 26th of February, 1909.

The task of the Conference was delicate and difficult. The Declaration of Paris in 1856 had, it is true, furnished four rules as a point of departure:

(1) Privateering is and remains abolished.

(2) The neutral flag covers enemy's merchandise with the exception of contraband of war.

(3) Neutral merchandise, with the exception of contraband of war, is not capturable under the enemy's flag.

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

But the half century which had elapsed since the Declaration of Paris had shown that these rules left uncovered a great field of controversy and that they had themselves given rise to numerous questions for which they afforded no solution. The divergent views upon these subjects of controversy had become intrenched in many traditional ideas of different nations as to the requirements of their national interests either as possible belligerents or possible neutrals, and these ideas made concessions difficult, so difficult that at the Second Hague Conference it had been found quite impracticable to reach any conclusions upon questions of this character having real importance.

The members of the London Conference addressed themselves to their work with ability, knowledge, and good temper, and they agreed upon a code of rules which they called a "Declaration concerning the laws of naval war," and which is known as the Declaration of London. The first chapter of the Declaration, containing twenty-one articles, deals with the law of blockade in time of war. The second chapter covers the law of contraband, in twenty-three articles. The third chapter contains three articles upon the law of unneutral service. The fourth chapter, seven articles, on the destruction of neutral prizes. The fifth chapter, two articles, on transfer of flag. The sixth chapter, four articles, on enemy character. The seventh chapter, two articles regarding convoy. The eighth chapter, one article concerning resistance to search. The ninth chapter, an article upon compensation. Then follow seven final articles. The preamble of the Declaration declares the Powers (naming them)—

> Considering the invitation which the British Government has given to various Powers to meet in conference in order to determine together as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize Court;
>
> Recognizing all the advantages which in the unfortunate event

of a naval war an agreement as to the said rules would present, both as regards peaceful commerce, and as regards the belligerents and as regards their political relations with neutral governments;

Considering that the general principles of international law are often in their practical application the subject of divergent procedure;

Animated by the desire to insure henceforward a greater uniformity in this respect;

Hoping that a work so important to the common welfare will meet with general approval:

Have appointed as their plenipotentiaries, that is to say: [Names of plenipotentiaries.]

Who, after having communicated their full powers, found in good and due form, have agreed to make the present declaration:

PRELIMINARY PROVISION

The signatory Powers are agreed in declaring that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

It is interesting to observe that in the rules regarding contraband, the doctrine of continuous voyages, with which the Americans were so much concerned during the Civil War, is applied to absolute contraband but not to conditional contraband; that the great extension of the list of contraband articles, which, in the war between Russia and Japan, caused such general dissatisfaction among neutrals and threatened to nullify the doctrine that free ships make free goods, has been checked by a definite list of articles which are not under any circumstances to be considered contraband, and by carefully framed provisions requiring affirmative proof that goods are destined for the use of the armed forces or a government department of the enemy as a condition upon the right to seize conditional contraband. It is also interesting that the question so much discussed at the time of the *Trent* affair between England and the United States has been disposed of by the provision of Article 47 that "any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war even though there may be no ground for the capture of the vessel."

This by implication excludes civil agents such as Mason and Slidell from capture but approves the method followed by Captain Wilkes in taking persons assumed to be liable to capture from the vessel and releasing the vessel.

It is not, however, my purpose to discuss the specific provisions of these rules.

The Declaration was accompanied by a very lucid and illuminating report prepared by Mr. Renault, which was presented to the Conference upon behalf of the drafting committee and which, under Continental usage, is to be treated as an authoritative explanation of the text. The report says of the Declaration:

> The body of rules contained in the Declaration, which is the result of the deliberations of the Naval Conference, and which is to be entitled Declaration concerning the laws of naval war, answers well to the desire expressed by the British Government in its invitation of February, 1908. The questions of the program are all settled except two, concerning which explanations will be given later. The solutions have been deduced from the various views or different practices and correspond to what may be called the *media sententia*. They do not always harmonize absolutely with the views peculiar to each country, but they do not shock the essential ideas of any. They should not be examined separately, but as a whole, otherwise one runs the risk of the most serious misunderstandings. In fact, if one considers one or more isolated rules either from the belligerent or the neutral point of view, he may find the interests with which he is especially concerned have been disregarded by the adoption of these rules, but the rules have their other side. The work is one of compromise and of mutual concession. It is, as a whole, a good work.
>
> We confidently hope that those who study it seriously will answer affirmatively. The Declaration substitutes uniformity and certainty for the diversity and the obscurity from which international relations have too long suffered. The Conference has tried to reconcile in an equitable and practical way the rights of belligerents and those of neutral commerce; it is made up of Powers placed in very unlike conditions, from the political, economic, and geographical points of view. There is on this account reason to suppose that the rules on which these Powers are in accord take sufficient account of the different interests involved, and hence may be accepted without disadvantage by all the others.

Two questions proposed by Great Britain to the Conference remain unanswered: One, relating to the transformation of merchant vessels into war-ships on the high seas, and the other, the question whether the nationality or the domicile of the owner should be adopted in determining whether property is enemy property. Upon these questions the divergence of views remains unsettled. But throughout the great field

of controversy in this branch of international law all existing differences have been settled by fair agreement upon just and reasonable rules.

Professor Westlake said, in the *Nineteenth Century,* for March, 1910:

> That the ten greatest naval Powers of the world should have met in conference on the laws of naval war as affecting neutrals, and that after careful consideration they should have agreed upon a code so comprehensive as that contained in the Declaration of London, would alone suffice to make the year nineteen hundred and nine memorable to all who are interested in the improvement of international relations. It remains for the year nineteen hundred and ten to make that code binding on the parties by ratification, after which the natural course of events will speedily make it the binding code of the world.

It appeared to many of us, indeed, when the agreement was reached and the Conference dissolved, that a great thing had been done and that the way had been cleared to carry into effect the Prize Court Convention and to establish upon a permanent basis the judicial settlement of this class of international controversies through the application of an accepted code of law.

Unfortunately, that belief has not been justified. An excited controversy immediately arose regarding the effect of the rules contained in the Declaration of London upon the interests of Great Britain. One set of objectors declared that the rules sacrificed the interests of Great Britain as a belligerent. Another set asserted that the rules destroyed the interests of Great Britain as a neutral. Both could not be true, yet each set of objectors continued strenuously to oppose the Declaration upon its own grounds.

An examination of the arguments on both sides in Great Britain leads to the conclusion that Mr. Norman Bentwich sums up the controversy fairly when he says, in the *Fortnighty Review:*

> Great Britain should now be in a position to ratify the Hague Prize Court Convention, when at least she has made the necessary changes in her national prize law. She has come out very well indeed from the international bargaining: she had most to lose by the previous uncertainty; she has gained most by the settlement. At Paris, in 1856, she gave up one of her most powerful belligerent rights—the right to capture enemy property in neutral ships. Now in London she has not given up a single established belligerent

> erent right of value, her sole concession being on the question of convoy which is more apparent than real; and, on the other hand, she has gained a number of safeguards for her neutral commerce, and a number of limitations of the alleged belligerent rights of other Powers. There is indeed a naval school which is bitterly hostile to the ratification of the Declaration, on the ground that by it England gives up certain national claims of long standing and concedes certain rights against which she has long struggled. But the claims we give up have not been effectively exercised by us, the rights we concede have regularly been practiced against us.

Nevertheless the Prize Court Bill, introduced in Parliament to give effect to the Convention and the Declaration, passed the House of Commons but was rejected by the House of Lords, and so the matter stands.

This is unfortunate not merely because the rules of law contained in the Declaration are wise and just and would be beneficial to the world, but because the most promising forward movement toward the peaceable settlement of international disputes is frustrated by the kind of treatment which, if persisted in, must apparently prevent all forward movement in the same line. The Prize Court Convention is representative of the general movement for judicial settlement. The Declaration of London is representative of the agreement upon the rules of international law which is essential to the establishment of the practice of judicial settlement in all other branches of international controversy.

For some time past there has been a growing impression among men familiar with international affairs that the obstacles to the development of any real system for the submission of international disputes to impartial decision are to be found not so much in the unwillingness of nations to submit their disputes to such a decision, but in the lack of adequate machinery through which such decisions may be secured. The tendency of arbitrations in which representatives of the disputing countries are joined with eminent publicists from other countries for the determination of international controversies is not to decide questions of fact and law, but it is to negotiate a settlement. Arbitrators as a rule act as diplomatists under the diplomatic sense of honorable obligation rather than as judges under the judicial sense of honorable obligation. Their tendency is to do what they think is wise and for the best interests of all concerned and to get the controversy disposed of in some way without too much ill-feeling upon either side. In this

process the frequent failure of international law to furnish any certain or undisputed guide for action affords free opportunity for the personal predilections of the arbitrator, often colored or determined by the prevailing opinions in the country from which he comes; and these opinions are often quite unlike those which prevail among the people of either of the disputing countries. It often happens, therefore, that the selection of the arbitrators is the most critical and decisive step in the arbitration. It is very difficult to apply to such a proceeding the analogy of a judicial proceeding under municipal law for the trial and decision of cases between private litigants. It may well be that countries are unwilling to have their interests disposed of in that way, although they would be perfectly ready to submit their cases to the decision of judges acting under the judicial sense of responsibility. Many of us are convinced that the true line of development for the peaceable settlement of international controversies is to be found in the establishment of a real international court which shall hear and determine questions instead of negotiating a settlement of them. This question was much discussed in the Hague Conference of 1907, which approved and recommended to the Powers the adoption of a draft Convention for the creation of a Judicial Arbitral Court to be composed of judges appointed for fixed periods with stated compensation and chosen from persons "fulfilling the conditions qualifying them in their respective countries to occupy high legal posts, or to be jurists of recognized competence in matters of international law." The procedure, powers, and jurisdiction of the court were all provided for and the draft convention as approved by the Conference was defective only in not determining how the judges should be appointed. The determination upon this matter was prevented by difference of opinion between the larger and the smaller Powers represented in the Conference. The provision for a general judicial court with jurisdiction to hear and determine all matters of international dispute was thus carried within one step of the completeness which was reached in the Convention for the International Prize Court. The Prize Court thus became the advance guard of the proposed judicial system, the experiment upon which the success of the whole plainly depends. President Roosevelt, in his message to Congress of December 3, 1907, said truly:

> Not only will the International Prize Court be the means of protecting the interest of neutrals, but it is in itself a step toward the creation of the most general court for the hearing of inter-

> national controversies, to which reference has just been made. The organization and action of such a Prize Court can not fail to accustom the different countries to the submission of international questions to the decision of an international tribunal, and we may confidently expect the results of such submission to bring about a general agreement upon the enlargement of the practice.

The relations between the project for the Prize Court and the project for the general Judicial Arbitral Court are so manifest that the United States has already proposed to the other Powers an enlargement of the jurisdiction of the Prize Court so that any question between the signatory Powers can be heard and determined by the judges of the Prize Court. This was done by instructions to the delegates of the United States at the London Conference, dated February 6, 1909, by an identic circular note to the Powers represented at that Conference dated March 5, 1909, and by a formal communication from the Department of State to the Powers, dated October 18, 1909. The form given to the proposal in the last mentioned communication from the American State Department was that there should be—

> a further agreement that the International Court of Prize established by the Convention signed at The Hague, October 18, 1907, and the judges thereof shall be competent to entertain and decide any case of arbitration presented to it by a signatory of the International Court of Prize, and that when sitting as a Court of Arbitral Justice the said International Court of Prize shall conduct its proceedings in accordance with the draft convention for the establishment of a Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference, on October 18, 1907.

I am advised that this proposal was favorably received and that action to give it effect in some practicable form only awaits the ratification of the Prize Court Convention. This line of advance also is thus blocked by the failure to confirm the Declaration of London.

This review of the origin and nature of the Declaration of London and of the attendant conditions exhibits the true significance of the Declaration. It is not merely a code of useful rules. It is necessary to the existence of the International Prize Court and therefore to the existence of any Judicial Arbitral Court. It is the one indispensable forward step without which no practical progress can now be made in the further development of a system of peaceable settlement of inter-

national disputes. It is to be hoped that a fuller realization of its far-reaching importance will soon lead to its acceptance. I can not avoid the conviction that a broad-minded and statesmanlike treatment of this constructive measure for practical progress in international relations, is of greater value than merely benevolent but academic declarations in favor of peace which are to be found in general treaties of arbitration and in diplomatic correspondence and in public speeches.

Indeed the whole practice of making general treaties of arbitration can not fail to be discredited by the failure, if there is to be a failure, of the Prize Court Convention, for the cynical are sure to question the sincerity of general treaties of arbitration covering the whole field of international relations between nations which refuse to assent to this Convention covering but a small part of the same field.

ELIHU ROOT.

Call of the Conference by Great Britain[1]

Sir Edward Grey to His Majesty's Representatives at Berlin, Madrid, Paris, Rome, St. Petersburg, Tokio, Vienna, and Washington[2]

FOREIGN OFFICE, *February 27, 1908.*

SIR, The Convention for the establishment of an International Court of Appeal in matters of prize which formed Annex 12 to the Final Act of the Second Peace Conference has been under the consideration of His Majesty's Government.

2. Article 7 of the Convention provides that, in the absence of treaty stipulations applicable to the case, the Court is to decide the appeals that come before it, in accordance with the rules of international law, or if no generally recognized rules exist, in accordance with the general principles of justice and equity.

3. The discussions which took place at The Hague during the recent Conference showed that on various questions connected with maritime war divergent views and practices prevailed among the nations of the world. Upon some of these subjects an agreement was reached, but on others it was not found possible, within the period for which the Conference assembled, to arrive at an understanding. The impression was gained that the establishment of the International Prize Court would not meet with general acceptance so long as vagueness and uncertainty exist as to the principles which the court, in dealing with appeals brought before it, would apply to questions of far-reaching importance affecting naval policy and practice.

4. His Majesty's Government therefore proposes that another conference should assemble during the autumn of the present year, with the object of arriving at an agreement as to what are the generally recognized principles of international law, within the meaning of paragraph 2 of Article 7 of the Convention, as to those matters wherein the practice of nations has varied and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular

[1] *British Parliamentary Paper,* Miscellaneous, No. 4 (1909), p. 1. [Cd. 4554.]

[2] With the concurrence of all the Powers invited to the conference, the invitation was subsequently extended to the Netherland Government.

case, the Court should observe in dealing with appeals brought before it for decision.

5. The rules by which appeals from national Prize Courts would be decided affect the rights of belligerents in a manner which is far more serious to the principal naval Powers than to others, and His Majesty's Government are therefore communicating only with the Governments of Austria-Hungary, France, Germany, Italy, Japan, Russia, Spain, and the United States of America. They would propose that the conference should assemble in October[1] and, if it is agreeable to the Governments of those countries, they would suggest that it should meet in London.

6. The questions upon which His Majesty's Government consider it to be of the greatest importance that an understanding should be reached are those as to which divergent rules and principles have been enforced in the Prize Courts of different nations. It is therefore suggested that the following questions should constitute the programme of the conference:

(*a*) Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with regard to compensation where vessels have been seized but have been found in fact only to be carrying innocent cargo;

(*b*) Blockade, including the questions as to the locality where seizure can be effected, and the notice that is necessary before a ship can be seized;

(*c*) The doctrine of continuous voyage in respect both of contraband and of blockade;

(*d*) The legality of the destruction of neutral vessels prior to their condemnation by a Prize Court;

(*e*) The rules as to neutral ships or persons rendering "unneutral service" (*"assistance hostile"*);

(*f*) The legality of the conversion of a merchant-vessel into a warship on the high seas;

(*g*) The rules as to the transfer of merchant-vessels from a belligerent to a neutral flag during or in contemplation of hostilities;

(*h*) The question whether the nationality or the domicile of the

[1] The meeting of the conference was postponed to December 4, 1908.

owner should be adopted as the dominant factor in deciding whether property is enemy property.

7. His Majesty's Government are deeply sensible of the great advantage which would arise from the establishment of an International Prize Court, but in view of the serious divergences which the discussion at The Hague brought to light as to many of the above topics after an agreement had practically been reached on the proposals for the creation of such a Court, it would be difficult, if not impossible, for His Majesty's Government to carry the legislation necessary to give effect of the Convention unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal should be governed.

8. If the programme outlined above is concurred in by the Government to which you are accredited, it would be convenient if, on some subsequent date, as for instance the 1st August, the Governments were to interchange Memoranda setting out concisely what they regard as the correct rule of international law on each of the above points, together with the authorities on which that view is based. This course would greatly facilitate the work of the Conference, and materially shorten its labours.

9. I have to request your Excellency to address a communication in this sense to the Minister for Foreign Affairs, expressing at the same time the hope that if his Government are favourable to the idea of the conference being held, they will send a Delegate furnished with full powers to negotiate and conclude an agreement.

I am, etc.,

E. GREY.

British Circular Instruction of July 8, 1908[1]

Sir Edward Grey to Sir C. Mac Donald[2]

FOREIGN OFFICE, *July 8, 1908.*

SIR,

With reference to paragraph 8 of my despatch of the 27th February last, I transmit to you herewith two copies of a Memorandum setting

[1] *British Parliamentary Paper,* Miscellaneous, No. 4 (1909), p. 2. [Cd. 4554.]

[2] A similar despatch was addressed to His Majesty's Representatives at Paris, Berlin, Madrid, Vienna, Rome, Washington, St. Petersburg, and The Hague.

out the views of His Majesty's Government, founded upon the decisions in the British Courts as to the rules of international law on the points enumerated in my above-mentioned despatch proposed for discussion at the forthcoming Naval Conference at London.[1] I have to instruct you to hand one copy of this Memorandum to the Japanese Government, and to inform me by telegraph that you have done so.

In so doing, you should explain that it is merely a compilation of rules and dicta of British Courts and British practice collected for convenience, but necessarily put compendiously, so that, if a question arose, it would have to be decided by reference to the full authorities, and that, therefore, it is not to be taken as an official code, since some of the rules and dicta are of ancient date, and their application may be difficult in view of modern conditions.

I am, &c.,

E. GREY.

British Circular Instruction of September 14, 1908[2]

Sir Edward Grey to His Majesty's Representatives at Berlin, Madrid, Paris, Rome, St. Petersburg, The Hague, Tokio, Vienna, and Washington

FOREIGN OFFICE, *September 14, 1908.*

(Circular)

(Extract)

The invitations which were issued by His Majesty's Government for a Conference in London during the coming autumn with the object of arriving at an agreement as to what are the generally recognized principles of international law on certain questions of maritime war have now been accepted by all the Powers to whom they were sent. With the concurrence of all the Governments which were originally asked to take part in the Conference, an invitation was subsequently issued to the Netherland Government in view of the peculiar position occupied by their country as the seat of the proposed International

[1] This Memorandum is incorporated in the "Statement of Views Expressed by the Powers, in their Memoranda." Pertinent portions with the original notes may be found under the subheading "Great Britain," *infra*, pp. 20–111.

[2] *British Parliamentary Paper*, Miscellaneous, No. 4 (1909), p. 14. [Cd. 4554.]

Prize Court and as the meeting place of the First and Second Peace Conferences. This invitation has also been accepted.

The list of subjects enumerated in my circular despatch of the 27th February last has met with general approval, though a desire has been expressed that the specific mention of the subjects enumerated in the circular should not be held to exclude the discussion of other questions connected therewith if their consideration would be of help to carry into effect the work of the Conference. While cordially acquiescing in the wish that no point or question should be excluded which is germane to the work of the Conference, His Majesty's Government are anxious that the subjects for consideration should be limited to those whose elucidation is required in order to facilitate the general acceptance of the scheme for the creation of the International Prize Court.

His Majesty's Government will endeavour to prepare, and hope to lay before the Conference on its assembly, as a suitable basis for its deliberations, a draft declaration in terms which shall harmonize as far as may be possible the views and interpretations of the accepted law of nations as enunciated in the memoranda of the several Governments. The text of any paper drawn up on the lines contemplated may of course have to depart in some respects from the views held by particular Governments, although every effort will be made to reconcile such divergences, and it is necessary to point out, even at the present stage, that the provisions of the proposed draft declaration must not, in the circumstances explained, be taken to command on every point the assent of Great Britain, but will be submitted as a basis for discussion.

With reference to the date at which the Conference should assemble, it will be remembered that His Majesty's Government originally suggested that the first meeting should take place early in October; but I have since learned that it would be convenient to some of the Powers if a somewhat later date was fixed upon, in order that the sittings should not clash with the Copyright Conference to be held at Berlin in October. Moreover, His Majesty's Government would experience much difficulty in carrying through the necessary preparatory work for the elaboration of the bases of discussion in the period originally contemplated. They had hoped to receive the memoranda embodying the views of the several Governments on the 1st August last. It was, however, not until some time after that date that the first memoranda were received, and even at the present time most of them are still out-

standing. His Majesty's Government would therefore now propose that the Conference should assemble at the Foreign Office in London on Tuesday, the 1st December next.[1]

In bringing the contents of this despatch to the knowledge of the Government to which you are accredited, you will take an opportunity of assuring them of the pleasure that it will give to His Majesty's Government to welcome their delegates to the Conference, in the confident hope that the spirit of co-operation and good-will which has led to its meeting will subsist throughout its deliberations and produce the results which it is the earnest desire of the Governments there represented to attain.

I am, &c.

E. GREY.

British Circular Instruction of November 10, 1908[2]

Sir Edward Grey to His Majesty's Representatives at Berlin, Madrid, Paris, Rome, St. Petersburg, The Hague, Tokio, Vienna, and Washington

FOREIGN OFFICE, *November 10, 1908.*

(Extract)

The document which His Majesty's Government are drawing up as a basis for discussion at the Conference is in an advanced stage of preparation. It will, I hope, be ready about the 15th of this month, and I shall lose no time in communicating it to the Governments of the Powers to be represented at the Conference.

As has already been explained, the object which His Majesty's Government have had in view in drafting this Declaration is to set out as definitely as possible the points of law on which the principles upheld by all the Powers—and also, wherever this can be shown, their practice —are in agreement, and also those points in regard to which common experience and similarity of conditions arising from modern developments of maritime commerce, navigation, and war make it possible at the present time to lay down the general principles of international law

[1] A further adjournment was ultimately made to December 4, 1908.

[2] *British Parliamentary Paper*, Miscellaneous, No. 4 (1909), p. 18. [Cd. 4554.]

which seem to have gradually emerged out of the separate pursuit of independent lines by each country.

The main task of the Conference will not therefore be to deliberate *de lege ferenda,* as the Peace Conferences have been called upon, and may again be called upon, to do with a view to develop and extend the scope of the conventional law of nations. The proposed Declaration should, in the opinion of His Majesty's Government, place on record that those Powers which are best qualified and most directly interested, recognize, as the result of their common deliberations, that there exists in fact a common law of nations of which it is the purport of the Declaration, in the common interest, to set out the principles.

His Majesty's Government venture to hope that in thus defining "the generally recognized rules of international law," which, as is expressly laid down, are to form the basis of the decisions of the International Prize Court, the Conference will put an end to many uncertainties and doubts which are a danger both to peaceful commerce and to good political relations, and which only too often are caused by the mere fact that the law to which all nations are really anxious to conform lacks the authority of an accepted definition.

In preparing the document in the form proposed, His Majesty's Government have accordingly intended, not to suggest any new doctrines, but to crystallize, in the shape of a few simple propositions, the questions on which it seems possible to lay down a guiding principle generally accepted. In regard to other questions which can not be so dealt with, His Majesty's Government will be happy to consider in the most conciliatory spirit such proposals as have been or may be put forward with the view to the adoption of special conventional stipulations.

I am, &c.

E. GREY.

Statement of the Views Expressed by the Powers in Their Memoranda, and Observations by the British Government Intended to Serve as a Basis for the Deliberations of the Conference[1]

A

CONTRABAND

Observations

It is established according to all the memoranda, that the principle of contraband of war continues to be a principle sanctioned by international law.

All the memoranda alike make a distinction according as the objects intercepted have a hostile character more or less openly or clearly shown and thus establish, expressly or impliedly, the classification into absolute contraband and conditional or relative or accidental contraband.

This view was maintained in the deliberations of the Second Peace Conference at The Hague, 1907.

I—Absolute Contraband

Views expressed by the memoranda

Germany

Art. 17. The following articles and materials are, without notice, regarded as contraband, under the name of absolute contraband:

1. Arms of all kinds, including arms for sporting purposes and their unassembled distinctive parts;
2. Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts;
3. Powder and explosives of all kinds;
4. Gun-carriages, caissons, limbers, military wagons, field forges, and their unassembled distinctive parts;
5. Clothing and equipment of a distinctly military character;

[1] *British Parliamentary Papers,* Miscellaneous, No. 5 (1909), p. 59. [Cd. 4555.]

6. Saddle, draft, and pack animals suitable for use in war;
7. All kinds of harness of a distinctly military character;
8. Conserved food suitable for the use of troops;
9. Articles of camp equipment and their unassembled distinctive parts;
10. Railroad rails as well as locomotives and vehicles intended to run on rails, and their unassembled distinctive parts;
11. Telegraphs, radiotelegraphs, and telephones and their unassembled distinctive parts;
12. Armor plates;
13. Warships and boats and their unassembled parts especially distinctive as suitable for use only in a vessel of war;
14. Balloons as well as their unassembled distinctive parts and accessories, articles, and materials of a character suitable for use in aerial navigation;
15. Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms and of military materials for use on land or sea.

Belligerents can complete the list of absolute contraband by a special and notified declaration. They can, however, add to the already existing list only articles and materials made exclusively for use in war.

United States of America

Art. 33. The term "contraband of war" includes only articles having a belligerent destination and purpose. Such articles are classed under two general heads:

(1) Articles that are primarily and ordinarily used for military purposes in time of war, such as arms and munitions of war, military material, vessels of war, or instruments made for the immediate manufacture of munitions of war.

Articles of the first class, destined for ports of the enemy or places occupied by his forces, are always contraband of war.

In case of war, the articles that are conditionally and unconditionally contraband, when not specifically mentioned in treaties previously made and in force, will be duly announced in a public manner.

Art. 34. Vessels, whether neutral or otherwise, carrying contraband

of war destined for the enemy, are liable to seizure and detention, unless treaty stipulations otherwise provide.

Art. 35. Until otherwise announced, the following articles are to be treated as contraband of war:

Absolute contraband. Ordnance; machine guns and their appliances and the parts thereof; armour 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 and their component parts; machinery for the manufacture of arms and munitions of war; saltpetre; military accoutrements and equipments of all sorts; horses and mules.

AUSTRIA-HUNGARY

(*a*) According to theory and practice only war material is subject as contraband to confiscation pure and simple. Some Powers, it is true, have placed in contraband called absolute, articles of double usage. Such articles are not, however, generally considered as contraband in the strict sense, their owners being indemnified, usually, by the captor. A number of distinguished authors even limit the notion of contraband to articles which, by their nature, can be considered as being bound to aid the belligerent in hostilities, that is, to arms and munitions of war, commerce in all other articles remaining entirely free (*see* Kleen, *De la contrebande de Guerre,* 1893, p. 28 *et seq.; Lois et Usages de la Neutralité,* Vol. 1, p. 397; de Boeck, *Propriété Privée Ennemie sous Pavillon Ennemi,* p. 590; Despagnet, *Cour de Droit International Public,* p. 831; *Institut de Droit International,* first draft, 1896, § 3).

But to-day belligerents have recourse, in an increasing measure, to all branches of agricultural and industrial production under the most varied forms; to equip and feed their gigantic armies the Powers are forced to provide themselves with a multitude of things which have a normally pacific use (provisions, cloth, raw materials, horses, oil).

Even if it seems logical, at first view, to declare contraband such articles as well as war material it would be dangerous, all the same, to extend by international agreement the notion of contraband beyond war material properly so-called.

To such an extension can be opposed with stronger reason all the objections raised by the delegates of Great Britain in the course of the Second Peace Conference against the principle of contraband itself (IVth Commission, 8th session).

In case the Powers should not reach an agreement to abolish definitively the principle of contraband itself it would be at least very desirable to abandon the contraband called relative.

Moreover, serious considerations militate against the notion of absolute contraband. According to the doctrine generally adopted contraband is characterized by the fact that in carrying articles suitable for use in war the neutral procures for the consignee an advantage over his enemy. To this end the articles must actually fall into his hands. The mere fact that they are going towards the enemy is not sufficient to impress upon them the enemy character. If the war occurs only on land the belligerent ought not to confiscate blindage or marine engines, and if the articles carried are intended only to cross enemy territory, the hindrance put on the shipment would scarcely be justifiable. It will perhaps be said that the adversary would have to fear, in this case, that the enemy might seize them while in transit. A safe-conduct delivered by the authorities of the enemy country and produced by the neutral detained would, however, remove this fear.

It follows that there exists, indeed, only a presumable contraband (and not an absolute), the transportation of war material simply creating the presumption that the articles en route towards the enemy would be employed in the war. Proof to the contrary can not be refused to neutrals.

As to the precise determination of contraband it must be asked whether it should consist of a limiting enumeration of the articles of contraband or in a definition. A definition seems preferable. Almost all authors, particularly the English writers, reject, with good reasons, the "list" since an enumeration would be incomplete or at least would soon become so (see Perels, *Das internationale öffentliche Seerecht,* p. 238).

In case a definition of contraband should be adopted, the Powers

would have to abstain from notifying, in their proclamations of war, a list of articles to be confiscated. The International Prize Court would lack any basis of jurisdiction if belligerents were authorized henceforth to determine arbitrarily the articles of contraband.

Spain

(A) In case the Powers do not agree to abandon the principle of contraband of war, the latter will stand with the following limitations:

1. Only the articles enumerated by the Convention stipulated at the Conference shall be considered as articles of contraband. The list arranged by the corresponding subcommittee of the Second Peace Conference of 1907 shall serve as the basis of the enumeration.

France

(A) 1. The transportation by neutrals of contraband of war with enemy destination is forbidden.

2. The following articles, when destined for the enemy, are considered contraband:

Pieces of ordnance and firearms;
Side-arms;
Projectiles;
Powder and other explosives;
Saltpetre;
Sulphur;
Articles of equipment, of encampment, and of military harness,
All material for military or submarine telegraphy and for use with military balloons, as well as all instruments, materials, or any articles capable of being utilized for the armament of vessels or for use in war.

Great Britain

The cases relating to this subject decided in the British courts, being always concerned with some particular cargo, do not contain any lists of articles which may, or which may not, be regarded as contraband. In many cases the actual decisions relate to articles which can not now be considered to be contraband, and to that extent they must be considered out of date.

The rules upon which the courts acted can, however, be ascertained from the cases and applied to the circumstances of the present time.

It is believed that the list of absolute contraband agreed to at the Second Peace Conference is in exact accord with such rules.

1. The term "contraband" is applied to neutral property on board ship on the high seas or in the territorial waters of either belligerent which (1) is by nature capable of being used to assist in, and (2) is on its way to assist in, the naval or military operations of the enemy.

2. In determining whether the second of these conditions is fulfilled the court is bound to distinguish between goods which are primarily used or particularly adapted for purposes of war, and goods which are capable of being used for the purposes of either peace or war, and which do not fall within the former description. The former are usually known as absolute contraband and the latter as conditional contraband.[1]

Italy

1. If the articles considered as contraband in case of war are not enumerated by treaties previously concluded (such for example, as art. 15 of the *Treaty of Commerce and Navigation* between Italy and the United States of America, February 26, 1871, and some other conventions concluded by the Royal Government with some of the States of South and Central America), this specification shall be made at the beginning of hostilities by a special act of the Government.

In default of treaties or of a special declaration the following articles are considered as contraband of war: cannon, guns, carbines, revolvers, pistols, sabres, and other arms, fire or pocket, of all kinds; munitions of war; articles of military equipment of all kinds; and, in general, everything which can without manipulation serve immediately for maritime or terrestrial armament. (*Code of the Merchant Marine,* October 24, 1877, art. 216.)

Japan

I. Contraband of war is classed in two general categories:

(*a*) *Absolute contraband.* Arms, munitions, and other articles and

[1] *Jonge Margaretha,* English Admiralty Reports, 1 C. Robinson, 188; C. S. Roscoe, *English Prize Cases,* vol. 1, p. 100; *Neptunus,* 3 C. Rob. 108, 1 E. P. C. 264.

materials employed immediately or ordinarily in a military use, when they are destined for the territory of the enemy or for a place occupied by him or his military or naval forces.

(*b*) *Conditional contraband.* . . .

NETHERLANDS

(1) The idea of contraband is applied to the transportation on the open sea or in the waters situated within the jurisdiction of the belligerents, towards enemy territory of goods included in the list of absolute contraband inserted in the report of the 4th Commission of the Second Peace Conference.

RUSSIA

1. Art. I. It is, without notice, forbidden to transport to the enemy the following articles considered as absolute contraband of war:

1. Arms of all kinds, mounted or in separate parts;
2. Munitions of war of all kinds;
3. Explosives and material for their fabrication;
4. All material belonging to parts of artillery, of engineering, of train, camp outfit, material for military aerial navigation;
5. Articles of equipment and of military clothing;
6. Horses and other animals, articles of harness, saddles and packs suitable for use in war;
7. Articles and materials serving for the construction of railroads, or for telegraphic and radiotelegraphic or telephonic installations, as well as for other means of communication capable of being used in war;
8. Food specially suitable for the use of the army;
9. Gold and silver, or bullion, as well as money and paper money of all kinds;
10. Vessels under neutral flag available for use in war;
11. Boats of all kinds, submarine craft, floating docks, and parts of docks, mounted or in detached parts available for use in war;
12. Armor plates;
13. Any instruments, materials, or articles serving for the armament of vessels, or for the manufacture and repair of arms and of military material.

It is equally forbidden to carry to the enemy all other articles serving, in general, exclusively for the use of war, which the belligerent shall have expressly declared absolute contraband of war.

. . . . .

Observations

All the memoranda start here from the same idea, that articles whose hostile character is manifest are without notice liable to be seized by the belligerent. It seems that the following list, already established at The Hague, represents, as exactly as possible, the articles which should be classed as contraband without notice when they have the hostile destination stipulated hereafter (*see* No. 4).

1. Arms of every kind, including arms for sporting purposes and their unassembled distinctive parts;
2. Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts;
3. Powder and explosives specially adapted for use in war;
4. Gun-carriages, caissons, limbers, military wagons, field forges, and their distinctive parts;
5. Clothing and equipment of a distinctly military character;
6. All kinds of harness of a distinctly military character;
7. Saddle, draft, and pack animals suitable for use in war;
8. Articles of camp equipment and their unassembled distinctive parts;
9. Armor plates;
10. War-ships and boats and their unassembled parts specially distinctive as suitable for use only in a war vessel;
11. Instruments and apparatus made exclusively for the manufacture of munitions of war, for the manufacture and repair of arms and of military material for use on land or sea.

Basis for discussion

1. *The list of absolute contraband inserted in the procès-verbal of the second meeting of the Committee on Contraband at the Second Peace Conference is accepted.*

OBSERVATIONS

The general principle being that in such matter the justification of the absolute character of the contraband is the manifestly hostile nature of the articles, it may be asked if there now exist reasons opposed to the principle that the States, by means of a notified declaration for the purpose of avoiding surprises, can add to the list of absolute contraband other articles made for war exclusively.

Basis for discussion

2. *Articles which are exclusively used for war can be added to the list of absolute contraband by means of a notified declaration.*

II—CONDITIONAL CONTRABAND

Views expressed by the memoranda

GERMANY

Art. 18. Other articles and materials suitable for use in war are considered as contraband of war when they are destined for the armed force or for the services of the State of a belligerent and have been by a notified declaration expressly qualified as contraband of war.

They are comprised under the name of relative contraband.

UNITED STATES OF AMERICA

Art 33. The term "contraband of war" includes only articles having a belligerent destination and purpose. Such articles are classed under two general heads:

(2) . . . Articles that may be and are used for purposes of war or peace, according to circumstances.

Articles of the second class, when actually and especially destined for the military or naval forces of the enemy, are contraband of war.

In case of war, the articles that are conditionally and unconditionally contraband, when not specifically mentioned in treaties previously made and in force, will be duly announced in a public manner.

Art. 35. Until otherwise announced, the following articles are to be treated as contraband of war:

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 actually destined for the enemy's military or naval forces.

Austria-Hungary

(A) 1. . . . In case the Powers should not agree to abolish definitely the principle of contraband itself, it would at least be strongly desirable to abandon the so-called relative contraband.

Spain

2. Relative and accidental contraband is abolished.

France

(A) 2. . . . Coal and petrol directly and solely destined for the use of a war fleet or for a port of war must be signed as contraband of war.

3. Food and raw materials intended for non-combatants are not in principle considered as contraband of war, but can be declared such according to circumstances of which the Government is judge and in virtue of an order emanating from it.

Great Britain

1. The term "contraband" is applied to neutral property on board ship on the high seas or in the territorial waters of either belligerent which (1) is by nature capable of being used to assist in, and (2) is on its way to assist in, the naval or military operations of the enemy.

2. In determining whether the second of these conditions is fulfilled the court is bound to distinguish between goods which are primarily used or particularly adapted for purposes of war, and goods which are capable of being used for the purposes of either peace or war, and which do not fall within the former description. The former are usually known as absolute contraband and the latter as conditional contraband.[1]

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[1] *Jonge Margaretha,* 1 C. Rob. 188, 1 E. P. C. 100; *Neptunus,* 3 C. Rob. 108, 1 E. P. C. 264.

Italy

(*a*) I. In case of war, if the articles considered as contraband are not enumerated by treaties previously concluded (such for example, as art. 15 of the *Treaty of Commerce and Navigation* between Italy and the United States of America, of February 26, 1871, and some other conventions concluded by the Royal Government with States of South and Central America), this specification shall be made at the beginning of hostilities by a special act of the Government.

Japan

1. Contraband of war is divided into two general categories:
   (*a*) *Absolute contraband.* . . .
   (*b*) *Conditional contraband.* Articles and materials other than those above described, which can be used with a military purpose, when they are destined for the military or naval forces of the enemy.

Netherlands

2. Relative and accidental contraband are abolished.

Russia

(1) Art. 2. The belligerent has, besides, the right, after previous notification, to forbid the transportation of other articles susceptible of being used in war by an army or fleet, where these articles are en route to armed forces of the enemy (relative contraband of war). . . .

Observations

Although there may be the conventional suppression of conditional contraband desired by several Powers, it should be stated that according to the ideas most generally admitted, the States have the power to consider as such, articles susceptible of serving uses of war as well as inoffensive uses when they have a special destination to the military or naval forces of the enemy. In the present state of international commerce and in the common interest of its security it is necessary that conditional contraband be the subject of a notified declaration.

Basis for discussion

3. *Articles suitable for use in war as well as for inoffensive uses may be declared conditional contraband when they shall have the special hostile destination specified above* (see No. 5). *Notification thereof must be given.*

III—Destination

Views expressed by the memoranda

Germany

16. It is forbidden to neutral vessels going towards the territory of a belligerent, or towards a territory occupied by him, or towards his armed force, to carry articles of contraband of war which are not destined to be discharged in an intermediate neutral port.

The ship's papers are complete proof of the route of the vessel as well as the place of discharge of the cargo, unless the vessel is encountered when she has manifestly deviated from the itinerary indicated by her ship's papers without being able to prove a sufficient cause for this deviation.

18. Other articles and materials capable of use in war are considered as contraband of war when they are destined for the armed forces or for the services of the State of a belligerent and when, by a notified declaration, they have been expressly listed as contraband of war. They are comprised under the name of relative contraband.

There is a peremptory presumption of the destination cited in the preceding paragraph if the consignment in question is addressed to the authorities of a belligerent.

This destination is presumed if the consignment is addressed to a merchant who is known to furnish a belligerent articles and materials of this nature. The same presumption applies in the case when the consignment is destined for a fortified place held by a belligerent or for another place serving as a base of operations or for supplying his armed forces, unless it is a question of establishing the contraband character of the vessels themselves which are en route towards one of these places. The presumption specified in this paragraph may be rebutted.

United States of America

Art. 33. . . . Articles of the first class, destined for ports of the enemy or places occupied by his forces are always contraband of war.

Articles of the second class when actually and especially destined for the military or naval forces of the enemy are contraband of war.

. . . . .

Art. 34. Vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy are liable to seizure and detention, unless treaty stipulations otherwise provide (*see* Art. 36, p. 53).

Austria-Hungary

(See p. 22.)

Spain

(A) 3. Contraband being limited to articles which are used only in war, the fact of their shipment to an enemy fleet or to points of enemy territory or territory occupied by him constitutes in itself proof of the illegal character of the goods. If the latter, destined immediately for an enemy point, are only in transit and possess really a final neutral destination, the consignee must show this by previous notice to the other belligerent and the production of a safe-conduct delivered by the enemy whose territory must be crossed by the goods.

4. Notwithstanding the paragraph preceding, in order that the rights of the belligerents to suppress contraband can be exercised, it is necessary that the vessel on board which the goods are being forwarded be en route directly towards the enemy fleet or point.

France

(C) 1. In respect to *transportation of contraband:*

The destination of the goods decides its character of contraband. The destination of the vessel is insufficient to establish that of the goods (see also A, ss. (1) and (2), p. 24).

Great Britain

3. There is an irrebuttable presumption that absolute contraband is on its way to assist in the operations of the enemy when its desti-

nation is an enemy fleet or any place in the territory or in the occupation of the enemy.[1]

4. There is a presumption that conditional contraband is on its way to assist in the operations of the enemy only if there is proof that its destination is for the naval or military forces of the enemy, or for some place of naval or military equipment in the occupation of the enemy, or if there has been fraudulent concealment or spoliation of papers.[2]

5. The destination of the cargo is generally presumed to be that of the ship. Where the ship is to call at more than one port, the presence on board of goods which are bona fide documented for discharge at a neutral port before the ship reaches an enemy port, can not be made a ground for detention; but, if there is no such documentary evidence, that port which is least favourable to the neutral will be presumed to be the destination of such cargo as would be contraband if carried to that port.[3] If it is proved that the contraband cargo has an ulterior hostile destination, different from that of the ship, to which such cargo is to be forwarded as part of a single mercantile transaction, the destination of the ship will not protect the cargo.[4]

6. A ship carrying contraband as defined in Section 1 may be seized at any moment throughout the whole course of her voyage so long as she is on the high seas or in belligerent waters. The liability to seizure is not affected by the fact that the vessel is intending to touch at some neutral port of call before reaching the hostile destination.

. . . . . .

Italy

(*a*) II. 1. "Neutral vessels directed towards an enemy country, whose cargo is formed in whole or in part of articles of contraband of war shall be seized and taken into one of the ports of the State where the vessel and the contraband goods shall be confiscated and the

[1] *Charlotte,* 5 C. Rob. 305, 1 E. P. C. 490.

[2] *Jonge Margaretha,* 1 C. Rob. 188, 1 E. P. C. 100; *Edward,* 4 C. Rob. 68, 1 E. P. C. 350; *Ringende Jacob,* 1 C. Rob. 92, 1. E. P. C. 60; *Twende Brodre,* 4 C. Rob. 32, 1 E. P. C. 332.

[3] *See* dicta of Lord Stowell in *Trende Sostre,* 6 C. Rob. 391, note, 1. E. P. C. 590, and *Richmond,* 5 C. Rob. 328.

[4] *Hobbs* v. *Henning,* Law Journal Reports, Common Pleas, vol. 34, p. 117; *Seymour* v. *London and Provincial Marine Insurance Company,* same series, vol. 41, p. 193; vol. 42, p. 111.

other goods left at the disposal of the owners." (*Cod. M. M.*, art. 215.)

2. The above-mentioned provision has been interpreted and applied in the sense that the character of contraband of war depends on the final and intentional destination of the cargo and not on the immediate and material destination of the vessel. In a specific case it has been held that contraband exists when the vessel is directed towards a neutral port there to discharge the goods destined to proceed by land route to the enemy country particularly if the country in question has no outlet on the sea. (*Decision of the Prize Commission,* December 8, 1896, capture of the *Doelwijk.*)

Japan

I. Contraband of war is divided into two general categories:

(*a*) *Absolute contraband.* Arms, munitions, and other articles and materials employed immediately and ordinarily for military purposes when they are destined for the territory of the enemy or for a place occupied by him or his military or naval forces.

(*b*) *Conditional contraband.* Articles and materials other than those described above, which can be used for military purposes when they are destined for the military or naval forces of the enemy.

The articles and materials above mentioned are considered as destined for the military or naval forces of the enemy when they are destined for his territory and when, according to the circumstances connected with the place of destination, they can be considered as intended for the military use of the enemy.

II. When the port of destination or call of a vessel is in the territory of the enemy or in a place occupied by the enemy, or when there are reasons to believe that the vessel is going to meet the military or naval forces of the enemy, the destination of the vessel is considered to be hostile.

III. The destination of the cargo is ordinarily determined by the destination of the vessel.

The goods found on board a vessel are presumed to have a hostile destination if the destination of the vessel is a place which, geographically, or from other considerations, can be regarded as constituting

the last halting-place in the transportation of the goods, whether by transshipment or by land transport, to a hostile destination.

Netherlands

I. (1) The notion of contraband is applied to the transportation on the open sea or in the waters situated within the jurisdiction of the belligerents, towards the enemy territory, of goods included in the list of absolute contraband inserted in the report of the 4th Commission of the Second Peace Conference.

III. (1) The theory of "continuous voyage" is applied only to the transportation of contraband towards the enemy territory without transshipment in a neutral port.

Russia

I. 1. . . . Articles of absolute contraband are subject to confiscation when they are transported with destination of an enemy country, a territory occupied by the enemy, or for the armed forces of the enemy.

Art. 2. The belligerent has, besides, the right, after previous notification, to forbid the transportation of other articles suitable for use in war by an army or a fleet, when these articles are transported with destination of armed forces of the enemy (relative contraband of war). They are liable to confiscation if the interested parties do not prove that they are not destined to be used for war.

Art. 3. Under the name transportation destined for the armed forces of the enemy is comprised the transportation of contraband of war with destination:

(*a*) For the army or fleet of the enemy;

(*b*) For a military port or a place fortified by the enemy;

(*c*) For a port occupied by the enemy;

(*d*) For any other port of the enemy, if the articles of contraband are transported for the enemy Government or its purveyors.

Art. 4. Illegal destination in the sense of Articles 1, 2, and 3, is considered as established when the articles of contraband are found on board a vessel:

(*a*) Which is going directly towards an enemy country, a territory occupied by the enemy or his armed forces;

(*b*) Which, while falsely declaring a neutral destination, is, in real-

ity, going towards an enemy country, a territory occupied by the enemy or towards the armed forces of the enemy;

(*c*) Whose destination is, in fact, a neutral port, if the articles of contraband which are found on board are destined to be forwarded finally by sea to an enemy country, a territory occupied by the enemy or to his armed forces.

Observations

As all the memoranda show, the simple hostile destination suffices for absolute contraband, and so far as conditional contraband is concerned a special military destination is necessary.

Basis for discussion

4. *The simple destination to the enemy country as well as the destination to the armed forces of the enemy or to a territory occupied by the enemy, is sufficient to render articles of absolute contraband liable to capture.*

5. *A special destination to the armed forces of the enemy is necessary to render articles of conditional contraband liable to capture.*

Observations

In view of the development of the means of communication and of the multiple ramifications of maritime and land traffic the experience of recent maritime wars has led to the application of certain presumptions of special military destination; but it does not appear that any of these presumptions has had a character absolutely setting aside all proof to the contrary as it has been proposed to agree to for the future in certain cases.

Basis for discussion

6. *There is a presumption of the destination to the armed forces if the consignment is addressed to the enemy authorities, or to a merchant who is well known to furnish the enemy articles and materials for war, or if its destination is a fortified enemy place or another place serving as a base of operations for the armed enemy forces, unless it is a question of establishing the character of the vessel itself which is going towards one of these places. In other cases the destination is presumed innocent. The above presumptions admit of rebuttal.*

OBSERVATIONS

Without discussing here whether new principles should be introduced, it may be stated that the memoranda purporting to represent the existing rules are unanimous in considering that the destination of the goods proves its character of contraband.

Basis for discussion

7. The destination of the goods decides their character of contraband.

IV—PENALTIES

Views expressed by the memoranda

GERMANY

21. Contraband of war is subject to confiscation.

. . . . . .

Goods not contraband of war which are found on board a vessel and which belong to the owner of the contraband are also subject to confiscation unless the provisions of paragraph 2[1] should be applied.

22. The vessel carrying contraband of war is liable to confiscation:

1. If the owner, or the charterer of the entire vessel, or the captain has known or ought to have known of the presence of the contraband on board and that this contraband forms by value, weight, or volume, more than a fourth of the cargo;
2. If the captain has opposed an open resistance to the stopping of the vessel, to the visit, or to the capture.

The confiscation mentioned in paragraph 1, No. 1, is not permissible, if there is occasion to apply the provisions of paragraph 2 of Article 21.

UNITED STATES OF AMERICA

(Nothing)

AUSTRIA-HUNGARY

(A) II. Theory and practice subject absolute contraband to confiscation. Nevertheless the right of confiscation can not be logically deduced from the notion of contraband; it is only the result of histori-

[1] Confiscation of contraband at the opening of hostilities: see below.

cal development. In order to justify this claimed right writers invoke the legitimate interest of belligerents to defend themselves against neutrals who by their "commercial adventures" would augment the forces of the enemy. It is clear that to satisfy this interest it would be sufficient to prevent the transported articles from falling into the hands of the adversary (see Fauchille, *Revue Générale de Droit International Public,* 1897, p. 302). The right of confiscation greatly exceeds this interest; it offers even a strange anomaly; the belligerent seizes the contraband gratuitously in order that his adversary should not secure it by purchase (see Perels, *op. cit.,* p. 236; Lehmann, *Die Zufuhr von Kriegskonterbande,* 1877, p. 73).

One might, however, urge the military interest which the belligerents have in employing the articles seized in the strife. Is this interest worthy to be considered? Whatever it may be it could easily be taken into account without reviving confiscation pure and simple, so onerous for neutrals who are not held to contribute to the costs of the war. It would suffice to oblige the belligerents to indemnify the owners of the confiscated goods. But it is remarked, that in imposing this obligation upon the belligerents they would often be forced to purchase a quantity of arms and munitions for which they had no need, while the neutrals would profit eagerly by the occasion to rid themselves of them with profit.

To escape this troublesome consequence, choice between confiscation with indemnity and sequestration could be left to the parties to the strife.

Spain

5. Contraband once discharged, the responsibilities which arise in international law from its transportation are annulled.

6. Articles of contraband are liable to confiscation. Other goods loaded on the same vessel are free, whether they belong also to the owner of those articles or not.

7. Between the system which authorizes the confiscation of the vessel carrying no difference what quantity of contraband and the system which consents to such action only when there has been resistance or fraud, this formula of conduct can be established: if the captain or the one who has fitted out the vessel has known or been in a position to know of the presence of the contraband on board, the vessel will be responsible to the captor for a ransom or compensation

equivalent to three times the value of the contraband and to five times the amount of the freight. If the ransom has not been paid the captor can, in any case, proceed to measures of execution only against the vessel and while the latter remains in his hands.

France

(A) 4. Neutral contraband goods found on board an enemy vessel is confiscated. Neutral vessels laden with contraband goods destined for the enemy are stopped; the said goods are seized and confiscated. The vessels and the remainder of the cargo are released unless the contraband goods compose three-fourths of the value of the cargo, in which case the vessels and the cargo are confiscated entirely.

Great Britain

6. . . . When the contraband goods have been discharged, the liability to seizure is at an end.[1] In exceptional cases it has been held that a ship which has carried contraband to the enemy on her outward voyage under circumstances aggravated by fraud and simulated papers is still liable to capture and condemnation on her return voyage.[2]

8. The contraband is liable to condemnation as prize. Any other cargo on board belonging to the owner of the contraband is also subject to condemnation. Innocent cargo, not belonging to the owner of the contraband, will be restored to its owner, but no compensation will be paid for loss arising from the detention of the goods.

Any interest in the ship carrying the contraband which belongs to the owner of the contraband is also subject to condemnation.

The ship is also subject to condemnation if she has made forcible resistance to the captor, or if she carries false or simulated papers, or if there are other circumstances amounting to fraud. In the absence of the above conditions the ship will be restored, but no compensation will be paid for loss of freight, or for the detention.[3]

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[1] *Imina,* 3 C. Rob. 168, 1 E. P. C. 289, and see the reference to practice by Lord Stowell in *Frederick Molke,* 1 C. Rob. 86, 1 E. P. C. 58.

[2] *Nancy,* 3 C. Rob. 122; *Margaret,* 1 Acton 333, 2 E. P. C. 113.

[3] *Jonge Tobias,* 1 C. Rob. 329, 1 E. P. C. 146; *Staadt Emden,* 1 C. Rob. 26, 1 E. P. C. 37; *Oster Risoer,* 4 C. Rob. 199, 1 E. P. C. 382; *Neutralitet,* 3 C. Rob. 295, 1 E. P. C. 309.

Italy

(*a*) II. 1. "Neutral vessels going towards an enemy country, whose cargo is formed wholly or in part by articles of contraband of war, shall be captured and taken into one of the ports of the State, where the vessel and the contraband goods shall be confiscated and the other goods shall be left to the disposition of the owners." (*Cod. M. M.*, art. 215.)

3. It has been held also that the vessel is not liable to confiscation if it appears that the owner did not know the use to which it was proposed to put his vessel, namely, for the transportation of contraband.

Japan

IV. Contraband of war and goods found on board the same vessel belonging to the owner of the articles of contraband are subject to confiscation.

V. Vessels having contraband of war as well as the cargo on board belonging to the owner of the vessel are subject to confiscation in the following cases:

(*a*) When fraudulent means are employed in the transportation of the contraband goods;

(*b*) When the transportation of the contraband goods is the principal object of the voyage.

A vessel is also liable to confiscation when the contraband goods found on board belong to the owner of the vessel.

Netherlands

I. (4) Contraband is liable to confiscation.

The vessel carrying the contraband is liable to confiscation only:

1. If an important part of the cargo is made up of contraband, unless it appears that the captain, or the charterer, could not have known the true character of the cargo;

2. If the captain resists the stopping, the visit, or the capture of the vessel.

Russia

I. Art. 1. . . . Absolute contraband is subject to confiscation if it is transported with destination to an enemy country, a territory occupied by the enemy, or by his armed forces.

. . . . .

Art. 2. . . . They (these articles of conditional contraband) are liable to confiscation if the interested parties do not prove that the articles transported are not destined to be used for war.

Art. 6. Merchant vessels of neutral nationality are liable to confiscation when they carry:

(*a*) Contraband of war forming by its volume, its weight, or its value, more than a fourth of the whole cargo;

(*b*) Articles of contraband even in less quantity if their presence on board the vessel evidently could not, by their very nature be unknown to the captain.

Art. 7. The vessel carrying contraband of war in less quantity than one-fourth of the cargo is liable to a fine equivalent to five times the value of the contraband cargo.

Art. 8. If the confiscation extends only to the contraband cargo, and not to the vessel on board which it is loaded, this latter is held only until it has delivered the contraband and paid the fine (Article 7).

The contraband cargo can be delivered to the captor either at the very place of the capture or in a port where the vessel can be taken if the captor judges it necessary.

Art. 9. The confiscation of the vessels and cargoes seized can take place only by virtue of a sentence of a prize court.

Art. 10. If a consignment not constituting contraband of war is found on board a captured vessel, this consignment is restored to the owners without indemnification.

Observations

As to contraband, whatever it be, confiscation is unanimously recognized as the penalty at present applicable.

Basis for discussion

8. *All articles of contraband are liable to confiscation.*

OBSERVATIONS

The common modern idea is to consider confiscation as a sanction and not as a benefit or a gratuity for the captor.

As for either the vessel carrying the contraband or the goods other than contraband found on board the same vessel, confiscation appears subordinated either to the greater or less importance of the contraband in relation to the expedition, or to a real or presumed complicity without either the one or the other of these considerations in itself being unanimously established.

Basis for discussion

9. *Confiscation of the vessel carrying contraband or goods other than contraband found on board the same ship is subordinated to the greater or less importance of the contraband in relation to the expedition or to a real or presumed complicity. When complicity is retained as the cause of confiscation the fraudulent circumstances cause it to be presumed.*

OBSERVATIONS

Finally it is a principle appearing as generally accepted that a capture can not be made on the ground of a carriage of contraband previously made and at the time completed.

Basis for discussion

10. *A capture can not be made on the ground of a carriage of contraband previously made and at the time completed.*

V—TEMPORARY EXEMPTION AT THE BEGINNING OF HOSTILITIES

Views expressed by the memoranda

GERMANY

21. . . . Confiscation is permitted only against indemnification if at the time the vessel was encountered at sea the captain did not know and was not in a position to know of the opening of hostilities, or, when it is a question of articles or materials declared contraband of war by application of paragraph 2 of Article 17 and of paragraph 1 of Article 18, did not know and was not in a position to know of this declaration, or, finally, if the captain after having had knowledge

of the opening of hostilities or of the declaration had not yet been able to discharge the articles of contraband. Ignorance is presumed if a steamer is met on the open sea within eight days or a sailing vessel within four weeks following the opening of hostilities or the notification made, conformably to Article 20, to the Power to which it is amenable, and without having within this period called at any port. Proof to the contrary is admissible.

UNITED STATES OF AMERICA

(Nothing)

AUSTRIA-HUNGARY

(Nothing)

SPAIN

(Nothing)

FRANCE

(Nothing)

GREAT BRITAIN

(Nothing)

ITALY

(Nothing)

JAPAN

VI. A vessel which has contraband on board is not, from this fact alone, liable to capture if the captain has no knowledge, real or presumed, of the opening of hostilities.

NETHERLANDS

I. (5) The contraband captured can be confiscated only against indemnification if the captain of the vessel stopped has not known and has not been able to know that the war had begun.

RUSSIA

(Nothing)

OBSERVATIONS

As is seen, a certain number of memoranda have not considered the question of temporary exemption at the opening of hostilities. It may

be asked, however, whether the proposition expressed by the German and Japanese memoranda does not represent an opinion accepted to-day as a necessary guarantee of international commerce in time of peace.

Basis for discussion

11. *There is a temporary exemption from confiscation when the vessel is encountered on the sea navigating in ignorance of the hostilities or of the declaration of contraband applicable to its cargo.*

VI—Compensation

Views expressed by the memoranda

Germany

Art. 27. When, the capture of the vessel or of the goods not having been sustained, there is occasion for restitution of these properties or the payment of the indemnity in lieu thereof, the owner has a right to compensation, provided the seizure has not been brought about by his own fault or that of the captain.

United States of America

(Nothing)

Austria-Hungary

The rules of equity adopted in this matter by practice require that a vessel seized for carrying contraband be restored to the owner in a case where the prize court shall not have condemned it. If restoration has become impossible the owner must be reimbursed in the value of the vessel.

What causes discussion is the question whether the belligerent must also repair the loss caused the owner by the seizure and detention of the vessel. In this regard, it seems that the practice of the British Prize Courts could be followed, ordering the reparation unless the captor has good reasons to suspect the seized goods as contraband (Calvo, *Droit International,* vol. IV, p. 320, *et seq.*). If not, the belligerent must repair all damage resulting directly from the unjustified seizure and retention. He would therefore have to make up for:

1. The depreciation, if any, of the vessel, provided it exceeded the limits of deterioration caused by ordinary use (wear and tear); when the vessel can not be restored he shall be held to reimburse the value which it had at the time of the seizure;
2. The cost of the transportation of the vessel from the last port which the vessel had left before it was seized to the moment of restitution at the port of origin in so far as the said transportation was effected at the expense of the owner, for example, with his fuel or by his crew;
3. The cost of the defense and of the proceedings before the national prize courts;
4. Interest counting from the day when the owner presented his claim to the prize court of first instance.

As to 3 and 4, it should be remarked:

The reimbursement of the costs of the proceedings and of the defense before the International Prize Court is regulated by article 46 of the Convention relative to the establishment of that tribunal.

As to the liquidity and the amount of interest to be paid, Calvo observes (*op. cit.*, vol. III, p. 430, *et seq.*); "The question of the interest due up to the day of the payment of the indemnities awarded seems no longer able to raise any doubt, the rate to be fixed alone causing discussion. In this matter, according to the principles generally followed, the interest allowed is regulated ordinarily according to the rate of commercial interest legally admitted in the debtor country, which rarely exceeds six per cent." The stipulation of such interest would protect neutrals from injuries which the belligerents might cause them by retarding the payment.

It may also be asked, whether the belligerent ought not to indemnify the owner for the loss of profits occasioned by the detention of his vessel. Deprived of the use of the vessel the neutral suffers a sensible loss which it would appear very unjust not to take into account. On the other hand reparation would impose on the belligerents an onerous duty; likewise the fixing of the amount would place the prize courts in the face of almost insurmountable difficulties.

The arbitral sentence pronounced in the Alabama case, offers an instructive precedent. It related, it is true, to reparation of damage sustained by a belligerent, not a neutral. But the state of affairs was

analogous, the arbiters having been called to decide, among other things, on the reparation of "indirect" damages. "The Tribunal," says Despagnet (*op. cit.*, p. 819), "set aside the indirect claims whose appreciation is very difficult and can lead to exaggerated results." On the said decision, Calvo makes the following observations (*op. cit.*, p. 431):

> According to the rules of the law of nations as well as to those of the civil law, the reparation of the injury proven can not equitably exceed the direct loss. Who does not see, indeed, that, once engaged in the field of hypotheses concerning what the victim, violently or unjustly dispossessed, would have been able, certain combinations being given, to make of his property by making such or such use of it, one becomes entirely arbitrary in view of the impossibility of taking into account the contrary or unfavorable circumstances which, especially in a commercial matter, may overturn the most skillfully contrived projects and calculations.

Should the neutral then not be indemnified for the loss of profits for the sole reason that these profits can not be calculated to the penny? It is clear that the question can not be solved in the sense of the one or the other alternative, and that equity demands a compromise of the interests at stake. Moreover it is evident that Calvo, in the passage cited, does not at all reject, in principle, the reparation of the loss of profits, but only of the profits which could have been obtained only in particular circumstances and whose amount escapes all estimate. If the amount of the loss can not be fixed in a clear and incontestible manner, it could at least be established approximately by taking the average of the net earnings which the vessel has made in the course of a certain number of years, during the space of time corresponding to the period during which the vessel was withdrawn from the control of the owner. When, for example, the vessel was seized in March, 1910, and restored in October of the same year, its owner would only have to show the amount of net profits which he had drawn from the vessel in the period from March to October in the course of 1909, 1908, 1907 . . . Thus he would receive an indemnification, at least suitable if not complete, without the prize court having need of entering into problematic calculations, and the belligerent risking having to pay exorbitant sums in reparation.

Spain

(A) 8. It is right that the belligerent who exceeds his rights in the process of repression recompense the losses and injuries caused. In declaring the capture illegal the court will determine if there is occasion for an indemnity and what, in favor of those interested in the vessel or cargo stopped without reasonable cause.

France

(A) 6. When the examination of the ship's papers has shown irregularities which are capable of raising legitimate suspicions as to the nationality of the vessel or as to the nature of the cargo, and when, as a consequence, the capture has been effected, no indemnity is due, even if it should be immediately recognized that the vessel carried no prohibited goods.

The neutral whose property has been seized on board an enemy vessel has the right, in principle only, to the restoration of his goods, or in case of sale, to reimbursement of the net price arising therefrom, without compensatory damages, at the expense of the captor.

The neutral whose vessel has been momentarily halted to permit the seizure of contraband found on board and not involving the capture of the vessel, likewise, has no right to compensation.

When the captor has deemed it necessary, because of military considerations, to destroy a prize at sea, the destruction is an act of war, which gives no right of indemnity to the neutral owner of the cargo.

Great Britain

9. If a ship is brought in for adjudication on the ground that she was carrying contraband, and no part of her cargo is condemned, the captor must make full compensation for the losses sustained by the claimants, unless there was at the time of seizure some evidence of facts which, if established, would be a ground for condemnation, and also reasons for believing that upon further inquiry such facts would be established.[1]

Italy

IV. . . . When the capture has taken place in the circumstances and with the forms established by international usage or by treaties

[1] *Ostsee,* 9 Moore, P. C. 150, 2 E. P. C. 432; *Leucade,* Spinks 217, 2 E. P. C. 473.

no indemnity can be claimed, even if the prize court has not decreed confiscation. The omission of some secondary formalities, (concerning, for example, the report of capture) could not cloud the legitimacy of the capture, especially if it is a matter of formalities established in the interest of the captor (such as the affixing of seals). (*Comm. prises,* December 8, 1906, cited above.)

Japan

I. When it is recognized that the seizure of a vessel for carrying contraband, for accomplishment of a service contrary to neutrality, or for violation of a blockade, has been made without reasonable cause of suspicion, an indemnity should be paid for the direct damages caused by the seizure.

II. Neutral vessels, seized for the following reasons, have no right to compensatory damages by reason of the seizure;

(*a*) When fraudulent ship's papers are produced;

(*b*) When they are not supplied with the desired ship's papers, or when these papers are not produced;

(*c*) When the ship's papers have been destroyed or cancelled, or when they are not regular;

(*d*) When they are navigating under a false flag or other false indications.

Netherlands

I. (6) The unjustified capture or seizure of the vessel, or of its cargo, gives occasion for a reparation of losses and interest. This compensation is not due if the captor proves that the retention or fraudulent destruction of the ship's papers justified the suspicion of contraband.

Russia

I. Art. 10. If a cargo not constituting contraband of war is found on board a captured vessel, this cargo is restored to the owners without indemnification.

Art. 11. If the vessel or the cargo which ought to be restored is destroyed by the captor, or has sunk, or is damaged through his fault, the owner should be indemnified only for the direct losses suffered under this head.

Art. 12. Independently of the restoration of the vessel, or of the cargo, or of their value, a special indemnity shall be granted to the owners if it is established that the vessel or the cargo has been seized without sufficient reasons or in violation of the prescribed rules.

Observations

From the practices at present followed the principle seems to emerge that, in order to give rise to compensation, the capture must be in all regards unjustifiable.

Basis for discussion

12. *The right to compensation depends on the question whether, in the opinion of the court, there are sufficient reasons for capturing the vessel.*

VII—Convoy

Views expressed by the memoranda

Germany

7. Neutral merchant vessels navigating under the escort of war vessels of a neutral Power (convoy) can none the less be stopped, subjected to visit, and, on occasion, seized and confiscated.

United States of America

Art. 29. The exercise of the right of search during war shall be confined to properly commissioned and authorized vessels of war. Convoys of neutral merchant vessels, under escort of vessels of war of their own State, are exempt from the right of search, upon proper assurances, based on thorough examination, from the commander of the convoy.

Austria-Hungary

The former practice of dispensing with the visit to neutral merchant vessels escorted by a war vessel of their own nationality, a practice all but generally established, is justified by the legitimate claim of the neutrals that the naval officers ought to be believed on parole. The British Prize Courts, alone, are opposed to this contention and English authors approve their decisions, alleging several arguments, namely:

The commander may be mistaken as to the character of the cargo; his affirmation that vessels convoyed do not contain contraband is without value, the neutrals limiting now and then the notion of contraband in a manner not recognized by the belligerents; the officer may not know whether there do not exist particular circumstances justifying, as an exception, the seizure of the cargo; the vessels escorted might leave the convoy before arrival at the port of destination.

It is self-evident that a reform could, without doubt, take account of these just observations in some respects. The most of them would lose all importance if the notion of contraband were unanimously fixed, especially by limiting it to war material.

Spain

9. Merchant vessels navigating in convoy under the custody of one or more war vessels of their own country are exempt from the visit of the belligerents. (*Spanish Instructions for the Exercise of the Right of Visit,* of 1898, art. 11.)

France

(A) 5. One must abstain absolutely from exercising the right of visit when the vessels are convoyed by a neutral war vessel of their own nationality. One must in such case limit himself to requesting of the commander of the convoy the declaration that the vessels do not belong to the enemy and are not engaged in any illicit commerce.

If, however, there is occasion to suspect that the good faith of the commander of the convoy has been imposed upon, the suspicion must be communicated to him; it would belong to him alone in this case to proceed to the visit of the suspected vessels.

Great Britain

7. A neutral vessel is not entitled to resist the exercise of the right of search by a belligerent war-ship on the ground that she is under the convoy of a war-ship of her own nationality; forcible resistance by her or by the neutral war-ship to the exercise of the right of search is ground for condemnation of both ship and cargo.[1]

[1] *Maria,* 1 C. Rob. 340, 1 E. P. C. 152; *Elsabe,* 4 C. Rob. 408, 1 E. P. C. 167.

Italy

"III. Neutral vessels under the escort of war vessels shall be exempt from all visit.

"The declaration of the commander of the war vessel shall be sufficient to justify the flag and the cargo of the escorted vessels." (*Cod. M. M.,* art. 218.)

However, a written declaration can be requested from him, containing the list of vessels placed under his protection and the assurance that no article of contraband of war for the profit or destination of the enemy is on board. (*Instructions to the Commanders of the Vessels of the Royal Navy, on the Occasion of the War Against Austria,* approved by Royal Decree, June 20, 1866, art. XI.)

An *oral* declaration of the commander is sufficient according to the *Treaty of Commerce and Navigation* with the United States of February 26, 1871 (art. 12); a similar provision has been put into conventions concluded by the royal government with States of South and Central America.

If there are reasons to suppose that the good faith of the commander of the vessel has been abused, communication of these suspicions shall be made to the commander who shall proceed, alone, to the visit of the suspected vessel. (*Instructions,* art. XI.)

Japan

A neutral vessel under convoy of a war vessel of its own nationality is, except in case of grave suspicion, exempt from search and visit on the part of the belligerent, if the commander of the convoy declares in writing that the vessel convoyed has no contraband on board, is not engaged in an attempt to violate a blockade, is not performing a service contrary to neutrality for the profit of the other belligerent, and that her ship's papers are regular and complete. Said declaration must also give the name and nationality as well as the ports of departure and destination of the vessel.

Netherlands

I. (3) Neutral vessels escorted by war vessels of their own nationality are exempt from visit of the commander if the convoy declares that the ship's papers are in order and that there is no contraband in the cargo.

Russia

I. Art. 13. Merchant vessels which are convoyed by a neutral war vessel of their own nationality are exempt from visit.

Observations

The present work, as has been explained at the beginning, does not have as its object to discuss the proposition which can be made in view of conventional arrangements. On the question of convoy the memoranda, which purport to set forth the existing rules, recognize, with the exception of the British memorandum, that the neutral vessel under convoy of its own flag is exempt from visit. Can it be said that this rule is at present so extended that it can be considered as constituting a principle generally recognized in international law?

In such case should it not be also recognized as an accepted usage that in case of suspicion the belligerent can demand that the commander of the convoy himself proceed to a visit?

Basis for discussion

13. *The neutral vessel under convoy of its own flag is exempt from visit. If, however, there is reason to suspect that the good faith of the commander of the convoy has been imposed upon, the suspicion must be conveyed to him: it is for him alone to proceed to the visit of the suspected vessels.*

B

BLOCKADE

I—Conditions of Establishment and Character

Views expressed by the memoranda

Germany

8. A blockade can not be established by a belligerent except with regard to an enemy litoral or one occupied by him.

9. The blockade to be obligatory must be effective, declared, and notified.

10. The blockade is effective when it is maintained by a naval force whose importance and position makes it actually to interdict all navigation between the sea and the parts of the litoral blockaded.

The blockade is not considered as raised if bad weather has compelled the blockading vessels to quit their position temporarily.

United States of America

Art. 36. Blockade is a measure between belligerents and in order to be binding must be effective; that is, it must be maintained by a force sufficient to render hazardous the ingress to or egress from a port.

If the blockading force be driven away by stress of weather and return without delay to its station, the continuity of the blockade is not thereby broken. If the blockading force leave its station voluntarily, except for purposes of the blockade, or is driven away by the enemy, the blockade is abandoned or broken. The abandonment or forced suspension of a blockade requires a new notification of blockade.

Austria-Hungary

(B) The proposition presented by the Italian delegation to the IId Peace Conference (IVth Commission, 4th meeting, annex 18) conforms to the principles recognized by the authors and by jurisprudence. In consequence Austria-Hungary adhered thereto in principle and has at the present time no reason to depart from this point of view. It seems only desirable to define several of the proposed provisions and complete them in some respects. Here are in short the rules to be formulated:

The heading must indicate that the provisions relate only to blockade in times of war.

The blockade is only obligatory when it is limited exclusively to the enemy coasts or to the coasts of a blockading belligerent or his ally, occupied by the armed forces of the adversary.

Spain

(B) 1. In order that a blockade shall be obligatory for neutrals, these conditions are necessary: the declaration, the notification, and the effectiveness. The terms in which the project presented by the Italian delegation to the Second Peace Conference defines and limits each of these conditions, fixes the notion of the transgression of

the blockade, and establishes the responsibilities of the transgressing vessel and cargo, can be considered as satisfactory.

8. The incommunicability with the blockaded coast does not extend to neutral war vessels.

9. The blockade must be impartial, that is, be applied uniformly to different flags.

10. The blockade, effected according to the above rules, is a proceeding proper to a state of war.

France

(B) 1. The blockade must be notified . . .

Great Britain

1. A blockade is an act of war carried out by the war-ships of a belligerent detailed to prevent access to or departure from a defined part of the enemy's coast.

2. A blockade, in order to be binding, must be effective, that is to say, it must be maintained by a force sufficient to render hazardous the ingress to or egress from a port.[1]

3. If the blockade be effective, as defined in section 2, the question as to the number and disposition of the ships of the blockading force is not a matter for the consideration of the court. Thus if the blockade were effectively maintained by one vessel alone it would be sufficient.[2]

4. A blockade must be impartially enforced against the ships of all nations.[3]

5. A blockade must be imposed by a naval officer on the authority of his Government; in the absence of express instructions, such authority will be presumed to have been conferred upon any naval officer in command of a force which is at the time so situated that he is unable to obtain such instructions.[4]

6. If a blockade is imposed by a naval officer without express instructions his action must be approved and adopted by his Govern-

[1] *Betsy,* 1 C. Rob. 93, 1 E. P. C. 63; *Nancy,* 1 Acton 57, 2 E. P. C. 106; *Franciska,* Spinks, 2 E. P. C. 373 *et seq.*

[2] *Ibid.*

[3] *Franciska,* Spinks, 293 *et seq.,* 2 E. P. C. 355 *et seq.*

[4] *Rolla,* 6 C. Rob. 365, 1 E. P. C. 573; *Franciska,* Spinks, 114, 2 E. P. C. 372.

ment, and such approval and adoption will relate back to the date of imposition of the blockade.[1]

10. A blockade comes to an end if it is declared either by the blockading Government or by the naval officer in command of the blockading force to have been raised, or if the blockaded port or territory is occupied by the forces of the blockading Power, or if the blockade is not maintained effectively or enforced impartially against the ships of all nations, or if the blockading forces are driven off by a superior force or are temporarily withdrawn for some other service.[2]

11. A blockade is not terminated by the fact that the blockading ships are temporarily driven off by stress of weather, nor by the fact that vessels occasionally succeed in getting in or out of a blockaded port.[3]

Italy

(*b*) I. 1. Straits giving access to a sea bathing neutral States can not be blockaded. (*Opinions of the Council of Diplomatic Claims,* April 11, 1878, capture of the vessels *Britannia* and *Matilde Bellagamba.*)

Straits neutralized by provision of conventional law, also, are exempt from the right of blockade.

2. The blockade, to be obligatory, must be effective and declared. (*Cod. M. M.,* art. 217.)

. . . . .

3. The blockade is effective when it is maintained by the blockading forces so disposed as to be able to watch the access to the port and the blockaded coast and see every vessel which would seek to land there and to be able, the occasion arising, to prevent effectively the entry. (*Service Regulations for Vessels of the Royal Navy, Commissioned and in Reserve,* March 31, 1898, art. 909, n. 6; *Cont. dipl.,* April 11, 1878, cited above.)

. . . . .

(*b*) V. 1. The cessation of the blockade must be notified publicly. (*Regulation,* art. 909, n. 3.)

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[1] *Rolla,* 6 C. Rob. 365, 1 E. P. C. 573; *Franciska,* Spinks, 114, 2 E. P. C. 372.

[2] *Circassian,* Moore, *International Arbitrations,* p. 3911; *Hoffnung,* 6 C. Rob. 112, 1 E. P. C. 533; *Franciska,* Spinks, 124, 295, 2 E. P. C. 357, 380.

[3] *Frederick Molke,* 1 C. Rob. 86, 1 E. P. C. 59; *Columbia,* 1 C. Rob. 154, 1 E. P. C. 91; *Franciska,* Spinks, 124, 2 E. P. C. 380.

2. The blockade is not regarded as raised and it may be resumed without further notification being required when the blockading vessels have been obliged to withdraw temporarily because of circumstances and not because of acts of the enemy. (*Regulation,* art. 909, n. 4.)

Japan

I. The blockade is obligatory only if it is maintained by a force sufficient to present an evident danger to a vessel trying to pass.

II. The blockade should not be considered as raised by the simple fact that the blockading force temporarily leaves the blockaded zone because of stormy weather or for the needs of the blockade.

Netherlands

II. (1) The blockade is an act of war directed against an enemy coast.

(2) The blockade to be obligatory must be effective, declared, and notified by the belligerent.

(4) The blockade is effective when it is maintained by forces sufficient and stationed in such a way as to be able to prevent the entry into and departure from the blockaded area.

Russia

II. Art. 1. The blockade to be obligatory must be effective, declared, and notified.

Art. 2. The blockade is effective when it is maintained by naval forces of war sufficient effectively to forbid the passage between the sea and the blockaded litoral and stationed so as to create a real danger for vessels which would wish to try it.

The blockade is not considered as raised if bad weather has forced the blockading vessels to leave their station temporarily.

Observations

The provision of the Declaration of Paris, 1856, according to which *"blockades, in order to be legally binding, must be effective; that is to say maintained by a force sufficient really to prohibit access to the enemy's coast,"* having become of general application, seems to constitute to-day a principle of common law.

As to whether the blockade is effective, examination of the memoranda leads to the conclusion that it is a question of fact.

Most of the memoranda recall a practice, which seems general, according to which the blockade is not considered raised if because of bad weather the blockading forces are temporarily withdrawn.

In addition, the memoranda all agreed in recognizing that the blockade must be rendered public.

Basis for discussion

14. *Conformably to the Declaration of Paris,* 1856, *blockades to be legally binding must be effective, that is to say, maintained by a force sufficient really to prohibit access to the enemy coast.*

15. *The question whether a blockade is effective is a question of fact.*

16. *The blockade is not considered as raised if, because of bad weather, the blockading forces are temporarily withdrawn.*

17. *Blockades to be legally binding must be previously made public.*

II—Declaration and Notification

Views expressed by the memoranda

Germany

11. The declaration of the blockade shall be made by the commander of the blockading force or by his Government. It must indicate the precise moment of the commencement of the blockade and the exact limits of the blockaded coast.

The blockade must be notified to the authorities of the place or of the coast blockaded and to the neutral Powers. The notification to a neutral Power is made by a communication addressed either to the Government itself, or to its diplomatic representative near the blockading belligerent, or to the consul, or to one of the consuls of the neutral Power who exercise their functions in the place or on the coast blockaded.

If the communication has been made to the local authorities only, the blockade is immediately effective only with regard to departing vessels. As to incoming vessels the blockade must, in this case, be notified by the blockading force to each vessel especially, and, if possible, mention of this notification shall be endorsed on the ship's papers by an officer.

15. When neutral vessels find themselves in the blockaded port at the moment of the establishment of the blockade, they must be granted a period which should be at least sufficient to permit them to leave the port.

United States of America

Art. 38. The notification of a blockade must be made before neutral vessels can be seized for its violation. This notification may be general, by proclamation, and communicated to the neutral States through diplomatic channels; or it may be local and announced to the authorities of the blockaded port and the neutral consular officials thereof. A special notification may be made to individual vessels, which is duly endorsed upon their papers as a warning. A notification to a neutral State is a sufficient notice to the citizens or subjects of such State. If it be established that a neutral vessel has knowledge or notification of the blockade from any source, she is subject to seizure upon a violation or attempted violation of the blockade.

The notification of blockade should declare not only the limits of the blockade, but the exact time of its commencement and duration of time allowed a vessel to discharge, reload cargo, and leave port.

Art. 42. Neutral vessels found in port at the time of the establishment of a blockade will be allowed a specified number of days from the establishment of the blockade, to load their cargoes and depart from such port.

Austria-Hungary

(B) . . .

Not only the establishment, but also the extension, the restriction, and the raising of the blockade must be notified;

Every incomplete or false declaration must be considered null.

Spain

(B) 2. The declaration of the blockade may be made by the superior officer of the blockading forces.

3. Departure from the blockaded port is permissible for vessels in ballast or with a cargo which has been taken on board bona fide prior to the declaration of the blockade or which could not be sold in the blockaded port.

France

(B) 1. The blockade must be notified.

Besides the notification addressed to the neutral Governments through diplomatic channels (*general notification*), the establishment of every blockade must be made the object of formal *declaration* to the authorities of the blockaded points. This declaration is sent to the said authorities at the same time as to the consul of one of the neutral Powers by means of a bearer of a flag of truce.

The said declaration of blockade designates expressly the limits of the blockade in longitude and latitude.

The commander of the naval forces there fixes a period for departure for the benefit of bona fide navigation and commerce. This period must always be sufficient to protect them.

The same formalities must be carried out if the blockade is extended to some new point on the coast or if it is reestablished after having been raised or interrupted.

Great Britain

7. The officer in command of the blockading force should take such steps as he conveniently can to bring the blockade to the knowledge of the authorities of the ports blockaded, and also of the foreign consuls in such ports.

8. When a blockade has been imposed by the instructions of a Government, or when the action of a naval officer in imposing a blockade has been adopted and approved, the Government must notify the fact by the ordinary diplomatic channels to neutral Powers and must also publish the fact to its own subjects.[1]

9. A notification of blockade, in order to raise a presumption of knowledge of its existence, must specify the limits of the portion of the coast blockaded and the time of the commencement of the blockade.

A declaration of blockade, or a notification to a neutral Government, or a warning given to a vessel by a war-ship of the blockading Power, must not announce a blockade of greater extent than is in fact effectively maintained.[2]

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[1] *Neptunus,* 2 C. Rob. 110, 1 E. P. C. 195.

[2] *Hendrick and Maria,* 1 C. Rob. 146, 1 E. P. C. 84; *Franciska,* Spinks, 299, 2 E. P. C. 263.

Italy

(*b*) I. 2. The blockade to be legally binding must be effective and declared. (*Cod. M. M.*, art. 217.)

The blockade must be announced publicly by the naval commander who declares it by means of a notification indicating exactly the limits of its extension, the day of its commencement, and the conditions to be observed in crossing the line of the blockade. (*Regulation*, art. 909, n. 2.)

The period must also be announced in which the departure from the port is permitted to neutral vessels that have entered before the commencement of the blockade; this period must be sufficient to protect bona fide navigation and commerce. (*Instructions*, art. VI.)

Japan

III. The declaration of the blockade should indicate the precise moment when the blockade begins, the extent of the zone blockaded, and the period accorded to neutral vessels to leave the blockaded zone.

IV. The declaration of blockade should be communicated, as soon as possible, to the authorities of the blockaded locality as well as to the neutral States.

Netherlands

II. (2) The blockade to be binding must be effective, declared, and notified by the belligerent.

(3) The declaration of blockade determines:

The precise moment of the commencement of the blockade;

A sufficient period in which departure is permitted to neutral vessels which entered before the commencement of the blockade;

The limits embracing the region in which the blockade will be exercised;

These limits can not extend beyond a distance from the coast, corresponding to the military exigencies, necessary to render efficacious the closing of the enemy coast.

(5) The blockade is notified to the authorities of the blockaded coast, to the diplomatic or consular agents, and to the Governments of the non-belligerent Powers.

Russia

II. Art.1. The blockade to be obligatory must be effective, declared, and notified.

Art. 3. The declaration of the blockade should determine the precise moment of the commencement of the blockade, its limits, and the period in which departure from the port is permitted to neutral vessels which entered the blockaded locality before the commencement of the blockade.

Art. 4. The declaration of the blockade must be notified to the Governments of the neutral States and, if possible, to the authorities of the locality blockaded.

If the notification to the Governments of the neutral States has not yet taken place, or if a neutral vessel, sailing in the blockaded locality or leaving it, proves that it had no knowledge of the blockade, the notification must be made to the vessel itself, and if possible indorsed on the ship's papers.

Observations

The different memoranda appear to employ the words "declaration" and "notification" in meanings sometimes alike and sometimes different.

To avoid all confusion it is useful first of all to define them:

By the word "declaration" it seems that one should mean exclusively the act by which the blockading Power, or the naval authorities acting in its name, officially promulgates the blockade.

By the word "notification," the act by which the blockading Power gives to the interested parties communication of the declaration.

It does not seem that any practice followed now is opposed to the declaration of blockade's being made by the naval authorities, as well as by the Government of the belligerent.

As to the matters that the declaration should contain, all the memoranda agree to recognize that the declaration must indicate:

1. the date and hour of the commencement of the blockade;
2. the geographical limits of the blockaded coast.

Moreover the general practice has always been to grant a reasonable period for departure to neutral vessels; the length of time is fixed in the declaration.

Finally, the declaration of the blockade should be notified to the authorities of the blockaded places as well as to the neutral Powers.

It appears also to be the general practice that the preceding rules are applied in case of extension of the blockade or the reestablishment of it after cessation.

Basis for discussion

18. *The declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name. It specifies:*

1. *the date and the hour of the commencement of the blockade;*
2. *the geographical limits of the blockaded coast;*
3. *the period allowed neutral vessels for departure.*

19. *The declaration of blockade is notified:*

1. *to the local authorities;*
2. *to the neutral Powers.*

20. *The preceding rules are applicable in case of extension of the blockade or of reestablishment thereof after cessation.*

III—Liability to Seizure

Views expressed by the memoranda

Germany

11. . . . If the communication has been made to the local authorities only, the blockade is effective immediately only with regard to departing vessels; as for incoming vessels, the blockade must in this case be notified by the blockading force to each vessel specially, and if possible, mention of this notification shall be written by an officer on the ship's papers.

13. . . . The vessel and the goods are not subject to confiscation if the captain has not known of the establishment of the blockade, unless this ignorance is chargeable against him. In respect to entering vessels the ignorance is presumed unless it is proven to the contrary:

1. If the vessel has gone to sea before the establishment of the blockade and since its departure has not called at another port.
2. If there has been no other notification of the blockade to the neutral Power to which the vessel is amenable than a communication addressed to its consular representative (Article

11, paragraph 2), of which the latter has not yet had opportunity to inform his Government.

Moreover, the goods are not subject to confiscation, if the owner proves that, at the time the vessel put to sea, he did not know and should not have known of the establishment of the blockade.

. . . . .

12. . . . The capture is permitted only so far as the vessel tries to cross the lines of the blockade or as it is pursued *in flagranti* by a vessel of the blockading force.

United States of America

Art. 39. Vessels appearing before a blockaded port, having sailed before notification, are entitled to special notification by a blockading vessel. They should be boarded by an officer who should enter upon the ship's log or upon its papers, over his official signature, the name of the notifying vessel, a notice of the fact and extent of the blockade, and of the date and place of the visit. After this notice an attempt on the part of the vessel to violate the blockade makes her liable to capture.

Art. 40. Should it appear from the papers of a vessel, or otherwise, that the vessel had sailed for the blockaded port after the fact of the blockade had been communicated to the country of her port of departure, or after it had been commonly known at that port, she is liable to capture and detention as a prize. Due regard must be had in this matter to any treaties stipulating otherwise.

Art. 41. A neutral vessel may sail in good faith for a blockaded port, with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. In such case she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, sufficient doubt as to the good faith of the proceeding will subject her to capture.

Art. 43. The liability of a vessel purposing to evade a blockade, to capture and condemnation, begins with her departure from the home port and lasts until her return, unless in the meantime the blockade of the port is raised.

Austria-Hungary

(B) . . . Ignorance of the blockade shall be presumed when the ship arrested has left the last port before the blockade was notified and it does not happen from the circumstances that it has learned of the establishment of the blockade in the course of the voyage.

Spain

(B) 4. The transshipment of goods in proximity to the line of blockade in order to cross the latter with small boats is punishable. It will be the same for taking up a position in the neighborhood of the line with the object of profiting from the opportunity to run it.

5. The vessel which, after having run or tried to run the blockade and being pursued by the blockading vessels, is lost to view by them, or succeeds in gaining an open port, becomes free.

France

(B) 1. . . . Vessels which are sailing towards a blockaded port are only supposed to know of the state of blockade when the notification thereof has been entered in writing on their log book by a war vessel forming the blockade (*special notification*). This notification must always mention the date and the geographical position of the place where it has been made.

2. Violation of a regularly established blockade results from the attempt to penetrate into the blockaded places as well as from the attempt to leave them after the declaration of the blockade, unless this be within the period allowed for leaving. The seizure of the vessels can, in consequence, be effected only within the radius of action of the war vessels charged with assuring the reality of the blockade.

The vessel which has crossed the line but is still pursued is a good prize. If the chase is abandoned the capture can not be made later.

Great Britain

15. A vessel can not be guilty of breach of blockade unless she has had notice of its existence. Notice may be actual or presumptive.[1]

[1] *Betsy*, 1 C. Rob. 93, 1 E. P. C. 63.

16. The master of a vessel will be held to have had actual notice if he is proved to have had knowledge of the blockade, however acquired.[1]

17. Notice will be presumed:

(1) If notification of the blockade has been made to the proper authorities of the State from whose port the vessel last sailed, and sufficient time has elapsed for such authorities to notify the information at that port before the vessel sailed;[2]

(2) If the blockade, whether notified or not, be proved to have been notorious at the port from which the vessel last sailed before her departure;[3]

(3) If the master refuses to attend to the summons of a war-ship of the blockading force.

18. In the absence of notice, either actual or presumptive, a vessel is entitled to be warned of the blockade by a war-ship of the blockading force. No evidence of such warning will be accepted unless it has been indorsed on the ship's papers.[4]

19. A vessel, unless compelled by stress of weather or other necessary cause, is guilty of breach of blockade if, with notice of the blockade:

(1) She comes or attempts to come out of a blockaded port after the expiration of such time as may have been allowed for egress from that port;

(2) She goes or attempts to go into a blockaded port;

(3) Approaches a blockaded port in order to enquire as to the continuance of the blockade;[5]

(4) Remains in the vicinity of a blockaded port in such a position as to be able to take advantage of any opportunity to enter, or to take up a cargo from, or to discharge a cargo into, lighters or similar craft which might succeed in breaking the blockade.[6]

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[1] *Franciska,* Spinks, 298, 2 E. P. C. 361.

[2] *Neptunus,* 2 C. Rob. 110, 1 E. P. C. 195; *Adelaide, ibid.,* note; *Jonge Petronella,* 2 C. Rob. 131, 1 E. P. C. 208.

[3] *Ibid.*

[4] *Neptunus,* 2 C. Rob. 110, 1 E. P. C. 198.

[5] *Spes* and *Irene,* 5 C. Rob. 77, 1 E. P. C. 427; *Union,* Spinks, 164.

[6] *Charlotte Christine,* 6 C. Rob. 101.

21. *Breach of Blockade Inwards.* When there exists the intention to break the blockade if an opportunity should occur, the act of sailing towards the blockaded port is an overt act sufficient to put the vessel *in delicto* until that intention is abandoned. But if the ship's papers and the evidence of the master and crew are consistent with an alternative destination, or an intention to inquire at some open port not near the blockaded port as to the continuance of the blockade, then the vessel is presumed to have an innocent intention, unless she has reached a position inconsistent with a course to such open port.[1]

22. *Breach of Blockade Outwards.* A ship which has succeeded in getting out of a port by violating the blockade is subject to capture until the end of the voyage, whether it has touched at an intermediate port or not.

ITALY

(*b*) II. A blockade is known undeniably by a vessel sailing towards a blockaded port only after it has received a special notification thereof. Therefore, each vessel presenting itself before the line of the blockade must be informed by one of the blockading war vessels, of the existence of the blockade and of the circumstances under which it has been established. Mention of this notice must be written on the ship's papers of the vessel. Without this the vessel can not be proceeded against under the head of violation of blockade. (*Instructions,* art. VII; *Regulation,* art. 909, n. 5.)

The Treaty of Commerce and of Navigation in force with the United States of America (art. 14) and other conventions concluded by the royal government with some of the States of South and Central America contain analogous provisions.

(*b*) III. 1. The destination of the vessel to the blockaded port is not sufficient reason for considering it guilty of violation of blockade.

The vessel seized at the moment of crossing the line of an effective and declared blockade is guilty of violation of blockade whether it

[1] *Columbia,* 1 C. Rob. 154, 1 E. P. C. 89; *Vrouw Johanna,* 2 C. Rob. 109, 1 E. P. C. 194; *Imina,* 3 C. Rob. 167, 1 E. P. C. 289; *James Cook,* Edw. 261, 2 E. P. C. 53; *Little William,* 1 Acton 141; *Dispatch,* 1 Acton 163; *Haabet,* 6 C. Rob. 54, 1 E. P. C. 524; *Gliertigheit,* 6 C. Rob. 58, 1. E. P. C. 527; *Aline and Fanny,* Spinks, 322, 2 E. P. C. 537; *Fortuna,* Spinks, 307.

is trying to enter the blockaded place or to leave it. (*Cod. M. M.*, art. 217; *Instructions,* art. VIII.)

2. A vessel trying to leave the blockaded port can be seized even outside the line of the blockade, provided it has been pursued to the moment of crossing and overtaken before it has been able to reach a neutral port. If the vessel has been able to cross the line of the blockade without difficulty and without hindrance, it shall no longer be liable to seizure, even if it arrives at a port of the blockading Power. (*Cont. dipl.,* April 11, 1878, cited above.)

Japan

V. Vessels must be considered as having knowledge of the existence of the blockade in the following cases:

(*a*) When they are found within the limits of the blockaded zone;

(*b*) When they come from a locality where the existence of the blockade is generally known.

A vessel is reputed to have knowledge of the existence of a blockade when the declaration of blockade has been communicated to the competent authorities of the State to which the vessel belongs, and a sufficient period must have elapsed to permit the authorities to give public notice of the said blockade.

VI. A vessel encountered approaching a blockaded zone, if it has no knowledge, real or presumed, of the existence of the blockade, must receive the special notification thereof by an officer of the blockading force, and the said notification must be entered on the ship's papers.

Netherlands

II. (6) The blockade is applied to merchant vessels which could not have known of the establishment of the blockade, only after they shall have been advised of it by one of the blockading vessels. This notification shall be endorsed on the ship's papers.

(7) The violation of the blockade takes place at the moment of the crossing of the line of the blockade. A pursuit for violation of blockade can extend beyond the line of the blockade but shall end as soon as the vessel shall have reached an open port or at the prior moment of the raising of the blockade.

Russia

II. Art. 4. . . . If the notification to the Governments of the neutral States has not yet taken place, or if a neutral vessel sailing towards the blockaded locality or leaving it, proves that it had no knowledge of the blockade, the notification must be made to the vessel itself, and, if possible, written on the ship's papers.

Art. 5. Every vessel, which, after the notification of the blockade, sails towards a blockaded locality, or which tries to run the blockade, may be seized for violation of the blockade.

Art. 6. The destination in a blockaded locality is considered established when the vessel:

(*a*) Is going directly towards a blockaded locality, or

(*b*) In spite of its apparently lawful destination it is, in fact, going to a blockaded locality.

Observations

As all the memoranda show, the question of liability to seizure can be considered from the point of view:

(*a*) of the knowledge of the blockade by the vessel prior to the violation;

(*b*) of the place where the seizure can be made.

(*a*) *Knowledge of the blockade.* The following general principle can apparently be drawn from all the memoranda, that the liability of a neutral vessel to seizure for violation of blockade is, before all, subordinated to the knowledge itself of the blockade.

It is clear on the other hand that if the vessel has personally received individual notification of the blockade it can not allege its ignorance.

In presence of the modern development of rapid communication can one go farther? And does there exist at present, as appears to be the thought of the majority of the memoranda, some common idea on the point of knowing whether and when the knowledge of the blockade can be presumed and what is then the nature of the presumption?

Basis for discussion

21. *The liability of a neutral vessel to capture for violation of blockade is contingent on her knowledge of the blockade.*

22. Knowledge of the blockade is presumed when the vessel has left her last port of departure after the notification, in sufficient time, of the blockade to the authorities of the said port.

23. The vessel which has received personally individual notification of the blockade can not argue her ignorance. This notification must be entered on the ship's papers, with indication of the date and of the hour as well as the geographical position of the vessel at that moment.

Observations

(*b*) *Place of Capture.* If one examines attentively what capture is intended to sanction, one can not deny that it is assuredly the interdiction which the blockade proclaims, that is to say, the interdiction to arrive at the blockaded place. If at times, by reason of the tactical disposition of the blockading force, it may be considered that the latter, in fact, forms a barrier or line the approach to which it watches, it is not to be forgotten that, properly speaking it is not the passage itself of this line which is the object of this interdiction but always indeed the arrival at the blockaded place.

On the other hand, it has long been uncontested that the violation of a blockade presupposes that the blockade is effective, that is to say, that the interdiction is really maintained by a force sufficient to assure its respect.

Starting from these common ideas, the Governments have separately followed the application thereof, by ways, with the aid of which, the doctrinal analysis of the authors has little by little built up systems which have rather obscured than clarified the results practically established.

In reality vessels condemned for violation of blockade are captured before having actually accomplished the forbidden act, that is, before having reached the blockaded place, however near they may have been able to come.

What capture requires is that the act of violation be manifestly characterized, and that the sanction correspond truly to the infraction.

It is only in proportion as the vessel approaches the blockaded place that the infraction is characterized, up to the moment when the expedition destined for the blockaded port arrives within the radius of action of the blockading force, and then the infraction becomes manifest, the capture is justified.

If these considerations are correct, it seems that the views expressed in the different memoranda could be advantageously related to their common origin and would be able to meet in an equally common formula announcing what is, in sum, the practical result in which they would always appear to end.

Basis for discussion

24. *The seizure of neutral vessels for violation of blockade can only be effected within the radius of action of the war vessels charged with assuring the reality of the blockade.*

25. *The vessel which, in violation of the blockade, has left the blockaded port remains liable to seizure as long as it is pursued. If the chase is abandoned the capture can not be made later.*

OBSERVATIONS

Á certain number of memoranda have considered the case where, because of distress, a neutral vessel shall see itself forced to give up in a blockaded locality. It is permitted to think in such a place that an exceptional favor is in accordance with the universal sentiments of humanity.

Basis for discussion

26. *A neutral vessel, in case of distress, may, with the consent of the commander of the blockading force, enter the blockaded locality.*

IV—PENALTY

Views expressed by the memoranda

GERMANY

12. The vessel which violates the blockade is liable to confiscation. It is the same with respect to goods found on board.

The capture is permitted only in so far as the vessel tries to cross the lines of the blockade or as it is pursued *in flagrante* by a vessel of the blockading force.

13. The vessel and the goods are not liable to confiscation if the captain has not known of the establishment of the blockade unless

this ignorance can be charged against him. As to incoming vessels, ignorance is presumed unless proof is addressed to the contrary:

(1) If the vessel has put to sea before the establishment of the blockade and has not since its departure called at any port;

(2) If there has been no other notification of the blockade to the neutral Power to which the vessel belongs, than a communication addressed to its consular representative (Article II, paragraph 2) which the latter has not yet been able to communicate to his Government.

Moreover, the goods are not liable to confiscation if the owner proves that up to the moment when the vessel put to sea he did not know and could not be expected to know of the establishment of the blockade.

United States of America

(Nothing)

Austria-Hungary

(Nothing)

Spain

(B) 6. If bad weather or other circumstances oblige the blockading vessels to withdraw from the line of blockade, neutral vessels which during their absence shall enter or leave can not be treated as having violated the blockade. (*Spanish Regulations on Blockade,* of 1864, art. 2.)

7. The circumstance that all or part of the goods on board the vessel breaking the blockade has a free destination beyond the blockaded port does not exempt them from confiscation with the ordinary exception of ignorance of the blockade, which the owner of the cargo might be able to invoke.

France

(Nothing)

Great Britain

24. The penalty for the violation of a blockade is condemnation of the ship and cargo.

When the blockade is or might have been known by the owners

of the cargo or by their agents at the moment of embarkation, there is an absolute legal presumption of the knowledge of the intention to violate the blockade. When the blockade could not have been known by the owners of the cargo or by their agents at the moment of embarkation, the cargo will be released.[1]

Italy

(*b*) IV. "Vessels under neutral flag, surprised at the moment of forcing an effective and declared blockade, shall be captured and confiscated with their cargo." (*Cod. M. M.*, art. 217.)

Japan

IX. Vessels which knowingly violate, or try to violate, a blockade are liable to confiscation with their cargo, but if it is proven that the owners of the cargo had no knowledge of the intention of the vessels to violate the blockade, the said cargo is released.

Netherlands

II. (8) Vessels violating the blockade can be confiscated with their cargo.

Russia

II. Art. 8. The vessel seized for violation of the blockade is liable to confiscation.

It is the same with the cargo unless it is proven by the interested parties that it belongs to persons ignorant of the violation of the blockade.

Art. 9. The confiscation of the vessels and of the cargoes, mentioned in Article 8, can take place only by virtue of a sentence of a prize court.

Observations

A first, general, certain principle is that of the confiscation of the neutral vessel which is recognized as guilty of violation of blockade.

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[1] *Panaghia Rhomba*, 12 Moore P. C. 168, 2 E. P. C. 635, and the cases cited there.

As to the cargo, the confiscation is likewise pronounced except, according to several memoranda, in the case where the charterer proves his complete ignorance, at the moment of departure, of the intention to touch at the blockaded port.

Basis for discussion

27. *The vessel recognized as guilty of violation of blockade is confiscated. The cargo is also confiscated unless the shipper proves that, at the moment when the goods were shipped, he neither knew nor could have known of the intention to touch at the blockaded port.*

C

CONTINUOUS VOYAGE

The question can be put either for the contraband or for the blockade, and for the goods or for the vessel.

A—In the Matter of Contraband

Views expressed by the memoranda

Germany

Art. 16. It is forbidden to neutral vessels going toward the territory of a belligerent, or towards a territory occupied by him, or towards his armed force, to transport articles of contraband of war which are not destined to be discharged in an intermediate neutral port.

The ship's papers constitute complete proof of the route of the vessel as well as of the place of discharge of the cargo, unless the vessel is encountered having manifestly deviated from the itinerary indicated by the ship's papers and being unable to justify by sufficient reason such deviation.

United States of America

Art. 34. Vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy are liable to seizure and detention, unless treaty stipulations provide otherwise.

Austria-Hungary

(C) I. The so-called "theory of continuous voyage," applied by the prize courts of some Powers, is rejected almost unanimously by the continental authors. By admitting that there could be contraband between neutral ports, every neutral vessel would be susceptible of being captured under pretext that the goods it was carrying could, by detours, reach the enemy. Goods which, according to the ship's papers, are destined for a neutral port can not, in all justice, be seized. An exception could be made, at the most, for the case where it should be established that the vessel must, with the said goods on board, call at an enemy port. Moreover, even in this case, the interest of the belligerents demands the seizure only when the vessel is going directly for the enemy territory or with destination for the enemy forces.

That which is absolutely contrary to the practice of almost all the States and to the doctrine is the pretention of the belligerents to capture a vessel which has carried contraband of war, after it has discharged the suspected goods. A title of law on which such pretention could be founded can not be imagined; the history of contraband of war shows that the capture of the vessel and the seizure of the goods can not in any manner be considered as a punishment but only as an act of legitimate defense, and that the neutral who traffics in contraband does not commit an illegal action but that he embarks only on a "commercial adventure." This opinion is that of almost all the authors, and it has been formally authorized by the Second Conference of The Hague. (Art. 7 of the "Convention Concerning the Rights and Duties of Neutral Powers in Case of Maritime War.")

Spain

(C) Number 4 of the points relative to contraband of war . . . excludes the application of the doctrine of continuous voyage.

(A) 4. Notwithstanding the paragraph preceding (*vide supra,* p. 32), in order that the right of the belligerent to repress contraband can begin to be exercised, the vessel on which the goods are found must be going directly towards the enemy fleet or point.

France

(C) 1. In the matter of *transportation of contraband:*

The destination of the goods decides its character of contraband. The destination of the vessel is insufficient to establish that of the goods.

Great Britain

1. When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of "continuous voyage" consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port.

2. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere.

5. There is no reported case in the British Prize Courts in which the doctrine of continuous voyage has in specific terms been applied to the carriage of contraband. His Majesty's Government, however, raised no objection to the condemnation as contraband of goods on board a British ship seized while making a voyage to a neutral port, where it was proved that the goods had been shipped for transshipment at the neutral port and subsequent conveyance to the enemy territory.[1] In litigation arising out of the insurances on cargoes so seized and condemned, the British Court held that the goods were properly described as contraband.[2]

6. His Majesty's Government have also enforced the right to detain vessels carrying goods of a contraband nature to a neutral port, where the territory of the belligerent to whom they were destined had no access to the sea.[3] No contraband was found on board such vessels, and no case was brought before a prize court for decision.

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[1] *Peterhoff,* Wallace's Reports (United States Supreme Court), vol. 5, p. 28.

[2] *Seymour* v. *London and Provincial Marine Insurance Company,* Law Journal Reports, Common Pleas, vol. 41, p. 193, and vol. 42, p. 111; see also *Hobbs* v. *Henning,* same series, vol. 34, p. 117.

[3] This right was also maintained by the Italian Prize Court in the case of the *Doelwyck* (see *Journal du Droit International Privé,* vol. 24 (1897), p. 268).

ITALY

(*c*) The reply to these questions is contained implicitly in the provisions cited above at letter (*a*), II, n. 1 and 2, so far as concerns contraband. . . .

(*a*), II. I. "Neutral vessels, going towards an enemy country whose cargo is formed wholly or in part of articles of contraband of war shall be captured and taken into one of the ports of the State, where the vessel and the goods shall be confiscated and the other goods shall be left at the disposal of the owners." (*Cod. M. M.*, art. 215.)

2. The provision aforesaid has been interpreted and applied in this sense, that the character of contraband of war depends on the final and intended destination of the cargo and not on the immediate and material destination of the vessel. In a particular case it has been held that contraband exists when the vessel is going towards a neutral port with intention to discharge there the goods destined to reach the enemy country by land route, particularly if the country in question has no seaboard. (*Comm. prises,* December 8, 1896, capture of the *Doelwijk.*)

JAPAN

III. The destination of the cargo is ordinarily determined by the destination of the vessel.

Goods found on board a vessel are presumed to have a hostile destination if the destination of the vessel is a place which geographically or according to other considerations can be regarded as constituting the last halting place in the transportation of the goods, whether by transshipment or by land transport to a hostile destination.

NETHERLANDS

III. (1) The theory of the "continuous voyage" is applied solely to the transportation of contraband towards the enemy territory without transshipment in a neutral port.

RUSSIA

III. See:

Article 4 of the draft on contraband . . .

Art. 4. Illegal destination in the sense of Articles 1, 2, and 3[1] is

[1] See p. 35.

considered as established when the articles of contraband are found on board a vessel:

(*a*) Which is going directly toward an enemy territory occupied by the enemy or towards the armed forces of the enemy;

(*b*) Which, while falsely declaring a neutral destination, is, in reality, going towards an enemy country, a territory occupied by the enemy, or towards his armed forces;

(*c*) Whose destination is in fact a neutral port, if the articles of contraband which are on board are destined to be sent finally by sea to an enemy country, a territory occupied by the enemy or to his armed forces.

OBSERVATIONS

When an expedition permits a voyage including a neutral port and from there an enemy destination the doctrine of continuous voyage consists in treating the entire voyage as a single voyage without taking account of the interposition of the neutral port.

It is believed possible to deduce from the practices followed up to the present that it is the destination of the goods which determines its character of contraband. Consequently, if this destination is manifestly established, it makes little difference that the voyage of the goods does or does not include transshipments and stops or calls of the vessel in the course of the route.

Basis for discussion

28. *When the destination of contraband merchandise is established it makes no difference that the voyage of the goods includes or does not include transshipments and stops or calls of the vessel in course of the route.*

B—IN THE MATTER OF BLOCKADE

Views expressed by the memoranda

GERMANY

Art. 8. A blockade can be established by a belligerent only with regard to an enemy coast or coast occupied by him.

Art. 12. . . . The capture is permitted only when the vessel

tries to cross the lines of the blockade or is pursued *in flagranti* by a vessel of the blockading force.

United States of America

Art. 43. The liability of a vessel purposing to evade a blockade to capture and condemnation begins with her departure from the home port and lasts until her return, unless in the meantime the blockade of the port is raised.

Austria-Hungary

II. The defenders of the theory of continuous voyage avail themselves of it when it concerns a blockade to affirm that a vessel can be captured:

1. Even after it has succeeded in forcing the blockade;
2. When it makes sail for the blockaded port, even when, before reaching it, it must call at ports not blockaded.

The two aspirations lack a judicial basis. When the vessel has forced the line of defense its capture would constitute an act of chastisement and not of defense. And so long as the vessel has not yet approached the blockading squadron, it can not have attempted to violate the blockade. Now only the attempt to violate the blockade justifies the capture. On this point almost all the authors are agreed. (Cf. *Revue de Droit et de Législation Comparée,* 1882, pp. 176, 328, *et seq.,* and 607.)

Spain

(C) Number 4 of the points relative to contraband of war, as also the acceptance of the Italian project in regard to the notion of the violation of the blockade, excludes the application of the doctrine of continuous voyage.

France

(C) 2. *In the matter of blockade:*

Vessels going towards a blockaded port can be captured only at the moment when they attempt to force the lines of the blockade. Up to that time, their destination towards the blockaded port or their

destination to a neighboring neutral port, with goods for the blockaded port, does not constitute an offense against neutrality.

Great Britain

7. There are passages in the judgments of cases decided in the British Prize Courts which indicate that, where an ulterior port is blockaded, a vessel intending to attempt to enter such blockaded port at a later stage of her voyage would not be exempt from condemnation if seized while making for a neutral port, provided that such seizure and condemnation were consistent with the principles set out in section 21 of the memorandum of blockade. But the fact that there is no reported case where condemnation under such circumstances has been decreed, suggests that in practice this doctrine can hardly ever be applied.[1]

Where the ship does not intend to proceed to the blockaded port the fact that goods on board are to be sent on by sea or by inland transport is no ground for condemnation.[2]

A ship which has succeeded in coming out of a blockaded port is liable to capture until the conclusion of the voyage, as indicated by her papers, and such voyage is not terminated by the mere touching at an intermediate port.[3]

Italy

(*c*) The answer to these questions is contained implicitly in the provisions cited above . . . at the letter (*b*), III, n. 1, so far as concerns the blockade.

(*b*) III. 1. The destination of the vessel to the blockaded port is not sufficient to consider it as guilty of violation of the blockade.

The vessel seized at the moment of crossing the line of an effective and declared blockade, whether it is trying to enter the blockaded place or to leave it, is guilty of violation of blockade. (*Cod. M. M.*, art. 217; *Instructions*, art. VII.)

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[1] *Little William*, 1 Acton 141; *Imina*, 3 C. Rob. 167, 1 E. P. C. 289.

[2] *Jonge Pieter*, 4 C. Rob. 79, 1 E. P. C. 353; *Ocean*, 3 C. Rob. 297, 1 E. P. C., 310; *Stert*, 4 C. Rob. 65, 1 E. P. C. 348.

[3] *General Hamilton*, 6 C. Rob. 61, 1 E. P. C. 528.

JAPAN

VIII. If a vessel, having as ostensible destination a place other than a blockaded zone, is recognized as having the intention of going into the blockaded zone after having touched at the said place not blockaded, the voyage is considered to be continuous and the entire destination to be that of the blockaded zone.

NETHERLANDS

III. (1) The theory of the "continuous voyage" is applied solely to the transport of contraband towards the enemy territory without transshipment in a neutral port.

RUSSIA

See:

. . . article 6 of the Draft regarding the blockade.

Art. 6. The destination in a blockaded locality is considered as established when the vessel:

(*a*) is going directly towards a blockaded locality, or

(*b*) in spite of its apparently lawful destination, is, in fact, going towards a blockaded locality.

OBSERVATIONS

In the matter of blockade it does not appear that the memoranda consider the violation of the blockade by the goods themselves; what they consider is the violation of the blockade by the vessel. If the violation of the blockade must be manifestly characterized to authorize the capture (*vide supra,* p. 70) it can not be said that this condition is fulfilled when the vessel is at the time going towards a neutral port.

Basis for discussion

29. *The violation of the blockade is insufficiently characterized to authorize the capture of the vessel when the latter is at the time going towards a neutral port.*

D

DESTRUCTION OF PRIZES

Views expressed by the memoranda

Germany

24. The captured vessels and goods must be conducted to the seat of a prize court of the captor belligerent to be tried.

25. As an exception, the captured vessels and goods may be sunk, scuttled, or otherwise destroyed if their preservation could compromise the security of the war vessel or the success of its operations.

Before the destruction of the vessel its crew must be placed in security and all the ship's papers and such other articles as the interested parties consider important for the establishment of the validity of the capture must be transferred to the war vessel.

26. In the case contemplated in paragraph 1 of Article 25, goods which cannot be confiscated and which, by reason of circumstances, can not be transferred to the war vessel, may also be sunk or destroyed with the vessel. In this case the owner of the goods shall have the right to an indemnity.

United States of America

Art. 45. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest suitable port within the territorial jurisdiction of the United States in which a prize court may take action.

Art. 48. The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel or its cargo is needed for immediate public use it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

Art. 49. If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication—such as unseaworthiness, the existence of infectious disease, or the lack of a prize crew—they may be appraised and sold, and if this can not be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize. But in all such cases all of the papers and other testimony should be sent to the prize court in order that a decree may be duly entered.

AUSTRIA-HUNGARY

(D) The regulations of several States, as also a great number of authors (cf. Bonfils-Grah, *Handbuch des Völkerrechts,* p. 724), authorize, by right of exception, the destruction of neutral prizes. It is clear, however, that this authorization, even having in view only the rarest cases, is very dangerous for the commerce of neutrals. This is why it would be desirable that the exceptions be at least specified and limited. But that seems hardly possible.

It may be asked whether the right to destroy the prizes presents advantages for belligerents. This right would indeed involve the obligation for the captor to take on board before destruction of the prize all the crew, the passengers, and, as far as possible, the cargo of the captured vessel, to disembark the above-mentioned persons in the nearest neutral port, at least in the case where the destruction would be recognized as unlawful, to be responsible for all damages they would suffer by transportation on a vessel exposed to enemy projectiles, by the loss in whole or in part of their baggage, and by the forced interruption of their voyage. It might happen that the belligerent would risk having to pay such sums that it would seem preferable to him, for example, to let some arms fall into the hands of the enemy. It must not be forgotten either that it is a grave attack on the interests of neutrals if the belligerent takes on board its war vessels, to expose them there to all kinds of dangers and even to death, subjects of States with which he is at peace.

It would then be desirable to reach a solution forbidding, in an absolute manner, the destruction of neutral prizes. If this object can not at once be attained, it would, nevertheless, be possible to come to an agreement on a regulation tending to render the destruction superfluous in almost all cases. For this it would be necessary:

1. To establish rules according to which the destruction would, in practice, become very rare, and
2. To introduce, in the different matters of the law of maritime war, prescriptions, offering all the guarantees possible so that the destruction of neutral prizes may become useless.

Ad 1. The number of the cases where destruction can occur might be restricted in a very perceptible manner if the belligerents were permitted, or, better, if they were enjoined—as the Italian delegation to The Hague has proposed—to conduct the neutral prizes into neutral ports, at least in the cases where, in virtue of art. 21 of the

"Convention Concerning the Rights and Duties of Neutral Powers in Case of Maritime War," the neutral States are, from this moment, obliged to receive the neutral prizes. The cases in question are precisely those which oftenest render impossible the sending of the capture into national ports too far distant and which, for that reason, lead necessarily to destruction.

The belligerent captor could then be obliged, when he could not take the neutral prize to a port of his own country because of innavigability, the bad state of the sea, the lack of fuel or provisions, to conduct it or send it to the nearest neutral port, except in the case where by so doing he would compromise the safety of his vessel or the success of his operations.

It is true that the neutral State ought then to hold sequestered such a prize until the end of the hostilities.

Ad 2. In this case questions of contraband, blockade, and hostile assistance are especially concerned.

It might be declared, for example, on the one hand, that it would be lawful for the captain of the neutral vessel to deliver immediately the contraband or to destroy it, if by doing so he could escape capture and consequent destruction of his vessel, and, on the other hand, that the captor would be obliged to take possession of the goods or permit their destruction if, in letting the neutral vessel continue on the route with the contraband on board, he would compromise his own security or the success of his operation.

Similar rules could be likewise established as to other subjects of prize law.

It is clear that the formula therefor could only be found where an agreement had been reached on the principles of the régime to which neutral prizes would have to be submitted.

Spain

(D) Neutral prizes can not be destroyed by the captor so long as the competent tribunal has not declared them legal. The application of this principle can, however, be subordinated by the Powers signatory to the future Convention for the acceptance of the prescriptions contained in the "Convention Concerning the Rights and Duties of Neutral Powers in Case of Maritime War," to the subject of the access of neutral prizes to neutral ports. But even in this case, the

destruction would not be justified except by reason of the state of the sea, the condition of the capturing and captured vessels for navigating, or of the lack of fuel or provision, and not from the proximity of the enemy or from lack of military elements sufficient to insure the conduction to the corresponding port. These last reasons and others analogous to them imply that the captor does not possess sufficient means to complete the capture.

France

(D) In principle, prizes must be put in charge of a prize crew, conducted into a national or allied port, and not destroyed. The captor, however, is authorized to destroy every prize whose preservation would compromise his own safety or the success of his operations, particularly if he can not preserve the prize without weakening his crew.

Use of this right of destruction should be made only with the greatest reserve towards enemy vessels, and *a fortiori* towards neutral vessels. The destruction of a neutral vessel should be quite exceptional.

In case of destruction the captor must take care to preserve all the ship's papers and other elements necessary to permit the judgment of the prize.

Great Britain

1. The duty of a belligerent captor is to bring in, for adjudication by a prize court, any merchant ship which he has seized. Where this is impossible she may, if she is an enemy ship, be destroyed after removal of the crew and papers; if the nationality of the ship is neutral, or if there is any doubt as to the nationality, she should be dismissed, for her destruction can not be justified as between the neutral owner and the captor by any necessity on the part of a belligerent.[1]

2. Innocent neutral cargo on board an enemy ship not being liable to seizure,[2] the owner of such cargo is entitled to compensation where the enemy ship is destroyed.

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[1] *Actaeon*, 2 Dodson 48, 2 E. P. C. 209; *Felicity*, 2 Dodson 381, 2 E. P. C. 233; see also the dictum of Dr. Lushington in the *Leucade*, Spinks, 231, 2 E. P. C. 488.

[2] *Declaration of Paris*, article 3.

Italy

(*d*) The questions concerning the right to proceed to the destruction of merchant vessels, either enemy or neutral, before the prize court has rendered a decision are not regulated expressly by Italian positive law.

In a special case, it has been held that the owner of a neutral merchant vessel destroyed before its capture had been submitted to the regular judgment of the prize court, would have no reason or interest to complain when the vessel was found in conditions which legally justified its capture and confiscation. (*Cont. dipl.,* December 16, 1859, capture of the vessel *Fama Argentina.*)

Japan

The commanders of belligerent war vessels are held to send neutral vessels after seizure to be put on trial. If for any reason they can not do so, said vessels ought not to be destroyed before condemnation.

Netherlands

IV. (1) A neutral vessel captured ought to be released by the captor if it can not be taken into a port of the captor or into a neutral port pending the decision of the prize court (conformably to article 23 of the Convention Concerning the Rights and Duties of Neutral Powers in Case of Maritime War.)

(2) In the case specified in the preceding paragraph the belligerent can, without destroying the vessel, take all measures to prevent the contraband from reaching the enemy destination. The prize court will decide on the correctness of the measures taken.

(3) In the circumstances mentioned under (1) an enemy vessel can be destroyed after the crew and the ship's papers shall have been put in safety.

(4) The owner shall be indemnified for the destruction of his cargo if the latter was not liable to confiscation.

Russia

IV. Art. 1. The destruction of a vessel of neutral nationality, captured and liable to confiscation, is forbidden except in cases where

its preservation could compromise the safety of the captor vessel or the success of its operations.

Art. 2. In the cases specified in Article 1, the commander of the captor vessel is required to transship the men, and as far as possible the cargo, before destroying the vessel, as well as to take the necessary measures to preserve all the ship's papers and, if there is occasion, other articles which might be necessary for the trial before the prize court.

Observations

1. *Destruction of neutral prizes:*

Everybody agrees to recognize that in principle a neutral prize must be taken into a port of prize and made the object of a decision of a prize court.

Certain Governments consider that the general principle is absolute and admits no exceptions. Other Governments have admitted in their practice, the exceptional power of the captor to destroy the prize in certain determined cases. Ought this exceptional power to be recognized as constituting a generally accepted interpretation of the common principle?

Basis for discussion

30. *In principle a neutral prize must be taken into a prize port.*

31. *Should the obligation to take the captured neutral vessel into a prize port be interpreted as absolute or as admitting exceptions?*

Observations

2. *Destruction of neutral goods on board an enemy prize:*

A question connected with the preceding has been considered by a certain number of memoranda; it concerns the case where a neutral property on board an enemy vessel is found included in the destruction of the latter. Propositions of conventional stipulation may be or will be able to be made in this regard, but, in actual practice, should the recognized general principle, according to which neutral goods under enemy flag is not liable to seizure, be interpreted in the sense that in case of destruction the owner of this merchandise should be indemnified for its value? Or, in such a case, is there an act of war giving no occasion legally even to a pecuniary obligation against the belligerent?

Basis for discussion

32. *Should the principle according to which neutral goods found on board an enemy vessel are not liable to seizure be interpreted in the sense that, in case of destruction of the vessel, the owner of the goods must be indemnified, or that in such a case the destruction of the vessel constitutes an act of war not legally causing a pecuniary responsibility against the belligerent?*

E

HOSTILE ASSISTANCE

Views expressed by the memoranda

Germany

2. Vessels placed under the orders of a military chief, who is on board, can not avail themselves of the character of merchant vessels in the sense of article 1 of the Convention Relative to the Establishment of an International Prize Court, concluded at The Hague, October 18, 1907.

3. The neutral or enemy character of a merchant vessel is determined by the flag it carries.

A vessel carrying a neutral flag can, nevertheless, be treated as an enemy vessel:

. . . . .

(3) If it is chartered wholly by the enemy Government.

23. A neutral merchant vessel is, moreover, liable to confiscation:

(1) If it is at the time and exclusively engaged either in the transportation of enemy troops or in the transmission of information in the interest of the enemy;

(2) If it is making the voyage especially in view of the transportation of individual passengers embodied in the armed forces of the enemy or in view of the transmission of information in the interest of the enemy;

(3) If, with the knowledge of the owner or of the charterer or, finally, of the captain, it is carrying a military detachment of the enemy or one or more persons who are directly assisting the operations of the enemy.

Confiscation of the vessel is not permitted if, at the moment when

the vessel was encountered on the sea, the captain did not know and should not have known of the opening of hostilities or if, after having had knowledge thereof, had not yet been able to disembark the transported persons. Ignorance is presumed if the vessel is met in open sea in the course of the week which follows the opening of hostilities and without in this interval having called at a port. This may be rebutted.

In every case, the persons belonging to the armed forces of the enemy can be made prisoners of war.

United States of America

Art. 14. Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction.

Art. 17. A neutral vessel carrying the goods of the enemy is, with her cargo, exempt from capture except when carrying contraband of war, endeavouring to evade a blockade, or guilty of unneutral service.

Art. 18. A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. Mail steamers under neutral flags carrying such dispatches in the regular and customary manner, either as a part of their mail in their mail bags, or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade or unneutral service, in which case the mail bags must be forwarded with seals unbroken.

Austria-Hungary

I. *The so-called contraband by analogy*

Almost all the authors assimilate to contraband of war, the transportation of troops, of agents of the belligerents, and of despatches. It is true that in this case the application by analogy of the principles relative to the repression of contraband is not concerned since the confiscation could only take place in the case of the despatches, while the persons transported can be made prisoners by the enemies of the person to whom they are addressed.

As to matters of detail, nearly every author treats them differently. Likewise in practice, these questions are not always decided in the same way. In general, the rules accepted in 1896 at Venice by the Institut de Droit International ("Service de transports," par. 6 to 8) might be sufficient to decide all litigations which can normally be presented. This is why these rules could serve as a basis for a discussion of the subject. It is true that to these rules others bearing on the repression of the contraventions should be added.

II. Hostile assistance in a larger sense

Vessels under neutral flag can not avail themselves of their neutrality if they commit hostile acts against a belligerent or if they render services to his adversary. Such a vessel should be liable to confiscation; guilty individuals should be treated as enemies. The transportation of contraband properly called or by analogy does not constitute, of course, a service involving the above-named consequences.

Spain

(E) 1. The Spanish Instructions for the Exercise of the Right of Visit, of 1898, authorize the seizure of a neutral vessel:

If it is transporting, for the enemy, officers of war, troops, or sailors;

If it is carrying dispatches or communications of the enemy, except in the case where the vessel belongs to a maritime postal line and said dispatches or communications are in valises, boxes, or packages of public correspondence, the captain being therefore unaware of their contents;

If it is employed in spying on the operations of the war, chartered or rewarded by the other belligerent for this service;

If it participates in the war, contributing in any manner to the operations.

2. The vessel carrying persons whose conduction is prohibited to neutrals, conformably to prior prescriptions, can not be arrested if they are travelling as ordinary travellers at their own expense; but the belligerent can oblige these individuals to disembark.

3. Confiscation is the sanction corresponding to hostile assistance, and it may be applied even after the act or transportation if the

vessel continues under the orders of the adversary or remains bound by engagements with him.

France

(E) The French regulations do not provide such a category of vessels and, consequently, any special treatment to impose upon them.

These vessels would be considered according to their cargo, as effecting a legal or prohibited transportation, and would have applied, if there were occasion, the rules relative to contraband.

Great Britain

1. A neutral vessel employed by, or on behalf of, a belligerent to carry combatants or intending combatants for purposes connected with the war is liable to condemnation together with the cargo on board.[1] The fact that the master is ignorant that the vessel is being so employed is no ground for exemption,[2] nor will it make any difference that the employment of the ship originated in acts of violence or duress on the part of the belligerent.[3] The vessel is liable to condemnation although at the time of seizure the service on which she had been employed had come to an end, provided that she was still subservient to the purposes of the belligerent.[4]

2. The same rule applies where the vessel is employed to carry officers in the civil service of the Government on the public service and at the public expense.[5]

3. A neutral vessel chartered or employed by a belligerent Government to carry a cargo on its behalf and acting under the orders or direction of that Government, or of its officers, is liable to condemnation as an enemy ship, together with the cargo so carried.[6]

4. Neutral vessels in the service of the belligerent, within the meaning of the above sections, and under the orders and control of the belligerent, may, if found taking part in military operations or in the immediate vicinity of an enemy fleet, be sunk.[7]

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[1] *Friendship,* 6 C. Rob. 420, 1 E. P. C. 599; *Orozembo,* 6 C. Rob. 430; 1 E. P. C. 605.

[2] *Orozembo, ibid.*

[3] *Carolina,* 4 C. Rob. 256, 1 E. P. C. 385.

[4] *Carolina, ibid.*

[5] Dictum of Lord Stowell in the *Orozembo,* 6 C. Rob. 434.

[6] *Rebecca,* 2 Acton, 119.

[7] No such case has actually been decided in the British Prize Courts, but in 1894 a British ship, the *Kowshing,* was sunk by the Japanese when so employed.

5. A vessel knowingly carrying persons in the naval or military service of the belligerent is liable to capture and condemnation,[1] but this penalty would not necesarily be enforced where such persons were merely travelling in the ordinary way as private passengers at their own expense.[2]

6. A neutral vessel carrying the public despatches of the enemy is liable to condemnation, at any rate if there has been concealment of the dispatches or other circumstances of fraud, or if their presence was known to the master. If the master or other agent of the cargo was privy to their carriage, the cargo will also be liable to condemnation.[3]

The above rule will, however, not be applied in the case of dispatches between a diplomatic representative of the belligerent State in a neutral country and his own Government,[4] or in the case of postal correspondence within the scope of articles 1 and 2 of the Convention relating thereto signed at The Hague in 1907.[5]

Italy

(*e*) Nor is this matter regulated by particular provisions of positive Italian law. There is occasion, however, to consider how perfectly the principle conforms to the spirit of this law, as well as to the rules of international law, that neutral vessels lose the privileges which they derive from this quality when they render themselves guilty of hostile acts towards one of the belligerent parties, or when they perform acts intended to lend assistance to the adversary in the operations of war, especially the transportation of troops or the transmission of information in the interest of the enemy.

The Prize Commissions and the Italian Consultative Administrative Corps have not had occasion to examine and resolve the numerous questions which are connected with the application of this principle.

It has, however, been decided, in circumstances quite special, that a foreign merchant vessel which renders itself guilty of hostile acts towards the State must be considered as enemy and as such can

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[1] *Hope,* 6 C. Rob. 462 n.

[2] Dictum of Lord Stowell in the *Friendship,* 6 C. Rob. 429, 1 E. P. C. 604.

[3] *Atalanta,* 6 C. Rob. 441, 1 E. P. C. 607; *Susan,* 6 C. Rob. 461 n., 1 E. P. C. 614 n.

[4] *Caroline,* 6 C. Rob. 461, 1 E. P. C. 615.

[5] "Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War."

be legally captured and confiscated. (*Comm. Prises,* capture of the *Vesuvio,* sanctioned by Royal Rescript, January 10, 1850; *Comm. Prises,* November 28, 1857, cited above.)

Japan

I. Neutral vessels as well as the cargo found on board and belonging to the owners of the vessels are liable to capture in the following cases:

(*a*) When they are carrying officers, men, or other persons in the military or naval service of the enemy State;

(*b*) When they are carrying an official correspondence between the functionaries of the enemy State, except the correspondence between the diplomatic or consular representatives and their Government.

II. In the cases above neither the vessel nor the cargo is subject to confiscation if it is proven.

(*a*) When the captains of the vessels have no knowledge, real or presumed, of the existence of a state of war;

(*b*) Or that reasonable precautions have been taken by the owners or the captains of the vessels to assure themselves of the inoffensive character and nature of the persons and correspondence carried by the vessels.

III. A neutral vessel making a reconnaissance or carrying information, or voluntarily rendering in some other fashion services to the profit of one belligerent or the injury or detriment of the other, is liable to confiscation as well as the goods found on board and belonging to the owner of the vessel.

Netherlands

V. (1) A neutral vessel can not avail itself of its quality of neutral, so long as it is employed:

1. For the transportation of troops for the use of the belligerents;
2. For rendering services under the orders or surveillance of the belligerents;
3. For taking part in the military operations or lending assistance contrary to neutrality in the immediate vicinity of a hostile fleet.

(2) Neutral vessels on board which are persons belonging to the military forces of the belligerents are not contemplated in the preced-

ing paragraph if these persons are carried at their own expense as ordinary travelers.

Russia

(V) Art. I. The belligerents have the right not to recognize the neutral character:

1. Of every vessel which carries:
   (*a*) Military detachments of the enemy belonging to his armed forces of land or sea, or
   (*b*) Individual passengers belonging to the armed forces of the enemy, or the military and official correspondence of the enemy when the transportations of this kind constitute for the vessel the principle object of the voyage;
2. Of every vessel which takes a direct part in the military operations of the enemy or else finds itself, by reason of the state of war, in the service of the enemy;
3. Of every vessel which offers resistance to the arrest, visit, or seizure.

Art. 2. The confiscation of the vessels mentioned in article 1 can not occur except by virtue of a sentence by the prize court.

Art. 3. Persons belonging to the crew of the vessels mentioned in Article 1 are recognized as prisoners of war.

Observations

It may be stated, as it appears from the memoranda which have treated the question in its entirety, that a common general idea is admitted, according to which the belligerent can pursue a certain number of acts, constituting on the part of neutral merchant vessels an assistance given to the enemy. Therein lies a violation of neutrality which the belligerent is within his right to prevent.

In this regard a distinction can be made between:

(*a*) The case of certain hostile services which are not the special object of the voyage of the vessel (for example, transportations of military detachments, detached members of the military, of enemy functionaries or agents, of enemy diplomatic pouches).

In such case, it appears that up to the present a treatment has generally been applied at first analogous to that applied in matters of contraband, that is, seizure of the vessel.

As to the penalty itself, all the memoranda not having discussed the question, it appears difficult here to draw out at present a general principle.

(*b*) The case where the vessel is entirely or specially in the service of the enemy belligerent (for example, entire chartering by the enemy Government of a vessel attached to an enemy fleet in any military purpose whatever).

The majority of the memoranda recognize that in such a case the neutral vessel must submit to treatment analogous to that which it would undergo if it were an enemy merchant vessel.

But in any case actually, and without prejudice to the value of the provisions of new conventional rules, it does not appear that the assimilation to an enemy war vessel of a neutral vessel rendering hostile assistance of whatever sort is recognized as acquired, in any respect.

Basis for discussion

33. *Neutral merchant vessels carrying military detachments, detached members of the military, enemy functionaries or agents, or enemy diplomatic pouches, are liable to capture without their transportation's constituting the special object of the voyage.*

34. *Neutral merchant vessels entirely or specially in the service of the enemy belligerent are liable to the same treatment which they would undergo if they were enemy merchant vessels.*

F

TRANSFORMATION OF MERCHANT VESSELS

Views expressed by the memoranda

Germany

1. The conversion of merchant vessels into war vessels contemplated by the Convention on this subject concluded at The Hague, October 18, 1907, can only be done:

(1) In the ports and roads or in the territorial waters of the belligerents;

(2) On the open sea.

Vessels thus converted can not be reconverted into merchant vessels during the continuance of the war.

United States of America
(Nothing)

Austria-Hungary

(F) The question whether it is allowable to convert merchant vessels into war vessels on the high seas has not been discussed by the authors. In practice there is no unanimity in the matter. To decide the question, one can only consider the legitimate aspirations of the interested parties. It can not be affirmed that on the high seas the belligerent can dispose of his vessels at his will. It is true that his sovereignty extends to his vessels. But as the high sea is common to all ("omnium communis") the sovereignty of each State is there limited by the interests of other States.

This is why the States are within their rights when they ask that the conversion of merchant vessels into war vessels ought to be permitted only under conditions guaranteeing that pacific traffic shall have to fear neither the reappearance of privateers nor other vexatious measures. Consequently the conversion of merchant vessels into war vessels can not be permitted or prohibited, without restrictions.

To conciliate, in the case in hand, the opposing interests, it would perhaps be useful to forbid the reconversion of war vessels into merchant vessels. This the Austro-Hungarian delegation has already stated in the IVth Commission of the Second Peace Conference. It is true that at that time the said proposition did not receive all the votes although it can not be admitted that it would be contrary to the interests of anyone whomsoever.

If in the future this proposition be not more favorably received, other means capable of protecting neutrals against the encroachments of the belligerents ought to be sought, since every one must desire a solution of the question.

As it appears from the terms in which the question has been stated in the program ("on the high seas") it is important at this time to complete in an essential point, the Convention Relative to the Transformation of Merchant Vessels into War Vessels, signed at The Hague in 1907. And, as it appears from the discussions which were held on this subject in the said Conference, it is not a question, properly speaking, of establishing a definition of the notion "war vessel" but rather of determining the conditions to be fulfilled by the converted vessels in

order to be allowed to exercise the right of prize against neutrals. In order to carry out this mission in a real and efficacious manner they would need an armament of some importance and a speed superior to that which merchant vessels in general possess. In establishing these two conditions exacted by the very nature of things there will be offered to neutrals valuable guarantees without injuring the legitimate interests of the belligerents.

Finally, article 6 of the Convention referred to above would appear insufficient. If the belligerent is obliged only to inscribe the converted vessel on the list of his war vessels, the neutrals, and this is the important thing, have no knowledge of the conversion made. For this, a notification would be necessary. In like manner, the reconversion—if it was generally declared legal, if only in the national ports—ought to be notified.

To sum up, the conversion could be submitted—without distinguishing whether it must take place in the national waters, in the territorial waters occupied by a belligerent, or on the high sea—to the following supplementary conditions:

1. A minimum of guns of a certain calibre;
2. A minimum of speed;
3. Immediate notification with indication of the place where the conversion, even the reconversion, has taken place;
4. Effective disarming in case of reconversion;
5. Mention, in the notification, of the circumstances relative to 1, 2, and 4;
6. Responsibility of the State for all damages sustained by third States or their *ressortissants* growing out of a contravention against the rules enumerated above.

Spain

(F) There exist considerable juridical differences between a war vessel and a merchant vessel, even if the latter carries the belligerent flag. The difference is characterized and defined by the relations of the one and the other vessel not only with the authorities of their country, but with the authorities, the forces, and the persons and private properties of the enemy as well as of the neutral Powers. If an error or simply an ambiguity is produced with regard to the character of the vessel it would become impossible for third parties to discern to whom are forbidden and to whom are permitted the in-

herent powers of military action of the State. On the other hand, the rules which prevent the equipment of a vessel or of a military expedition in a neutral port could result inefficaciously if the change of condition of the vessel on the high sea were permitted. Each voyage, indeed, is regulated and qualified by the papers delivered in one port with destination of another. If the State itself withdraws its vessels from the effects of the documents, the latter remain without value. For all these reasons, the conversion of merchant vessels into war vessels on the open sea must be declared null.

France

(F) All the States, enjoying on a footing of absolute equality, on the open sea, the full exercise of their sovereignty in regard to the vessels of their flag, are, in consequence, free to submit them there to such measures of mobilization or military transformation as it suits them to order.

Great Britain

No general practice of nations has prevailed in the past on this point from which any principles can be deduced and formulated as to the established rules of international law. So far as can be ascertained there are no precedents on the subject.

The question is regarded by His Majesty's Government as one to be decided by reference to the rights of neutrals. Resistance on the part of a neutral merchant vessel to the exercise of the admitted belligerent right of visit and search, involving as it does the possible condemnation of the vessel as good prize, is so serious a matter for the neutral, that it is essential that there should be no possibility of doubt as to the ships that are entitled to exercise this right. It is submitted that the true rule to be deduced from the principles which govern the relations between belligerents and neutrals is that the exercise of the right to visit and bring in neutral merchant vessels is strictly limited to ships being, and known to be, public ships of the belligerent fighting fleet flying the pennant. It would be a grave extension of that right if it were held to be permissible to exercise those powers by means of vessels, believed by neutrals to be peaceful merchant vessels, suddenly and without warning converted into ships of war, possibly in the immediate neighborhood of vessels which they desire to stop and search. Any further limitation to the security of peaceful commerce or of the

freedom of neutral vessels to navigate the seas is opposed to the general interests of nations, while the exercise of belligerent force against neutrals in the manner indicated above would almost inevitably lead to friction, with the attendant danger of bringing other nations into the arena of war. The somewhat arbitrary powers accorded to belligerents as against neutrals for the protection of the vital interests of the former should not, it is submitted, be increased by according sanction to proceedings which, however they may be argumentatively sustained, are entirely novel and without the support of any existing principles of international law. His Majesty's Government, therefore, regard it as of great importance to neutrals that units of the fighting force of a belligerent should not be created except within the jurisdiction of that Power.

The only cases decided in the British Prize Courts, where any point of this kind has arisen, are some decisions on the rights of the original British owners of ships, which have been captured by the enemy, to restitution of their property on its subsequent recapture by the British forces.[1] The British Prize Act deprived the original owner of his right to restitution if the vessel had been set forth as a ship or vessel of war. These cases deal only with the rights of the respective groups of British claimants, as determined by the Act of Parliament, and have, therefore, little or no bearing on the general question.

Italy

(F) This question has not been provided for by the positive Italian law.

The Italian delegation to the Second International Peace Conference has proposed a resolution in this regard in the following terms:

> "Vessels which leave the territorial waters of their country after the opening of hostilities can not change their quality either on the open sea or in the territorial waters of another State." (IVth Commission, annex 17.)

Japan

A merchant vessel cannot be converted into a war vessel or reconverted into a merchant vessel by a belligerent, if it is not in a port or

[1] *Ceylon,* 1 Dodson 105, 2 E. P. C. 133; *Georgiana,* 1 Dodson 397, 2 E. P. C. 193.

in the territorial waters belonging to the said belligerent or to his ally, or occupied by their military or naval forces.

Netherlands

VI. (1) The conversion of a merchant vessel into a war vessel can only take place in the territory or the territorial waters of the Power whose flag it will carry.

(2) A merchant vessel converted into a war vessel can not lose this character before the end of the war.

Russia

VI. The conversion of a merchant vessel into a war vessel can take place in the course of hostilities in the territorial waters of the belligerent as well as on the high sea. In both cases belligerents are required to observe the rules prescribed by the Convention relative to the conversion of merchant vessels into war vessels signed at The Hague, October 18, 1907.

Observations

The views expressed by the memoranda on the conversion of merchant vessels into war vessels on the high sea show that up to the present this question, of relatively recent origin, has been decided by the Governments according to their own particular views and there does not at present exist any common principle in this regard recognized by all.

It will be for the Conference to examine the best way to pursue to put an end, if possible, to the uncertainty of the law in this matter.

G

TRANSFER OF FLAG

Views expressed by the memoranda

Germany

Art. 3. The neutral or enemy character of a merchant vessel is determined by the flag which it carries.

A vessel carrying a neutral flag can nevertheless be treated as an enemy vessel:

1. If up to the outbreak of hostilities or within the two weeks prior thereto it has carried the enemy flag.

United States of America

(Nothing)

Austria-Hungary

(G) According to the practice of almost all States, the sale of an enemy vessel made in course of voyage and after the outbreak of hostilities can not prevent the capture of the vessel, the latter continuing in the circumstances in question to be considered as enemy.

The former French theory, by virtue of which enemy vessels could not change nationality after the outbreak of hostilities, that is, lose their character of enemy vessels, permits an excessive restriction of neutral commerce, inasmuch as this commerce should, in principle, remain free, even in time of war. France herself, moreover derogated from this theory in 1870.

Section 26 of the draft for the regulation of prizes voted by l'Institut de Droit International in its session at Turin, seems to contain a solution of the question all the more felicitous because it takes into account the interests of belligerents and neutrals. The said paragraph is thus worded:

> The legal document showing the sale of an enemy vessel made during the war must be perfect and the vessel should be registered before it leaves the port of departure, and in accordance with the laws of the country whose nationality it acquires. The new nationality can not be acquired by a vessel which is sold during a voyage.

There is no objection, moreover, to the establishment of supplementary guaranties against injury by means of fictitious sales made by *ressortissants* of one of the belligerents, to the legitimate interests of the other belligerent.

Spain

(G) The Government of H. C. M. considers acceptable the rules suggested by the Cabinet of London in section 7 of its memorandum. When the change of the flag of the vessel corresponds to an effective transfer of ownership or to other motives of a private order, its validity will be recognized, but if it is the result of the intention to

avoid, by simulation, the risks existant to-day for private enemy property in case of maritime war it must be considered null.

France

(G) The change of nationality of merchant vessels effected *after* the declaration of war is null and without effect. The transfer which has occurred *prior* to the declaration of war and in a regular manner is valid. The date of the transfer to a neutral flag prior to the declaration of war must be established by authentic documents found on board and the transfer must have been followed by a registration before the competent authorities.

An act of naturalization which has been granted by a neutral Government in favor of the owner of the vessel after the declaration of war must be held as suspicious. It is necessary in this case to act according to the circumstances and other indications collected, especially according to the place of construction of the vessel, the composition of its crew, the observance of the national conditions imposed on the flag raised.

Great Britain

1. The assignment, either by sale or gift, to a neutral of an enemy ship, other than a ship of war, is not rendered invalid merely by the fact that it was made during or in contemplation of hostilities.[1]

2. Such an assignment is not, however, valid if—

(*a*) It is made in a blockaded port.[2]

(*b*) It is made in the course of a voyage. For this purpose a voyage is at an end as soon as the ship reaches a port where she can actually be delivered into the possession of the transferee.[3]

(*c*) The vendor retains any share in the ship, or if there is an agreement to reconvey her at the end of the war.[4]

3. The onus of proving that the transfer is genuine lies on the claimant and the assignment must be complete, bona fide, and for good consideration.

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[1] *Benedict,* Spinks 314, 2 E. P. C. 527; *Baltica,* 11 Moore, P. C. 141, 2 E. P. C. 628; *Minerva,* 6 C. Rob. 396. 1 E. P. C. 591.

[2] *General Hamilton,* 6 C. Rob. 62, 1 E. P. C. 528.

[3] *Danckebaar Africaan,* 1 C. Rob. 112, 1 E. P. C. 74; *Vrow Margaretha,* 1 C. Rob. 336, 1 E. P. C. 149; *Jan Frederick,* 5 C. Rob. 128, 1 E. P. C. 435; *Baltica,* 11 Moore, P. C. 141, 2 E. P. C. 628.

[4] *Sechs Geschwister,* 4 C. Rob. 100, 1 E. P. C. 363; *Novdt Gedacht,* 2 C. Rob. 137, note.

A vessel transferred to a neutral flag is, therefore, still liable to be condemned by the prize court if the circumstances of the transfer are attended with suspicion not removed by the claimant,[1] as, for example, if:

(*a*) No documentary evidence of the assignment is found on board at the time of the seizure;

(*b*) The transferor has any control over the ship, reservation of profits, or power to revoke the assignment;

(*c*) Possession has not been taken by the alleged transferee, or by some agent of his who is not an enemy;

(*d*) The ship is under the control of an enemy;

(*e*) The master or other person in command is in the service of an enemy.

ITALY

(*g*) "Italian nationality can not be granted to any vessel arising from the sale which shall have been made by an individual subject of a Power which is in a state of war with another Power which shall be in a state of peace with the Government of the King.

"The minister of the marine can always, if the verity of the sale is established, grant the nationalization of the vessel." (*Cod. M. M.*, art. 42.)

It results from this provision that according to the spirit of Italian positive law the sale of an enemy vessel to a neutral purchaser *after the outbreak of hostilities* is presumed to be fictitious and as such it can not be recognized. Proof to the contrary is, however, admitted with quite special guaranties.

The Council of Diplomatic Claims expresses itself in an analogous sense. It has declared, indeed, that the transfer of the ownership of a vessel can not be considered valid if it is not shown by the ship's papers, and there would be no reason to take account of a sale which could not be registered on the papers because the vessel was *in transitu*. It results, however, from the opinion as a whole that the proof of the reality and of the legality of the sale is admitted. (*Cont. dipl.*, June 16, 1866, capture of the ship *Venezia*.)

[1] *Vigilantia*, 1 C. Rob. 1, 1 E. P. C. 31; *Endraught*, 1 C. Rob. 19; *Welvaart*, 1 C. Rob. 122; *Juffrouw Anna*, 1 C. Rob. 124, 1 E. P. C. 76; *Novdt Gedacht*, 2 C. Rob. 137, note; *Jemmy*, 4 C. Rob. 31, 1 E. P. C. 331; *Soglasie*, Spinks 105; *Ernst Merck*, Spinks 99, 2 E. P. C. 338; *Ariel*, 11 Moore, P. C. 110, 2 E. P. C. 600; *Christine*, Spinks 82, 2 E. P. C. 320.

Japan

The transfer of ownership of a vessel in the course of or in anticipation of war by the enemy State or by an enemy person to another person having his domicile in the other belligerent State or an allied State, or in a neutral State, is valid only if sufficient proof is furnished of a complete and bona fide transfer.

In the case where the ownership of a vessel is transferred pending the completion of its voyage, such transfer should not be considered as in good faith and complete until the actual delivery.

Netherlands

VII. (1) The validity of the transfer of merchant vessels from a belligerent flag to a neutral one during or at the beginning of hostilities is recognized without restriction.

(2) A merchant vessel transferred from a belligerent flag to a neutral flag in a blockaded port or on a blockaded coast can not claim the treatment accorded to a neutral flag.

Russia

VII. The belligerents have the right of not recognizing the neutral character of a merchant vessel bought by neutral persons from an enemy State or one of its *ressortissants* unless the new owner proves that the acquisition was completed before he had knowledge of the commencement of the war.

Observations

The transfer of a vessel can not be admitted when the object in view is to escape the consequences to which its character of enemy vessel exposes it.

The most of the memoranda presenting the existing law have followed different ways in interpreting and applying this common principle. The proof being difficult in such a matter, some simple or absolute presumptions, more or less justified, have been laid down, particularly when the transfer takes place in the course of hostilities. In such a case, according to all the memoranda, the absolute presumption of nullity does not constitute a general rule except in the case of a transfer *in transitu*.

The common practice tends to recognize the validity of the transfer before the outbreak of hostilities whenever this transfer has occurred regularly, that is, when there is nothing fictitious or irregular about it which renders it suspicious.

Basis for discussion

35. *A vessel can not be transferred to a neutral flag for the purpose of escaping the consequences to which its character of enemy vessel exposes it.*

36. *The transfer effected before the outbreak of hostilities is valid if it has occurred regularly, that is, if there is nothing fictitious or irregular about it which renders it suspicious.*

37. *After the outbreak of hostilities, there is an absolute presumption of nullity of the transfer which is made while the vessel is in transitu.*

H

ENEMY CHARACTER

Views expressed by the memoranda

Germany

Art. 3. The neutral or enemy character of a merchant vessel is determined by the flag which it carries.

A vessel flying a neutral flag may nevertheless be treated as an enemy vessel:

(1) If up to the opening of hostilities or within the two weeks prior thereto, it has carried the enemy flag;

(2) If it actually makes a voyage which has only been authorized by the enemy government after the opening of hostilities or within the two months prior thereto;

(3) If it is chartered entirely by the enemy government.

Art. 4. The neutral or enemy character of the goods found on board an enemy vessel is determined by the nationality of the one who carries the risk of fortuitous loss during the voyage. Any agreement between the interested parties which modifies the general rules of the law regarding the transfer of risks is considered null and void when it has been made either in anticipation of a war or after the opening of hostilities.

If the person who carries the risks can not be determined by the ship's papers, there is a presumption that the risks are carried by the consignee of the goods and in the case where the latter can not be determined, either, by a national of the enemy Power.

If the nationality of the one who carries the risks is not known and can not be established by the ship's papers it is presumed to be enemy.

The presumptions mentioned in paragraphs 2 and 3 can be rebutted.

Art. 5. Neutral goods found on an enemy vessel can be treated as enemy goods:

(1) If they have been clothed with neutral quality only on board the vessel and after the opening of hostilities;

(2) If the one who carries the risks has possessed enemy character and has changed therefrom only after the opening of hostilities or within the two months prior thereto;

(3) If, in case of capture of the goods, the enemy government indemnifies for the loss.

United States of America

(Nothing)

Austria-Hungary

I. *As to the ownership of vessels*

The neutral or enemy character of a vessel is determined in the first place by the flag of the vessel.

The question whether the vessel is authorized to fly the flag which it shows must be determined according to the laws of the State whose flag the vessel is flying. (§ 25 of the Regulation of Prizes adopted at Turin by l'Institut de Droit International.)

Inasmuch as the character, enemy or neutral, of a vessel is determined by the person of the owner, account can in all justice be taken only of the nationality and not of the domicile of the party at interest. And this for the following reasons:

1. The principle of domicile is rejected by almost all the States.
2. It is the nature of things that only the *ressortissants* of the enemy State, and not those of neutral States, can be considered as enemy owners.
3. The partisans of the principle of domicile urge a certain analogy with war on land, since, in the latter, neutrals who live in enemy territory can not either avoid the sufferings of war.

But the "Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land" declares expressly: "The nationals of a State, which is not taking part in the war, are considered as neutrals."

4. The neutral who lives in the enemy territory is not called to the colors, while this is the case with the *ressortissants* of the belligerent who have their domicile in neutral territory. (Kleen, *Lois et Usages de la Neutralité,* vol. I, p. 147 *et seq.*)
5. The principle of the domicile "will always remain vague and capricious while nationality is clear and can be easily established." (Kleen, *op. cit.*)
6. The principle of domicile would force a State to consider its own *ressortissants* as enemies, an absurd and immoral consequence.

For all these reasons it would be desirable to accept the principle of nationality as being more practical and from the legal point of view, more just. (Cf. Calvo, *Droit International,* vol. III, p. 59 *et seq.*)

Only the principle of nationality, moreover, corresponds to the legitimate interests of neutral commerce. It is true that its too rigorous application would do injury to neutral countries in whose territory there are *ressortissants* of belligerent States. The advantage to the belligerent State to be able to injure the subjects of his adversary through their property is trifling. This is why the principle of nationality could, perhaps—and this would be the most equitable solution—be combined with the principle of domicile and it be stipulated that: The *ressortissants* of the enemy State who have their domicile therein shall be considered enemy owners.

II. *As to the ownership of the goods*

The reasons above enumerated argue in favor of a solution by which only the goods belonging to enemy nationals should be considered as enemy goods. This solution would be conformable to the opinion of almost all the States and of almost all the continental authors.

The question whether, during the transportation of goods, they belong to the consignor or to the consignee, should, without doubt, be determined according to the contract existing between them unless the transfer of the goods has been pretended.

Besides, it would be equitable to extend to goods the application of the principle which has just been adopted for the vessels, that is, of considering as enemy goods only the goods whose owners are *ressortis-*

sants of an enemy State and have their domicile therein. Because between the property of persons who live in neutral States and the enemy State there exists no relation such that the belligerent would have a legitimate interest for seizing it.

Spain

(H) *Influence of the nationality of the owner on the character of the vessel*

It is by the flag that the virtuality of fixing the belligerent or neutral character of the vessel must be recognized, the flag being ostensible and the ownership not. As to the right of the vessel to fly a particular flag, the law of the country concerned is applicable.

(I) *Influence of the nationality of the owner on the character of the goods*

1. The principle of the domicile of the owner serving as a basis for establishing the belligerent or neutral character of the goods, seems from the practical point of view the most useful for avoiding the difficulties which the system of nationality would cause.

2. The principles adopted relative to the change of flag of vessels during the war become applicable to the transfer of goods on voyage so far as the nature of the case permits. In the case as well of determining whether the goods belong at a given moment to the consignor or to the consignee, to the vendor or to the purchaser, the rules which govern private contracts shall be taken into account provided there be no simulation.

France

(H) All goods whose owner is enemy are enemy goods. All goods whose owner is neutral are neutral goods.

Every owner of enemy nationality is enemy. Every owner of neutral nationality is neutral.

One must hold as suspicious an act of naturalization on the part of a neutral government in favor of the owner occurring after the declaration of war.

Great Britain

1. The principle adopted by the British courts has been to treat the domicile of the owner as the dominant factor in deciding whether property captured in time of war is enemy property; but for this

purpose the principle is not limited in all respects to the domicile of origin or residence, and is applied in the following way:[1]

(*a*) A person domiciled in a neutral country, but having a house of trade in an enemy country, is deemed to acquire a commercial domicile in the enemy country in respect of transactions originating there;[2] but the other property of such an owner is not affected thereby.[3]

(*b*) A commercial domicile not being the domicile of nationality is terminated when actual steps are taken bona fide, to abandon such domicile for a different one *sine animo revertendi*.[4]

2. This principle applies equally to the cases of an individual, a partnership, or a corporation, residence in the two latter cases being understood to mean the place whence the business is controlled.[5]

3. In the case of a partnership where one or more of the partners is domiciled in enemy territory, property not liable to be seized as enemy property on other grounds is presumed to be divided proportionately between the partners, and the share attributed to a partner domiciled in enemy territory is deemed to be enemy property.[6]

Italy

(*h*) This question can be raised either as to the vessel or as to the goods.

1. As to the vessel there is some reason to consider how the principle according to which the neutral or enemy character of the vessel depends on the flag, conforms to the Italian law; and it is according to the law of the State to which this flag belongs that the right of the vessel legitimately to fly the flag in question must be determined.

2. According to the Italian public and private law the character of the goods must depend on the nationality and not the domicile of the owner; and in this sense the Italian legislator has incidentally decided

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[1] *Postilion*, Hay and Marriott, 245, 1 E. P. C. 20; *Harmony*, 2 C. Rob. 322, 1 E. P. C. 241; *Aina*, Spinks 8, 2 E. P. C. 247; *Gerasimo*, 11 Moore, P. C. 88, 2 E. P. C. 577, 582.

[2] Dictum of Lord Stowell in *Jonge Klassina*, 5 C. Rob. 302, 1 E. P. C. 488; cases cited in *Vigilantia*, 1 C. Rob. 1, 1 E. P. C. 31.

[3] *Portland*, 3 C. Rob. 43.

[4] *Indian Chief*, 3 C. Rob. 11, 1 E. P. C. 251.

[5] Cases cited in *Vigilantia*, 1 C. Rob. 1, 1 E. P. C. 31; see judgment of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Limited*, Law Reports, 1902, Appeal Cases, p. 505.

[6] *Citto*, 3 C. Rob. 38; *Harmony*, 2 C. Rob. 322, 1 E. P. C. 241.

the question in hand as appears by the analogy of art. 42 of the code of merchant marine (see letter (*g*) above).

Indeed the Italian legislator, having to choose as the basis of all judicial reports, even those simply patrimonial, between nationality and domicile, has always preferred nationality. Moreover, from the point of view of the public law and according to considerations of a political order, the war being essentially a public and political condition, it appears that the quality of enemy can not logically be extended in principle and for all purposes beyond the individuals belonging to the one or the other belligerent communities. It appears, also, that the State can not accept a doctrine which would compel it to consider as enemies in some respects its own subjects, for the sole reason that they might have their domicile abroad while this circumstance would not be sufficient to exempt them from their military and political obligations to their native country.

Japan

I. Enemy goods are:

(*a*) Vessels in the service of the enemy State, voluntarily or by constraint;

(*b*) Vessels navigating under an enemy flag or with an enemy clearance;

(*c*) Vessels belonging in whole or in part to the enemy State or to an enemy person;

(*d*) Vessels whose ownership has been transferred in the course of or in anticipation of hostilities by the enemy State or by an enemy person to another person having his domicile in the other belligerent State, or in an allied State, or in a neutral State, unless there is proof of a transfer complete and in good faith of the ownership. If the transfer of ownership is made while the vessel is making the voyage, it should not be considered as of good faith and complete until actual delivery.

II. Enemy goods are:

(*a*) Goods belonging to the enemy State or to an enemy person.

(*b*) Products of the soil of the enemy State belonging to the owner of the ground.

(*c*) The cargo consigned to the enemy State or to an enemy person or agent, including the cargo loaded before but in anticipation of the opening of hostilities.

(*d*) The cargo consigned, in the course of or in anticipation of hostilities, by the enemy State or by an enemy person or agent to another person having his domicile in the other belligerent State or its ally or in a neutral State. However, if it is clearly established that the ownership of the said cargo belongs to the consignee it is exempt from confiscation.

The goods belonging to the enemy State or to an enemy person which are the object of a transfer in the course of a voyage are considered as enemy goods until the actual delivery.

III. Enemy persons are:

(*a*) Persons having their domicile in the enemy State or who are engaged in the service of the enemy State, whatever be their nationality.

(*b*) Persons engaged in business in the enemy State in what concerns this business.

Netherlands

VIII. (1) The "enemy" or "neutral" character of the vessel is determined by its flag.

(2) The "enemy" or "neutral" character of the cargo depends on the domicile of the owner.

Russia

VIII. The nationality of the vessel is determined by the flag which it has the right to carry.

The nationality of the cargo is determined by the nationality of its owner.

Observations

Up to the present it is an acquired principle that private enemy property on the sea is liable to capture, but that neutral commerce with the enemy is free.

Every commercial transaction supposing, necessarily, two or more persons, it is only the commerce considered from the unilateral point of view of the enemy that the belligerent has the right to pursue.

To determine the enemy character of vessels or of goods the practice followed to this time takes into consideration either the nationality, the domicile, or the principal establishment of the owner.

So far as the vessels are specially concerned, however, most of the memoranda consider that the neutral or enemy character is deter-

mined by the flag carried by the vessel in conformity to the laws which govern the flying of this flag.

Besides it seems, indeed, that it is a principle generally recognized that the vessel under an enemy flag is considered as an enemy vessel.

But can every vessel under neutral flag be equally considered as neutral, setting aside the special case where the vessel by virtue of special penal law would incur a treatment analogous to that of an enemy vessel?

Basis for discussion

38. *The neutral or enemy character of a vessel is determined in the first place by the flag regularly carried.*

Observations

As to the goods, can it at least be said, as a general rule, that it is the neutral or enemy character of the regular owner that is taken into consideration, whether one admits afterwards as a criterion in this respect, his nationality, his domicile, or his principal establishment?

Basis for discussion

39. *The neutral or enemy character of the goods is determined by the neutral or enemy character of the one who is the regular owner of the goods.*

Declaration Concerning the Laws of Maritime War[1]

[Translation]

His Majesty the German Emperor, King of Prussia; the President of the United States of America; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Majesty the Emperor of All the Russias.

Having regard to the terms in which the British Government invited various Powers to meet in conference in order to arrive at an agreement as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize Court;

Recognizing all the advantages which an agreement as to the said rules would, in the unfortunate event of a naval war, present, both as regards peaceful commerce, and as regards the belligerents and their diplomatic relations with neutral Governments;

Having regard to the divergence often found in the methods by which it is sought to apply in practice the general principles of international law;

Animated by the desire to insure henceforward a greater measure of uniformity in this respect;

Hoping that a work so important to the common welfare will meet with general approval;

Have appointed as their plenipotentiaries, that is to say:

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[1] Signed at London, February 26, 1909. Ratification advised by the Senate of the United States, April 24, 1912. Adversely acted on by the Parliament of Great Britain. The text of this Convention and the following report is taken from the copy printed for the use of the U. S. Senate, a reprint of which appears in *Foreign Relations of the United States,* 1909, pp. 318, 304. For the original French text, see the *British Parliamentary Paper,* Miscellaneous, No. 5 (1909), pp. 381, 342 [Cd. 4555]; Naval War College, *International Law Topics; The Declaration of London of February 26, 1909* (Government Printing Office, Washington, 1910), pp. 169, 12. For other translations of the Declaration and Report, see Naval War College, *ibid.,* pp. 169 and 13; *British Parliamentary Paper,* Miscellaneous, No. 4 (1909), pp. 73 and 33. [Cd. 4554.]

His Majesty the German Emperor, King of Prussia:

Mr. Kriege, Privy Councilor of Legation and Legal Adviser to the Department for Foreign Affairs, member of the Permanent Court of Arbitration.

The President of the United States of America:

Rear Admiral Charles H. Stockton, retired;

Mr. George Grafton Wilson, professor at Brown University and lecturer on international law at the Naval War College and at Harvard University.

His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary:

His Excellency Mr. Constantin Théodore Dumba, Privy Councilor of His Imperial and Royal Apostolic Majesty, Envoy Extraordinary and Minister Plenipotentiary.

His Majesty the King of Spain:

Mr. Gabriel Maura y Gamazo, Count de la Mortera, Member of Parliament.

The President of the French Republic:

Mr. Louis Renault, professor of the Faculty of Law at Paris, Honorary Minister Plenipotentiary, Legal Adviser to the Ministry of Foreign Affairs, member of the Institute of France, member of the Permanent Court of Arbitration.

His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India:

The Earl of Desart, K.C.B., King's Proctor.

His Majesty the King of Italy:

Mr. Guido Fusinato, Councilor of State, Member of Parliament, ex-Minister of Public Instruction, member of the Permanent Court of Arbitration.

His Majesty the Emperor of Japan:

Baron Toshiatsu Sakamoto, Vice Admiral, Head of the Department of Naval Instruction.

Mr. Enjiro Yamaza, Councilor of the Imperial Embassy at London.

Her Majesty the Queen of the Netherlands:

His Excellency Jonkheer J. A. Röell, Aide-de-camp to Her Majesty the Queen in extraordinary service, Vice Admiral retired, ex-Minister of Marine.

Jonkheer L. H. Ruyssenaers, Envoy Extraordinary and Minister

Plenipotentiary, ex-Secretary General of the Permanent Court of Arbitration.

His Majesty the Emperor of all the Russias:

Baron Taube, Doctor of Laws, Councilor to the Imperial Ministry of Foreign Affairs, professor of international law at the University of St. Petersburg.

Who, after having communicated their full powers, found to be in good and due form, have agreed to make the present Declaration:

Preliminary Provision

The signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

Chapter I—Blockade in Time of War

Article 1

A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

Article 2

In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

Article 3

The question whether a blockade is effective is a question of fact.

Article 4

A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.

Article 5

A blockade must be applied impartially to the ships of all nations.

Article 6

The commander of a blockading force may give permission to a war-ship to enter, and subsequently to leave, a blockaded port.

Article 7

In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade

and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

ARTICLE 8

A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

ARTICLE 9

A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

(1) The date when the blockade begins;

(2) The geographical limits of the coastline under blockade;

(3) The period within which neutral vessels may come out.

ARTICLE 10

If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

ARTICLE 11

A declaration of blockade is notified—

(1) To neutral Powers, by the blockading Power by means of a communication addressed to the Governments direct, or to their representatives accredited to it;

(2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

ARTICLE 12

The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is reestablished after having been raised.

ARTICLE 13

The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.

ARTICLE 14

The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

ARTICLE 15

Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

ARTICLE 16

If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book, and must state the day and hour, and the geographical position of the vessel at the time.

If, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

ARTICLE 17

Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective.

ARTICLE 18

The blockading forces must not bar access to neutral ports or coasts.

ARTICLE 19

Whatever may be the ulterior destination of a vessel or of her cargo, she can not be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

ARTICLE 20

A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

Article 21

A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

Chapter II—Contraband of War

Article 22

The following articles may, without notice,[1] be treated as contraband of war, under the name of absolute contraband:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

(4) Gun-mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

(5) Clothing and equipment of a distinctively military character.

(6) All kinds of harness of a distinctively military character.

(7) Saddle, draught, and pack animals suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armor plates.

(10) War-ships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

Article 23

Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

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[1] In view of the difficulty of finding an exact equivalent in English for the expression "*de plein droit*," it has been decided to translate it by the words "without notice," which represent the meaning attached to it by the draftsman as appears from the General Report (see p. 148).

ARTICLE 24

The following articles, susceptible of use in war as well as for purposes of peace, may, without notice,[1] be treated as contraband of war, under the name of conditional contraband:

(1) Foodstuffs.

(2) Forage and grain, suitable for feeding animals.

(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war, and their component parts.

(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.

(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.

(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.

(9) Fuel; lubricants.

(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.

(12) Horseshoes and shoeing materials.

(13) Harness and saddlery.

(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

ARTICLE 25

Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ARTICLE 26

If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

[1] See note on Article 22.

ARTICLE 27

Articles which are not susceptible of use in war may not be declared contraband of war.

ARTICLE 28

The following may not be declared contraband of war:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

(2) Oil seeds and nuts; copra.

(3) Rubber, resins, gums, and lacs; hops.

(4) Raw hides and horns, bones and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.

(8) Chinaware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnish.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decoration; office furniture and requisites.

ARTICLE 29

Likewise the following may not be treated as contraband of war:

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

ARTICLE 30

Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

ARTICLE 31

Proof of the destination specified in Article 30 is complete in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

ARTICLE 32

Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation

ARTICLE 33

Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods can not in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

ARTICLE 34

The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this article may be rebutted.

ARTICLE 35

Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

ARTICLE 36

Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.

ARTICLE 37

A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

ARTICLE 38

A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

ARTICLE 39

Contraband goods are liable to condemnation.

ARTICLE 40

A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

ARTICLE 41

If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

ARTICLE 42

Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation

ARTICLE 43

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband can not be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

ARTICLE 44

A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war-ship.

The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

CHAPTER III—UNNEUTRAL SERVICE

ARTICLE 45

A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

Article 46

A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

(1) If she takes a direct part in the hostilities;

(2) If she is under the orders or control of an agent placed on board by the enemy Government;

(3) If she is in the exclusive employment of the enemy Government;

(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.

Article 47

Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.

Chapter IV—Destruction of Neutral Prizes

Article 48

A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

Article 49

As an exception, a neutral vessel which has been captured by a belligerent war-ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time.

Article 50

Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war-ship.

Article 51

A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

Article 52

If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

Article 53

If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

Article 54

The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found

on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

Chapter V—Transfer to a Neutral Flag

Article 55

The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Article 56

The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There, however, is an absolute presumption that a transfer is void:

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

Chapter VI—Enemy Character

Article 57

Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule.

Article 58

The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

Article 59

In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

Article 60

Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

Chapter VII—Convoy

Article 61

Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent war-ship, all information as to the character of the vessels and their cargoes, which could be obtained by search.

Article 62

If the commander of the belligerent war-ship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the war-ship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

Chapter VIII—Resistance to Search

Article 63

Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

Chapter IX—Compensation

Article 64

If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

Final Provisions

Article 65

The provisions of the present Declaration must be treated as a whole, and can not be separated.

Article 66

The signatory Powers undertake to insure the mutual observance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and

will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.

ARTICLE 67

The present Declaration shall be ratified as soon as possible.

The ratifications shall be deposited in London.

The first deposit of ratifications shall be recorded in a protocol signed by the representatives of the Powers taking part therein, and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification.

A duly certified copy of the protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

ARTICLE 68

The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the protocol recording such deposit, and, in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

ARTICLE 69

In the event of one of the signatory Powers wishing to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers.

It will only operate in respect of the denouncing Power.

Article 70

The Powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have adopted, and therefore express the hope that the Powers which were not represented there will accede to the present Declaration. They request the British Government to invite them to do so.

A Power which desires to accede shall notify its intention in writing to the British Government, and transmit simultaneously the act of accession, which will be deposited in the archives of the said Government.

The said Government shall forthwith transmit to all the other Powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession takes effect sixty days after such date.

In respect of all matters concerning this Declaration, acceding Powers shall be on the same footing as the signatory Powers.

Article 71

The present Declaration, which bears the date of the 26th February, 1909, may be signed in London up till the 30th June, 1909, by the plenipotentiaries of the Powers represented at the Naval Conference.

In faith whereof the plenipotentiaries have signed the present Declaration, and have thereto affixed their seals.

Done at London, the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government, and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference.

[Here follow the signatures.[1]]

[1] The following States appended their signatures prior to March 20, 1909: Germany, United States of America, Austria-Hungary, France, Great Britain and the Netherlands. Subsequent signatories are: Spain, Italy, Russia and Japan.

General Report Presented to the Naval Conference on Behalf of its Drafting Committee [1]

[Translation[2]]

On the 27th February, 1908, the British Government addressed a circular to various Powers inviting them to meet at a conference with the object of reaching an agreement as to the definition of the generally recognized principles of international law in the sense of Article 7, paragraph 2, of the Convention signed at The Hague on the 18th October, 1907, for the establishment of an International Prize Court. This agreement appeared necessary to the British Government on account of certain divergences of view which had become apparent at the Second Peace Conference in connection with the settlement of various important questions of international maritime law in time of war. The existence of these divergent views might, it seemed, render difficult the acceptance of the International Prize Court, as the power of this court would be the more extended in proportion as the rules to be applied by it were more uncertain.

The British Government suggested that the following questions might form the program of the proposed conference, and invited the Powers to express their views regarding them in preparatory memoranda:

(*a*) Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with regard to compensation where vessels have been seized, but have been found in fact only to be carrying innocent cargo.

(*b*) Blockade, including the questions as to the locality where seizure can be effected, and the notice that is necessary before a ship can be seized.

(*c*) The doctrine of continuous voyage in respect both of contraband and of blockade.

(*d*) The legality of the destruction of neutral vessels prior to their condemnation by a prize court.

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[1] This committee consists of Messrs. Kriege (Germany), Wilson (United States of America), Dumba (Austria-Hungary), Estrada (Spain), Renault (France), Reporter, Hurst (Great Britain), Ricci-Busatti (Italy), Sakamoto (Japan), Ruyssenaers (Netherlands), Baron Taube (Russia).

[2] For the original French text of the report see *British Parliamentary Paper*, Miscellaneous, No. 5 (1909), p. 344. [Cd. 4555.]

(*e*) The rules as to neutral ships or persons rendering "unneutral service" (*assistance hostile*).

(*f*) The legality of the conversion of a merchant vessel into a war-ship on the high seas.

(*g*) The rules as to the transfer of merchant vessels from a belligerent to a neutral flag during or in contemplation of hostilities.

(*h*) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

The invitations were accepted, and the Conference met on the 4th December last. The British Government had been so good as to assist its deliberations by presenting a collection of papers which quickly became known among us by the name of *The Red Book,* and which, after a short introduction, contains a "statement of the views expressed by the Powers in their memoranda, and observations intended to serve as a basis for the deliberations of the Conference." These are the "bases of discussion" which served as a starting point for the examination of the chief questions of existing international maritime law. The Conference could not but express its gratitude for this valuable preparatory work, which was of great assistance to it. It made it possible to observe, in the first place, that the divergences in the practices and doctrines of the different countries were perhaps less wide than was generally believed, that the essential ideas were often the same in all countries, and that the methods of application alone varied with traditions or prejudices, with permanent or accidental interests. It was therefore possible to extract a common element which it could be agreed to recommend for uniform application. This is the end to which the efforts of the different delegations tended, and they vied with one another in their zeal in the search for the grounds of a common understanding. Their efforts were strenuous, as is shown by the prolonged discussions of the Conference, the grand committee, and the examining committees, and by the numerous proposals which were presented. Sailors, diplomatists, and jurists cordially cooperated in a work the description of which, rather than a final estimate of its essential value, is the object of this report, as our impartiality might naturally be suspected.

The body of rules contained in the Declaration, which is the result of the deliberations of the Naval Conference, and which is to be entitled "Declaration concerning the laws of maritime war," answers well

to the desire expressed by the British Government in its invitation of February, 1908. The questions in the program are all settled except two, with regard to which explanations will be given later. The solutions have been extracted from the various views or practices which prevail and represent what may be called the *media sententia.* They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately, but as a whole; otherwise there is a risk of the most serious misunderstandings. In fact, if one or more isolated rules are examined either from the belligerent or the neutral point of view, the reader may find that the interests with which he is especially concerned are jeopardized by the adoption of these rules. But they have another side. The work is one of compromise and mutual concessions. Is it, as a whole, a good one?

We confidently hope that those who study it seriously will answer that it is. The Declaration puts uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered. The Conference has tried to reconcile in an equitable and practical way the rights of belligerents with those of neutral commerce; it consists of Powers whose conditions, from the political, economic, and geographical points of view, vary considerably. There is therefore reason to suppose that the rules on which these Powers have agreed take sufficient account of the different interests involved, and hence may be accepted without objection by all the others.

The preamble of the Declaration summarizes the general ideas just set forth.

Having regard to the terms in which the British Government invited various Powers to meet in conference in order to arrive at an agreement as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of the 18th October, 1907, relative to the establishment of an International Prize Court.

Recognizing all the advantages which an agreement as to the said rules would present in the unfortunate event of a naval war, both as regards peaceful commerce, and as regards the belligerents and their diplomatic relations with neutral Governments.

Having regard to the divergence often found in the methods by which it is sought to apply in practice the general principles of international law.

Animated by the desire to insure henceforward a greater measure of uniformity in this respect.

Hoping that a work so important to the common welfare will meet with general approval.

What is the scope of application of the rules thus laid down? They must be observed in the relations between the signatory parties, since those parties acknowledge them as principles of recognized international law and, besides, expressly bind themselves to secure the benefit of them for one another. The signatory Powers who are or will be parties to the Convention establishing the International Prize Court will have, besides, an opportunity of having these rules applied to disputes in which they are concerned, whether the court regards them as generally recognized rules, or takes account of the pledge given to observe them. It is moreover to be hoped that these rules will before long be accepted by the majority of States, who will recognize the advantage of substituting exact provisions for more or less indefinite usages which tend to give rise to controversy.

It has been said above that two points in the program of the Conference were not decided.

1. The program mentions under head (*f*): The legality of the conversion of a merchant vessel into a war-ship on the high seas. The conflicting views on this subject which became apparent at the Conference of The Hague in 1907, have recurred at the present Conference. It may be concluded, both from the statements in the memoranda and from the discussion, that there is no generally accepted rule on this point, nor do there appear to be any precedents which can be adduced. Though the two opposite opinions were defended with great warmth, a lively desire for an understanding was expressed on all sides; everybody was at least agreed that it would be a great advantage to put an end to uncertainty. Serious efforts were made to do justice to the interests espoused by both sides, but these unfortunately failed. A subsidiary question dependent on the previous one, on which, at one moment it appeared possible to come to an agreement, is that of reconversion. According to one proposal it was to be laid down that "merchant vessels converted into war-ships can not be reconverted into merchant vessels during the whole course of the war." The rule was absolute and made no distinction as regards the place where reconversion could be effected; it was dictated by the idea that such conversion would always have disadvantages, would be productive of surprises, and lead to actual frauds. As unanimity in favor of this proposal was not forthcoming, a subsidiary one was brought forward, *viz.*, "The conversion of a war-ship into a merchant vessel on the high seas is forbidden during the war." The case had in view

was that of a war-ship (generally a recently converted merchant vessel) doffing its character so as to be able freely to revictual or refit in a neutral port without being bound by the restrictions imposed on war-ships. Will not the position of the neutral State between two belligerents be delicate, and will not such State expose itself to reproach whether it treats the newly converted ship as a merchant vessel or as a war-ship? Agreement might perhaps have been reached on this proposal, but it seemed very difficult to deal with this secondary aspect of a question which there was no hope of settling as a whole. This was the decisive reason for the rejection of all proposals.

The question of conversion on the high seas and that of reconversion therefore remain open.

2. Under head (*h*) the British program mentions the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property. This question was subjected to a searching examination by a special committee, which had to acknowledge the uncertainty of actual practice; it was proposed to put an end to this by the following provisions:

> The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of no nationality or of double nationality (*i. e.*, both neutral and enemy), by his domicile in a neutral or enemy country; provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral country.

Unanimity not being forthcoming, these provisions remained without effect.

We now reach the explanation of the Declaration itself, on which we shall try, by summarizing the reports already approved by the Conference, to give an exact and uncontroversial commentary; this, when it has become an official commentary by receiving the approval of the Conference, may serve as a guide to the different authorities—administrative, military, and judicial—who may be called on to apply it.

Preliminary Provision

The signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

This provision dominates all the rules which follow. Its spirit has been indicated in the general remarks to be found at the beginning of this report. The purpose of the Conference has, above all, been to note, to define, and, where needful, to complete what might be considered as customary law.

Chapter I—Blockade in Time of War

Blockade is here regarded solely as an operation of war, and there is no intention of touching in any way on what is called "pacific" blockade.

Article 1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

Blockade, as an operation of war, can be directed by a belligerent only against his adversary. This very simple rule is laid down at the start, but its full scope is apparent only when it is read in connection with Article 18.

Article 2. In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

The first condition necessary to render a blockade binding is that it should be effective. There has been universal agreement on this subject for a long time. As for the definition of an effective blockade, we thought that we had only to adopt the one to be found in the Declaration of Paris of the 16th April, 1856, which, conventionally, binds a great number of States, and is in fact accepted by the rest.

Article 3. The question whether a blockade is effective is a question of fact.

It is easily to be understood that difficulties often arise on the question whether a blockade is effective or not; opposing interests are at stake. The blockading belligerent wishes to economize his efforts, and neutrals desire their trade to be as little hampered as possible. Diplomatic protests have sometimes been made on this subject. The point may be a delicate one, because no absolute rule can be laid down as to the number and position of the blockading ships. All depends on matters of fact and geographical conditions. In one case a single ship will suffice to blockade a port as effectively as possible, whereas in another a whole fleet may not be enough really to prevent access to one or more ports declared to be blockaded. It is therefore essen-

tially a question of fact, to be decided on the merits of each case, and not according to a formula drawn up beforehand. Who shall decide it? The judicial authority. This will be, in the first place, the national tribunal which is called on to pronounce as to the validity of the prize and which the vessel captured for breach of blockade can ask to declare the capture void, because the blockade, not being effective, was not binding. This resort has always existed; it may not always have given satisfaction to the Powers concerned, because they may have thought that the national tribunal was rather naturally led to consider effective the blockade declared to be so by its Government. But when the International Prize Court Convention comes into force there will be an absolutely impartial tribunal, to which neutrals may apply, and which will decide whether, in a given case, the blockade was effective or not. The possibility of this resort, besides allowing certain injustices to be redressed, will most likely have a preventive effect, in that a Government will take care to establish its blockades in such a way that their effect can not be annulled by decisions which would inflict on it a heavy loss. The full scope of Article 3 is thus seen when it is understood that the question with which it deals must be settled by a court. The foregoing explanation is inserted in the report at the request of the committee, in order to remove all possibility of misunderstanding.

ARTICLE 4. A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.

It is not enough for a blockade to be established; it must be maintained. If it is raised it may be reestablished, but this requires the observance of the same formalities as though it were established for the first time. By tradition, a blockade is not regarded as raised when it is in consequence of stress of weather that the blockading forces are temporarily withdrawn. This is laid down in Article 4. It must be considered limitative in the sense that stress of weather is the only form of compulsion which can be alleged. If the blockading forces were withdrawn for any other reason, the blockade would be regarded as raised, and, if it were resumed, Articles 12 (last rule) and 13 would apply.

ARTICLE 5. A blockade must be applied impartially to the ships of all nations.

Blockade, as an operation of lawful warfare, must be respected by neutrals in so far as it really remains an operation of war which has

the object of interrupting all commercial relations with the blockaded port. It may not be made the means of allowing a belligerent to favor the vessels of certain nations by letting them pass. This is the point of Article 5.

ARTICLE 6. The commander of a blockading force may give permission to a war-ship to enter, and subsequently to leave, a blockaded port.

Does the prohibition which applies to all merchant vessels apply also to war-ships? No definite reply can be given. The commander of the blockading forces may think it useful to cut off all communication with the blockaded place and refuse access to neutral war-ships; no rule is imposed on him. If he lets them in, it is as a matter of courtesy. If a rule has been drawn up merely to lay down this, it is in order that it may not be claimed that a blockade has ceased to be effective on account of leave granted to such and such neutral war-ships.

The blockading commander must act impartially, as stated in Article 5. Nevertheless, the mere fact that he has let a war-ship pass does not oblige him to let pass all neutral war-ships which may come. It is a question of judgment. The presence of a neutral war-ship in a blockaded port may not have the same consequences at all stages of the blockade, and the commander must be left free to judge whether he can be courteous without making any sacrifice of his military interests.

ARTICLE 7. In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade, and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

Distress can explain the entrance of a neutral vessel into a blockaded place, for instance, if she is in want of food or water, or needs immediate repairs. As soon as her distress is acknowledged by an authority of the blockading force, she may cross the line of blockade; it is not a favor which she has to ask of the humanity or courtesy of the blockading authority. The latter may deny the state of distress but when once it is proved to exist, the consequence follows of itself. The vessel which has thus entered the blockaded port will not be obliged to remain there for the whole duration of the blockade; she may leave as soon as she is fit to do so, when she has obtained the food or water which she needs, or when she has been repaired. But the leave

granted to her must not be made an excuse for commercial transactions; therefore she is forbidden to discharge or ship any cargo.

It is needless to say that a blockading squadron which insisted on preventing a vessel in distress from passing, might do so if she afforded her the help which she needed.

ARTICLE 8. A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

Independently of the condition prescribed by the Declaration of Paris that it must be effective, a blockade, to be binding, must be declared and notified. Article 8 confines itself to laying down the principle which is applied by the following articles.

To remove all possibility of misunderstanding it is enough to define clearly the meaning of these two expressions, which will frequently be used. The declaration of blockade is the act of the competent authority (a government or commander of a squadron) stating that a blockade is, or is about to be, established under conditions to be specified (Article 9). The notification is the fact of bringing the declaration of blockade to the knowledge of the neutral Powers or of certain authorities (Article 11).

These two things—declaration and notification—will in most cases be done previously to the enforcement of the rules of blockade, that is to say, to the real prohibition of passage. Nevertheless, as we shall see later, it is sometimes possible for passage to be forbidden by the very fact of the blockade which is brought to the knowledge of a vessel approaching a blockaded port by means of a notification which is special, whereas the notification which has just been defined, and which is spoken of in Article 11, is of a general character.

ARTICLE 9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

(1) The date when the blockade begins.

(2) The geographical limits of the coastline under blockade.

(3) The period within which neutral vessels may come out.

The declaration of blockade in most cases emanates from the belligerent Government itself. That Government may have left the commander of its naval forces free himself to declare a blockade according to the circumstances. There will not, perhaps, be as much reason as formerly to give this discretion, because of the ease and rapidity

of communication. This, being merely an internal question, matters little.

The declaration of blockade must specify certain points which it is in the interest of neutrals to know, in order to be aware of the extent of their obligations. The moment from which it is forbidden to communicate with the blockaded place must be exactly known. It is important, as affecting the obligations both of the blockading Power and of neutrals, that there should be no uncertainty as to the places really blockaded. Finally, the custom has long been established of allowing neutral vessels which are in the blockaded port to leave it. This custom is here confirmed, in the sense that the blockading Power must allow a period within which vessels may leave; the length of this period is not fixed, because it clearly depends on very varying circumstances, but it is understood that the period should be reasonable.

ARTICLE 10. If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

The object of this article is to insure the observance of Article 9. Supposing the declaration of blockade contains statements which do not tally with the actual facts; it states that the blockade began, or will begin, on such a day, whereas, in fact, it only began several days later. Its geographical limits are inaccurately given; they are wider than those within which the blockading forces are operating. What shall be the sanction? The nullity of the declaration of blockade, which prevents it from being operative. If then, in such a case, a neutral vessel is captured for breach of blockade, she can refer to the nullity of the declaration of blockade as a plea for the nullity of the capture; if her plea is rejected by the national tribunal, she can appeal to the international court.

To avoid misunderstandings, the significance of this provision must be noticed. The declaration states that the blockade begins on the 1st of February; it really only begins on the 8th. It is needless to say that the declaration had no effect from the 1st to the 8th, because at that time there was no blockade at all; the declaration states a fact, but does not take the place of one. The rule goes further: The declaration shall not even be operative from the 8th onward; it is definitely void, and another must be made.

There is no question here of cases where Article 9 is disregarded by neglect to allow neutral vessels in the blockaded port time to leave it. The sanction could not be the same. There is no reason to annul the declaration as regards neutral vessels wishing to enter the blockaded port. A special sanction is needed in that case, and it is provided by Article 16, paragraph 2.

ARTICLE 11. A declaration of blockade is notified—

(1) To neutral Powers, by the blockading Power by means of a communication addressed to the Governments direct, or to their representatives accredited to it.

(2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

A declaration of blockade is not valid unless notified. The observance of a rule can only be required by those who have the opportunity of knowing it.

Two notifications must be made:

1. The first is addressed to neutral Powers by the belligerent Power, which communicates it to the Governments themselves or to their representatives accredited to it. The communication to the Governments will in most cases be made through the diplomatic agents; it might happen that a belligerent had no diplomatic relations with a neutral country; he will then address itself, ordinarily by telegraph, directly to the Government of that country. It is the duty of the neutral Governments advised of the declaration of blockade to take the necessary measures to dispatch the news to the different parts of their territory, especially their ports.

2. The second notification is made by the commander of the blockading force to the local authorities. These must inform, as soon as possible, the foreign consuls residing at the blockaded place or on the blockaded coastline. These authorities would be responsible for the neglect of this obligation. Neutrals might suffer loss from the fact of not having been informed of the blockade in sufficient time.

ARTICLE 12. The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.

Supposing a blockade is extended beyond its original limits, as regards the new part, it is a new blockade and, in consequence, the rules as to declaration and notification must be applied to it. The

same is true in cases where a blockade is reestablished after having been raised; the fact that a blockade has already existed in the same locality must not be taken into account.

ARTICLE 13. The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.

It is indispensable to know of the establishment of a blockade, it would at least be useful for the public to be told of its raising, since it puts an end to the restrictions imposed on the relations of neutrals with the blockaded port. It has therefore been thought fit to ask the Power which raises a blockade to make known the fact in the form in which it has notified the establishment of the blockade. (Article 11.) Only it must be observed that the sanction could not be the same in the two cases. To insure the notification of the declaration of blockade there is a direct and adequate sanction; an unnotified blockade is not binding. In the case of the raising there can be no parallel to this. The public will really gain by the raising, even without being told of it officially. The blockading Power which did not notify the raising would expose itself to diplomatic remonstrances on the ground of the non-fulfillment of an international duty. This non-fulfillment will have more or less serious consequences, according to circumstances. Sometimes the raising of the blockade will really have become known at once, and official notification would add nothing to this effective publicity.

It is needless to add that only the voluntary raising of a blockade is here in question; if the blockading force has been driven off by the arrival of enemy forces, it can not be held bound to make known its defeat, which its adversary will undertake to do without delay. Instead of raising a blockade, a belligerent may confine himself to restricting it; he only blockades one port instead of two. As regards the port which ceases to be included in the blockade, it is a case of voluntary raising, and consequently the same rule applies.

ARTICLE 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

For a vessel to be liable to capture for breach of blockade, the first condition is that she must be aware of the blockade, because it is not just to punish some one for breaking a rule which he does not know. Nevertheless, there are circumstances in which, even in the

absence of proof of actual knowledge, knowledge may be presumed, the right of rebutting this presumption being always reserved to the party concerned. (Article 15.)

ARTICLE 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

A vessel has left a neutral port subsequently to the notification of the blockade made to the Powers to which the port belongs. Was this notification made in sufficient time; that is to say, so as to reach the port in question, where it had to be published by the port authorities? That is a question of fact to be examined. If it is settled affirmatively, it is natural to suppose that the vessel was aware of the blockade at the time of her departure. This presumption is not, however, absolute, and the right to adduce proof to the contrary is reserved. It is for the incriminated vessel to furnish it by showing that circumstances existed which explain her ignorance.

ARTICLE 16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book, and must state the day and hour and the geographical position of the vessel at the time.

If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

A vessel is supposed to be approaching a blockaded port without its being possible to tell whether she knows or is presumed to know of the existence of the blockade; no notification in the sense of Article 11 has reached her. In that case a special notification is necessary in order that the vessel may be duly informed of the fact of the blockade. This notification is made to the vessel herself by an officer of one of the war-ships of the blockading force, and is entered on the vessel's log-book. It may be made to the vessels of a convoyed fleet by a neutral war-ship through the commander of the convoy, who acknowledges receipt of it and takes the necessary measures to have the notification entered on the log-book of each vessel. The entry notes the time and place where it is made, and the names of the blockaded

places. The vessel is prevented from passing, and the blockade is thus made binding for her, though not previously notified; this adverb is therefore omitted in Article 8. It can not be admitted that a merchant vessel should claim to disregard a real blockade, and to break it for the sole reason that she was not personally aware of it. But, though she may be prevented from passing, she may only be captured when she tries to break blockade after receiving the notification. This special notification is seen to play a very small part, and must not be confused with the special notification absolutely insisted on by the practice of certain navies.

What has just been said refers to the vessel coming in. The vessel leaving the blockaded port must also be considered. If a regular notification of the blockade has been made to the local authorities (Article 11 (2)), the position is simple: the vessel is, or is presumed to be, aware of the blockade, and is therefore liable to capture in case she has not kept to the period for leaving allowed by the blockading Power. But it may happen that no declaration of blockade has been notified to the local authorities, or that that declaration has contained no mention of the period allowed for leaving, in spite of the rule prescribed by Article 9 (3). The sanction of the blockading Power's offense is that the vessel must be allowed to go free. It is a strong sanction, which corresponds exactly with the nature of the offense committed, and will be the best means of preventing its commission.

It is needless to say that this provision only concerns vessels to which the period allowed for leaving would have been of use—that is to say, neutral vessels which were in the port at the time when the blockade was established; it has nothing to do with vessels which are in the port after having broken blockade.

The commander of the blockading squadron may always repair his omission or mistake, make a notification of the blockade to the local authorities, or complete that which he has already made.

As is seen from these explanations, the most ordinary case is assumed —that in which the absence of notification implies negligence on the part of the commander of the blockading forces. The situation is clearly altogether changed if the commander has done all in his power to make the notification, but has been prevented from doing so by lack of good-will on the part of the local authorities, who have intercepted all communications from outside. In that case he can not be forced to let pass vessels which wish to leave, and which, in the absence

of the prescribed notification and of presumptive knowledge of the blockade, are in a position similar to that contemplated in Article 16, paragraph 1.

ARTICLE 17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective.

The other condition of the liability of a vessel to capture is that she should be found within the area of operations of the war-ships detailed to make the blockade effective; it is not enough that she should be on her way to the blockaded port.

As for what constitutes the area of operations, an explanation has been given which has been universally accepted, and is quoted here as furnishing the best commentary on the rule laid down by Article 17:

> When a Government decides to undertake blockading operations against some part of the enemy coast it details a certain number of war-ships to take part in the blockade and intrusts the command to an officer whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places and instructs each ship as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched taken together, and so organized as to make the blockade effective, form the area of operations of the blockading naval force.
>
> The area of operations so constituted is intimately connected with the effectiveness of the blockade and also with the number of ships employed on it.
>
> Cases may occur in which a single ship will be enough to keep a blockade effective—for instance, at the entrance of a port or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider and extends farther from the coast. It may therefore vary with circumstances and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.
>
> It does not seem possible to fix the limits of the area of operations in definite figures any more than to fix beforehand and

definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might perhaps be done at the time of making the declaration.

It is clear that a blockade will not be established in the same way on a defenseless coast as on one possessing all modern means of defense. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force, which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations joined with that of effectiveness, as we have tried to define it—that is to say, including the zone of operations of the blockading forces—allows the belligerent effectively to exercise the right of blockade, which he admittedly possesses, and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly incur by approaching points to which access is forbidden by the belligerent.

ARTICLE 18. The blockading forces must not bar access to neutral ports or coasts.

This rule has been thought necessary the better to protect the commercial interests of neutral countries; it completes Article 1, according to which a blockade must not extend beyond the ports and coasts of the enemy, which implies that, as it is an operation of war, it must not be directed against a neutral port, in spite of the importance to a belligerent of the part played by that neutral port in supplying his adversary.

ARTICLE 19. Whatever may be the ulterior destination of a vessel or of her cargo, she can not be captured for breach of blockade if, at the moment, she is on her way to a non-blockaded port.

It is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough

to justify the capture, for breach of blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port.

ARTICLE 20. A vessel which has broken blockade outward, or which has attempted to break blockade inward, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned or if the blockade is raised, her capture can no longer be effected.

A vessel has left the blockaded port or has tried to enter it. Shall she remain indefinitely liable to capture? To reply by an absolute affirmative would be to go too far. This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; it would not be enough for her to be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is one of fact; it is not enough that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended, but not abandoned. Capture is no longer possible when the blockade has been raised.

ARTICLE 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

The vessel is condemned in all cases. The cargo is also condemned on principle, but the interested party is allowed to oppose a plea of good faith; that is to say, to prove that when the goods were shipped the shipper did not know and could not have known of the intention to break the blockade.

CHAPTER II—CONTRABAND OF WAR

This chapter is one of the most, if not the most, important of the Declaration. It deals with a matter which has sometimes given rise to serious disputes between belligerents and neutrals. Therefore regulations to establish exactly the rights and duties of each have often been urgently called for. Peaceful trade may be grateful for the precision with which a subject of the highest importance to its interests is now for the first time treated.

The notion of contraband of war connotes two elements: It con-

cerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends; if they are destined for a neutral Government, no; if they are destined for an enemy Government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law.

Articles 22 and 24 enumerate the articles which may be contraband of war, and which are so in fact when they have a certain destination laid down in Articles 30 and 33. The traditional distinction between absolute and conditional contraband is maintained. Articles 22 and 30 refer to the former, and Articles 24 and 33 to the latter.

ARTICLE 22. The following articles may, without notice,[1] be treated as contraband of war, under the name of absolute contraband:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

(4) Gun-mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

(5) Clothing and equipment of a distinctively military character.

(6) All kinds of harness of a distinctively military character.

(7) Saddle, draft, and pack animals suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armor plates.

(10) War-ships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

This list is that drawn up at the Second Peace Conference by the committee charged with the special study of the question of contraband. It was the result of mutual concessions, and it has not seemed wise to reopen the discussion on this subject for the purpose either of cutting out or of adding articles.

[1] In view of the difficulty of finding an exact equivalent in English for the expression *"de plein droit,"* it has been decided to translate it by the words "without notice," which represent the meaning attached to it by the draftsman of the present General Report. (See next page.)

The words *"de plein droit"* (without notice) imply that the provision becomes operative by the mere fact of the war, and that no declaration by the belligerents is necessary. Trade is already warned in time of peace.

ARTICLE 23. Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

Certain discoveries or inventions might make the list in Article 22 insufficient. An addition may be made to it on condition that it concerns articles exclusively used for war. This addition must be notified to the other Powers, which will take the necessary measures to inform their subjects of it. In theory the notification may be made in time of peace or of war. The former case will doubtless rarely occur, because a State which made such a notification might be suspected of meditating a war; it would, nevertheless, have the advantage of informing trade beforehand. There was no reason for making it impossible.

The right given to a Power to make an addition to the list by a mere declaration has been thought too wide. It should be noticed that this right does not involve the dangers supposed. In the first place, it is understood that the declaration is only operative for the Power which makes it, in the sense that the article added will only be contraband for it, as a belligerent; other States may, of course, also make a similar declaration. The addition may only refer to articles exclusively used for war; at present it would be hard to mention any such articles which are not included in the list. The future is left free. If a Power claimed to add to the list of absolute contraband articles not exclusively used for war, it might expose itself to diplomatic remonstrances, because it would be disregarding an accepted rule. Besides, there would be an eventual resort to the International Prize Court. Suppose that the court holds that the articles mentioned in the declaration of absolute contraband is wrongly placed there because it is not exclusively used for war, but that it might have been included in a declaration of conditional contraband. Confiscation may then be justified if the capture was made in the conditions laid down for this kind of contraband (Articles 33–35) which differ from those enforced for absolute contraband (Article 30).

It had been suggested that, in the interest of neutral trade, a period should elapse between the notification and its enforcement. But that would be very damaging to the belligerent, whose object is precisely to protect himself, since, during that period, the trade in articles which he thinks dangerous would be free and the effect of his measure a failure. Account has been taken, in another form, of the considerations of equity which have been adduced (see Article 43).

ARTICLE 24. The following articles, susceptible of use in war as well as for purposes of peace, may, without notice,[1] be treated as contraband of war, under the name of conditional contraband:

(1) Foodstuffs.

(2) Forage and grain, suitable for feeding animals.

(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war, and their component parts.

(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.

(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.

(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.

(9) Fuel; lubricants.

(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.

(12) Horseshoes and shoeing materials.

(13) Harness and saddlery.

(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

On the expression *"de plein droit"* (without notice) the same remark must be made as with regard to Article 22. The articles enumerated are only conditional contraband if they have the destination specified in Article 33.

Foodstuffs include products necessary or useful for sustaining man, whether solid or liquid.

Paper money only includes inconvertible paper money, *i. e.*, bank notes which may or not be legal tender. Bills of exchange and checks are excluded.

Engines and boilers are included in (6).

[1] See note to Article 22.

Railway material includes fixtures (such as rails, sleepers, turntables, parts of bridges), and rolling-stock (such as locomotives, carriages, and trucks).

ARTICLE 25. Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

This provision corresponds, as regards conditional contraband, to that in Article 23 as regards absolute contraband.

ARTICLE 26. If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

A belligerent may not wish to use the right to treat as contraband of war all the articles included in the above lists. It may suit him to add to conditional contraband an article included in absolute contraband or to declare free, so far as he is concerned, the trade in some article included in one class or the other. It is desirable that he should make known his intention on this subject, and he will probably do so in order to have the credit of the measure. If he does not do so, but confines himself to giving instructions to his cruisers, the vessels searched will be agreeably surprised if the searcher does not reproach them with carrying what they themselves consider contraband. Nothing can prevent a Power from making such a declaration in time of peace. See what is said as regards Article 23.

ARTICLE 27. Articles which are not susceptible of use in war may not be declared contraband of war.

The existence of a so-called free list (Article 28) makes it useful thus to put on record that articles which can not be used for purposes of war may not be declared contraband of war. It might have been thought that articles not included in that list might at least be declared conditional contraband.

ARTICLE 28. The following may not be declared contraband of war:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

(2) Oil seeds and nuts; copra.

(3) Rubber, resins, gums, and lacs; hops.

(4) Raw hides and horns, bones, and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk; stone, including marble, bricks, slates, and tiles.

(8) Chinaware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnish.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decoration; office furniture and requisites.

To lessen the drawbacks of war as regards neutral trade it has been thought useful to draw up this so-called free list, but this does not mean, as has been explained above, that all articles outside it might be declared contraband of war.

The ores here referred to are the product of mines from which metals are derived.

There was a demand that dyestuffs should be included in (10), but this seemed too general, for there are materials from which colors are derived, such as coal, which also have other uses. Products only used for making colors enjoy the exemption.

"*Articles de Paris,*" an expression the meaning of which is universally understood, come under (15).

(16) refers to the hair of certain animals, such as pigs and wild boars.

Carpets and mats come under household furniture and ornaments (17).

ARTICLE 29. Likewise the following may not be treated as contraband of war.

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

The articles enumerated in Article 29 are also excluded from treatment as contraband, but for reasons different from those which have led to the inclusion of the list in Article 28.

Motives of humanity have exempted articles exclusively used to aid the sick and wounded, which, of course, include drugs and different medicines. This does not refer to hospital ships, which enjoy special immunity under the convention of The Hague of the 18th October, 1907, but to ordinary merchant vessels, whose cargo includes articles of the kind mentioned. The cruiser has, however, the right, in case of urgent necessity, to requisition such articles for the needs of her crew or of the fleet to which she belongs, but they can only be requisitioned on payment of compensation. It must, however, be observed that this right of requisition may not be exercised in all cases. The articles in question must have the destination specified in Article 30—that is to say, an enemy destination. Otherwise, the ordinary law regains its sway; a belligerent could not have the right of requisition as regards neutral vessels on the high seas.

Articles intended for the use of the vessel, which might in themselves and by their nature be contraband of war, may not be so treated; for instance, arms intended for the defense of the vessel against pirates or for making signals. The same is true of articles intended for the use of the crew and passengers during the voyage; the crew here includes all persons in the service of the vessel in general.

Destination of contraband.—As has been said, the second element in the notion of contraband is destination. Great difficulties have arisen on this subject, which find expression in the theory of continuous voyage, so often attacked or adduced without a clear comprehension of its exact meaning. Cases must simply be considered on their merits so as to see how they can be settled without unnecessarily annoying neutrals or sacrificing the legitimate rights of belligerents.

In order to effect a compromise between conflicting theories and practices, absolute and conditional contraband have been differently treated in this connection.

Articles 30 to 32 refer to absolute, and Articles 33 to 36 to conditional contraband.

ARTICLE 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

The articles included in the list in Article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by Article 30. The journey made by the goods is regarded as a whole.

ARTICLE 31. Proof of the destination specified in Article 30 is complete in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

As has been said, the obligation of proving that the contraband goods really have the destination specified in Article 30 rests with the captor. In certain cases proof of the destination specified in Article 31 is conclusive; that is to say, the proof may not be rebutted.

First case.—The goods are documented for discharge in an enemy port; that is to say, according to the ship's papers referring to those goods, they are to be discharged there. In this case there is a real admission of enemy destination on the part of the interested parties themselves.

Second case.—The vessel is to touch at enemy ports only, or she is to touch at an enemy port before reaching the neutral port for which the goods are documented, so that although these goods, according to the papers referring to them, are to be discharged in a neutral port, the vessel carrying them is to touch at an enemy port before reaching that neutral port. They will be liable to capture, and the possibility of proving that their neutral destination is real and in accordance with the intentions of the parties interested is not admitted. The fact that before reaching that destination the vessel will touch at an enemy port would occasion too great a risk for the belligerent whose cruiser

searches the vessel. Even without assuming that there is intentional fraud, there might be a strong temptation for the master of the merchant vessel to discharge the contraband, for which he would get a good price, and for the local authorities to requisition the goods.

The same case arises where the vessel, before reaching the neutral port, is to join the armed forces of the enemy.

For the sake of simplicity, the provision only speaks of an enemy port, but it is understood that a port occupied by the enemy must be regarded as an enemy port, as follows from the general rule in Article 30.

ARTICLE 32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

The papers therefore are conclusive proof of the course of the vessel, unless she is encountered in circumstances which show that their statements are not to be trusted. See also the explanations given as regards Article 35.

ARTICLE 33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods can not in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

The rules for conditional contraband differ from those laid down for absolute contraband in two respects: (1) There is no question of destination for the enemy in general, but of destination for the use of his armed forces or government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first and Article 35 to the second principle.

The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If from the circumstances the peaceful purpose is clear, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, as, for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no room for doubt. But what is the solution when the articles are destined for the civil government departments of the enemy State? It may be money sent to a government department for use in the payment of its

official salaries, or rails sent to a department of public works. In these cases there is enemy destination which renders the goods liable in the first place to capture and in the second to condemnation. The reasons for this are at once legal and practical. The State is one, although it necessarily acts through different departments. If a civil department may freely receive foodstuffs or money, that department is not the only gainer, but the entire State, including its military administration, gains also, since the general resources of the State are thereby increased. Further, the receipts of a civil department may be considered of greater use to the military administration and directly assigned to the latter. Money or foodstuffs really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the departments of the enemy State is assimilated to that for its armed forces.

It is the departments of the State which are dependent on the central power that are in question and not all the departments which may exist in the enemy State; local and municipal bodies, for instance, are not included, and articles destined for their use would not be contraband.

War may be waged in such circumstances that destination for the use of a civil department can not be suspect, and consequently can not make goods contraband. For instance, there is a war in Europe, and the colonies of the belligerent countries are not in fact affected by it. Foodstuffs or other articles in the list of conditional contraband destined for the use of the civil government of a colony would not be held to be contraband of war, because the considerations adduced above do not apply to their case; the resources of the civil government can not be drawn on for the needs of the war. Gold, silver, or paper money are exceptions, because a sum of money can easily be sent from one end of the world to the other.

ARTICLE 34. The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this article may be rebutted.

Contraband articles will not usually be directly addressed to the military authorities or to the government departments of the enemy State. Their true destination will be more or less concealed, and the captor must prove it in order to justify their capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom, or place for which, the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy Government with articles of the kind in question. It may be a fortified place belonging to the enemy or a place used as a base, whether of operations or of supply, for the armed forces of the enemy.

This general presumption may not be applied to the merchant vessel herself on her way to a fortified place, though she may in herself be conditional contraband, but only if her destination for the use of the armed forces or government departments of the enemy State is directly proved.

In the absence of the above presumptions, the destination is presumed to be innocent. That is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

Finally, all the presumptions thus set up in the interest of the captor or against him may be rebutted. The national tribunals, in the first place, and, in the second, the international court, will exercise their judgment.

ARTICLE 35. Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband, which is only liable to capture when it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they can no longer be contra-

band, and no examination will be made as to whether they are to be forwarded to the enemy by sea or land from that neutral port. It is here that the case of absolute contraband is essentially different.

The ship's papers furnish complete proof as to the voyage on which the vessel is engaged and as to the place where the cargo is to be discharged; but this would not be so if the vessel were encountered clearly out of the course which she should follow according to her papers, and unable to give adequate reasons to justify such deviation.

This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed, and unable to justify such deviation. The ship's papers are then in contradiction with the true facts and lose all value as evidence; the cruiser will be free to decide according to the merits of the case. In the same way, a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not according to his judgment. To resume, the ship's papers are proof, unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

It does not follow that because a single entry in the ship's papers is shown to be false their evidence loses its value as a whole. The entries which can not be proved false retain their value.

ARTICLE 36. Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.

The case contemplated is certainly rare, but has nevertheless arisen in recent wars. In the case of absolute contraband, there is no difficulty, since destination for the enemy may always be proved, whatever the route by which the goods are sent (Article 30). For conditional contraband the case is different, and an exception must be made to the general rule laid down in Article 35, paragraph 1, so as

to allow the captor to prove that the suspected goods really have the special destination referred to in Article 33 without the possibility of being confronted by the objection that they were to be discharged in a neutral port.

ARTICLE 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

The vessel may be captured for contraband during the whole of her voyage, provided that she is in waters where an act of war is lawful. The fact that she intends to touch at a port of call before reaching the enemy destination does not prevent capture, provided that destination in her particular case is proved in conformity with the rules laid down in Articles 30 to 32 for absolute, and in Articles 33 to 35 for conditional contraband, subject to the exception provided for in Article 36.

ARTICLE 38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

A vessel is liable to capture for carrying contraband, but not for having done so.

ARTICLE 39. Contraband goods are liable to condemnation.

This presents no difficulty.

ARTICLE 40. A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

It was universally admitted that in certain cases the condemnation of the contraband is not enough, and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided that the contraband must bear a certain proportion to the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three-quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemna-

tion of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods, occupying space, or of weight, sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, the condemnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.

ARTICLE 41. If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

It is not just that, on the one hand, the carriage of more than a certain proportion of contraband should involve the condemnation of the vessel, while if the contraband forms less than this proportion, it alone is confiscated. This often involves no loss for the master, the freight of this contraband having been paid in advance. Does this not encourage trade in contraband, and ought not a certain penalty to be imposed for the carriage of a proportion of contraband less than that required to entail condemnation? A kind of fine was proposed which should bear a relation to the value of the contraband articles. Objections of various sorts were brought forward against this proposal, although the principle of the infliction of some kind of pecuniary loss for the carriage of contraband seemed justified. The same object was attained in another way by providing that the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and of the custody of the vessel and of her cargo during the proceedings are to be paid by the vessel. The expenses of the custody of the vessel include in this case the keep of the captured vessel's crew. It should be added that the loss to a vessel by being taken to a prize port and kept there is the most serious deterrent as regards the carriage of contraband.

ARTICLE 42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

The owner of the contraband is punished in the first place by the condemnation of his contraband property; and in the second by that of the goods, even if innocent, which he may possess on board the same vessel.

ARTICLE 43. If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband can not be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities, or of the declaration of contraband, provided such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

This provision is intended to spare neutrals who might in fact be carrying contraband, but against whom no charge could be made. This may arise in two cases: The first is that in which they are unaware of the outbreak of hostilities; the second is that in which, though aware of this, they do not know of the declaration of contraband made by a belligerent, in accordance with Articles 23 and 25, which is, as it happens, the one applicable to the whole or a part of the cargo. It would be unjust to capture the ship and condemn the contraband; on the other hand, the cruiser can not be obligated to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need. These opposing interests are reconciled by making condemnation conditional on the payment of compensation. (See the convention of the 18th October, 1907, on the rules for enemy merchant vessels on the outbreak of hostilities, which expresses a similar idea.)

ARTICLE 44. A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war-ship.

The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

A neutral vessel is stopped for carrying contraband. She is not liable to condemnation, because the contraband does not reach the proportion specified in Article 40. She can, nevertheless, be taken to a prize port for judgment to be passed on the contraband. This right of the captor appears too wide in certain cases, if the importance of the contraband, possibly slight (for instance, a case of guns or revolvers), is compared with the heavy loss incurred by the vessel by being thus turned out of her course and detained during the time taken up by the proceedings. The question has, therefore, been asked whether the right of the neutral vessel to continue her voyage might not be admitted if the contraband articles were handed over to the captor, who, on his part, might only refuse to receive them for sufficient reasons, for instance, the rough state of the sea, which would make transshipment difficult or impossible, well-founded suspicions as to the amount of contraband which the merchant vessel is really carrying, the difficulty of stowing the articles on board the war-ship, etc. This proposal did not gain sufficient support. It was alleged to be impossible to impose such an obligation on the cruiser, for which this handing over of goods would almost always have drawbacks. If, by chance, it has none, the cruiser will not refuse it, because she herself will gain by not being turned out of her course by having to take the vessel to a port. The idea of an obligation having thus been excluded, it was decided to provide for the voluntary handing over the contraband, which, it is hoped, will be carried out whenever possible, to the great advantage of both parties. The formalities provided for are very simple and need no explanation.

There must be a judgment of a prize court as regards the goods thus handed over. For this purpose the captor must be furnished with the necessary papers. It may be supposed that there might be doubt as to the character of certain articles which the cruiser claims as contraband; the master of the merchant vessel contests this claim, but prefers to deliver them up so as to be at liberty to continue his voyage. This is merely a capture which has to be confirmed by the prize court.

The contraband delivered up by the merchant vessel may hamper the cruiser, which must be left free to destroy it at the moment of handing over, or later.

Chapter III—Unneutral Service

In a general way, it may be said that the merchant vessel which violates neutrality, whether by carrying contraband of war or by breaking blockade, affords aid to the enemy, and it is on this ground that the belligerent whom she injures by her acts is justified in inflicting on her certain losses. But there are cases where such unneutral service bears a particularly distinctive character, and for such cases it has been thought necessary to make special provision. They have been divided into two classes according to the gravity of the act of which the neutral vessel is accused.

In the cases included in the first class (Article 45), the vessel is condemned, and receives the treatment of a vessel subject to condemnation for carrying contraband. This means that the vessel does not lose her neutral character and has a full claim to the rights enjoyed by neutral vessels; for instance, she may not be destroyed by the captor except under the conditions laid down for neutral vessels (Articles 48 *et seq.*); the rule that the flag covers the goods applies to goods she carries on board.

In the more serious cases which belong to the second class (Article 46), the vessel is again condemned; but further, she is treated not only as a vessel subject to condemnation for carrying contraband, but as an enemy merchant vessel, which treatment entails certain consequences. The rules governing the destruction of neutral prizes does not apply to the vessel, and as she has become an enemy vessel, it is no longer the second but the third rule of the Declaration of Paris which is applicable. The goods on board will be presumed to be enemy goods; neutrals will have the right to claim their property on establishing their neutrality (Article 59). It would, however, be going too far to say that the original neutral character of the vessel is completely lost, so that she should be treated as though she had always been an enemy vessel. The vessel may plead that the allegation made against her has no foundation in fact, that the act of which she is accused has not the character of unneutral service. She has, therefore, the right of appeal to the international court in virtue of the provisions which protect neutral property.

Article 45. A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband—

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

The first case supposes passengers traveling as individuals; the case of a military detachment is dealt with hereafter. The case is that of individuals embodied in the armed military or naval forces of the enemy. There was some doubt as to the meaning of this word. Does it include those individuals only who are summoned to serve in virtue of the law of their country and who have really joined the corps to which they are to belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental European country and are settled in America; these individuals have military obligations toward their country of origin; they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. Shall they be considered as embodied in the sense of the provision which we are discussing? If we adjudged by the municipal law of certain countries we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with practical necessity and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral Governments would not willingly submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so.

The transmission of intelligence in the interest of the enemy is to be treated in the same way as the carriage of passengers embodied in his armed force. The reference to a vessel especially undertaking a voyage is intended to show that her usual service is not meant. She has been turned from her course; she has touched at a port which she does not ordinarily visit in order to embark the passengers in question. She need not be exclusively devoted to the service of the enemy; that case would come into the second class (Article 56 (4)).

In the two cases just mentioned the vessel has performed but a single service; she has been employed to carry certain people, or to transmit certain intelligence; she is not continuously in the service of the enemy. In consequence she may be captured during the voyage on which she is performing the service which she has to render. Once that voyage is finished, all is over, in the sense that she may not be captured for having rendered the service in question. The principle is the same as that recognized in the case of contraband (Article 38).

The second case also falls under two heads.

There is, first, the carriage of a military detachment of the enemy, or that of one or more persons who during the voyage directly assist his operations, for instance, by signaling. If these people are soldiers or sailors in uniform there is no difficulty, the vessel is clearly liable for condemnation. If they are soldiers or sailors in mufti, who might be mistaken for ordinary passengers, knowledge on the part of the master or owner is required, the charterer being assimilated to the latter. The rule is the same in the case of persons directly assisting the enemy during the voyage.

In these cases, if the vessel is condemned for unneutral service, the goods belonging to her owner are also liable to condemnation.

These provisions assume that the state of war was known to the vessel engaged in the operations specified; such knowledge is the reason and justification of her condemnation. The position is altogether different when the vessel is unaware of the outbreak of hostilities, so that she undertakes the service in ordinary circumstances. She may have learned of the outbreak of hostilities while at sea, but have had no chance of landing the persons whom she was carrying. Condemnation would then be unjust, and the equitable rule adopted is in accordance with the provisions already accepted in other matters. If a vessel has left an enemy port subsequently to the outbreak of

hostilities, or a neutral port after that outbreak has been notified to the Power to whom such port belongs, her knowledge of the existence of a state of war will be presumed.

The question here is merely one of preventing the condemnation of the vessel. The persons found on board her who belong to the armed forces of the enemy may be made prisoners of war by the cruiser.

ARTICLE 46. A neutral vessel is liable to condemnation and, in a general way, to the same treatment as would be applicable to her if she were an enemy merchant vessel—

(1) If she takes a direct part in the hostilities.

(2) If she is under the orders or control of an agent placed on board by the enemy Government.

(3) If she is in the exclusive employment of the enemy Government.

(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.

The cases here contemplated are more serious than those in Article 45, which justifies the severer treatment inflicted on the vessel, as explained above.

First case.—The vessel takes a direct part in the hostilities. This may take different forms. It is needless to say that, in an armed conflict, the vessel takes all the risks incidental thereto. We suppose her to have fallen into the power of the enemy whom she was fighting, and who is entitled to treat her as an enemy merchant vessel.

Second case.—The vessel is under the orders or control of an agent placed on board by the enemy Government. His presence marks the relation in which she stands to the enemy. In other circumstances the vessel may also have relations with the enemy, but to be subject to condemnation she must come under the third head.

Third case.—The whole vessel is chartered by the enemy Government, and is therefore entirely at its disposal; it can use her for different purposes more or less directly connected with the war, notably, as a transport; such is the position of colliers which accompany a belligerent fleet. There will often be a charter party between the belligerent Government and the owner or master of the vessel, but all that is required is proof, and the fact that the whole vessel has, in fact, been chartered is enough, in whatever way it may be established.

Fourth case.—The vessel is at the time exclusively devoted to the carriage of enemy troops or to the transmission of intelligence in the

enemy's interest. The case is different from those dealt with by Article 45, and the question is one of a service to which the ship is permanently devoted. The decision accordingly is that, so long as such service lasts, the vessel is liable to capture, even if, at the moment when an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence.

As in the cases in Article 45 and for the same reasons, goods found on board belonging to the owner of the vessel are also liable to condemnation.

It was proposed to treat as an enemy merchant vessel a neutral vessel making, at the time, and with the sanction of the enemy Government, a voyage which she has only been permitted to make subsequently to the outbreak of hostilities or during the two preceding months. This rule would be enforced notably on neutral merchant vessels admitted by a belligerent to a service reserved in time of peace to the national marine of that belligerent—for instance, to the coasting trade. Several delegations formally rejected this proposal, so that the question thus raised remains an open one.

ARTICLE 47. Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel.

Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel when she is searched. If the vessel is subject to condemnation, the cruiser will capture her and take her to one of her own ports with the persons on board. Clearly the soldiers or sailors of the enemy State will not be set free, but will be treated as prisoners of war. Perhaps the case will not be one for the capture of the ship—for instance, because the master was unaware of the status of an individual who had come on board as an ordinary passenger. Must the soldier or soldiers on board the vessel be set free? That does not appear admissible. The belligerent cruiser can not be compelled to set free active enemies who are physically in her power and are more dangerous than this or that contraband article. She must naturally proceed with great discretion, and must act on her own responsibility in requiring the surrender of these individuals, but the right to do so is hers; it has therefore been thought necessary to explain the point.

Chapter IV—Destruction of Neutral Prizes

The destruction of neutral prizes was a subject comprised in the program of the Second Peace Conference, and on that occasion no settlement was reached. It reappeared in the program of the present Conference, and this time agreement has been found possible. Such a result, which bears witness to the sincere desire of all parties to arrive at an understanding is a matter for congratulation. It has been shown once more that conflicting hard-and-fast rules do not always correspond to things as they are, and that if there be readiness to descend to particulars, and to arrive at the precise way in which the rules have been applied, it will often be found that the actual practice is very much the same, although the doctrines professed appear to be entirely in conflict. To enable two parties to agree, it is first of all necessary that they should understand each other, and this frequently is not the case. Thus it has been found that those who declared for the right to destroy neutral prizes never claimed to use this right wantonly or at every opportunity, but only by way of exception; while, on the other hand, those who maintained the principle that destruction is forbidden, admitted that the principle must give way in certain exceptional cases. It therefore became a question of reaching an understanding with regard to those exceptional cases to which, according to both views, the right to destroy should be confined. But this was not all; there was need for some guaranty against abuse in the exercise of this right; the possibility of arbitrary action in determining these exceptional cases must be limited by throwing some real responsibility upon the captor. It was at this stage that a new idea was introduced into the discussion, thanks to which it was possible to arrive at an agreement. The possibility of intervention by a court of justice will make the captor reflect before he acts, and at the same time secure reparation in cases where there was no reason for the destruction.

Such is the general spirit of the provisions of this chapter.

Article 48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the prize.

The general principle is very simple. A neutral vessel which has been seized may not be destroyed by the captor; so much may be

admitted by everyone, whatever view is taken as to the effect produced by the capture. The vessel must be taken into a port for the determination there as to the validity of the prize. A prize crew will be put on board or not, according to circumstances.

ARTICLE 49. As an exception, a neutral vessel which has been captured by a belligerent war-ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time.

The first condition necessary to justify the destruction of the captured vessel is that she should be liable to condemnation upon the facts of the case. If the captor can not even hope to obtain the condemnation of the vessel, how can he lay claim to the right to destroy her?

The second condition is that the observance of the general principle would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time. This is what was finally agreed upon after various solutions had been tried. It was understood that the phrase *compromettre la sécurité* was synonymous with *mettre en danger le navire,* and might be translated into English by: involve danger. It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. For a danger which did not exist at the actual moment of the capture may have appeared some time afterwards.

ARTICLE 50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war-ship.

This provision lays down the precautions to be taken in the interests of the persons on board and of the administration of justice.

ARTICLE 51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the the face of an exceptional necessity, of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.

This claim gives a guaranty against the arbitrary destruction of prizes by throwing a real responsibility upon the captor who has carried out the destruction. The result is that before any decision is

given respecting the validity of the prize, the captor must prove that the situation he was in was really one which fell under the head of the exceptional cases contemplated. This must be proved in proceedings to which the neutral is a party, and if the latter is not satisfied with the decision of the national prize court he may take his case to the international court. Proof to the above effect is, therefore, a condition precedent which the captor must fulfill. If he fails to do this, he must compensate the parties interested in the vessel and the cargo, and the question whether the capture was valid or not will not be gone into. In this way a real sanction is provided in respect of the obligation not to destroy a prize except in particular cases, the sanction taking the form of a fine inflicted on the captor. If, on the other hand, this proof is given, the prize procedure follows the usual course; if the prize is declared valid, no compensation is due; if it is declared void, the parties interested have a right to be compensated. Resort to the international court can only be made after the decision of the prize court has been given on the whole matter, and not immediately after the preliminary question has been decided.

ARTICLE 52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

ARTICLE 53. If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

Supposing a vessel which has been destroyed carried neutral goods not liable to condemnation; the owner of such goods has, in every case, a right to compensation; that is, without there being occasion to distinguish between cases where the destruction was or was not justified. This is equitable and a further guaranty against arbitrary destruction.

ARTICLE 54. The captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed and the formalities duly carried out, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in Article 40. The captain may put a prize crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of Article 44, agree to the handing over of the contraband if offered by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to hand over the contraband, and the cruiser is not in a position to take the vessel into a national port. Is the cruiser obliged to let the neutral vessel go with the contraband on board? To require this seemed going too far, at least in certain exceptional circumstances. These circumstances are in fact the same as would have justified the destruction of the vessel, had she been liable to condemnation. In such a case, the cruiser may demand the handing over, or proceed to the destruction, of the goods liable to condemnation. The reasons for which the right to destroy the vessel has been recognized may justify the destruction of the contraband goods, the more so as the considerations of humanity which can be adduced against the destruction of a vessel do not in this case apply. Against arbitrary demands by the cruiser there are the same guaranties as those which made it possible to recognize the right to destroy the vessel. The captor must, as a preliminary, prove that he was really faced by the exceptional circumstances specified; failing this, he is condemned to pay the value of the goods handed over or destroyed, and the question whether they were contraband or not will not be gone into.

The article prescribes certain formalities which are necessary to establish the facts of the case and to enable the prize court to adjudicate.

Of course, when once the goods have been handed over or destroyed and the formalities carried out, the vessel which has been stopped must be left free to continue her voyage.

Chapter V—Transfer to a Neutral Flag

An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is immune. It can therefore be readily understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or merely in order to shield the vessel

from the risks to which she would have been exposed had she retained her former nationality. This question naturally arises when the transfer has taken place a comparatively short time before the moment at which the ship is searched, whether the actual date be before or after the outbreak of hostilities. The answer will be different according as the question is looked at from the point of view of commercial or belligerent interests. Fortunately, rules have been agreed upon which conciliate both these interests as far as possible, and which at the same time tell belligerents and neutral commerce what their position is.

ARTICLE 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary requirements of the law have been fulfilled. It is upon the captor, if he wishes to have the transfer annulled, that the onus lies of proving that its object was to evade the consequences entailed by the war in prospect. There is one case which is treated as suspicious, that, namely, in which the bill of sale is not on board when the ship has changed her nationality less than sixty days before the outbreak of hostilities. The presumption of validity which has been set up by the first paragraph in favor of the vessel is then replaced by a presumption in favor of the captor. It is presumed that the transfer is void, but the presumption may be rebutted. With a view to such rebuttal, proof may be given that the transfer was not effected in order to evade the consequences of the war; it is unnecessary to add that the ordinary requirements of the law must have been fulfilled.

It was thought desirable to give to commerce a guaranty that the right of treating a transfer as void on the ground that it was effected in order to evade the consequences of war should not extend too far, and should not cover too long a period. Consequently, if the transfer has been effected more than thirty days before the outbreak of hostilities, it can not be impeached on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show that it is genuine and final. These conditions are as follows: the transfer must be unconditional, complete, and in conformity with the laws of the countries concerned, and its effect must be such that both the control of, and the profits earned by, the vessel pass into other hands. When once these conditions are proved to exist, the captor is not allowed to set up the contention that the vender foresaw the war in which his country was about to be involved, and wished by the sale to shield himself from the risks to which a state of war would have exposed him in respect of the vessels he was transferring. Even in this case, however, when a vessel is encountered by a cruiser and her bill of sale is not on board, she may be captured if a change of nationality has taken place less than sixty days before the outbreak of hostilities; that circumstance has made her suspect. But if before the prize court the proof required by the second paragraph is adduced, she must be released, though she can not claim compensation, inasmuch as there was good reason for capturing her.

Article 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

Provided that there is an absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vender.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

The rule respecting transfers made after the outbreak of hostilities is more simple. Such a transfer is only valid if it is proved that its object was not to evade the consequences to which an enemy vessel, as such, is exposed. The rule accepted in respect to transfers made before the outbreak of hostilities is inverted. In that case there is a presumption that the transfer is valid; in the present, that it is void—provided always, that proof to the contrary may be given. For

instance, it might be proved that the transfer had taken place by inheritance.

Article 56 recites cases in which the presumption that the transfer is void is absolute, for reasons which can be readily understood. In the first case the connection between the transfer and the war risk run by the vessel is evident. In the second, the transferee is a mere man of straw, who is to be treated as owner during a dangerous period, after which the vender will recover possession of his vessel. Lastly, the third case might strictly be regarded as already provided for, since a vessel which lays claim to neutral nationality must naturally prove that she has a right to it.

At one time provision was made in this article for the case of a vessel which was retained, after the transfer, in the trade in which she had previously been engaged. Such a circumstance is in the highest degree suspicious; the transfer has a fictitious appearance, inasmuch as nothing has changed in regard to the vessel's trade. This would apply, for instance, if a vessel were running on the same line before and after the transfer. It was, however, objected that to set up an absolute presumption would sometimes be too severe, and that certain kinds of vessels, as for example, tank ships, could, on account of their build, engage only in a certain definite trade. To meet this objection the word "route" was then added, so that it would have been necessary that the vessel should be engaged in the same trade and on the same route; it was thought that in this way the above contention would have been satisfactorily met. However, the suppression of this case from the list being insisted on, it was agreed to eliminate it. Consequently, a transfer of this character now falls within the general rule; it is certainly presumed to be void, but the presumption may be rebutted.

Chapter VI—Enemy Character

The rule in the Declaration of Paris that "the neutral flag covers enemy goods, with the exception of contraband of war," corresponds so closely with the advance of civilization and has taken so firm a hold on the public mind that it is impossible, in the face of so extensive an application, to avoid seeing in that rule the embodiment of a principle of the common law of nations which can no longer be disputed. The determination of the neutral or enemy character of merchant vessels accordingly decides not only the question of the

validity of their capture, but also the fate of the non-contraband goods on board. A similar general observation may be made with reference to the neutral or enemy character of goods. No one thinks of contesting today the principle according to which "neutral goods, with the exception of contraband of war, are not liable to capture on board an enemy ship." It is, therefore, only in respect of goods found on board an enemy ship that the question whether they are neutral or enemy property arises.

The determination of what constitutes neutral or enemy character thus appears as a development of the two principles laid down in 1856, or rather as a means of securing their just application in practice.

The advantage of deducing from the practices of different countries some clear and simple rules on this subject may be said to need no demonstration. The uncertainty as to the risk of capture, if it does not put an end to trade, is at least the most serious of hindrances to its continuance. A trader ought to know the risks which he runs in putting his goods on board this or that ship, while the underwriter, if he does not know the extent of those risks, is obliged to charge war premiums, which are often either excessive or else inadequate.

The rules which form this chapter are, unfortunately, incomplete. Certain important points had to be laid aside, as has been already observed in the introductory explanations and as will be further explained below.

ARTICLE 57. Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of this rule and is in no wise affected by it.

The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as distinguished from that of other movable property, and notably of the cargo. From more than one point of view ships may be said to possess an individuality; notably, they have a nationality, a national character. This attribute of nationality finds visible expression in the right to fly a flag. It has the effect of placing ships under the protection and control of the State to which they belong. It makes them amenable to the sovereignty and to the laws of that State and liable

to requisition should the occasion arise. Here is the surest test of whether a vessel is really a unit in the merchant marine of a country, and here, therefore, the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test and to discard all considerations connected with the personal status of the owner.

The text makes use of the words "the flag which the vessel is entitled to fly"; that expression means, of course, the flag under which, whether she is actually flying it or not, the vessel is entitled to sail according to the municipal laws which govern that right.

Article 57 safeguards the provisions respecting transfer to another flag, as to which it is sufficient to refer to Articles 55 and 56; a vessel may very well have the right to fly a neutral flag, as far as the law of the country to which she claims to belong is concerned, but may be treated as an enemy vessel by a belligerent, because the transfer in virtue of which she has hoisted the neutral flag is annulled by Article 55 or Article 56.

Lastly, the question was raised whether a vessel loses her neutral character when she is engaged in a trade which the enemy, prior to the war, reserved exclusively for his national vessel; but as has been observed above in connection with the subject of unneutral service, no agreement was reached, and the question remains an open one, as the second paragraph of Article 57 is careful to explain.

ARTICLE 58. The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

Unlike ships, goods have no individuality of their own; their neutral or enemy character is made to depend upon the personal status of their owner. This opinion prevailed after an exhaustive study of different views, which inclined toward reliance on the country of origin of the goods, the status of the person at whose risk they are, of the consignee, or of the consignor. The test adopted in Article 58 appears, moreover, to be in conformity with the terms of the Declaration of Paris, as also with those of the Convention of The Hague of the 18th October, 1907, relative to the establishment of an International Prize Court, where the expression "neutral or enemy property" is used. (Articles 1, 3, 4, 8.)

But it can not be concealed that Article 58 solves no more than a part of the problem, and that the easier part; it is the neutral or enemy

character of the owner which determines the character of the goods, but what is to determine the neutral or enemy character of the owner? On this point nothing is said, because it was found impossible to arrive at an agreement. Opinions were divided between domicile and nationality; no useful purpose will be served by reproducing here the arguments adduced to support the two positions. It was hoped that a compromise might have been reached on the basis of a clause to the following effect:

> The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of no nationality or of double nationality (*i. e.,* both neutral and enemy), by his domicile in a neutral or enemy country;
>
> Provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral or enemy country.

But there was no unanimity.

ARTICLE 59. In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, which leaves to the claimant the right, but at the same time the onus, of proving his title.

ARTICLE 60. Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

This provision contemplates the case where goods which were enemy property at the time of dispatch have been the subject of a sale or transfer during the course of the voyage. The ease with which enemy goods might secure protection from the exercise of the right of capture by means of a sale which is made subject to a reconveyance of the property on arrival has always led to a refusal to recognize such transfers. The enemy character subsists.

With regard to the moment from which goods must be considered

to acquire and retain the enemy character of their owner, the text has been inspired by the same spirit of equity as governed the Convention of The Hague, relative to the status of merchant vessels on the outbreak of hostilities, and by the same desire to protect mercantile operations undertaken in the security of a time of peace. It is only when the transfer takes place after the outbreak of hostilities that it is, so far as the loss of enemy character is concerned, inoperative until the arrival of the goods in question. The date which is taken into consideration here is that of the transfer, and not of the departure of the vessel. For, while the vessel which started before the war began, and remains, perhaps, unaware of the outbreak of hostilities, may enjoy on this account some degree of exemption, the goods may nevertheless possess enemy character; the enemy owner of these goods is in a position to be aware of the state of war, and it is for that very reason that he is likely to seek to evade its consequences.

It was, however, thought right to add what is, if not a limitation, at least a complement agreed to be necessary. In a great number of countries an unpaid vender has, in the event of the bankruptcy of the buyer, a recognized legal right to recover the goods which have already become the property of the buyer but not yet reached him (stoppage *in transitu*). In such a case the sale is canceled, and, in consequence of the recovery, the vender obtains the goods again and is not deemed ever to have ceased to be the owner. This right gives to neutral commerce, in the case of a genuine bankruptcy, a protection too valuable to be sacrificed, and the second paragraph of Article 60 is intended to preserve it.

Chapter VII—Convoy

The practice of convoy has, in the past, occasionally given rise to grave difficulties and even to conflict. It is therefore satisfactory to be able to record the agreement which has been reached upon this subject.

Article 61. Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent war-ship, all information as to the character of the vessels and their cargoes which could be obtained by search.

The principle laid down is simple; a neutral vessel under the convoy of a war-ship of her own nationality is exempt from search. The reason for this rule is that the belligerent cruiser ought to be able to find in the assurances of the commander of the convoy as good a

guaranty as would be afforded by the exercise of the right of search itself; in fact, she can not call in question the assurances given by the official representative of a neutral Government without displaying a lack of international courtesy. If neutral Governments allow belligerents to search vessels sailing under their flag, it is because they do not wish to be responsible for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation is altered when a neutral Government consents to undertake that responsibility; the right of search has no longer the same importance.

But it follows from the explanation of the rule respecting convoy that the neutral Government undertakes to afford the belligerents every guaranty that the vessels convoyed shall not take advantage of the protection accorded to them in order to do anything inconsistent with their neutrality, as, for example, to carry contraband, render unneutral service to the belligerent, or attempt to break blockade. There is need, therefore, that a genuine supervision should be exercised from the outset over the vessels which are to be convoyed; and that supervision must be continued throughout the voyage. The Government must act with vigilance so as to prevent all abuse of the right of convoy, and must give to the officer who is put in command of a convoy precise instructions to this effect.

A belligerent cruiser encounters a convoy; she communicates with the commander of the convoy, who must, at her request, give in writing all relevant information about the vessels under his protection. A written declaration is required, because it prevents all ambiguities and misunderstandings, and because it pledges to a greater extent the responsibility of the commander. The object of such a declaration is to make search unnecessary by the mere fact of giving to the cruiser the information which the search itself would have supplied.

ARTICLE 62. If the commander of the belligerent war-ship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the war-ship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

In the majority of cases the cruiser will be satisfied with the declaration which the commander of the convoy will have given to her, but

she may have serious grounds for believing that the confidence of the commander has been abused, as, for example, that a ship under convoy of which the papers are apparently in order and exhibit nothing suspicious is, in fact, carrying contraband cleverly concealed. The cruiser may, in such a case, communicate her suspicions to the commander of the convoy, and an investigation may be considered necessary. If so, it will be made by the commander of the convoy, since it is he alone who exercises authority over the vessels placed under his protection. It appeared, nevertheless, that much difficulty might often be avoided if the belligerent were allowed to be present at this investigation; otherwise he might still suspect, if not the good faith, at least the vigilance and perspicacity of the person who conducted the search. But it was not thought that an obligation to allow the officer of the cruiser to be present at the investigation should be imposed upon the commander of the convoy. He must act as he thinks best; if he agrees to the presence of an officer of the cruiser, it will be as an act of courtesy or good policy. He must in every case draw up a report of the investigation and give a copy to the officer of the cruiser.

Differences of opinion may occur between the two officers, particularly in relation to conditional contraband. The character of a port to which a cargo of corn is destined may be disputed. Is it an ordinary commercial port, or is it a port which serves as a base of supply for the armed forces? The situation which arises out of the mere fact of the convoy must in such a case be respected. The officer of the cruiser can do no more than make his protest, and the difficulty must be settled through the diplomatic channel.

The situation is altogether different if a vessel under convoy is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection was granted has not been fulfilled. Besides deceiving her own Government, she has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel encountered in the ordinary way and searched by a belligerent cruiser. She can not complain at being exposed to such rigorous treatment, since there is in her case an aggravation of the offense committed by a carrier of contraband.

Chapter VIII—Resistance to Search

The subject treated in this chapter was not mentioned in the program submitted by the British Government in February, 1908, but it is intimately connected with several of the questions in that program, and thus attracted the attention of the Conference in the course of its deliberations; and it was thought necessary to frame a rule upon it, the drafting of which presented little difficulty.

A belligerent cruiser encounters a merchant vessel and summons her to stop in order that she may be searched. The vessel summoned does not stop, but tries to avoid the search by flight. The cruiser may employ force to stop her, and the merchant vessel, if she is damaged or sunk, has no right to complain, seeing that she has failed to comply with an obligation imposed upon her by the law of nations.

If the vessel is stopped, and it is shown that it was only in order to escape the inconvenience of being searched that recourse was had to flight, and that beyond this she had done nothing contrary to neutrality, she will not be punished for her attempt at flight. If, on the other hand, it is established that the vessel has contraband on board, or that she has in some way or other failed to comply with her duty as a neutral, she will suffer the consequences of her infraction of neutrality, but in this case as in the last, she will not undergo any punishment for her attempt at flight. Expression was given to the contrary view, namely, that a ship should be punished for an obvious attempt at flight as much as for forcible resistance. It was suggested that the prospect of having the escaping vessel condemned as good prize would influence the captain of the cruiser to do his best to spare her. But in the end this view did not prevail.

Article 63. Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

The situation is different if forcible resistance is made to any legitimate action by the cruiser. The vessel commits an act of hostility and must from that moment be treated as an enemy vessel; she will therefore be subject to condemnation, although the search may not have shown that anything contrary to neutrality had been done. So far no difficulty seems to arise.

What must be decided with regard to the cargo? The rule which appeared to be the best is that according to which the cargo will be treated like the cargo on board an enemy vessel. This assimilation involves the following consequences. A neutral vessel which has offered resistance becomes an enemy vessel and the goods on board are presumed to be enemy goods. Neutrals who are interested may claim their property, in accordance with Article 3 of the Declaration of Paris, but enemy goods will be condemned, since the rule that the flag covers the goods can not be adduced, because the captured vessel on board which they are found is considered to be an enemy vessel. It will be noticed that the right to claim the goods is open to all neutrals, even to those whose nationality is that of the captured vessel; it would seem to be an excess of severity to make such persons suffer for the action of the master. There is, however, an exception as regards the goods which belong to the owner of the vessel; it seems natural that he should bear the consequences of the acts of his agent. His property on board the vessel is therefore treated as enemy goods. *A fortiori* the same rule applies to the goods belonging to the master.

Chapter IX—Compensation

This chapter is of very general application, inasmuch as the provisions which it contains are operative in all the numerous cases in which a cruiser may capture a vessel or goods.

Article 64. If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

A cruiser has captured a neutral vessel on the ground, for example, of carriage of contraband or breach of blockade. The prize court releases the vessel, declaring the capture to be void. This decision alone is evidently not enough to indemnify the parties interested for the loss incurred in consequence of the capture, and this loss may have been considerable, since the vessel has been during a period, which may often be a very long one, prevented from engaging in her ordinary trade. May these parties claim to be compensated for this injury? Reason requires that the affirmative answer should be given, if the injury has been undeserved—that is to say, if the capture was not brought about by some fault of the parties. It may, indeed, hap-

pen that there was good reason for the capture, because the master of the vessel searched did not produce evidence which ought in the ordinary course to have been available and which was only furnished at a later stage. In such a case it would be unjust that compensation should be awarded. On the other hand, if the cruiser has really been at fault, if the vessel has been captured when there were not good reasons for doing so, it is just that compensation should be granted.

It may also happen that a vessel which has been captured and taken into a port is released by the action of the executive without the intervention of a prize court. The existing practice, under such circumstances, is not uniform. In some countries the prize court has no jurisdiction, unless there is a question of validating a capture, and can not adjudicate on a claim for compensation based upon the ground that the capture would have been held unjustifiable; in other countries the prize court would have jurisdiction to entertain a claim of this kind. On this point, therefore, there is a difference which is not altogether equitable, and it is desirable to lay down a rule which will produce the same result in all countries. It is reasonable that every capture effected without good reasons should give to the parties interested a right to compensation without its being necessary to draw any distinction between the cases in which the capture has or has not been followed by a decision of a prize court; and this argument is all the more forcible when the capture may have so little justification that the vessel is released by the action of the executive. A provision in general terms has therefore been adopted, which is capable of covering all cases of capture.

It should be observed that in the text no reference is made to the question whether the national tribunals are competent to adjudicate on a claim for compensation. In cases where proceedings are taken against the property captured no doubt upon this point can be entertained. In the course of the proceedings taken to determine the validity of a capture the parties interested have the opportunity of making good their right to compensation, and if the national tribunal does not give them satisfaction they can apply to the International Prize Court. If, on the other hand, the action of the belligerent has been confined to the capture it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation; and if so, what are those tribunals? The international court has not, according to the convention of The Hague, any jurisdiction in

such a case. From an international point of view the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered or on the absence of any tribunal having jurisdiction to entertain it.

The question was raised as to whether it was necessary to draw a distinction between the direct and the indirect losses suffered by vessel or goods. The best course appeared to be to leave the prize court free to estimate the amount of compensation due, which will vary according to the circumstances and can not be laid down in advance in rules going into minute details.

For the sake of simplicity mention has only been made of the vessel, but what has been said applies, of course, to cargo captured and afterwards released. Innocent goods on board a vessel which has been captured suffer, in the same way, all the inconvenience which attends the capture of the vessel; but if there was good cause for capturing the vessel whether the capture has subsequently been held to be valid or not, the owners of the cargo have no right to compensation.

It is perhaps useful to indicate certain cases in which the capture of a vessel would be justified, whatever might be the ultimate decision of the prize court. Notably, there is the case where some or all of the ship's papers have been thrown overboard, suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers. There is in such a case an element which will justify any suspicion and afford an excuse for capturing the vessel, subject to the master's ability to account for his action before the prize court. Even if the court should accept the explanation given and should not find any reason for condemnation, the parties interested can not hope to recover compensation.

An analogous case would be that in which there were found on board two sets of papers, or false or forged papers, if this irregularity were connected with circumstances calculated to contribute to the capture of the vessel.

It appeared sufficient that these cases in which there would be a reasonable excuse for the capture should be mentioned in the present report, and should not be made the object of express provisions, since otherwise the mention of these two particular cases might have led to the supposition that they were the only cases in which a capture could be justified.

Such, then, are the principles of international law to which the Naval

Conference has sought to give recognition as being fitted to regulate in practice the intercourse of nations on certain important questions in regard to which precise rules have hitherto been wanting. The Conference has thus taken up the work of codification begun by the Declaration of Paris of 1856. It has worked in the same spirit as the Second Peace Conference, and, taking advantage of the labors accomplished at The Hague, it has been able to solve some of the problems which, owing to the lack of time, that Conference was compelled to leave unsolved. Let us hope that it may be possible to say that those who have drawn up the Declaration of London of 1909 are not altogether unworthy of their predecessors of 1856 and 1907.

Final Provisions

These provisions have reference to various questions relating to the effect of the Declaration, its ratification, its coming into force, its denunciation, and the accession of unrepresented Powers.

Article 65. The provisions of the present Declaration must be treated as a whole and can not be separated.

This article is of great importance and is in conformity with that which was adopted in the Declaration of Paris.

The rules contained in the present Declaration relate to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the delegations. Concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory, and a legitimate expectation would be falsified if one Power might make reservations on a rule to which another Power attached particular importance.

Article 66. The signatory Powers undertake to insure the mutual observance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.

According to the engagement resulting from this article, the Declaration applies to the relations between the signatory Powers when the belligerents are likewise parties to the Declaration.

It will be the duty of each Power to take the measures necessary to insure the observance of the Declaration. These measures may vary in different countries and may or may not involve the intervention of the legislature. The matter is one of national legal requirements.

It should be observed that neutral Powers also may find themselves in a position of having to give instructions to their authorities, notably to the commanders of convoys, as previously explained.

ARTICLE 67. The present Declaration shall be ratified as soon as possible.

The ratifications shall be deposited in London.

The first deposit of ratifications shall be recorded in a protocol signed by the representatives of the Powers taking part therein, and by His Britannic Majesty's principal Secretary of State for Foreign Affairs.

The subsequent deposits of ratification shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification.

A duly certified copy of the protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

This provision, of a purely formal character, needs no explanation. The wording adopted at The Hague by the Second Peace Conference has been borrowed.

ARTICLE 68. The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the protocol recording such deposit, and in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

ARTICLE 69. In the event of one of the signatory Powers wishing to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years beginning sixty days after the first deposit of ratifications, and after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers.

It will only operate in respect of the denouncing Power.

It follows implicitly from Article 69 that the Declaration is of indefinite duration. The periods after which denunciation is allowed have been fixed on the analogy of the Convention for the establishment of an International Prize Court.

ARTICLE 70. The Powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have adopted, and therefore express the hope that the Powers which were not represented there will accede to the present Declaration. They request the British Government to invite them to do so.

A Power which desires to accede shall notify its intention in writing to the British Government, and transmit simultaneously the act of accession, which will be deposited in the archives of the said Government.

The said Government shall forthwith transmit to all the other Powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession takes effect sixty days after such date.

In respect of all matters concerning this Declaration, acceding Powers shall be on the same footing as the signatory Powers.

The Declaration of Paris also contained an invitation to the Powers which were not represented to accede to the Declaration. The official invitation in this case, instead of being made individually by each of the Powers represented at the Conference, may more conveniently be made by Great Britain acting in the name of all the Powers.

The procedure for accession is very simple. The fact that the acceding Powers are placed on the same footing in every respect as the signatory Powers of course involves compliance by the former with Article 65. A Power can accede only to the whole, not merely to a part, of the Declaration.

ARTICLE 71. The present Declaration, which bears the date of the 26th February, 1909, may be signed in London up till the 30th June, 1909, by the plenipotentiaries of the Powers represented at the Naval Conference.

As at The Hague, account has been taken of the situation of certain Powers the representatives of which may not be in a position to sign the Declaration at once, but which desire, nevertheless, to be considered as signatory, and not as acceding, Powers.

It is scarcely necessary to say that the plenipotentiaries of the Powers referred to in Article 71 are not necessarily those who were, as such, delegates at the Naval Conference.

In faith whereof the plenipotentiaries have signed the present Declaration and have thereto affixed their seals.

Done at London the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government, and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference.

Final Protocol of the London Naval Conference[1]

[Translation]

The London Naval Conference, called together by His Britannic Majesty's Government, assembled at the Foreign Office on the 4th December, 1908, with the object of laying down the generally recognized principles of international law in accordance with Article 7 of the Convention signed at The Hague on the 18th October, 1907, for the establishment of an International Prize Court.

The Powers enumerated below took part in this Conference, at which they appointed as their representatives the following delegates:

GERMANY: Mr. Kriege, Privy Councilor of Legation and Legal Adviser to the Department of Foreign Affairs, member of the Permanent Court of Arbitration, plenipotentiary delegate; Captain Starke, Naval Attaché to the Imperial Embassy at Paris, naval delegate; Mr. Göppert, Councilor of Legation and Assistant Councilor to the Department for Foreign Affairs, legal delegate; Commander von Bülow, second naval delegate.

The UNITED STATES OF AMERICA: Rear Admiral Charles H. Stockton, plenipotentiary delegate; Mr. George Grafton Wilson, professor at Brown University, lecturer on international law at the Naval War College and at Harvard University, plenipotentiary delegate.

AUSTRIA-HUNGARY: His Excellency Mr. Constantin Théodore Dumba, Privy Councilor of His Imperial and Royal Apostolic Majesty, Envoy Extraordinary and Minister Plenipotentiary, plenipotentiary delegate; Rear Admiral Baron Léopold von Jedina-Palombini, naval delegate; Baron Alexandre Hold von Ferneck, Attaché to the Ministry of the Imperial and Royal Household and of Foreign Affairs, professor on the staff of the University of Vienna, assistant delegate.

SPAIN: Gabriel Maura y Gamazo, Count de la Mortera, Member of Parliament, plenipotentiary delegate; Captain R. Estrada, naval delegate.

FRANCE: Mr. Louis Renault, Minister Plenipotentiary, professor at the Faculty of Law at Paris, Legal Adviser to the Ministry of Foreign Affairs, member of the Institute of France, member of the Permanent Court of Arbitration, plenipotentiary delegate; Rear Admiral Le Bris, technical delegate; Mr. H. Fromageot, barrister at the Court of Appeal in Paris, technical delegate; Count de Manneville, Secretary of Embassy of the first class, delegate.

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[1] *Foreign Relations of the United States*, 1909, p. 316.

GREAT BRITAIN: The Earl of Desart, K.C.B., King's Proctor, plenipotentiary delegate; Rear Admiral Sir Charles Ottley, K.C.M.G., M.V.O., R.N., delegate; Rear Admiral Edmond J. W. Slade, M.V.O., R.N., delegate; Mr. Eyre Crowe, C.B., delegate; Mr. Cecil Hurst, C.B., delegate.

ITALY: Mr. Guido Fusinato, Councilor of State, Member of Parliament, ex-Minister of Public Instruction, member of the Permanent Court of Arbitration, plenipotentiary delegate; Captain Count Giovanni Lovatelli, naval delegate; Mr. Arturo Ricci-Busatti, Councilor of Legation, Head of the Legal Department of the Ministry for Foreign Affairs, assistant delegate.

JAPAN: Vice Admiral Baron Toshiatsu Sakamoto, Head of the Naval Education Department, plenipotentiary delegate; Mr. Enjiro Yamaza, Councilor of the Imperial Embassy in London, plenipotentiary delegate; Captain Sojiro Tochinai, Naval Attaché at the Imperial Embassy in London, naval delegate; Mr. Tadao Yamakawa, Councilor to the Imperial Ministry of Marine, technical delegate; Mr. Sakutaro Tachi, professor at the Imperial University of Tokyo, technical delegate; Mr. Michikazu Matsuda, Second Secretary at the Imperial Legation at Brussels, technical delegate.

NETHERLANDS: Vice Admiral Jonkheer J. A. Röell, Aide-de-camp, on special service to Her Majesty the Queen, ex-Minister of Marine, plenipotentiary delegate; Jonkheer L. H. Ruyssenaers, Envoy Extraordinary and Minister Plenipotentiary, ex-Secretary General of the Permanent Court of Arbitration, plenipotentiary delegate; First Lieutenant H. G. Surie, naval delegate.

RUSSIA: Baron Taube, Doctor of Laws, Councilor to the Imperial Ministry of Foreign Affairs, professor of international law at the University of St. Petersburg, plenipotentiary delegate; Captain Behr, Naval Attaché in London, naval delegate; Colonel of the Admiralty Ovtchinnikow, professor of international law at the Naval Academy, naval delegate; Baron Nolde, official of the sixth class for special missions attached to the Minister for Foreign Affairs, professor of international law at the Polytechnic Institute of St. Petersburg, technical delegate; Mr. Linden, Head of Department at the Imperial Ministry of Trade and Commerce, technical delegate.

In a series of meetings held from December 4, 1908, to February 26, 1909, the Conference has drawn up for signature by the plenipotentiaries the *Declaration concerning the laws of maritime war,* the text of which is annexed to the present protocol.

Moreover, the following wish has been adopted by the delegates of the Powers which have signed or which have expressed the intention of signing the Hague Convention dated October 18, 1907, for the establishment of an International Prize Court:

> The delegates of the Powers represented at the Naval Conference which have signed or expressed the intention of signing the Convention of The Hague of the 18th October, 1907, for the establishment of an International Prize Court, having regard to the difficulties of a constitutional nature which, in some States, stand in the way of the ratification of that Convention in its present form, agree to call the attention of their respective Governments to the advantage of concluding an arrangement under which such States would have the power, at the time of depositing their ratifications, to add thereto a reservation to the effect that resort to the International Prize Court in respect of decisions of their national tribunals shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said Convention either to individuals or to their Governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the Powers signatory of that Convention.

In faith whereof the plenipotentiaries and the delegates representing those plenipotentiaries who have already left London have signed the present protocol.

Done at London the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall be deposited in the archives of the British Government and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference.

For Germany:	KRIEGE.
For the United States of America:	C. H. STOCKTON, GEORGE GRAFTON WILSON.
For Austria-Hungary:	C. DUMBA.
For Spain:	RAMON ESTRADA.
For France:	L. RENAULT.
For Great Britain:	DESART.
For Italy:	GIOVANNI LOVATELLI.
For Japan:	T. SAKAMOTO, E. YAMAZA.
For the Netherlands:	J. A. RÖELL, L. H. RUYSSENAERS.
For Russia:	F. BEHR.

Instructions to the American Delegates to the Conference at London to Formulate Rules to be Observed by the International Prize Court [1]

Messrs. Charles H. Stockton and George G. Wilson.

Gentlemen: You have been appointed delegates plenipotentiaries to represent the United States at the Conference to be held at London on December 1, 1908, to formulate rules to be observed by the International Prize Court.

Article 7 of the Convention relative to the creation of an International Prize Court, signed at The Hague, October 18, 1907, provides that—

> If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.
>
> In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.
>
> The above provisions apply equally to questions relating to the order and mode of proof.
>
> If, in accordance with Articles 3, 2, *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the court will enforce the enactment.
>
> The court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

This article, proposed by the British delegation and adopted by the Conference, has proved unsatisfactory to the British Government, which has called a conference of maritime Powers in order to determine in advance of the establishment of the court the rules of law to govern its decisions in matters of prize submitted for its determination.

The first paragraph of Article 7 is clear and explicit, providing, as it does, that the court is to be governed by the provisions of a treaty

[1] *Foreign Relations of the United States,* 1909, p. 300.

in force between the litigating nations covering the question of law involved.

The first sentence of the second paragraph of the seventh article provides that in the absence of treaties between litigating parties "the court shall apply the rules of international law." If the rules of international law relating to prize were codified and accepted as an authoritative statement of the law of prize, the questions presented to the court for its determination would be decided with reference to a code of laws equally binding upon the signatory Powers. In as far as the law of prize has been codified the provision in question is clear and definite. The absence of a general agreement upon the rules of international law is recognized in the concluding sentence of the paragraph under consideration, which provides that "if no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity." This provision of the article has given rise to great discussion and dissatisfaction, because wide divergence of view exists as to the law properly applicable in such case. For example, in Anglo-American jurisprudence the laws of contraband and blockade constitute a system recognized generally as the Anglo-American system, whereas the laws of contraband and blockade definitely understood on the Continent are applied in the continental as distinguished from the Anglo-American sense. As, therefore, it can not be said that there is any general rule regulating the subject, as the partisans of each system judge and determine for themselves each case as it arises, it necessarily follows that the court would be obliged to determine which system is considered as more conformable "with the general principles of justice and equity."

In its note of March 27, 1908, inviting a Conference, the British Government stated that—

> The discussions which took place at The Hague during the recent Conference showed that on various questions connected with maritime war divergent views and practices prevailed among the nations of the world. Upon some of these subjects an agreement was reached, but on others it was not found possible, within the period for which the Conference assembled, to arrive at an understanding. The impression was gained that the establishment of the International Prize Court would not meet with general acceptance so long as vagueness and uncertainty exist as to the principles which the court, in dealing with appeals brought before it, would apply to questions of far-reaching importance affecting naval policy and practice.

The subjects upon which an agreement was considered indispensable by the British Government in order to enable the International Prize Court to perform the high services expected of this establishment were the following:

(*a*) Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with regard to compensation where vessels have been seized, but have been found in fact only to be carrying innocent cargo.

(*b*) Blockade, including the questions as to the locality where seizure can be effected, and the notice that is necessary before a ship can be seized.

(*c*) The doctrine of continuous voyage in respect both of contraband and of blockade.

(*d*) The legality of the destruction of neutral vessels prior to their condemnation by a prize court.

(*e*) The rules as to neutral ships or persons rendering "unneutral service" (*assistance hostile*).

(*f*) The legality of the conversion of a merchant vessel into a war-ship on the high seas.

(*g*) The rules as to the transfer of merchant vessels from a belligerent to a neutral flag during or in contemplation of hostilities.

(*h*) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

The importance attached by the British Government to an agreement upon these various subjects enumerated in the program is evidenced by the fact that it is stated in the British note that "it would be difficult, if not impossible, for His Majesty's Government to carry the legislation necessary to give effect to the Convention unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal should be governed."

In order to facilitate this agreement the British Government suggested that the Governments invited to the Conference "interchange memoranda setting out concisely what they regarded as the correct rule of international law on each of the above points, together with the authorities on which that view is based."

In reply to the request of the British Government that memoranda be exchanged I stated that—

The Department has given careful consideration to the suggestion that each Government invited to the Conference prepare and exchange memoranda setting forth its practice in the matters specifically mentioned in the tentative program for the Conference submitted in the British Embassy's note of March 27.

The attitude of the United States is well known to each of the participating Powers, as is their maritime practice to the delegates appointed by the United States. The delegates to the Second Hague Peace Conference were thus instructed by the Secretary of State:

As to the framing of a convention relative to the customs of maritime warfare, you are referred to the Naval War Code promulgated in General Orders 551 of the Navy Department of June 27, 1900, which has met with general commendation by naval authorities throughout the civilized world, and which in general expresses the views of the United States, subject to a few specific amendments suggested in the volume of international law discussions of the Naval War College of the year 1903, pages 91 to 97. The order putting this code into force was revoked by the Navy Department in 1904, not because of any change of views as to the rules which it contained, but because many of those rules, being imposed upon the forces of the United States by the order, would have put our naval forces at a disadvantage as against the forces of other Powers, upon whom the rules were not binding. The whole discussion of these rules contained in the volume to which I have referred is commended to your careful study.

You will urge upon the Peace Conference the formulation of international rules for war at sea and will offer the Naval War Code of 1900, with the suggested changes and such further changes as may be made necessary by other agreements reached at the Conference, as a tentative formulation of the rules which should be considered.

The attitude of the United States has not changed since the Conference, and the relevant portion of the instructions copied for your information are as applicable to the Maritime Conference as they were to the Second Hague Peace Conference.

I have the honor, therefore, to transmit herewith copies of the Naval War Code of 1900 and of the volume of International Discussions of the Naval War College of the year 1903, containing the amendments to be made to the Naval War Code of 1900, to serve as a basis of discussion in the Conference, subject, of course, to amendment, in lieu of the memoranda proposed to be prepared and exchanged by each Power invited to the Maritime Conference.

A like reply was sent in acknowledging the memoranda transmitted to the Department of State by Austria-Hungary, Germany, Japan, Netherlands, Russia, Spain, copies of which you have already received in due course.

As you are familiar with the law, practice, and policy of the United States concerning each of the matters mentioned in the tentative program of the British Government, it does not seem necessary to furnish you precise instructions on each of the points with which the Conference will be called to deal. You are, however, provided with a copy of the instructions to the American delegation to the Hague Conference of 1907, and you are directed to guide yourselves in the consideration of any matter discussed at the Conference by the general and specific provisions of the instructions relating to maritime warfare and the rights and duties of neutrals. You are accordingly authorized and instructed to present to the Conference, as a basis for discussion, the Naval War Code promulgated in General Orders 551 of the Navy Department of June 27, 1900, as modified by the specific amendments suggested in the volume of *International Law Discussions of the Naval War College* for the year 1903, pages 91–97, and you will endeavor, in your discretion, to secure as far as possible the adoption in conventional form of their provisions.

As the United States has not yet ratified the Convention for the establishment of the International Prize Court, signed at The Hague on October 18, 1907, and as the ratification of the instrument is rendered difficult by reason of objections of a constitutional and internal nature not obtaining in other countries, you will be careful not to assume an attitude or position in the discussions of the Conference which may seem to commit the United States to the ratification of the Convention for the establishment of the court, or to commit this Government, by an acceptance of the general rules of maritime warfare to be formulated by the Conference, to create the International Court of Prize provided for in the Convention signed at The Hague on October 18, 1907.

While taking an active part in the deliberations of the Conference and cooperating with the various Powers represented in order to render it a success by securing the adoption of a satisfactory code of maritime warfare, you will discuss the questions presented in the light of general theory and practice, without specific reference or application to the proposed International Prize Court.

The Department is, however, desirous that the International Court of Prize may be established in general accord with the provisions of the Convention concluded at The Hague on October 18, 1907, and in order to facilitate its establishment you will propose to the Confer-

ence an additional article or protocol for the consideration of and eventual acceptance by the Conference, by which each signatory of the Convention of October 18, 1907, shall possess the option, in accordance with local legislation, either to submit the general question of the rightfulness of any capture to the determination of the International Prize Court or to permit an appeal from the judgment of a national court in a specific case direct to the International Court of Prize, as contemplated by the Convention of October 18, 1907.

In the view of the Department the following draft would be not merely satisfactory, but calculated to remove the objections made to the establishment of the International Court of Prize:

Any signatory of the Convention for the establishment of an International Court of Prize, signed at The Hague on October 18, 1907, may provide in the act of ratification thereof, that, in lieu of subjecting the judgments of the courts of such signatory Powers to review upon appeal by the International Court of Prize, any prize case to which such signatory is a party shall be subject to examination *de novo* upon the question of the captor's liability for an alleged illegal capture, and, in the event that the International Court of Prize finds liability upon such examination *de novo,* it shall determine and assess the damages to be paid by the country of the captor to the injured party by reason of the illegal capture.

Following the precedents established by international conferences, all your reports and communications to this Government will be made to the Department of State for proper consideration and eventual preservation in the archives. Should you be in doubt at any time regarding the meaning or effect of these instructions, or should you consider at any time that there is occasion for special instructions, you will communicate freely with the Department of State by telegraph.

I am, gentlemen, your obedient servant,

ELIHU ROOT.

DEPARTMENT OF STATE,
Washington, November 21, 1908.

Report of the Delegates of the United States to the International Naval Conference Held at London, December 4, 1908, to February 26, 1909 [1]

AMERICAN EMBASSY,
London, 2d March, 1909.

The Hon. ROBERT BACON,
Secretary of State.

SIR: We have the honor to inform you that the International Naval Conference called at London in October, 1908, and later postponed until December, 1908, assembled at the Foreign Office in London on December 4, at noon. Sir Edward Grey, Secretary of State for Foreign Affairs, extended welcome to the Conference on behalf of Great Britain. The Conference then proceeded to organization, electing the Earl of Desart, British plenipotentiary, as president. The following Powers were represented in accordance with the invitation given them: Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, Holland, and Russia.

The Conference, after a few plenary meetings, resolved itself into a commission, in order that the topics before it might be considered in a less formal manner. After the topics had received considerable discussion a committee of examination was appointed with a view to reducing the material presented to a definite form for the consideration of the commission. After consideration by the commission the subjects would go to the Conference in plenary session for final action. The distinguished French jurist, Monsieur L. Renault, head of the French delegation, was elected the chairman of the commission and of the committee of examination and finally *rapporteur général.* The call of the Conference and the rules adopted for its procedure are appended to this report (Annexes A and B[2]).

The British Government, in order to facilitate the work of the Conference, called for a memorandum of the views of each Power as to their practice in matters covered by the subjects named in the call for the Conference.

The memoranda thus sent was finally translated into French and arranged together in a *Red Book* in various ways and under several

[1] *Foreign Relations of the United States,* 1909, p. 304.
[2] *Post,* p. 207.

heads with convenient bases of discussion. This book, a copy of which has been duly forwarded to the Department, proved to be of great value, especially in the earlier days of the Conference, in crystallizing views and showing points of agreement and variance upon the subjects treated by the Conference.

The rules, finally formulated by the Conference into a Declaration relative to the laws of maritime war, number sixty-four in all, and cover the subjects, arranged by chapters, of Blockade in time of war, Contraband of war, Unneutral service, Destruction of neutral prizes, Transfer of flag, Enemy character, Convoy, Resistance to visit, and Indemnity.

After the completion of the formulation of the rules above mentioned the Conference, considering the difficulties that may arise on account of the constitutional requirements of certain States which might prevent them from becoming parties to the Hague Convention for the establishment of the International Prize Court of Appeal, drew up a protocol of closure in which a *vœu* (or wish) was expressed to their several Governments calling attention to the advantage that would arise from the conclusion of an arrangement by which the States affected by such constitutional difficulties could have recourse to the International Prize Court by presenting each case *de novo,* without affecting the rights guaranteed by the Convention either to private persons or to their Governments. This protocol, with its included *vœu,* was the result of continued efforts made by the American delegation at the instance of the Department of State. It was signed by all of the plenipotentiaries present, or by the delegates present who had temporarily taken their places.

The final signing of the declaration and protocol was effected on the 26th February, after which the Conference adjourned *sine die.*

Chapter I—Blockade in Time of War

These rules are definitely understood to have no reference to what has been called "pacific blockade."

The general principles in regard to blockade set forth in the Declaration of Paris, April 16, 1856, which have been interpreted by courts, and are therefore fairly established, are reaffirmed.

The right of the commander of the blockading force to allow or to refuse admission to a blockaded port to neutral public ships, or neutral vessels in distress, is recognized.

The method of establishing and raising a blockade is made more clear. Certain States which had customarily maintained a position which required notification of the existence of blockade at the line of blockade made concessions to those which, like the United States, had stood for the principle of public notification to the Government whose flag the ship flies.

Some States, including the United States, had formerly maintained that the liability for the violation of the blockade continues until the vessel has reached her home port or completed her voyage. With the development of modern commerce there has arisen much difference of opinion as to what constitutes a home port or completion of voyage, and in fact the route of many vessels, such as tramp cargo steamers, is determined by the cargo available at the time, and such a vessel may not return to the port of departure for months. Under these circumstances and with a view to avoiding undue interference with neutral commerce, while at the same time retaining the freedom of action for the belligerent, a rule was drawn up and met with general favor, to the effect that the ship guilty of violation of blockade is liable to seizure so long as it is pursued by a ship of the blockading force within the area of blockading operations known as the *rayon d'action,* or before entering a neutral port to complete her voyage.

Confiscation is the general penalty for violation of blockade.

The question receiving the most attention was that of *rayon d'action.* Certain States were in favor of a limitation of the *rayon d'action* to a very small area. The American delegation regarded this limitation as opposed to the principles which it should support. The form of regulation finally adopted is as follows:

> Neutral vessels can not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective.

Statements made by the United States upon the subjects of blockade and area of operations are herewith appended—Annex B and Annex C.

Chapter II—Contraband of War

The question of contraband involved many difficulties which can be readily understood when the various memoranda submitted by the Powers on that subject are consulted. It is to the credit of the Con-

ference as a whole, and of its delegates singly, that an agreement, satisfactory from so many different points of view, was reached. These rules are more in harmony with modern conditions than those formerly existing, and lighten the burden of neutrals in war time without sacrificing belligerent rights.

The Conference adheres to the old nomenclature of absolute and conditional contraband, adding, however, a free list of articles which can not be considered contraband of war.

The first list—that of absolute contraband—is the one virtually agreed upon at The Hague, which, to prevent prolonged discussion and in accordance with instructions from the Department, was accepted as a whole by the American delegation. Item No. 7, concerning horses, etc., was found objectionable by one delegation, and if an amendment had been allowed to the list, their objection would have been supported by the American delegation, as horses, mules, etc., in the United States could be considered as conditional contraband. In European countries, however, liable as their inhabitants are to forced requisitions for horses, etc., they may be logically considered as absolute contraband. The list as adopted omits many articles named in the various memoranda, such as canned provisions, sulphur, saltpeter, and other materials used in the fabrication of explosives, which, if included, would have been prejudicial to the United States, and also omits cotton, which under one memorandum might easily have been included.

The second list of contraband—that of conditional contraband—depends for determination of character upon the destination, whether for peaceful or warlike purposes.

If by changes in warfare other materials outside of the free list become adapted to the uses of war, they can be added to the lists of absolute or conditional contraband by means of a published notification to the other Powers either before or after the opening of hostilities.

The free list consists of 17 groups of articles, as follows:

1. Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
2. Oil seeds and nuts; copra.
3. Rubber, resins, gums, and lacs; hops.
4. Raw hides and horns, bones, and ivory.
5. Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
6. Metallic ores.

7. Earth, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
8. Chinaware and glass.
9. Paper and paper-making materials.
10. Soap, paint, including articles exclusively used in their manufacture, and varnish.
11. Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
12. Agricultural, mining, textile, and printing machinery.
13. Precious and semi-precious stones, pearls, mother-of-pearl, and corals.
14. Clocks and watches, other than chronometers.
15. Fashion and fancy goods.
16. Feathers of all kinds, hairs, and bristles.
17. Household furniture; office furniture and requirements.

The establishment of this list is of great benefit to the sea-borne foreign trade of all countries, and especially to that of the United States, whose exports and imports would be greatly affected by any uncertainty regarding cotton, wool, silk, jute, flax, cotton seed, rubber, hides, fertilizers, metallic ores, paper and paper-making materials, chemicals, agricultural and other machinery, clocks and watches, furniture, etc. Drugs and medicines, and material for the sick and wounded, are included among those not contraband of war, but can be requisitioned with compensation for the needs of the sick and wounded of the captor.

The doctrine of continuous voyage is retained with respect to absolute contraband and well defined in Article 30. The doctrine of continuous voyage in any form has heretofore been considered as non-existent by several European Powers, and it is a very considerable concession upon their part to accept it as applied to absolute contraband. On our part, in giving up continuous voyage as applied to conditional contraband and blockade we gave up a belligerent right now regarded as of little value. The articles of conditional contraband carried by neutral carriers would be bulky and difficult to trace when bound for the common stock of a neutral country. Not being earmarked, they would be most difficult of seizure when afloat. They would be, as a rule, matters of export by us as neutrals, and would be such materials as foodstuffs, oats, hay, railway materials, coal, oil, barbed wire, horseshoes, etc. It is unnecessary to say that to free such articles from the fetters of the continuous-voyage doctrine would be of great service to our trade during war in which the United States is a neutral.

Much relief is afforded to neutrals in respect to the penalty of carrying contraband. In the first place, the ship is not subject to confiscation unless more than half of the cargo is contraband, to be determined either by weight, volume, value, or freight value.

A rule was adopted that a ship seized for carrying contraband, although not itself liable to confiscation because the proportion of contraband was below one-half, could be authorized to proceed according to circumstances if the captain was ready to deliver the contraband articles to the belligerent man-of-war. The captor in such a case has the option of destroying the contraband which is thus delivered to him. This procedure is one of value, as it saves from capture and detention a neutral liner filled with passengers, mails, and valuable freight, which might have a small amount of contraband known or unknown to its captain and owner. This procedure is also in conformity with many treaties made by the United States, dating from 1783 to 1864. It avoids vexatious seizure of neutral vessels—bad enough in the times of small vessels, but intolerable with the great liners of today.

Chapter III—Unneutral Service

Certain acts, to which, by forced interpretation, the doctrines of contraband or of blockade had at times been extended, are recognized as differing both in nature and in penalty from contraband and blockade. Thus much confusion is avoided in time of war upon the sea. Penalty of confiscation of ship for transport of troops and dispatches for the belligerent, and for cooperation in assisting the enemy, is provided, and in general, penalties are as for carriage of contraband. The penalty of confiscation and treatment as an enemy ship is provided for a ship taking direct part in hostilities, under orders of the belligerent, wholly loaded by the enemy Government or when exclusively used in transport service of the enemy.

The aim of Article 48 is to justify the taking of an officer incorporated in the armed forces from a ship without bringing the ship, if it be a large vessel, into port for adjudication, and also to allow the arrest of an officer or officers of high rank who, in disguise or incognito and unknown to the captain of the vessel, are on board of a neutral liner. In this case a want of knowledge on the part of the proper authorities of the vessel might readily clear the vessel from any taint and show there was no proper reason for sending in the ship, but the right to take the prisoner seems important. The least objectionable

action would be to take the enemy officer, but allow the ship to proceed.

Chapter IV—Destruction of Neutral Prizes

This question was considered very fully and frankly by the Conference. Views at first thought to be widely divergent were found to be similar in many respects. While some proclaimed the right to destroy neutral prizes, no one admitted that this could be done except for grave reasons. While some denied the right to destroy, all were inclined to admit that there might be exceptional circumstances under which destruction must be permitted.

All admitted that in general a neutral prize ought not to be destroyed, but should be taken to a prize court; but under exceptional circumstances a vessel otherwise liable to confiscation might be destroyed, though it would be necessary to care for persons and papers on board.

Necessity for destruction must be first established, and the further fact that the vessel would in any case be liable to confiscation must also be established, though if the necessity for destruction is not established, the liability of the State of the destroying vessel to pay indemnity is recognized whether or not the neutral vessel is guilty. The owner of neutral merchandise on board which is not liable to confiscation is also entitled to indemnity. Thus restraint commensurate with the gravity of the act is provided. A belligerent commander destroying a neutral vessel puts his Government under grave responsibilities, which are here recognized. The conclusion set forth in these rules seems to be in accord with the doctrine of the United States.

Chapter V—Transfer of Flag

The subject of transfer of flag of a ship in consequence of sale in anticipation of or during war was the subject of frequent and prolonged discussion. A private ship of the enemy would be liable to capture in time of war, while the ship of a neutral would be free. It is natural, therefore, that the owners of ships which would be liable to capture in time of war should desire to avoid this liability by selling the ships to a neutral and placing them under a free flag. At the same time a belligerent does not wish to be deprived of the opportunity to attack ships which are really enemy ships, though they may be for the time flying a neutral flag. Thus there arises in time of war the conflict between the right of the neutral to trade with one bel-

ligerent and the right of the other belligerent to interfere with belligerent commerce.

It has been decided that commerce in ships in time of war is, in general, not legitimate unless it is *bona fide* commerce and not undertaken to evade the consequences to which the ship would be liable if it retained the enemy flag. The burden of proof of validity of the transfer is placed on the vender. In all such cases commerce would be regarded as illegitimate when the transfer is made (1) *in transitu* or in a blockaded port, (2) with the right of repurchase or return, or (3) contrary to the laws of the flag which it bears.

It would also be possible, and to some extent has been the practice, for ship-owners anticipating war to make transfers just before the outbreak of war. Such transfers, when made with the view to evading the consequences of the war and not as commercial transactions, are not regarded as legitimate, but the burden of proof rests upon the captor, except when the papers in regard to the transfer, which has been made within sixty days before the outbreak of war, are not on board. In this exceptional case the burden of proof of the validity of the transfer is placed on the vessel, as there is not sufficient evidence at hand in the ship's papers to enable the captor to release the ship.

It would, however, be an undue interference with commerce if all sales or sales made a long time before the war were liable to be regarded as invalid. It is therefore decided that sales made more than thirty days before the war, even though made with the idea of evading the consequences of a war which might subsequently break out, would be valid unless there is some irregularity in the transfer itself, or unless it is not an actual transfer, evidence of which might be in the fact that the profits and control remain in the same hands as before the sale.

There are thus established three periods under which transfer of flag is considered, (1) during war, when burden of proof of the validity of the transfer rests upon the vender; (2) a period of thirty days before the war, during which it is necessary for the captor to prove that the transfer is made to evade the consequences of war; and (3) the period prior to thirty days, when, regardless of whether or not the transfer is made to escape the consequences of war, it is necessary for the captor to establish that the transfer itself is irregular, or not in fact a transfer. It is also necessary that in order to have

advantages of these provisions, a vessel transferred within sixty days before the war shall have the papers relating to the sale on board.

These provisions establish much more definite rules, where formerly there had been great diversity of practice among States, or even diversity in the same State at different periods. Commerce in ships is recognized as legitimate under such restrictions as seem necessary in order to safeguard belligerent rights.

The attitude of the American delegation is shown in the Annex E, appended. The American delegation advocated the adoption of a rule to the following effect:

> A transfer effected before the outbreak of war is valid if it is absolute, complete, *bona fide,* and conforms to the legislation of the States interested, and if it has for its effect that neither the control of the ship, nor the profits arising from its use, remain longer in the same hands as before the transfer.
>
> If the captor can establish that the above conditions have not been fulfilled, the transfer is presumed to have intervened with the intention to evade the consequences of war, and is null.

This rule, practically as above, was adopted.

The American delegation also advocated the placing of a definite limit to the period during which transfers made before the war could be questioned, and such a provision was finally adopted by the Conference.

Thus the rights of belligerents and of neutrals are defined and safeguarded.

Chapter VI—Enemy Character

The consideration of this topic was intrusted to a *comité juridique* consisting of one member from each delegation. The States represented at the Conference were found to be equally divided, five favoring the principle of domicile of the proprietor as the criterion of character of goods found on an enemy vessel and five favoring nationality. After many meetings, it was found impossible to reach an agreement, and this question was left open, the rule stating that—

> The neutral or enemy character of merchandise found on board an enemy ship is determined by the neutral or enemy character of its proprietor.

What principle should decide the neutral or enemy character of the proprietor is not determined.

The other rules in regard to enemy character in the main formulate existing practice.

Chapter VII—Convoy

Great Britain formerly refused to admit the right of convoy of neutral merchant vessels by neutral ships of war. In a spirit of conciliation that Government receded from its former position and admitted the right of convoy. There remained then only the determination of the method of its exercise. The American delegation steadily maintained that as the effect of convoy was in the main to remove the vessels under escort from the belligerent right of visit and search, the convoying officer should assume the responsibility for the vessels under his control. Naturally a war vessel of a belligerent approaching a convoy would be entitled to obtain the information in regard to the vessels under convoy that it would obtain from an actual visit to the vessels if they were not under convoy. The officer in command of the public vessel convoying the merchant vessels should be prepared to furnish this information. The commander of the vessel of the belligerent may have reason to believe that the convoying officer has been deceived, and in such case may properly request that his suspicions be considered. The convoying officer should investigate, and may if he desires allow an officer from the belligerent vessel to share the investigation, and should inform the commander of the belligerent of the results of his investigation.

If the commander of the convoy finds that a vessel to which he has given escort is, in his opinion, violating his good faith, he ought to withdraw his protection. Such a vessel has forfeited its right to protection, and, in justice both to other neutrals and the belligerent, ought to be liable for the consequences.

This rule was drawn with view to affording the greatest convenience and service to neutrals, without depriving belligerents of proper war rights. In spirit it accords with both American doctrine and treaties.

Chapter VIII—Resistance to Visit and Search

A general accord was found in the opinion upon this subject, and the following rule was adopted:

> Resistance by force to the legitimate exercise of the right of visit, search, or seizure renders the vessels in all cases liable to confiscation. The cargo is liable to the same treatment as the cargo

of an enemy ship. The merchandise belonging to the captain or to the owners of the ship is regarded as enemy merchandise.

Chapter IX—Indemnity for Seizure

It has been recognized by prize courts that in cases of unjust seizure the vessel seized should receive indemnity for the loss, inconvenience, and delay which it has suffered. It is also recognized that the vessel while innocent may appear to be guilty, and that the captor has a right to demand that the vessel be clearly innocent. This would not be the case if the papers were irregular, if the vessel were far out of its course and near a blockaded port, or otherwise evidently open to suspicion. Such grounds might justify the belligerent in taking the vessel to a prize court, but might not justify condemnation by the court.

That the rights of both belligerents and neutrals might be secured a rule in accord with general practice was formulated to the effect that when the seizure of a ship or merchandise is declared null by the prize court, or if, without being brought to judgment, the seizure of the vessel is not sustained, the persons interested have a right to indemnity unless there have been sufficient reasons for the seizure of ship or merchandise.

Conclusion

In closing this report, the American delegation to the International Naval Conference desires to state that the Declaration adopted by the Conference, defining the relations between belligerents and belligerents, and between belligerents and neutrals, will, without interfering with legitimate belligerent or neutral action, remove many of the reasons for international friction and misunderstanding, which until the present time have frequently existed. Ten Powers have reached an agreement upon matters which, if left to divergent practice, and solely to national prejudice, would have made some of the earnest hopes of the conferences at The Hague and the desires often expressed by the United States Government impossible of realization.

We desire to recognize the uniform courtesy and hospitality of the British Government, and we specially desire to express our appreciation of the great assistance rendered to us in many ways by the American Ambassador in London, and by the various members of the Embassy staff.

We have the honor to be, sir,
Your obedient servants,
C. H. STOCKTON,
GEORGE GRAFTON WILSON,
Delegates plenipotentiary to the International Naval Conference.
ELLERY C. STOWELL,
Secretary of the Delegation.

ANNEX A—*Call of Conference by Great Britain*[1]

ANNEX B—*Rules of procedure*

1. Plenipotentiary and non-plenipotentiary delegates have equally the right of speaking in the discussions of the Conference.

2. Secretaries of the delegations may accompany the members of their delegation at all the sessions of the Conference.

3. The sessions of the Conference are not public. Its deliberations remain strictly confidential.

4. The French language is recognized as the official language for the deliberations and acts of the Conference. Speeches delivered in another language are given orally in outline in French.

ANNEX C—*Statement of the delegation of the United States of America regarding the "radius of action"*

The American delegation accepts in principle basis No. 24 with the reservation that the belligerent or the officer in command of the blockading force shall have the right to fix the length of the radius of action which, according to our desire, should not exceed 1,000 miles. The radius of action or zone of operation should be defined, immediately upon the declaration of blockade, by the officer in command of the blockading force, in conformity with Article 18. The American delegation does not wish to impose upon belligerents set rules as to the length of radius of action, but simply to ask the right to fix a

[1] Printed *ante*, p. 13.

maximum of 1,000 miles when circumstances so demand. The delegation concurs in the remarks of Rear Admiral Le Bris regarding the nature of the radius of action to vary with geographical conditions, the propinquity of neutral ports and interests of neutral commerce, as well as with the force employed.

By determining the area of the zone of operation the delegation intends to ask that the force employed be proportionate to the zone. No country has been more steadfast than the United States in its opposition to paper blockades and it holds that the force charged with the duty of enforcing the blockade must be proportionate to the zone affected thereby.

The delegation adds, in explanation of the wide expanse of the desired radius of action, that the demand rests on the ground that blockade running is becoming more and more a night operation and that it is difficult to capture a vessel before daybreak after it has put to sea. The final chase and capture take place where, properly speaking, the outer line of the blockading force is stationed. The distance of that line varies with the length of night darkness which may reach sixteen hours, and the speed of the vessels, which may reach thirty knots. The distance may thus represent a zone of 480 miles, and even more if the inner line be very far from the entrance of the port.

ANNEX D—*Statement of the delegation of the United States regarding the pursuit of ships in cases of blockade running*

As regards Article 25, the delegation, while believing that the article could advantageously be combined with Article 24 so as to deal with the question of blockade as a whole, accepts the article under the reservation that pursuit is considered as continuous and not abandoned, in the meaning of the article, even though it should be abandoned by one line of the blockading force to be resumed after a while by a ship of the second line until the limit of the radius of action shall have been reached. Under certain conditions there may even be several lines, each one with its respective pursuit zones.

Annex E

The American delegation regrets that it finds it necessary to make a reservation on Article 1 of the rules relative to the transfer of the flag. It holds that a rule which reads—

> The transfer of a hostile vessel to a neutral flag, effected before the opening of hostilities, is valid unless it should be established that the transfer was effected with a view to eluding the consequences that go with the character of a hostile vessel—

does not agree with the spirit of the modern rules concerning war, adopted at The Hague, whose object is—

> to guarantee the safety of international commerce from the fortunes of war and wishing, in accordance with modern practice, to protect as far as possible transactions entered into in good faith and in progress before the opening of hostilities.

Neither does it agree with the principle which would restrict the effects of war to the duration of hostilities.

The rule as proposed seems to aim at depriving business men of the legitimate advantages of their foresight. It does not say how long the vessel shall be held in possession before the opening of hostilities whereby ocean commerce, lawful *per se,* would be protected against the disadvantages of a seizure.

It must be granted that a merchant may in time of peace endeavor, by a sale of his property of whatever nature, to protect himself from certain consequences flowing from the opening of hostilities. This may apply to a ship as well as to any other form of property.

The proposed rule would have a boundless retroactive effect.

The main object of a rule concerning a transfer of the flag before the opening of hostilities is to preclude transfers that are not *bona fide* commercial transactions.

It seems to the American delegation that this object could be achieved by adopting some rule, as the following:

> A transfer effected before the beginning of the war is valid if absolute, complete, in good faith, and in accordance with the law of the countries concerned, and if its effect is that neither the disposal of the ship nor the profit derived from its use remains in the same hands as before the transfer.
>
> If the captor can prove that the above-mentioned conditions have not been fulfilled, the transfer shall be presumed to have been interposed with the intent of eluding the consequences of war and shall be void.

Instructions Addressed to the British Delegates by Sir Edward Grey [1]

Sir Edward Grey to Lord Desart

FOREIGN OFFICE, *December 1, 1908.*

MY LORD,

Under the terms of a Royal Commission, dated the 9th ultimo, the King has been graciously pleased to intrust your Lordship with the duty of representing Great Britain as His Majesty's Plenipotentiary at the conference in which His Majesty's Government has invited the chief naval Powers to take part, with the view of formulating and placing on record by common agreement those principles of international law in matters of prize which are generally recognized as governing the usages of naval warfare. Your Lordship will be assisted by Rear-Admiral Sir Charles Ottley, K.C.M.G., M.V.O., Secretary to the Committee of Imperial Defence; Rear-Admiral E. J. W. Slade, M.V.O., Director of Naval Intelligence; and by Mr. Eyre Crowe, C.B., and Mr. C. J. B. Hurst, C.B., of His Majesty's Foreign Office, in the capacity of British Delegates.

2. Before setting out the instructions by which His Majesty's Government desire the British delegates to be guided in their discussions with the representatives of the other Powers, I desire to recall the circumstances which have led to the assembly of the conference. Among the international agreements negotiated at the second Peace Conference at The Hague in 1907, perhaps the most important, certainly one of the most far-reaching in its effects, was the convention relative to the establishment of an international prize court. The 7th article of that convention lays down that where, in any particular case brought before the international court, the question at issue is not governed by a treaty binding upon the parties, the court "shall apply the rules of international law. If no generally recognized rules exist, the court shall give judgment in accordance with the general principles of justice and equity." A stipulation of this nature was unanimously agreed by all the Powers represented at the second Peace Conference to be an

[1] *British Parliamentary Paper,* Miscellaneous, No. 4 (1909), p. 20. [Cd. 4554.]

essential feature of any system of international jurisdiction in matters of prize which could have practical value.

3. It was the intention of the framers of the convention—among whom the British representatives, acting on the instructions of His Majesty's Government, took a leading part—to endeavour to secure an understanding between the Powers as to the general principles of law recognized by them to be binding upon their respective national prize courts in the more important questions that might come before the international court on appeal, leaving it to that court to apply those same principles to the special circumstances of each particular case in accordance with the canons of justice and equity. Unexpected difficulties were found to be in the way of the immediate realization of this object, due chiefly to the disadvantage inherent perhaps in any process of negotiation in which every one of the independent States of the world takes a direct part, and also to the want of time remaining available after the protracted negotiations for the creation of an International Court had been brought to a successful conclusion. The communications, however, which passed at the time between the delegates of the principal naval Powers interested, justified the belief that, after a period of time devoted to further study and interchange of views, a satisfactory agreement could be arrived at, by which any uncertainty of vagueness as to the principles which, under article 7 of the prize court convention, would be applied by the International Court, would be removed, and substantial security afforded that, those principles having been definitely laid down, they would be uniformly applied in all cases. Several of the naval Powers gave it clearly to be understood that their ultimate acceptance of the jurisdiction of the international Prize Court would necessarily depend on such security being obtained.

4. Having regard to the importance attached by His Majesty's Government to the setting up of that Court, they decided to take the initiative in inviting the co-operation of the Powers whose belligerent rights would be most affected, in formulating in precise terms a set of rules relative to the law of prize, which should be recognized as embodying doctrines held to be generally binding as part of the existing law of nations. In February last I accordingly submitted to the respective Governments a list of questions on which His Majesty's Government, after careful examination, considered that an understanding should if possible be reached, and which would therefore appropriately constitute the programme of a special naval conference to meet in London this autumn. These questions were the following:—

(*a*) Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with regard to compensation where vessels have been seized but have been found in fact only to be carrying innocent cargo;

(*b*) Blockade, including the questions as to the locality where seizure can be effected, and the notice that is necessary before a ship can be seized;

(*c*) The doctrine of continuous voyage in respect both of contraband and of blockade;

(*d*) The legality of the destruction of neutral vessels prior to their condemnation by a Prize Court;

(*e*) The rules as to neutral ships or persons rendering "unneutral service" (*"assistance hostile"*);

(*f*) The legality of the conversion of a merchant-vessel into a war-ship on the high seas;

(*g*) The rules as to the transfer of merchant-vessels from a belligerent to a neutral flag during or in contemplation of hostilities;

(*h*) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

5. The proposals of His Majesty's Government met with a gratifying reception. The careful study of the information obtained from a confidential exchange of views between the several Powers revealed an extent of common ground which encouraged the hope that no insuperable difficulties would be found in stating, in terms acceptable to the great naval Powers, the broad principles governing the rights and duties of belligerents and neutrals in matters of prize. The end in view being certainty and uniformity as regards the application of those principles in all cases brought before the International Court, His Majesty's Government laid stress from the outset on the importance of giving, as far as possible, to any agreement to be reached the character and form of a declaration setting out at least the most important of the existing rules of international law recognized as being at present of general application. An alternative course was favoured by some of the other Powers. They proposed that a code of rules should be agreed upon as binding on the contracting parties in case of war between two or more of them, and then only on condition of reciprocity, no distinction being made between rules already acknowledged by the concensus of nations

to be of general validity, and others introducing new elements not hitherto admitted to have the force of international law. The results to be obtained from the adoption of this course did not appear to His Majesty's Government likely to produce a result which would effectually guarantee the application of known rules by the International Court. On the other hand, any proposition of law enunciated by the chief naval Powers as expressing, in their opinion, the existing, correct, and general rule in the matter, would, they are convinced, carry such weight that its uniform enforcement could be almost certainly relied upon. It would, no doubt, be open to the International Court, in any particular case, to examine into the question whether the rule, as stated, did in fact correctly embody a generally accepted principle of the law of nations, but it is difficult to believe that the Court would hold that such rule was not generally recognized when the nations whose courts and whose practice have almost exclusively determined the course of evolution of international law, and which between them appoint the majority of the judges of the Court, had unanimously declared that the rule was in fact of general application.

6. His Majesty's Government are far from wishing to preclude the discussion at the conference of any new rules which may be proposed. They are, on the contrary, themselves anxious to promote an agreement on certain subsidiary questions in respect to which they think it would be impossible at present to state a common principle as already accepted. With these matters, and with others that may arise in the course of the negotiations, His Majesty's Government are ready to deal by way of a convention, which would embody admittedly new rules and be ancillary to the proposed declaration. As regards, however, those primary questions which vitally affect the position of this country as a possible belligerent in a naval war, they would find it difficult to be satisfied with any merely conventional stipulations of limited application, that would leave it uncertain whether the International Court might not by its decisions introduce rules and principles of naval warfare which would unduly fetter the operations of His Majesty's ships.

7. Influenced by these considerations, His Majesty's Government suggested that the main task to be undertaken by the conference should be the drafting of a declaration in terms which should harmonize as far as possible the views and interpretations of the accepted law of nations to which the several governments had given expression. His Majesty's

Government are disposed to think that the divergences apparent in the theories and doctrines upheld have, in many cases, not been maintained in the practice actually followed. They feel moreover that the fresh interpretation which must inevitably be placed on many old rules under the altered conditions of modern navigation and warfare will naturally tend still further to diminish differences which may formerly have been acute, but which, under the influence of changed circumstances, can no longer be said to be incapable of reconciliation. Most of the existing rules date from a time when the operations of naval war as well as all oversea commerce were carried on in sailing-vessels of comparatively modest dimensions, and when communication by electric telegraph was unknown. Opposing sets of rules evolved under such conditions and tenaciously upheld and perhaps developed by rival schools of national jurisprudence during long periods happily marked by an absence of any occasion to put them afresh to the only real and effective test of war, have since, in not a few instances, become practically meaningless and inapplicable. It will, His Majesty's Government believe, be found in such cases that, by going back to first principles, common ground can often be reached where, under the stress of the unifying tendencies everywhere at work in equalizing the conditions under which the high-developed system of modern maritime trade and intercourse are carried on, the former opposition of doctrines is now seen to be unreal, and discord gives way to unity not only of interests but also of practice.

8. The necessity of a restatement of the underlying principles, in words adapted to present-day circumstances, thus furnishes both the means and the opportunity of arriving by common agreement at a uniform definition of the main principles of the existing law, to whose spirit all nations are without doubt anxious to conform. In this process of adjustment more than one rule can probably now be acknowledged to have a claim to general recognition, in regard to which such claim may have been rightly contested in former times. In so far as particular contentions, having their origin perhaps in the rigid application of a general principle to the requirements of the day, may fall to the ground on the emergence of an entirely different state of things, the principle itself may now be reasserted unfettered by special limitations or exceptions which may formerly have appeared essential to some nations. There need therefore not necessarily be any real contradiction between the vindication of such limitations or exceptions in the past, and their

disappearance from the fresh restatement of the principle at present.

9. Having, in the foregoing, explained the nature of the problem to be solved by the conference as it presents itself to His Majesty's Government, and the method which they consider appropriate to its solution, I now proceed to indicate more precisely the direction in which, as regards each point of the programme, that solution should, in their opinion, be sought.

(*a*) *Contraband*

10. Any proposal tending in the direction of freeing neutral commerce and shipping from the interference which the suppression by belligerents of the trade in contraband involves, should receive your sympathetic consideration, and, if not otherwise open to objection, your active support. It became clear at the second Peace Conference that there was no prospect of securing in the near future the acceptance of the principle of total abolition of contraband by the more important naval Powers; but a proposal then put forward by the United States for giving up the right of seizure for all but absolute contraband, is believed to be regarded with considerable favour. Should it be found that a renewal of such a proposal would now prove generally acceptable, His Majesty's Government would welcome the conclusion of an agreement to that effect. Clearly, however, such a stipulation could find no place in a declaration of the existing law, but would have to be relegated to the projected convention.

11. The Declaration, therefore, will have to recognize the existence of both absolute and conditional contraband. In considering its terms it should be borne in mind that what the commerce of the world above all desires is certainty. The object of all rules on this subject should be to ensure that a trader anxious to infringe in no way the accepted rights of belligerents, could make sure of not being, unwittingly, engaged in the carriage of contraband, and of thus avoiding the danger of condemnation and loss either of goods or ship, while the trader who deliberately shipped or carried contraband would do so with a knowledge of the risk he ran, and would have no claim to sympathy or compensation if his ship or goods were captured and subsequently condemned by the due process of a Prize Court.

12. In order to determine what is absolute contraband, some nations have had recourse to a strict definition of the term; others to an exhaustive and particular enumeration of all classes of articles comprised

in it. Attempts at definition have naturally started from the proposition that the expression "absolute contraband" should include nothing that could be used for any but war-like purposes. A serious difficulty, however, standing in the way of the general acceptance of a definition in these terms is the fact that certain things, notably horses and mules suitable for military purposes, have been held by most countries to be absolute contraband, although strictly speaking they may clearly be regarded as *"ancipitis usûs."* In order to allow of the inclusion of such items, the definition would have to be so much widened that many articles would thereby be brought within its scope which ought certainly not be allowed to be classed as absolute contraband. For this reason there has been a growing tendency to fall back upon the principle of close enumeration as more satisfactory, and opinion at the second Peace Conference was unmistakably favourable to this view. In fact, the agreement provisionally arrived at by a committee of that conference as to the items of which a list of absolute contraband should properly be composed, was at the time acknowledged to give very accurate expression to the principle underlying the actual practice of different countries. Great Britain has hitherto committed herself neither to a definition nor to an enumeration, but the list embodied in the agreement to which I have referred, substantially accords with what British prize courts have always adjudged to be comprised in the terms "absolute contraband." An endeavour should therefore be made to get that list, which I here subjoin, accepted as a correct statement of the existing law of nations.

"(1) Arms of all kinds, including arms for sporting purposes, and their component parts.

"(2) Projectiles, charges, and cartridges of all kinds, and their component parts.

"(3) Powders and explosives designed specifically to serve warlike purposes.

"(4) Gun-mountings, limber boxes, limbers, military waggons, field forges, and their component parts.

"(5) Military clothing and equipment.

"(6) Military harness of all kinds.

"(7) Saddle, draught, and pack animals suitable for warlike purposes.

"(8) Camp equipment, and the component parts.

"(9) Armour plates.

"(10) Ships and vessels of war, and their component parts, provided these are of such a nature as can only be used on a ship of war.

"(11) Instruments and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or of military or naval warlike material."

13. It must be doubted whether a rule, known to be favoured by some of the Powers, under which additions to an established list of absolute contraband would be either prohibited altogether or allowed only conditionally on notice previously given, could be brought within the purview of the Declaration. It appears to be generally agreed that no such addition ought in any case to be admissible, except in the case of articles which can not be utilized for other than warlike purposes. A rule to this effect, or, preferably, a rule preventing any additions whatever at the outbreak or after the commencement of war, might well form part of the proposed convention.

14. The preparation of a list of conditional contraband presents greater difficulties, because, looking to the complex requirements of a navy or an army, and the conditions of modern warfare, almost any article going to the armed forces of a belligerent might plausibly be contended to be capable of acquiring a contraband character. The primary characteristic of conditional contraband is its warlike destination, and in drafting any rules on the subject, care should be taken to insure that condemnation should in no case be allowed unless there was such evidence as would establish, or lead to the overwhelming presumption, that the destination of the goods was for the armed forces of the enemy, and not for the civil population of a place occupied by such forces. Whether a rule requiring each Power to publish, during peace, a list of what it intends to treat as conditional contraband would turn out to be of much value seems rather doubtful. Any Government wishing to reserve as wide a power as possible in this direction would either include a large number of articles, or would use general words covering almost anything which, when the time came, it might desire to treat as conditional contraband. An agreement to publish a list in advance would therefore in practice appear valuable only in so far as it constituted a recognition of the fact that it is not every article going to a place occupied by the armed forces of a belligerent that can be treated as conditional contraband.

15. As regards the question of destination as a necessary element of the contraband character of particular goods, His Majesty's Government believe the more widely established rule to be that the destination of the contraband cargo, and not that of the vessel by which it is conveyed, is the decisive factor. In other words: it may be laid down that the fact of the destination of the carrying ship being a neutral port will not relieve the cargo from condemnation if it is established that the contraband did in fact possess a belligerent destination. This principle may rightly be extended not only to cases where the contraband is to be carried on to the enemy after transihpment, but also to cases where the goods are forwarded by land transit through neutral territory.

16. Contraband cargo is by general agreement liable to condemnation, and it would appear to be equitable that non-contraband cargo belonging to the owner of the contraband should also be subject to condemnation. Innocent cargo, on the other hand, belonging to other persons unconcerned with the contraband venture should be released, the owners having, however, no claim to anything more than the restitution of their goods.

17. The views of the various Powers as to the liability of the ship carrying the contraband cargo are not altogether in accord. The British principle, speaking generally, is that, apart from any interest of the shipowners in the contraband cargo, liability to condemnation depends on the existence of forcible resistance or false papers. The continental Powers, however, generally import a condition that if the contraband forms either in value or in bulk more than a given proportion of the entire cargo the ship will be liable to condemnation. It seems to His Majesty's Government that there is much to be said for this view. It is certainly, on the whole, favourable to neutrals, assuming the proportion so fixed to be sufficiently large. It is not probable that a shipowner or master could be ignorant of the character and purpose of goods forming the bulk of the cargo, or the larger proportion of its value (on which freight was paid), and thus the presumption would seldom operate unjustly to the shipowner, while where the contraband formed but a small proportion of the cargo, whether in bulk or in value, it would be of advantage to him, and to commerce generally, that its carriage should not involve the condemnation of the vessel. An agreement would therefore not be unreasonable under which ships would be condemned for the carriage of contraband where (*a*) the contraband was owned by

the shipowner or captain, or (*b*) where it formed at least one-half of the cargo either in bulk or value, or (*c*) where knowledge on the part of the shipowner or master of the contraband and its destination was a necessary deduction from the circumstances in which the contraband was carried. The shipowner should be declared to be entitled to compensation in all cases where no contraband was found on board, unless the Prize Court held that there was good cause for bringing the ship in for adjudication.

18. The question of the right to visit, search, and seize neutral ships when under convoy is one on which there has been a clear divergence between the old continental system and the British doctrine. That doctrine has, however, not been enforced in any recent war. In 1854 the right to visit ships under convoy was specifically waived, owing to the difficulty inherent in naval co-operation with an allied Power which did not recognize that right. Nor have His Majesty's Government since attempted to exercise it. The situation was radically changed by the Declaration of Paris, which put an end to the right formerly enjoyed, of seizing enemy goods other than contraband, under whatever flag carried, and His Majesty's Government are now desirous of limiting as much as possible the right to seize for contraband, if not eliminating it altogether. In proportion as the lists of contraband are reduced—and there is good ground for hoping that this will be successfully done in a large measure—the value of the right to seize for contraband automatically diminishes. Whilst accordingly, on the one hand, the importance to a belligerent of the right to seize vessels under convoy has lost most of its value, the principle of exemption is, on the other hand, favourable to neutral trade, and in conformity with the spirit of British policy. This is therefore one of the cases where, owing to the force of changing circumstances, the original British contention has practically lost its importance, so that its specific abandonment would effect no substantial alteration in the actual situation, and may very well be admitted to be little more than the formal acknowledgment of a now generally accepted rule.

(*b*) *Blockade*

19. It is a matter of general agreement that a blockade must be effective, and that its existence and extent must be notified; but there have been differences of opinion as to what is an effective blockade, what is a sufficient notification, and when and where a ship going to or

coming out of a blockaded port may be captured and brought in. These questions are all closely connected, and a satisfactory solution of them is of extreme importance to a State like Great Britain, whose absolute dependence on the possession of sea power for security makes it imperative for her to maintain intact the weapon of offence which the possibility of effectually blockading an enemy's coasts places in the hands of a nation having command of the sea.

20. By a declaration of blockade, the blockading Power forbids access to the blockaded coast, and the Declaration of Paris accordingly makes the recognition of a state of blockade dependent on the effectiveness with which such access is prevented. So much is common ground. It is in respect to the means by which it is sought to prevent access that a divergence seems to exist between the English and the continental points of view. There has been a wide-spread impression that the opposing views are totally irreconcilable, but a careful and systematic examination of all reported British cases has convinced His Majesty's Government that the divergence is the result not so much of differing practices as of theories constructed by jurists in order to justify the executive measures adopted by belligerents, and of deductions somewhat hastily drawn from the language employed in the decisions of the Prize Courts. Obviously, were actual attainment to the blockaded coast to be alone recognized as the offence which justified capture, the maintenance of a blockade would become impossible. Consequently, some other ground for capture must be admitted. Under the system practised by the continental nations a "line of blockade" is created, and the offence is defined as the act of crossing this line. According to the English definition, the offence consists in the *attempt* to reach the blockaded coast, and it has been laid down that the act of sailing towards that coast with the intention of reaching it constitutes an attempt. Against the former system it has been urged that the line of blockade is purely arbitrary and bears no fixed relation to the coast blockaded, while the latter system has been characterized as an endeavour to attach penal consequences to what is only an intention. In truth, both systems are to some extent arbitrary, but this is the unavoidable result of the impossibility of maintaining a blockade without resort to some such method of procedure. In course of time these systems appear to have become stereotyped by jurists to such an extent that the reasons for their existence and the practices from which they were deduced have been lost sight of, with the result that claims have from time to time

been put forward by the advocates of either system which have met with serious opposition, and which are probably quite unwarranted. For instance, it has been said on the one side that a ship is liable to capture the moment she has left her port of departure, however far she may be from the blockaded coast; while, on the other, it has been maintained that a ship can not be captured at any point unless the blockade is "effective at that point," that is to say, only when she is in the act of crossing a line which is itself effectively guarded. To adopt the former view is to prohibit a ship from starting with the blockaded port as an alternative destination, which may be abandoned if, on approaching the neighbourhood of that port, she should ascertain that it is still blockaded. To adopt the latter view is to throw on the blockading force the onus of covering some line other, and probably much more extended, than the blockaded coast, although it is only actual access to that coast which need be prevented in order to make the blockade effective.

21. To turn from theory to practice: In order that blockade runners may be effectively stopped, there must, among other things, be an arrangement by which they are prevented from slipping by under cover of darkness. This implies such a disposal of the blockading squadrons as to insure that a vessel attempting to break the blockade would have to pass either outer or inner lines or groups of blockading ships in the daytime. Whilst in this way the several lines together could make the blockade effective, it might quite possibly be said that no one line alone constituted an effective guard at the spot where it was stationed. In such circumstances, the theoretical rule that no ship of the blockading fleet can properly effect a capture unless the blockade is effective at the point where the ship is stationed, in other words, unless vessels which may pass it at any time would almost certainly be stopped, clearly becomes impossible of execution. As regards the practical application of the other system, an attentive examination of all the reported cases in the British prize courts relative to questions of blockade has shown that, while the principle of liability to seizure at any point of a voyage to or from a blockaded port or coast has been maintained in theory, there is, in fact, no such case in which a vessel has been condemned for breach of blockade except when actually close to, or directly approaching, the blockaded port or coast. The possibility of change of destination and other circumstances have always been taken into consideration, with the result that, except in cases which admitted of no doubt as to

the immediate intentions of the vessel, she has invariably been released. Thus, in practice, the British Courts have acted on a rule which closely approximates to that upheld by continental Governments if freed from the impracticable interpretations and deductions with which the latter has been overlaid by an extreme school of jurists. It therefore appears to His Majesty's Government that it ought not to be impossible to give suitable expression to the common principle.

22. A blockading fleet will, in general, station itself at such a distance from the blockaded coast as will render it reasonably secure from attack from that coast. This distance is likely. under modern conditions of war, to be considerable, and the blockading ships would probably be disposed in two or more lines or groups. The French Government have recently defined the area within which vessels may be seized for breach of blockade, to be the "*rayon d'action* of the vessels charged with the duty of insuring the effectiveness of the blockade." If the *rayon d'action* may be defined as the area of operation of the blockading force, His Majesty's Government would be disposed to accept a rule to the above effect as fairly representing the actual practice of both the rival systems, and therefore capable of being described as of general application. Such a rule would safeguard all belligerent rights in regard to blockade which Great Britain has been able practically to assert in former wars, whilst it would at the same time reassure neutrals that their ships would not be captured until actually approaching the waters in which the blockade was effectively maintained.

23. There arises in this connection the question as to the limit of distance or time up to which the pursuit of a vessel that has broken blockade outwards may be continued. According to the British theory, the vessel would remain liable to pursuit and capture until she had reached the terminal point of her homeward voyage. The opposing school holds that the right to pursue and capture ceases when the pursuit has been abandoned. His Majesty's Government are advised that the acceptance of the latter view would not be likely to inflict any material injury on the interests of Great Britain. They therefore consider that it will not be necessary to insist on the rigorous adoption of the British principle on this point.

24. It is universally accepted that a blockade must be notified, by the Government declaring it, to all neutral Powers, and by the officer commanding the blockading force, to the local authorities of the adjacent countries. According to the view uniformly upheld by the British

courts, and adopted by most of the Powers, the notification of the belligerent Government to a neutral Power is considered to affect with knowledge of the blockade a ship sailing to the blockaded port when sufficient time has elapsed for the neutral Power to make the existence of the blockade known in its territory before the sailing of that vessel, or when the existence of the blockade was notorious at the port of departure when the vessel left. Some of the Powers, however, have required, in addition, a special notice to be given by a belligerent cruiser to the vessel herself when on her way to the blockaded port, and to be entered on her papers. It has been contended in support of this contention that a ship, even if sailing with a knowledge of the blockade, may justifiably continue her course to the blockaded port in the hope that at the time of her arrival the blockade may have come to an end. Its effect in practice is that any ship may with impunity make a first attempt to run a blockade, because, even if stopped, she would incur no risk of capture or condemnation, and could either abandon the attempt without any penalty, or renew it on a favourable occasion. Whatever force there may have been in the argument in favour of such a rule in the days of sailing-ships, when the means of communication by telegraph and otherwise were very different from those which now obtain, it is almost impossible to suppose that under present conditions the existence of any blockade would not be perfectly well known to all ship-owners; and it would rarely occur that a voyage pursued without any communication with land would be of such duration as to validate the excuse that a ship was not aware of the continuance of a blockade of which she had had an opportunity of knowing before she originally sailed. The case for special and individual notice, therefore, is not now a strong one, and His Majesty's Government can not see any injustice or hardship in a rule making any ship attempting to reach a blockaded coast which has sailed after the public notification by the belligerent to the neutral Power, liable for breach of blockade. They trust that this view will now no longer be opposed by the Powers which have hitherto maintained the necessity of a special notice to the ship herself, and that it will be definitely accepted by the Conference.

(*c*) *Continuous Voyage*

25. The principle underlying the doctrine of continuous voyage is not of recent origin, and may be regarded as a recognized part of the law of nations. Its application to vessels carrying contraband has

already been incidentally explained in paragraph 15 of the present instructions, as justifying the seizure of any neutral ship carrying a contraband cargo which is in fact destined for enemy territory, whether the cargo was to be carried to such territory by the ship herself, or, after transshipment, by another vessel, or by overland transport from a neutral port.

26. For the purposes of blockade, on the other hand, the destination justifying capture is that of the ship, and not of the cargo; and a vessel whose final destination is a neutral port can not, unless she endeavours, before reaching that destination, to enter a blockaded port, be condemned for breach of blockade, although her cargo may be earmarked to proceed in some other way to the blockaded coast. His Majesty's Government believe that all the Powers will probably be in agreement on this point, unless the United States were to maintain that the condemnation pronounced by their Supreme Court in the well-known case of the "Springbok" extended the application of the doctrine of continuous voyage to breaches of blockade, and rendered the vessel carrying a cargo destined for a blocked port liable to seizure, even though she herself was not proceeding to such port. It is, however, exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly, if such was the intention, the decision would *pro tanto* be in conflict with the practice of the British courts. His Majesty's Government see no reason for departing from that practice, and you should endeavour to obtain general recognition of its correctness.

(*d*) *Destruction of Neutral Prizes*

27. It is recognized by the universally acknowledged principles of international law that all prizes ought, if possible, to be brought into a Prize Court, and ought not, generally speaking, to be destroyed or otherwise dealt with prior to condemnation. It is, however, generally admitted that in cases in which the captor finds himself unable, without compromising his own safety or affecting the success of the military operation on which he is engaged, or owing to his distance from any home port, to bring an enemy merchant-vessel in, he may destroy her after removing the passengers, crew, and papers, and that if it be established that she is in fact an enemy vessel, such destruction involves the captor in no liability. Even in such cases, His Majesty's Government

have some doubt whether there is a right to destroy neutral cargoes on board without compensation, a doubt which the terms of the Declaration of Paris, under which neutral goods in enemy ships not being contraband are not liable to seizure, tend to confirm. Primarily, an enemy ship should be brought in, and if she is, before adjudication, destroyed for the convenience of the captor the neutral owner of cargo should not suffer thereby.

28. Some of the Powers do not consider this right of destruction in special circumstances to be limited to enemy ships, but seek to extend it to neutral merchant-vessels suspected to be carriers of contraband of war. They declare that although it is contrary to principle to destroy a neutral merchant-vessel instead of bringing her in, such a course may nevertheless be justifiable in exceptional cases, where she can not so be brought in without danger to the captor or without substantial interference with the success of his military operations; and it has been contended both by writers on international law and in discussion at the second Peace Conference, that this right would extend to a case in which the captor was merely unable to spare a prize crew to take the vessel into one of his own ports without unduly diminishing his fighting force. Great Britain on her part has always held that, in the case of a neutral ship, or in case of doubt as to nationality, if the prize can not be brought in, she should be dismissed, and that no military necessity can justify to the neutral owner the destruction of his ship without due process of a prize court. In the few recorded cases where, in past times, neutral prizes have been so destroyed by English captors, the Court decreed full compensation as due of right to the owners for the wrong done to them. At the second Peace Conference, Great Britain endeavoured unsuccessfully to obtain general recognition for the rule that destruction of neutral prizes should in all circumstances be forbidden. The result of the discussions at that conference has been to show that there is practically no prospect of this contention being accepted in its entirety, and it must be admitted that while authority can be quoted in its support from text books and from British cases, there is a large body of opinion among writers on international law that although in principle a neutral ship should in every case be brought in or released, circumstances might arise in which its immediate destruction would be justified.

29. The matter is clearly one of much importance to neutral traders, and its importance is illustrated and accentuated by Russian action and Russian decisions during the recent Russo-Japanese war, when, as it appeared to His Majesty's Government, neutral vessels were destroyed without justification, but the legitimacy of such destruction was sustained by the Russian Prize Courts. It is therefore very desirable that some agreement should, if possible, be come to at the forthcoming Conference which should afford a real check on belligerents in this respect. The way to an agreement might perhaps be found by proceeding on the lines of affirmation of the general principle that neutral prizes must not be destroyed before adjudication, followed by a precise statement of the conditions on which alone a departure from the principle could be allowed in exceptional circumstances. These conditions would have to be so framed as to safeguard the rights and interests of neutrals in as effective a manner as possible.

30. His Majesty's Government can not admit the contention that inability of the captor to spare a prize crew would suffice to justify destruction. Such an admission would probably be held to authorize the destruction of neutral prizes in the majority of cases where the captor had not a port of his own near to the place of capture. It is to be expected that the duty of intercepting merchant-vessels for visit and examination will often be intrusted to vessels of great speed and considerable offensive but small defensive powers, and unable conveniently to carry crews larger than requisite for the ordinary duties of the vessel. Such vessels would seldom be able to spare a sufficient number of men to form prize crews, and they would therefore frequently be in the position of not being able to send in a prize without weakening their fighting force, and thus, as it might be argued, affecting their safety and the success of their operations. No doubt this danger is to some extent qualified by the fact that it would be difficult for such vessels to accommodate the passengers and crew of the prize, and unless they were able to do this, their only course would be to take the prize into port under their guns, which would be almost impracticable if the port was at some distance from the place of capture. Clearly the crew and passengers on board a neutral vessel, which may perhaps include women and children, ought not to be exposed to the hardships and risks which would arise if they were to remain for any length of time on board a belligerent man-of-war. Such a ship might, while these per-

sons were still on board, be in action with an enemy, and nothing short of an altogether imperative necessity could justify a belligerent in exposing them to such a peril.

31. The conditions which His Majesty's Government consider might fairly be attached to a recognition on their part of the right to sink neutral prizes would be that the emergency should be justified by an imperative military necessity of which the prize courts, and ultimately the International Court, should be the judge, and that the crew and passengers must not, whilst on board a belligerent vessel, be exposed to the perils of a naval engagement. An effort should be made to secure the adoption by the Conference of the view that inability to spare a prize crew, or the mere remoteness of a convenient national port, does not constitute a military necessity which would justify the sinking of a neutral prize. An agreement to this effect would gain enormously in value if it were also stipulated that in all cases where a neutral ship is sunk before adjudication in a prize court, the owners should be entitled to full compensation, altogether apart from the question of the character of the traffic in which the ship was engaged.

32. When this subject was debated at the second Peace Conference, various suggestions were put forward from different quarters with a view to provide an alternative to destruction in cases where a vessel could not be brought into a national port. It is not improbable that some of those suggestions may be renewed on the present occasion. The principal proposal in this direction was that the captor should be permitted, when a prize has been captured at a long distance from any of his ports, to take her into a neutral port within reach, where she would be sequestrated pending the adjudication of the prize court, to which meanwhile the ship's papers and the necessary witnesses were to be sent as soon as practicable. His Majesty's Government have declined to accept article 23 of the convention signed at The Hague respecting the rights and duties of neutral Powers in maritime war, which authorizes this procedure. I am not now in a position to say what view His Majesty's Government might have taken as to the advisability of accepting the proposal with or without some modifications or restrictions, had its advocates offered it as a compromise in return for which they would abandon the claim to sink neutral prizes. It was in this form that the proposal was originally put forward. In the end, however, the claim to sink was maintained, and the alternative suggestion was

ultimately set up as an additional stipulation. In these circumstances His Majesty's Government did not feel justified in making the double concession involved in recognizing the general validity of practices which are clearly open to grave objections. I have already indicated the readiness of His Majesty's Government to consider how and to what extent those objections might be overcome as regards the destruction of neutral prizes. I do not, however, wish at this stage to fetter you by declaring the conditions formulated in paragraph 31 of the present instructions to offer the only possible solution that could be entertained by His Majesty's Government. On the contrary, their genuine anxiety for some understanding in this matter will dispose them to approach any proposals for a reasonable compromise in an unbiased and conciliatory spirit. Without committing themselves to any definite decision, His Majesty's Government will accordingly be willing to listen and give due weight to any arguments and suggestions that may be brought forward in order to harmonize the opposing views by reopening the question of the sequestration of neutral prizes in neutral ports, although, as at present advised, they are not very hopeful that any system can be devised which would prove really satisfactory and acceptable to all parties.

33. A suggestion has been made that it should be open to the captor and the captain of the prize, by agreement, to arrange that any contraband cargo on board should be handed over or destroyed, or that some form of bail might be given by the captain of the prize, to which he would subsequently have to surrender in one of the captor's prize courts, an that if either of these courses were adopted, the ship might be allowed to proceed. It has been argued that the possibility of this alternative to bringing the prize in would render it unnecessary, in any contingency which may be contemplated as probable, to resort to its destruction. This suggestion has been carefully examined, but His Majesty's Government have so far been unable to satisfy themselves that effect could be given to it without giving rise to complications of a practical and legal character which would render the framing of the necessary rules a task of great difficulty. You are, however, authorized to take into consideration and discuss any definite proposal which may be brought forward relating to this subject.

(*e*) *Unneutral Service*

34. There is a close connection between the controversy respecting the claim of a belligerent to sink neutral vessels in certain circumstances, and the question of the treatment to be accorded to vessels engaged in "unneutral service." It has never been seriously contested that ships which, whilst sailing under a neutral flag, take an active part in the naval operations of an enemy, thereby forfeit all rights and privileges which they would otherwise enjoy in virtue of their neutral status. In circumstances which can easily be imagined, such conduct would inevitably expose the offending vessel to the risk of immediate destruction without involving the belligerent who resorted to such action in any liability; and it may well happen that a particular case in which it might be argued that the sinking of a neutral vessel carrying contraband would be justified by an imperative military necessity, would be found to be really covered by the rules under which vessels rendering unneutral service may be summarily dealt with. It was with this consideration in view that the British Delegates at the second Peace Conference endeavoured to obtain the assent of the Powers to an arrangement by which a ship so engaged should be held to have the status, not of a neutral merchantman, but of an "auxiliary ship" of the belligerent navy. The British proposal was, owing apparently to a complete misconception of its purport and intention, received with a degree of suspicion and hostility which decided His Majesty's Government to withdraw it at the time. The problem, however, with which the proposal was meant to deal is one calling for definite settlement. His Majesty's Government will be quite prepared to accept any rule which would effectually deprive a vessel placed entirely or specifically at the service of the enemy, of the right to claim the treatment of a neutral. A practical solution might perhaps be found by placing such vessels on the same footing as enemy merchant-ships.

35. Little difficulty is expected to arise as regards a proper definition of that category of unneutral services which is usually dealt with under the head of the "analogues of contraband." The carriage of enemy despatches, and the conveyance of military detachments or of individual officers or civil agents of the enemy have generally been admitted to render the ship liable to seizure, and possibly to confiscation. No great importance is likely to be attached in future to the chance of seizing enemy despatches on board neutral vessels, since it now suffices to in-

clude such despatches in the ordinary postal correspondence, in order to render them immune from seizure under the terms of the Convention relative to certain restrictions on the exercise of the right of capture in maritime war, recently signed at The Hague.

36. It would be desirable to arrive at some understanding that the inadvertent conveyance by neutral vessels of a few individuals having the character of analogues of contraband should not entail on such vessels more than the minimum amount of interference necessary for preventing the contraband persons from reaching their destination. His Majesty's Government are aware of the serious difficulties in the way of any arrangement for giving effect to this view. I referred above (§ 33), when discussing the question of the sinking of neutral prizes, to the suggestion, made by some Powers in that connection, that means might be devised for letting the ship proceed after the removal of the contraband by the captor. The suggestion merits special consideration from the point of view of the treatment of contraband persons. If such a course as has been indicated were found to be practicable, the choice would seem to lie between the inconvenience and loss inevitably resulting from a large and valuable neutral ship being brought in for trial before a prize court, and the responsibility of acquiescing in the removal from under the neutral flag, on the demand of a belligerent man-of-war, of persons whose contraband character it might or might not be possible to establish to the satisfaction of the captain of the neutral vessel. If, in these circumstances, the practical difficulties can be overcome, your Lordship should not oppose an absolute refusal to the consideration of this question.

(*f*) *Conversion of Merchant-Ships into War-Ships*

37. The conditions under which merchant-ships may be converted into war-ships were much debated at the second peace conference, and on a number of points an agreement was reached, which was finally embodied in one of the conventions annexed to the final act of the conference. In regard to one important point, however, namely, as to whether such conversion could be legally effected on the high seas, it was found impossible to arrive at any understanding. The preamble of the convention referred to accordingly recites that—

> "Whereas the Contracting Powers have been unable to come to an agreement on the question whether the conversion of a mer-

chant ship into a war-ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected, remains outside the scope of this agreement, and is in no way affected by the following rules . . ."

38. In the presence of this clearly recorded divergence of views it is not possible to expect that the forthcoming conference could bring about agreement as to the existing law, but His Majesty's Government earnestly hope that means will be found to frame a common rule to which the principal naval Powers will bind themselves to conform in future. Such a rule must obviously be in the nature of a compromise, and it would have to be established by way of a convention. Apart from the important question of principle involved, there are two practical considerations which have chiefly weighed with His Majesty's Government in refusing to recognize the right to convert merchant-vessels into ships of war on the high seas. One is the facility which such a right would give to the captain of a merchant-vessel qualified to act as a war-ship to seize enemy or neutral ships without warning. The other is that enemy vessels under the mercantile flag, but suitable for conversion, would be able, as merchantmen, to claim and obtain in neutral ports all the hospitality and privileges which would, under the accepted rules of naval warfare, be denied to them if they were war-ships. Availing herself of these advantages, such a vessel, found in distant waters after the outbreak of hostilities, would be enabled to pass from one neutral port to another until she reached the particular point in her voyage where she might most conveniently be converted into a commerce destroyer. These difficulties might be met by restricting the right of conversion on the high seas to the case of vessels which had previously been specifically and publicly designated by the respective governments as suitable for the purpose and borne on their navy lists; and by subjecting such vessels, while in neutral ports, to the same treatment as belligerent men-of-war. But any other suggestions which may be made in the desired direction, His Majesty's Government will be ready to examine sympathetically.

(*g*) *Transfer of Merchant-Vessels to a Neutral Flag during or in Contemplation of Hostilities*

39. The point of difference between the Powers on the question of the transfer to a neutral flag is, broadly, whether *bona fide* transfers

after the outbreak of war, or within a fixed period before the war, are or are not permissible. Some Powers hold such transactions to be invalid. Great Britain, and several other Powers, adopt the view that, subject to certain conditions, such transfer is legitimate, but that it is for the purchaser to establish the *bona fides* of the transaction. A rule excluding altogether the right of transfer after the commencement of war appears to His Majesty's Government to be too serious a burden to impose on any country which carries on a large trade in building and selling ships. The equity of the case seems to demand that transfer should be permissible, but that the belligerent should be entitled to inquire closely as to the *bona fides* of the transaction, and that the onus should be on those concerned therein to establish that the transfer was complete and the transaction was genuine. His Majesty's Government think that the British Delegates should maintain this view at the Conference. They hope that it may be possible to convince the Representatives of the other Powers of its justice, and that an agreement may be arrived at on the subject. It seems, however, doubtful whether any such agreement could be established on the basis of a statement or an interpretation of existing law, and the solution may accordingly have to be sought by way of a conventional stipulation.

(*h*) *Enemy Property*

40. In considering the question of enemy property, it is necessary to distinguish between property in ships and property in goods. The neutral or enemy character of a ship depends, generally speaking, on the flag. It has been contended that a ship under a neutral flag may nevertheless be treated as an enemy ship if she is owned in whole or in part by an enemy, but the proposition stated in this general way appears to His Majesty's Government to go too far, and to be difficult as well as unjust in application. In existing circumstances its application would sometimes amount to absurdity, because it might be that the ownership by an enemy subject of one sixty-fourth only of a vessel divided between sixty-four private owners would turn that ship into an enemy vessel, whereas a ship owned by a limited company registered in a neutral country would not be an enemy ship, although the large majority of its shareholders might conceivably be citizens or subjects of the enemy State. On the whole, His Majesty's Government consider that it would be right to assent to the principle that the test of the nationality of the ship should be the flag which she is entitled to fly.

41. As regards the ownership of goods, the system of continental jurisprudence is to apply the test of the nationality of the owner, while British practice, followed also by Japan, the Netherlands, and, it is understood, the United States, attributes neutral or enemy character to property according as the owner is domiciled for the purposes of his trade or business in a neutral or enemy country. The principle of domicile appears to His Majesty's Government to be both sounder and more practical. There is a good deal of support for it in the works of writers on international law, and even the French Government, during the war of 1870–1, issued a notice based upon the British view, although the principle was not adopted in their prize decisions. His Majesty's Government doubt whether, as a practical matter, the interest of Great Britain would be materially affected by the general adoption of the continental rule of nationality. Enemy property, except contraband, is, by the Declaration of Paris, exempt from seizure when on board neutral vessels, and it is probable that in any war in which one of the belligerents had a decided naval preponderance, the enemy's mercantile marine would be speedily driven from the seas, and that consequently opportunities for capturing enemy property on board enemy ships would rapidly disappear as the war proceeded. Whilst therefore His Majesty's Government consider that the test of domicile is in every respect preferable, they do not think the principle involved is of such importance as to make insistence upon it a vital matter. Your endeavour should accordingly be to secure, if possible, the general acceptance of the test of domicile, but not to take a determined stand on its maintenance, should such an attitude stand in the way of reaching any agreement.

42. In the general conduct of the negotiations, your Lordship and the British delegates associated with you will ever bear in mind that the British Empire, like every other State, has, when neutral, everything to gain from an impartial and effective international jurisdiction in matters of prize such as it is the purpose of the forthcoming Conference to establish on a sure and solid foundation, and that if, unhappily, the Empire should be involved in war, it will not suffer if those legitimate rights of a belligerent State which have been proved in the past to be essential to the successful assertion of British sea power, and to the defence of British independence, are preserved undiminished and placed beyond rightful challenge. The maintenance of these belligerent rights in their integrity, and the widest possible freedom for neutrals in the

unhindered navigation of the seas are the principles that should remain before your eyes as the double object to be pursued, and should at the same time serve as the touchstone by which either the equity of concessions which you may ask other Powers to make, or the value of compromises to which you may be called upon to assent, can be safely and accurately judged.

I am, &c.

E. GREY.

Report of the British Delegates [1]

FOREIGN OFFICE, *March 1, 1909.*

SIR,

We have the honour to submit the following report on the proceedings of the International Naval Conference, which concluded its sittings on the 26th ultimo.

2. In your circular despatch of the 27th February, 1908, inviting certain Powers to attend the Conference, a specific programme of business was indicated. This programme was adopted and followed, and on nearly all the matters included therein an agreement has been reached, and a Declaration[2] drawn up giving effect to that agreement, in terms which, we trust, will meet with the approval of His Majesty's Government.

3. The work of the Conference was materially facilitated by the preliminary exchange of views between the several Governments which had agreed to send Delegates. This enabled His Majesty's Government, with the valuable assistance of the eminent French jurist, M. Fromageot, whose services had been placed at their disposal by the courtesy of the French Government, to present to the Conference as bases for its discussions a set of draft articles dealing with the questions comprised in the programme, and laying down a number of generally recognized rules of international law which it was found possible to deduce from the statements furnished by the different Powers. It is gratifying to be able to report that the bases of discussion so prepared were freely acknowledged by the foreign Delegates as having brought out with clearness and impartiality the main points which might provisionally be regarded as common ground, although it was inevitable, in the circumstances, that, in some cases, the propositions put forward could not be unreservedly accepted by every Power, and, moreover, that in regard to several subjects of importance, the points of agreement did not go beyond statements of general principles.

4. It is all the more gratifying that, in the course of debate and argument, and by mutual concession, it became possible by degrees to

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[1] *British Parliamentary Paper*, Miscellaneous, No. 4 (1909), p. 93. [Cd. 4554.]

[2] For text of Declaration, see p. 112.

harmonize differences and to elaborate more detailed rules, even as regards matters on which unanimity seemed at first unattainable. That such general agreement was reached has been due not alone to the spirit of determined good-will and the markedly conciliatory disposition evinced by the Delegates of all the Powers represented, to which we desire to bear sincere testimony, but also, we believe, in no small measure, to the fact, already recognized by His Majesty's Government, that, underlying the diversities of practice and theory in relation to the subjects under the consideration of the Conference, there really subsisted a fundamental harmony of conception which but required careful and sympathetic examination in order to reveal a genuine community of guiding ideas, of needs, and of interests between all States, requiring, and capable of being dealt with by, uniform and unambiguous rules.

5. The Conference was opened by you at the Foreign Office on the 4th December, 1908. Under the presidency of the British Plenipotentiary, it proceeded in a series of plenary meetings to give a first reading to the Bases of Discussion submitted by us on behalf of His Majesty's Government, in the course of which a number of amendments were handed in by different delegations. It was then agreed that the necessary detailed discussion would be more fruitful, and an understanding on the various questions at issue be facilitated, if the Conference were to sit in Committee, without the restraint of a formal record of the proceedings in official minutes. The more conversational system of debate thereby rendered possible allowed of a freedom of speech and easy interchange of views which had the most happy results. Under the courteous and efficient chairmanship of M. Renault, the distinguished French Plenipotentiary, whose unfailing tact, unrivalled knowledge, and wide experience materially contributed to the smooth progress of the discussions, the main lines of the general agreement which was subsequently embodied in the terms of the final Declaration, were laid down in this Grand Committee. A more restricted number of members was then selected to constitute an Examining Committee, which proceeded to work out in greater detail the questions presenting special difficulties, whilst the duty of preparing the final text of the rules agreed upon was assigned to a Drafting Committee. A small Legal Committee was also appointed to consider the very technical questions involved in the problem of how to determine what constitutes enemy property. Over the Legal Committee, M. Fromageot presided, whilst M. Renault acted as chairman and reporter of the other committees.

The proceedings of the Conference in plenary meetings are recorded in the minutes, and short summaries were made of the discussions in Grand Committee.[1] Attached to these minutes is, among other papers, the General Report to the Conference prepared by M. Renault.[2] We desire to call your particular attention to this document, which contains a most lucid explanatory and critical commentary on the provisions of the Declaration. It should be borne in mind that, in accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and that consequently foreign Governments and Courts, and, no doubt also, the International Prize Court, will construe and interpret the provisions of the Declaration by the light of the commentary given in the report.

6. In proceeding to report our action in regard to the several items of the programme of the Conference, it will be convenient to follow the order in which the subjects stand arranged in the successive chapters of the Declaration. We shall confine ourselves in the main to points of special importance, and more particularly to those on which the provisions of the Declaration do not altogether harmonize with the old rules of the British prize courts.

(i) *Blockade*

7. It is a matter for congratulation that in respect to the important subject of blockade we have been able to secure full recognition of the principles on which you directed us to lay stress. The twenty-one articles constituting the first chapter of the Declaration contain a body of rules which substantially correspond to the practice of this country as upheld by the decisions of British prize courts. The vexed question of the distance from the blockaded coast at which vessels attempting to break blockade may be captured, has been solved, as suggested in paragraph 22 of our instructions, by restricting the geographical limits within which capture is authorized to the area of operations of the blockading forces. As indicated in paragraph 21 of those instructions, this solution is quite in harmony with the facts of the various reported decisions of our prize courts.

8. The view hitherto upheld by certain Powers that no vessel can be

[1] For these papers see *British Parliamentary Paper,* Miscellaneous, No. 5 (1909), pp. 126–230. [4555.]

[2] See p. 130.

seized for breach of blockade until after a special notification of the existence of the blockade has been entered on her papers by an officer of the blockading squadron, has been abandoned as no longer in harmony with the conditions and requirements of modern warfare. The non-applicability of the doctrine of continuous voyage to cases of blockade-running has been definitely and unanimously recognized by article 19 of the Declaration.

(ii) *Contraband*

9. The negotiation of an agreement on the subject of contraband, and the framing of a body of rules acceptable to all parties and dealing comprehensively with the numerous points of controversy which have in the past so frequently given rise to serious international complications under this head, proved one of the most arduous tasks of the Conference. The settlement effected will no doubt be scrutinized with proportionate interest. We believe it will be found to be not merely satisfactory from the British point of view, but to constitute an effective safeguard of the best interests of neutrals in general, whilst preserving all legitimate rights of belligerents.

10. Proposals made to the Conference for a statement of the proper limitation of the belligerent's admitted right to suppress contraband trade moved, in the main, on two different, though not altogether divergent, lines. Endeavours were made, on the one hand, to define more clearly the articles which may be treated as contraband, and, on the other, to narrow down the conditions under which contraband can be lawfully seized. The renewal of the suggestion already put forward at the second Peace Conference at The Hague, that conditional contraband should be abolished, had, in spite of the support of a few Powers, on the whole so unfavourable a reception as to allow of no hope of its being accepted by the present Conference with anything approaching unanimity. In these circumstances, we decided to concentrate our efforts on obtaining as strict as possible a limitation and definition of the term contraband, and on securing the adoption of provisions for the exaction of rigorous proof by the captor for the establishment of the contraband character of goods seized and taken before a prize court. Reverting to certain suggestions made in your general instructions to the British Delegates at the second Peace Conference, we proposed the setting up of three lists, specifying (1) everything that may be treated as absolute contraband; (2) the kinds of goods which may become con-

ditional contraband; and (3) a number of articles which shall in no case be declared contraband.

11. The list of absolute contraband now adopted is that which had been previously agreed upon in the sub-committee on contraband of the second Peace Conference in 1907, and for which you instructed us to press. It was not without considerable difficulty that a unanimous solution of this question was arrived at. Several of the delegations desired to see a material enlargement of the list. We ourselves as well as our Japanese colleagues were most anxious to secure the elimination from it of horses and mules, which would no doubt be more appropriately included in conditional contraband. It became evident, however, that if each Power were to stand out for its own demands, no general agreement would be possible, and that unless the list, which had been settled at The Hague as the result of much discussion and many mutual concessions, were adopted without alteration, it might be difficult to prevent its being considerably enlarged by the addition of articles which ought to be excluded. The view in favour of accepting the list as it stands finally prevailed, it being agreed on all hands that the establishment of a strictly defined and generally recognized list, even if slightly defective, would be infinitely preferable to the continuance of the uncertainty which had resulted from the conflicting claims and the practice of different nations in this regard hitherto. The stipulations permitting additions to the list of absolute contraband restricts such additions to articles which can serve no other than warlike purposes. It was admitted that for the present no such article could be indicated which was not already included in the list agreed upon, but there was a general desire to preserve in this respect the rights of belligerents in future, should discoveries of inventions that could not now be foreseen lead to the adoption of new weapons, projectiles, or other means of offence or defence.

12. Our instructions intimated that a list of conditional contraband, although not a matter of essential importance, would yet be desirable, if only because it would constitute a recognition of the fact that it is not every article going to a place occupied by the armed forces of a belligerent that can be treated as conditional contraband. We accordingly proposed such a list, and we obtained its acceptance by the Conference. We were able to go farther, and have secured the adoption of a free list which will place it beyond the power of belligerents in future to treat as contraband the raw materials of some of the most important of

our national industries. In preparing this list we had the advantage of the technical advice of the Board of Trade. We have succeeded in including substantially all the items suggested by them, and we trust that the free list now constituted will afford a welcome guarantee of security to valuable branches of British commerce. In order to make it clear beyond doubt that the fact of not appearing in the free list does not necessarily relegate a particular class of goods to the category of those which may be declared contraband, we thought it right to press for the provision embodied in article 27 that in no case may anything be declared contraband that can not be used for warlike purposes.

13. It was recognized in our instructions that almost any articles going to the armed forces of a belligerent might plausibly be contended to be capable of acquiring a contraband character. This view being also held by all the delegations, it was impossible for us to resist the adoption of a clause giving the right of freely adding to the list of conditional contraband, subject to due notice being given. The right, however, to confiscate articles added to the lists of either absolute or conditional contraband is, under article 43 of the Declaration, made conditional upon the master of the vessel carrying such articles being aware, at the time of sailing, of their contraband character, failing which the goods can only be seized on payment of full compensation. The effect of this rule is that the neutral shipowner will always have previous knowledge of what belligerents will treat as contraband. He will know, without special notice, that goods falling under the heads enumerated in the above lists of absolute and conditional contraband, can only be conveyed to the enemy at the risk of seizure by a belligerent; he will have the certainty that no liability attaches to the carrying of goods included in the free list, and he can rely on receiving due notice of any additional articles being declared contraband. We feel confident that this large measure of certainty, which has not hitherto existed, will prove of material benefit to all neutral trade and shipping. The provisions as to proof of destination required to constitute a cargo conditional contraband are, we think, reasonable, and such as will involve no injustice to neutral commerce.

14. To obtain the advantages to be secured by the establishment of these lists, some concession had to be made to the Powers which have hitherto refused to recognize the doctrine of continuous voyage. The total abandonment of that doctrine was at first demanded in return for the acceptance of the lists, and this demand was pressed with much in-

sistence. As the Powers by whose prize courts the doctrine has always been upheld and applied were naturally reluctant to renounce a right which they claimed to be founded in logic and justice, and as, on the other hand, its abandonment was made a vital issue by those who refused to acknowledge it, there seemed at one time to be a danger of the complete breakdown of the Conference on this point. Ultimately a compromise was arrived at which permitted an adjustment of the conflicting views and interests on lines recognized to offer advantages to either side, and this compromise was accepted by us after obtaining your instructions thereon. It was agreed that the doctrine of continuous voyage should be maintained as regards absolute, but given up as regards conditional, contraband. We had urged that to forbid all interference with the trade in arms and other articles of absolute contraband carried on by neutrals, so long as consignments were ostensibly destined for a neutral port, however obvious (and, possibly, openly declared) their ultimate hostile destination, would be to set up a rule which, owing to its reasonableness, would almost certainly be disregarded by a hard-pressed belligerent, and which would, moreover, expose the neutral Governments whose subjects claimed to carry on such trade, to all the risks of diplomatic pressure and peremptory remonstrance on the part of a powerful belligerent, and so tend to enlarge the field of warlike operations.

15. These objections did not seem to apply with equal force to the trade in conditional contraband. All neutral shipping has a natural interest in being freed as completely as may be from the possibility of vexatious interference to which the doctrine of continuous voyage might tempt a belligerent to resort for the mere purpose of harassing indirectly the enemy's trade by striking at that of neutrals suspected of supplying him with conditional contraband, even at the risk of having eventually to pay compensation for certain number of unlawful seizures. On the other hand, it seems doubtful whether, under the conditions of modern commerce, the strictly legitimate exercise of the right to seize goods destined for the armed forces of the enemy, regardless of the enemy or neutral character of the port where the goods are to be landed, confers any far-reaching advantage on a State at war with a continental country which can freely draw its supplies from neighbouring neutral territories. It would always be easy, in the case of conditional contraband which, unlike absolute contraband, does not, by its very nature, suggest the use to which it will be put, to evade all liability to capture

by consigning such goods to neutral ports under conditions which would make it practically impossible for a captor to prove their final destination. It may therefore be said that the benefit derived by a State, when belligerent, from the right to apply the doctrine of continuous voyage to shipments of conditional contraband is narrowly limited in cases where the enemy territory is easily accessible through neutral ports, and is largely balanced, if not outweighed, by the interest which such State, as a neutral, would have in a definite prohibition of any belligerent molestation of the trade between two neutral ports except trade in absolute contraband. It was for these reasons, and impressed with the advantage of securing a definite and comprehensive settlement of the whole question of contraband, that we felt justified in applying for your assent to the compromise above described. It is only as regards countries having no maritime frontier that the doctrine of continuous voyage has been unanimously acknowledged to remain applicable in respect of both absolute and conditional contraband.

16. The third important question arising under the head of contraband, which occupied the attention of the Conference, was that of the liability to condemnation of the ship engaged in contraband traffic. It soon became evident that the principle of making liability depend on the proportion which the contraband on board bears to the total cargo was the one most likely to find general acceptance. There was, however, an embarrassing diversity in the actual proportion proposed for adoption by various delegations. It was not without considerable difficulty, and only after prolonged debates, that a unanimous pronouncement was obtained in favour of fixing the proportion at one-half, as suggested in our instructions. This solution has an important bearing on the question of the sinking of neutral prizes, to which we shall refer later on.

17. It was strongly urged that if the liability of the ship to condemnation was limited to cases where the contraband carried exceeded one-half of the cargo, provision ought to be made for imposing some lesser, but yet substantial, penalty on a ship guilty of carrying contraband in a smaller proportion. A system of fines was proposed, and defended as a necessary deterrent. We opposed any innovation of this nature, pointing out that a ship was, in fact, heavily punished already by the severe losses involved in being carried to a belligerent port and there detained pending the decision of the prize court. It was finally agreed that the case would be sufficiently met by the general adoption of

the British practice, whereby the ship may be condemned in the amount of the costs and expenses incurred by the captor on account of the proceedings in court, and the care and custody of the ship during those proceedings.

18. Careful consideration was given to the question, raised in paragraph 33 of our instructions, whether any satisfactory arrangement could be devised for allowing the immediate removal by the captor of any contraband found on board a neutral vessel. Proposals were put forward by several delegations. The most far-reaching was one submitted by Austria-Hungary, under which the neutral vessel carrying contraband was to be given the right to proceed on her way without further molestation if the master was ready to hand over the contraband to the captor on the spot, a proviso being added which made it necessary that a subsequent decision of a prize court should intervene in order either to validate the transaction or to decree compensation where the captor should have been proved to have acted wrongfully. In this form, the proposal did not meet with general support. It was objected that to concede an absolute right in the above terms to the neutral would constitute an unjustifiable interference with the legitimate rights of belligerents, and that, moreover, the rule would be found, in practice, unworkable. The Conference therefore fell back upon the clause now embodied in the Declaration as article 44, which goes no further than authorizing the handing over of contraband, or its destruction, on the spot, by common agreement between captor and neutral, subject to the subsequent reference of the case to a prize court. It is not anticipated that it will be possible to apply this rule in very numerous instances, as, under modern conditions of maritime commerce, the transshipment or destruction of cargo on the high seas is likely in most cases to present serious or insuperable difficulties. But, so far as it goes, the rule may afford a welcome measure of relief in favourable circumstances.

(iii) *Unneutral Service*

19. In the chapter of the Declaration dealing with the question of unneutral service, a distinction is made between two classes of acts. The less important offences against the law of neutrality described in article 45 will render the vessel engaged in such unneutral service liable to condemnation by a prize court, or to destruction under the special rules

making such destruction lawful in certain exceptional circumstances, which are explained in a later portion of the present report. The graver infractions of neutrality with which article 46 deals, will entail upon the guilty ship the loss of her status as a neutral, and will authorize a belligerent to treat her as if she were an enemy merchant-vessel. One of the effects of this provision is to remove such ship from the jurisdiction of the International Prize Court except in so far as that court may be called upon to decide whether the facts alleged against her were in reality such as to bring her under the operation of article 46 of the Declaration. The solution so arrived at is in accordance with the suggestion contained in section 34 of our general instructions.

20. The Conference had to consider the difficult question of whether and in what circumstances the removal of contraband persons from under a neutral flag by a belligerent man-of-war was sanctioned by the law of nations. According to the rules followed by various continental countries, the removal of such persons can be claimed and enforced as of right. No such general right has hitherto been admitted by this country, although what may be considered to be an exception was recently made in article 12 of the Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War. Under that article, "any war-ship belonging to a belligerent may demand the surrender of sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant-ships, yachts, or boats, whatever the nationality of such vessels." When discussing these provisions, the British delegates at the second Peace Conference made it clear that the right thereby conceded constituted, in their opinion, an innovation in international law and practice, whilst the representatives of other Powers, notably France, maintained that the principle involved formed part of the existing law. The same divergence of view arose on the present occasion.

21. We had, however, to take account of the considerations, set forth in paragraph 36 of our instructions, in favour of an arrangement being made whereby, in certain circumstances, large passenger steamers under a neutral flag should, if possible, be freed from the costly inconvenience of being taken into a prize court and there detained, perhaps for a prolonged period, merely because a few individuals forming part of the armed forces of a belligerent, but whose military status was unsuspected by the owners or captain of the vessel, were among her passengers. On a careful review of the question in all its bearings, we came

to the conclusion, shared by all the other members of the Conference, that, on the whole, the interests of neutrals, and particularly of those Powers which possess a numerous fleet of ocean liners regularly engaged in passenger traffic, would best be served by allowing a belligerent to remove from a neutral ship, and make prisoners of war, any persons found on board that are actually embodied in the armed forces of the enemy.

22. Cases of this kind could not be brought before the International Court in view of the strict limitation of its jurisdiction under article 3 of the Prize Court Convention. We nevertheless thought it right to accept the view of the majority of the Delegates, and, after some hesitation, all those who had in the first instance put forward objections to the admission of the article, decided on its acceptance and embodiment in the Declaration, where it appears as article 47. It was generally agreed that, whilst in the absence of a competent jurisdiction no penalty could be provided for any mistake made by a belligerent, whether wilfully or unintentionally, in seizing and taking off persons not in fact embodied in the enemy forces, a belligerent officer would incur the gravest responsibility by such action, and would lay his country open to serious diplomatic remonstrance and to demands for full satisfaction for the violation of the neutral flag. We feel convinced that the risk of such consequences will always ensure the exercise of the greatest caution by the commander of a belligerent man-of-war in demanding the handing over of contraband persons.

(iv) *Destruction of Neutral Prizes*

23. The understanding arrived at on the subject of the destruction of neutral prizes represents a compromise, in negotiating which we have endeavoured to adhere as closely as possible to the lines traced for our guidance in our general instructions. Starting from the position that if any agreement was to be effected at all, the right to destroy would, in some form or other, have to be admitted, we directed our efforts mainly to obtaining adequate safeguards that the exercise of such right, if conceded, would be restricted to exceptional emergencies, and that, if the right were abused, due reparation would be assured to the injured neutral interests. We believe that this is guaranteed by chapter IV of the Declaration. It is headed by the enunciation of the general rule that neutral prizes must not be destroyed but brought in for adjudication. Then follow, in six articles, provisions authorizing and regulating

a departure from this rule in certain circumstances and on certain conditions.

24. In the first place, a neutral vessel may not be destroyed which would not, if taken before a prize court, be subject to condemnation. Not every infraction of the rules respecting contraband and blockade renders the ship liable to that penalty. It is from this point of view that the provision under which such liability has, as regards the carriage of contraband, been limited to cases where the contraband exceeds one-half of the cargo, derives a special significance. Not only will all cases where contraband is carried in smaller proportions be excluded from the operation of the rule permitting destruction, but it is to be expected that where the captor has difficulties in correctly estimating the actual proportion between the contraband found on board and the total cargo, and where, consequently, he is in doubt whether the prescribed proportion exists—and this will happen not infrequently—he will hesitate to proceed to an extremity which, if subsequently found to be unjustified, may expose his Government to heavy claims for compensation. The Delegates representing those Powers which have been most determined in vindicating the right to destroy neutral prizes declared that the combination of the rules now adopted respecting destruction and liability of the ship practically amounted in itself to a renunciation of the right in all but a few cases. We did not conceal the fact that this was exactly the object at which we aimed.

25. The second material safeguard to neutrals consists in the provision that destruction may be resorted to only in cases where, to take the prize into a national port, would endanger the safety of the captor's ship or the success of the operations in which she is at the moment engaged. The Conference was unable to agree upon a more precise definition of the circumstances of "exceptional necessity" which constitute such danger. We endeavoured to obtain express recognition for the proposition that the mere inability to spare a prize crew did not constitute an element of danger in the sense of the proviso in article 49. It was, however, thought that, unless the circumstances of exceptional necessity could be exhaustively enumerated—which would clearly be impracticable—it would be better not to make special mention of any one particular contingency as not covered by that term, since this might be held to justify the conclusion that other eventualities, not specially excluded, were so covered. The solution which found favour was to confer on the prize courts, and in the last resort on the International

Court, a wide discretion in judging of the exceptional character of the circumstances that may be alleged as justifying the destruction of a neutral vessel, in the belief that this would ensure the faithful observance of the letter and spirit of the rule, and prevent any improper application of its provisions by an unscrupulous belligerent. It has accordingly been laid down that, in all cases of destruction of neutral vessels brought before a prize court, the captor shall be called upon, in the first instance, to prove the existence at the time of capture of those exceptional circumstances which alone, under article 49 justify such a step. Should the captor fail to establish this to the satisfaction of the court, full compensation must be paid, whatever might otherwise have been the liability of ship or cargo to condemnation. It will be observed that if innocent cargo is destroyed with the vessel, the owner is, under article 53, to be indemnified.

26. Having once recognized, with certain reservations, the right to destroy neutral vessels before adjudication in a prize court, we could not reasonably refuse to admit the extension of that right to cover, subject to the same reservations, the destruction of contraband goods found on board such vessels in a less proportion than one-half of the total cargo. Ultimately the justification of the destruction of a ship carrying contraband flows from the right of the belligerent to prevent contraband from reaching his enemy if he can. If, to this end, a ship liable to condemnation by a prize court may be sunk, it seems to follow, *à fortiori,* that in cases where a ship is not so liable, the contraband itself found on board may be destroyed, provided the belligerent is similarly circumstanced and under the same obligation to prove his constraint by an exceptional necessity before a prize court, as is prescribed in the case of the destruction of a neutral ship. We have accordingly agreed to the clause to this effect which appears in the Declaration as article 54.

(v) *Transfer of Merchant-Vessels from a Belligerent to a Neutral Flag*

27. The point of view which we were directed, in section 26 of our general instructions, to maintain in dealing with the question of the transfer of merchant-vessels from a belligerent to a neutral flag, has substantially prevailed in the agreement arrived at, on this subject. The effect of the rules embodied in articles 55 and 56 of the Declaration is, first, to distinguish broadly between two periods: that preceding, and that following, the outbreak of hostilities. The general principle laid

down is that *bona fide* transfers are valid, whether effected in one period or the other. But the burden of proof of such *bona fides* is differently distributed: it falls on the belligerent in respect of transfers made before the outbreak of war, and on the neutral in respect of transfers made subsequently. Subject to this general principle, a number of subsidiary rules are laid down. The period before the outbreak of war is again subdivided into two: (a) a period comprising the thirty days immediately preceding the opening of hostilities, and (b) the indeterminate period preceding those thirty days. A transfer made at least thirty days before war breaks out is good, unless it can be shown that it was not either absolute, complete, or in accordance with the municipal laws of the two countries interested, or that the control of the ship and the profits earned by her remained in the same hands as before the transfer. On the other hand, the validity of a transfer effected during the period of thirty days may be challenged, not only on the above grounds, but also on production of proof that it was made with a view to evade the consequences which the retention of enemy nationality during war would entail.

28. In order to facilitate the question of proof, it has been thought desirable to induce vessels, on being transferred to another flag in time of peace, to carry the bill of sale among the ship's papers during the two months succeeding the transfer. It is accordingly provided that, in the case of vessels transferred within sixty days before the outbreak of war, the fact that the bill of sale is not on board will render the transfer suspect, and have the effect of shifting the burden of proof as to the *bona fides* of the transaction from the captor on to the neutral. As the captor, in such circumstances, will be considered to have "good reasons" for bringing in the vessel, the latter, in accordance with article 64 of the Declaration, forfeits all right to compensation even if the prize court should eventually decide that the transfer was good.

29. The provisions respecting transfers made during a war are less complicated. The general rule is that such transfers are considered void unless it be proved that they were not made with a view to evade the consequences which the retention of enemy nationality during war would entail. This is only another way of stating the principle already explained that transfers effected after the outbreak of hostilities are good if made *bona fide,* but that it is for the owners of the vessels transferred to prove such *bona fides.* In certain circumstances, speci-

fied in the second paragraph of article 56, *mala fides* is presumed without possibility of rebuttal. The provisions under this head are practically in accord with the rules hitherto enforced by British prize courts.

(vi) *Enemy Character*

30. There was a general concensus at the Conference that the enemy or neutral character of a ship should be held to be absolutely determined by the flag she is entitled to fly. Such a rule has the great merit of simplicity, and is in accordance with our instructions.

31. The question was raised in this connection whether a ship shall be deemed to lose her neutral character if she engages in a trade which, before the war, was closed to any but the national belligerent's flag. Great Britain has formerly, under the well-known "rule of 1756," claimed to treat such ships as enemy ships, and several other Powers represented at the present Naval Conference were disposed to take the same view. Strong opposition was, however, encountered on the part of the majority of the Delegates, and as no unanimous solution could be arrived at, it was agreed to leave the question open, to be ultimately decided by the International Court if brought before it.

32. More difficult than the question of how to determine the nationality of a ship was that of deciding the enemy or neutral character of goods on board. A special committee of the Conference, on which all the delegations were represented, was at work for a prolonged period, endeavouring to formulate a rule on this subject which could be accepted by all; but the fundamental differences underlying the systems of jurisprudence which rely upon the criterion of domicile and of nationality respectively, proved incapable of being bridged. The adherents of the rival systems were evenly divided in the committee. Having regard to the consideration to which attention is called in our general instructions, that the practical application of any rule on the subject of enemy property is bound to be narrowly restricted, and realizing that any definite settlement would probably be preferable to the continued uncertainty as to the rules which the International Court would apply on this subject, we were disposed to make a concession and agree to the adoption of the principle of nationality, if unanimity could be attained on this basis. This condition, however, was not fulfilled, as the Powers were not all prepared to accept such a solution. It was inevitable, in these circumstances, that this question also should remain an open one. Whilst we consider this to be a matter for sincere

regret, we do not fail to recognize that, if the equal division of votes in the committee of the Conference may serve as some indication of the way in which the question may be viewed generally by the judges of the International Court, it is by no means certain that they will not eventually adopt the principle of domicile.

(vii) *Convoy*

33. In pursuance of the directions contained in section 18 of our general instructions, we intimated to the Conference that Great Britain was willing to recognize the immunity from visit and search of neutral vessels under convoy, as one of the now generally accepted principles of international law. This attitude on our part naturally smoothed the way for the adoption of the rules comprised in chapter VII of the Declaration. Some controversy arose as to the procedure to be prescribed in cases where it was found that the officer commanding the convoy had been deceived, and that contraband was in fact carried on board a vessel or vessels under his convoy. The solution adopted, as embodied in article 62, vindicates in every respect the freedom from belligerent interference of the convoying officer. It is he who alone is to investigate any allegations made against a particular vessel or vessels forming part of his convoy, and only if he is satisfied of their truth is he called upon to withdraw his protection from the offending vessels. These provisions seem to us to be the logical deductions to be drawn from the principle of immunity if once admitted, and we therefore agreed to them. It may be well to point out that any failure on the part of the commander of the convoy to carry out the obligations imposed upon him under article 62 could not be redressed by resort to the International Court, which would have no jurisdiction in such a matter. The injured belligerent would have to seek his remedy by way of diplomatic representation.

(viii) *Resistance to Search*

34. A short article has been included in the Declaration with a view to provide a definite rule as to the liability of a neutral vessel which resists the enforcement of the belligerent's right of visit and search. Cases of this kind may come before the International Court, and the general acceptance of a guiding rule was therefore thought desirable. It has been agreed that forcible resistance on the part of a neutral vessel which a belligerent man-of-war proposes to search exposes such

vessel to all the natural consequences of an armed conflict, including the risk of being sunk on the spot. If, as the result of such conflict, she is not sunk, but captured, she will be liable to condemnation in a prize court, whilst the cargo will be treated as if it were embarked on an enemy ship. It was made quite plain in the course of the discussion in committee on this question, and M. Renault has clearly explained in his General Report, that it is only the use of force in offering resistance which entails these consequences, and not the mere attempt to escape visit and search by taking to flight.

(ix) *Compensation*

35. It has been our endeavour to obtain the recognition of liberal and equitable rules in respect of payment of compensation to injured neutrals. We are glad to be able to report that our efforts in this direction have met with a fair measure of success. Article 64 of the Declaration establishes the general principle that where a neutral vessel has been seized and brought in, compensation is due to the owners of vessel or cargo if it is found by the prize court that there was not sufficient reason to justify the seizure. The article also covers the case of a ship captured, but subsequently released without being brought to judgment. Nothing is laid down as to the precise manner in which damages should be assessed. It has been thought wisest to leave full discretion in this respect to the courts.

(x) *Conversion of Merchant-Vessels into Men-of-War on the High Seas*

36. The one subject of the programme which has found no mention in the Declaration is the conversion of merchant-vessels into men-of-war on the high seas. The question is one of those which had been left unsolved by the second Peace Conference, and so decided was the division of opinion subsequently revealed by the memoranda exchanged by the several governments before the meeting of the present Naval Conference that it had been found impossible to state, in the shape even of a mere Basis of Discussion, an underlying general principle commonly accepted. In our instructions the hope was nevertheless expressed that some means might be found of reconciling the opposing views and to unite on the basis of a compromise, for which we were allowed a fairly wide discretion. We regret, however, that, in this

instance, all our efforts in bringing about an understanding were unsuccessful. We did not fail to put forward the arguments which, in the view of His Majesty's Government, militate against the recognition of an unrestricted right of conversion on the high seas, and we endeavoured in vain to obtain, in return for a recognition of such right subject to proper limitation, some guarantees against the abuses to which it appears to be obviously liable. We were met with a refusal to make any concessions or to abate one jot from the claim to the absolutely unfettered exercise of the right, which its advocates vindicate as a rule forming part of the existing law of nations. In these circumstances we felt that we had no option but to decline to admit the right, and the result is that the question remains an open one.

General Observations

37. The "final provisions," comprising articles 65–71 of the Declaration, lay down the conditions under which it is to come into force and be applicable. They would not call for any special remarks, except for the fact that they invest the Declaration with a conventional character. This seems therefore the place for entering into some explanation concerning the form and nature of the agreement concluded.

38. Our general instructions described the object for which the Naval Conference was assembled, to be that of "formulating in precise terms a set of rules relative to the law of prize, which should be recognized as embodying doctrines held to be generally binding, as part of the existing law of nations." It was, however, admitted to be unlikely that a unanimous agreement would be arrived at on all points on the basis of a definition of existing law. Moreover, it was obviously desirable that the body of rules adopted as representing that law should be complemented by stipulations dealing with other points not thereby covered, by which the Powers might be willing to bind themselves for the future. His Majesty's Government therefore proposed that two instruments should be negotiated: one, a declaration of existing law; the other, a convention, ancillary thereto and supplementing its provisions by additional rules accepted as operative between the parties. The Conference thought it wise to proceed in the first place with drafting the rules, and to allow the question of the exact form in which they were to be ultimately set up, to stand over until the whole ground actually covered could be surveyed. When finally the results of its discussions were reviewed, it became evident that there would be some

practical difficulty in rigorously following the course suggested. It was, in fact, found almost impossible to agree upon a clear line of division between rules generally accepted as embodying existing law, and rules admitted to be new. The reason was, in many cases, not so much that the rules set up new principles, or, indeed, involved any serious innovation of practice, but that some slight modification or development, which it had been necessary to introduce, was, even if in entire harmony with the spirit of the law as acknowledged to be in force, held by some Powers to preclude a rule being described as part of the existing law, because it was not strictly covered by the letter of their prize legislation. Such a hard-and-fast criterion of classification may, according to the British view of international law as a living thing, capable of development and adaptation from time to time to new conditions, seem inconveniently rigid and defective, but continental Powers whose legal systems are entirely built up on the strict application of the minute prescriptions of statutory codes, and whose view of international law takes little account of any but their own national regulations, hesitate, not perhaps unnaturally, to accord recognition to rules and practices not in absolute accord with the letter of those regulations.

39. In these circumstances, absolute insistence on the definite separation of new rules from statements of existing law, and on their embodiment in different instruments, would in all likelihood have led to the Declaration being reduced to a comparatively small number of articles, restricted, in the main, to the enunciation of broad principles, whilst most of the important details respecting their applications, together with many rules even now widely applied but not perhaps textually recognized hitherto as generally binding by one or another of the signatory Powers, would have had to be relegated to the supplementary convention. Such a result it seemed to us desirable to avoid if possible. After much discussion and argument with our foreign colleagues, we felt convinced that it would be better to have only one instrument, covering all the rules agreed upon, so long as we obtained recognition of the fact—which was not seriously disputed—that, as a body, those rules do amount practically to a statement of what is the essence of the law of nations properly applicable to the questions at issue under present-day conditions of maritime commerce and warfare. We believe we have clearly vindicated this principle by securing the insertion at the head of the Declaration of the preliminary provision which dominates the whole series of articles. It is therein declared that

in the opinion of the signatory Powers the rules contained in the Declaration *"correspond in substance with the generally recognized principles of international law."* The significance of this pronouncement, which is further enhanced by the recitals of the preamble, is well brought out in the introductory portion of M. Renault's general report. He explains how the provisions of the Declaration are in the first instance binding upon the signatory Powers in virtue of their express engagement, under article 66, to give effect thereto in their national prize courts and in the instructions to their naval officers. There is this further consequence that the International Court will have authority to apply the rules generally, as being in conformity with the accepted principles of international law, quite apart from the specific obligation which the signatory Powers undertake to obey them in their relations with each other.

40. Theoretically it is true that in a case where a non-signatory Power appearing before the International Court declined to acknowledge any liability under some rule of the Declaration which it did not admit to be of general application, the court would be free to hold that, in the presence of the opposing contentions as to what the law was, no generally recognized rule governing the subject in dispute existed. The consequence, however, of this would be that, under article 7 of the Prize Court Convention, the court would have to give judgment "in accordance with the general principles of justice and equity." Is it likely that a court having a majority of judges whose countries have negotiated, and subscribed to, the Declaration of London would come to any other conclusion than that the rule upon which the States most directly concerned had, in spite of wide divergence in geographical position, in historical traditions, and in national interests, unanimously agreed, truly represented the justice and equity of the case? We do not therefore think we are going too far in declaring our belief that the end which His Majesty's Government had in view in calling the Naval Conference had been practically realized so far as concerns the general obligatory character of the body of rules laid down. To what extent the rules themselves will safeguard the legitimate rights and interests of Great Britain, and how far their claim to general validity and therefore to general respect is made good by their inherent justice, and by their conformity with the true law of nations, of which, according to the view always upheld by this country, it is an essential feature that it should flow from the recognition of the principles of right and

of fair dealing common to all civilized peoples, are questions which we might leave to the judgment of His Majesty's Government.

41. It remains for us to speak of a matter with which, although not within the provinces of its programme, the Conference was called upon to deal in consequence of a proposal submitted at a late stage of the proceedings by the United States' delegation. The proposal, of which the full text will be found set out in annex 65 to the minutes of the Conference[1] was intended to smooth the way for the ratification of the Prize Court Convention by the United States, whose constitution appears to place insurmountable obstacles in the way of the acceptance of the procedure governing the recourse to the International Court as laid down in that convention. In order to overcome the difficulty which, it was explained, precluded any right of appeal being allowed from a decision of the United States' Supreme Court, the Conference was asked to express its acceptance of the principle that, as regards countries in which such constitutional difficulty arose, all proceedings in the International Prize Court should be treated as a rehearing of the case *de novo,* in the form of an action for compensation, whereby the validity of the judgments of the national courts would remain unaffected, whilst the duty of carrying out a decision of the International Court ordering the payment of compensation would fall upon the government concerned.

42. The proposal was further coupled with the suggestion that the jurisdiction of the International Prize Court might be extended, by agreement between two or more of the signatory Powers, to cover cases at present excluded from its jurisdiction by the express terms of the Prize Court Convention, and that in the hearing of such cases that court should have the functions, and follow the procedure, laid down in the Draft Convention relative to the creation of a Judicial Arbitration Court, which was annexed to the Final Act of the second Peace Conference of 1907.

43. Great hesitation was felt in approaching these questions. It was undeniable that they lay wholly outside the programme which the Conference had been invited to discuss, and to which the Powers accepting the invitation had expressly assented. It was, however, not disputed that so much of the United States' proposal as related to the difficulties in the way of the ratification of the Prize Court Convention was

[1] See *British Parliamentary Paper,* Miscellaneous, No. 5 (1909), p. 253. [Cd. 4555.]

in so far germane to the labours of the Conference, as these also were avowedly directed to preparing the way for the more general acceptance of the Prize Court Convention. As it must clearly be desired by all countries interested in the establishment of the International Prize Court that the United States should be one of the Powers submitting to its jurisdiction and bound by its decisions, the Conference thought it right, notwithstanding its lack of formal authority, to go so far as to express the wish ("voeu") which stands recorded in the final Protocol[1] of its proceedings, and of which the substance is that the attention of the various governments represented is called by their delegates to the desirability of allowing such countries as are precluded by the terms of their constitution from ratifying the Prize Court Convention in its present form, to do so with a reservation in the sense of the first part of the United States' proposal.

44. On the other hand, the question of setting up the Judicial Arbitration Court, which seemed to have no necessary connection with the Prize Court Convention, was decided by all the Delegations, except that which had brought it forward, to be one which the Conference could not discuss. It was observed with conclusive force that the Conference was attended by delegates of the principal naval Powers, whose unanimous agreement on questions of naval warfare might not unreasonably be expected to carry weight with other States, but which had neither formal nor moral authority for taking up a scheme that had failed to find general acceptance at The Hague owing to the decided opposition of the very Powers not represented at the present Naval Conference.

45. In conclusion we desire to bring to your notice the admirable way in which we have been served by the secretaries attached to our delegation. Mr. Norman, who acted as Secretary-General of the Conference, earned the marked approval of all its members by the painstaking and thoroughly efficient manner in which he organized and superintended the business arrangements of so large an assembly. The secretariat was composed of the secretaries of all the delegations, and at our last meeting M. Renault, who, as Chairman of Committee, was necessarily in the closest touch with the secretariat, expressed, in terms which were warmly applauded, the appreciation by the Conference of the highly satisfactory manner in which its duties had been performed.

[1] See p. 187.

As all the proceedings were in French, it was unavoidable that a large and important share of the work connected with the preparation and revision of the minutes fell to the secretaries of the French delegation, who most readily devoted to this, at times, arduous work their remarkable skill and unfailing patience. We feel that, as representatives of the Power whose plenipotentiary had the honour of presiding over the Conference, we are under a special obligation in this respect to M. de Sillac and the Baron Clauzel, which we wish gratefully to acknowledge. Both as regards the general work of the Conference and in assisting more directly the British Delegation, Mr. Norman was ably seconded by Mr. Tufton, whose zeal, capacity, and unwearying attention at all times much facilitated our labours, and by Mr. Bray, whose knowledge, judgment, and advice proved on more than one occasion of the greatest service in dealing with technical questions of importance.

We have the honour to be,
Sir,
Your most obedient servants,
DESART.
C. L. OTTLEY.
EDMOND J. W. SLADE.
EYRE A. CROWE.
C. J. B. HURST.

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