The Second peace conference (paragraph 2 of the ...

George Breckenridge Davis

The Second Peace Conference

(Paragraph 3 of Programme)

The Laws and Usages of Maritime Warfare

WORKING MEMORANDA

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and Rear-Admiral CHARLES S. SPERRY

(Confidential for the United States Delegates)

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THE LAWS AND USAGES OF MARITIME WARFARE.

PREPARATION OF A CODE.

The third part of the programme as set forth in the Russian ambassador's letter of April 3, 1906, provides for the—

Preparation of a convention regarding the laws and usages of naval warfare, concerning the special operations of naval warfare, such as the bombardment of ports, cities, and villages by a naval force; placing of torpedoes, etc.; transformation of merchant vessels into war vessels; private property of belligerents at sea; period granted merchant vessels in order to leave neutral or hostile ports after the beginning of hostilities; rights and duties of neutrals at sea, among others the question of contraband; rules to which belligerent vessels shall be subjected in neutral ports; destruction by vis major of merchant vessels captured as prizes. Into this convention would be inserted provisions relative to land warfare which would be applicable also to naval warfare. (Corres. Con. A Sec. Hague Peace Conf., p. 15.)

In the ambassador's letter of April 12 to the Secretary of State the question is restated as follows:

Framing of a convention relative to the laws and customs of maritime warfare, concerning—

The special operations of maritime warfare, such as the bombardment of ports, cities, and villages by a naval force; the laying of torpedoes, etc.

The transformation of merchant vessels into war ships.

The private property of belligerents at sea.

The length of time to be granted to merchant ships for their departure from ports of neutrals or of the enemy after the opening of hostilities.

The rights and duties of neutrals at sea, among others the questions of contraband, the rules applicable to belligerent vessels in neutral ports; destruction, in cases of vis major, of neutral merchant vessels captured as prizes.

In the said convention to be drafted, there would be introduced the provisions relative to war on land that would be also applicable to maritime warfare. (Ibid., p. 21.)

Under ordinary circumstances I should regard the discussion of the paragraph above cited as a subject falling entirely within the jurisdiction of the naval representative and as being a matter with which I have nothing to do. There are some phases of the case, however, as to which the necessary data can only be obtained in the archives and reports of the Departments of the Treasury and of Commerce and Labor, which must be consulted where the archives are deposited in the city of Washington. This is especially true as to the statistics in reference to tonnage and the sea-borne commerce of

the United States, which should be in the possession of the delegation to enable it to determine what the policy of the Government should be in respect to a number of questions, of which the immunity of private property from capture at sea is an example.

For the reasons above stated such matter as is presented is in the nature of suggestion merely, and the data which I have been able to collect are subordinated to any views that Admiral Sperry may submit in connection with the subject of maritime warfare and the capture or immunity from capture of private property at sea.

Until the preparation of a set of rules for the conduct of warfare at sea was suggested by the imperial foreign office it has never been attempted to secure international consent to the adoption of a code of rules for the conduct of naval operations as distinguished from the general operations of war. The works of text writers contain statements of the forces that may be employed in naval warfare, of the places where naval operations may be carried on, the rights of maritime search and capture, the penalties for engaging in contraband trade, violations of blockade, etc. The laws and naval regulations of many states also furnish a more or less complete body of rules for the government of their naval commanders in the conduct of hostilities at sea.

The most important contribution which has been made in recent times to this field of governmental regulation will be found in the United States Naval War Code, which was adopted by the Navy Department on June 27, 1900.

These rules were made the subject of exhaustive discussion and comparison by the Naval War College at its annual session of 1903. The class was composed of officers of high rank and long experience in the conduct of naval operations, who were assisted in their deliberations by Prof. George Grafton Wilson, the head of the department of international law at Brown University. This arrangement can not be too highly commended. Questions of fact involving experience in the exercise of naval command were submitted to the naval officers who composed the class. When conclusions were reached they were carefully scrutinized by Professor Wilson with a view to see whether they conformed to the accepted rules of international law as set forth in the works of text writers, the decisions of courts, and other standard authorities, and this exchange of views continued until the particular subject which was undergoing consideration had been thoroughly discussed, both from the practical and theoretical sides.

The work was carried on under the direction of Admiral Sperry, president of the Naval War College, himself an officer of great experience in naval affairs and an acknowledged authority upon international law.

As a result of the exhaustive discussion to which the rules of 1900 were subjected at the Naval War College during its session of 1903, it was recommended to the Navy Department that the code should be withdrawn, and the recommendation was concurred in by Secretary Moody on February 4, 1904. (G. O. 150, Navy Dept., 1905.)

It is in no sense a criticism of the code that its withdrawal was recommended by the Naval War College and approved by the Navy Department. The rules were prepared with great care at the Naval War College during Captain Stockton's incumbency of the office of president. Immediately upon its appearance it was made the subject of favorable comment abroad, where it has been translated and made the subject of practical criticism and academic discussion.

The articles were noticed, at considerable length, in the London Times of April 5, 1901 (Proceedings Naval War College 1903, p. 7), and were made the subject of hearty commendation by Prof. T. E. Holland, of Oxford, a high authority upon the law regulating the conduct of operations of war at sea. The reasons which actuated the temporary withdrawal of the code are very fully and lucidly set forth in the following conclusions, which were concurred in by Professor Wilson to the president of the Naval War College in his preliminary report of the work of the conference:

From the extended discussions of the session of 1903 and from the consideration of the conclusions of writers and others who have expressed opinions upon the code, there come into prominence several points which seem to deserve particular and immediate notice:

1. The Naval War Code is binding upon the Navy of the United States, though it is not binding upon any state with which the United States may be at war.

2. The Naval War Code contains some provisions upon which there is not at present any international agreement, and upon which there are differences of opinion among the authorities upon international law.

3. In case of war, the Navy of the United States might be placed in a position such that the enemy would be free to commit certain acts not forbidden by international law, but sanctioned by general practice, which acts the Navy of the United States could not do because forbidden by the code.

4. Certain articles of the code should in any case be amended and rewritten.

5. The Navy Department, by General Order 551, of June 27, 1900, published the code, under the approval of the President of the United States, "for the use of the Navy and for the information of all concerned." The code is therefore regarded as the official statement of the United States upon matters of maritime warfare. As such it has received careful and approving attention abroad.

6. It is an almost unanimous opinion at home and abroad that there should be a code for maritime warfare.

7. The Hague Convention of 1898 recommended that various matters relating to maritime warfare upon which the code of the United States touches, as well as some not included, be referred to a subsequent conference. Among these matters were some particularly urged upon the conference of 1898 by the delegates from the United States.

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8. The Naval War Code of 1900 was originally drawn with the hope that it possibly "should be presented to other countries as an international projet." The code is particularly adapted to serve such a purpose.

9. The United States would be following a course consistent with its past history and consistent with its attitude at The Hague conference in urging an international agreement upon the rules of war at sea.

As a result of all these and other considerations it was the opinion unanimously given by those in attendance upon the summer session of 1903 of the Naval War College that it would be advisable:

(1) That the proper steps be taken for the calling of an international conference for the consideration of the matters referred at The Hague conference and for the formulation of international rules for war at sea.

(2) That the Naval War Code of the United States be offered as a tentative formulation of the rules which should be considered.

(3) That pending the calling of an international conference upon the laws and usages of war at sea, General Order 551 be withdrawn in order that the delegates from the United States might be unrestrained.

(4) That if the code be reprinted before the conference is called, it be issued not as an order, but, with revisions, as a statement of the rules which may be expected to prevail in case of war upon the sea. (Proceedings Naval War College 1903, pp. 90–91.)

A full report of the conferences held during the session of 1903 will be found in the Report of the International Law Discussions held at the Naval War College during its session of that year. The volume, which is in possession of the delegation, contains the invaluable discussion of the Naval War Code of 1900 (ibid., pp. 13–91), together with a summary of the suggested changes (id., pp. 91–97). The text of the Naval Code of 1900 will be found in the appendix (id., pp. 103–114) in connection with the Code of Instructions for the Government of the Armies of the United States in the field, prepared by Dr. Francis Lieber (G. O. 100, A. G. O., 1863, id., pp. 113–139), and the Rules of War on Land which were adopted by The Hague Conference of 1899 (id., pp. 141–158), together with the Convention for the Adaptation of the Principles of the Geneva Convention of 1864 to Maritime Warfare, which form a part of The Hague Convention of 1899.

This admirable work, to which I can add nothing, sets forth the modern practice of warfare at sea so clearly and fully as to enable the delegation to formulate its views as to the adoption and composition of a code of rules for the conduct of operations in maritime war.

With a view to place all attainable data in possession of the delegation, should the conference determine to proceed with the adoption of a naval code, the following is submitted:

In any discussion of the expediency and propriety or necessity of preparing a code of rules for the conduct of warlike operations at sea it should be constantly borne in mind that many naval undertakings are conducted, wholly or in part, on land. The operations

of a landing party, for example, are entirely military in character, and joint operations of the land and naval forces, undertaken with a view to the siege or investment of a fortified place, or for any other legitimate operation of war, would be carried on in accordance with the rules which now regulate the operations of war on land. There are several operations in which naval force is, or may be, employed to accomplish an object of the war, as to constrain the furnishing of requisitions, which would seem to fall within the operation of the rules which now control the imposition of that form of burden upon the inhabitants of occupied territory. Indeed, the subject is expressly mentioned in the final clause of the naval programme, where it is said:

Into this convention would be inserted provisions relative to land warfare which would be applicable also to naval warfare.

The following are the articles of the United States Naval Code as they stood at the close of the session of the War College of 1903:

ARTICLE 1.

The general object of war is to procure the complete submission of the enemy at the earliest possible period with the least expenditure of life and property.

In maritime operations the usual measures for attaining this object are: To capture or destroy the military and naval forces of the enemy; his fortifications, arsenals, dry docks, and dockyards; his various military and naval establishments, and his maritime commerce and communications; to prevent his procuring war material from neutral sources; to cooperate with the army in military operations on land, and to protect and defend the national territory, property, and seaborne commerce.

ARTICLE 2.

The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction and the territorial waters of belligerents. Neither hostilities nor any belligerent right, such as that of visitation and search, shall be exercised in the territorial waters of neutral states.

The territorial waters of a state extend seaward to the distance of a marine league from the low-water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries inclosed within headlands, and where the territory by which they are inclosed belongs to two or more states the marine limits of such states are usually defined by conventional lines.

ARTICLE 3.

By the declaration of The Hague, signed July 29, 1899, to which the United States is a party, it is provided that:

The contracting powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of similar nature.

The present declaration is only binding on the contracting powers in case of war between two or more of them.

It shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a noncontracting power.

ARTICLE 4.

The bombardment by a naval force of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval forces are withheld, in which case due notice of bombardment shall be given.

ARTICLE 5.

Unless under satisfactory censorship or otherwise exempt, the following rules are established with regard to the treatment of submarine telegraphic cables in time of war, irrespective of their ownership:

(*a*) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(*b*) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy or at any point outside of neutral jurisdiction, if the necessities of war require.

(*c*) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.

ARTICLE 6.

If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters.

ARTICLE 8.

In the event of an enemy failing to observe the laws and usages of war, if the offender is beyond reach, resort may be had to reprisals, if such action should be considered a necessity; but due regard must always be had to the duties of humanity. Reprisals should not exceed in severity the offense committed, and must not be resorted to when the injury complained of has been repaired.

If the offender is within the power of the United States he can be punished, after due trial, by a properly constituted military or naval tribunal. Such offenders are liable to the punishments specified by the criminal law.

ARTICLE 11.

The personnel of a private vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses, or as prisoners of war when

by training or enrollment they are immediately available for the naval service of the enemy, or they may be released from detention or confinement. They are entitled to their personal effects and to such individual property, not contraband of war, as is not held as part of the vessel, its equipment, or as money, plate, or cargo contained therein.

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

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

ARTICLE 12.

The United States of America acknowledge and protect, in hostile countries occupied by their forces, private property, religion, and morality; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. (See discussion, p. 50.)

ARTICLE 14.

All private vessels of the enemy, except coast fishing vessels innocently employed, are subject to capture, unless exempt by treaty stipulations.

In case of military or other necessity, private vessels of an enemy may be destroyed, or they may be retained for the service of the Government. Whenever captured vessels, arms, munitions of war, or other material are destroyed or taken for the use of the United States before coming into the custody of a prize court, they shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained; and the survey, appraisement, and inventory shall be sent to the prize court where proceedings are to be held.

ARTICLE 15.

In absence of treaty governing the case, the treatment to be accorded private vessels of an enemy sailing prior to the beginning of a war, to or from a port of the United States, or sojourning in a port of the United States, at the beginning of the war, will be determined by special instructions from the Navy Department. (See discussion, p. 57.)

ARTICLE 19.

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

In place of Section IV the following articles of The Hague convention, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, should be inserted:

"ARTICLE 1. Military hospital ships—that is to say, ships constructed or assigned by States specially and solely for the purpose of assisting the wounded, sick, or shipwrecked, and the names of which shall have been communicated to the belligerent powers at the beginning or during the course of hostilities, and in any case before they are employed—shall be respected, and can not be captured while hostilities last.

"These ships, moreover, are not on the same footing as men-of-war as regards their stay in a neutral port.

"ART. II. Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized relief societies, shall likewise be respected and exempt from capture, provided the belligerent power to whom they belong has given them an official commission and have notified their names to the hostile power at the commencement of or during hostilities, and in any case before they are employed.

"These ships should be furnished with a certificate from the competent authorities, declaring that they had been under their control while fitting out and on final departure.

"ART. III. Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture if the neutral power to whom they belong has given them an official commission and notified their names to the belligerent powers at the commencement of or during hostilities, and in any case before they are employed.

"ART. IV. The ships mentioned in Articles I, II, and III shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents independently of their nationality.

"The governments engage not to use these ships for any military purpose.

"These ships must not in any way hamper the movements of the combatants.

"During and after an engagement they will act at their own risk and peril.

"The belligerents will have the right to control and visit them; they can refuse their help, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

"As far as possible the belligerents shall inscribe in the sailing papers of the hospital ships the orders they give them.

"ART. V. The military hospital ships shall be distinguished by being painted white outside, with a horizontal band of green about a meter and a half in breadth.

"The ships mentioned in Articles II and III shall be distinguished by being painted white outside, with a horizontal band of red about a meter and a half in breadth.

"The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

"All hospital ships shall make themselves known by hoisting, together with their national flag, the white flag with a red cross, provided by the Geneva convention.

"ART. VI. Neutral merchantmen, yachts, or vessels having or taking on board sick, wounded, or shipwrecked of the belligerents can not be captured for so doing, but they are liable to capture for any violation of neutrality they may have committed.

"ART. VII. The religious, medical, or hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their own private property.

"This staff shall continue to discharge its duties while necessary, and can afterwards leave when the commander in chief considers it possible.

"The belligerents must guarantee to the staff that has fallen into their hands the enjoyment of their salaries intact.

"ART. VIII. Sailors and soldiers who are taken on board when sick or wounded, to whatever nation they belong, shall be protected and looked after by the captors.

"ART. IX. The shipwrecked, wounded, or sick of one of the belligerents who

fall into the hands of the other are prisoners of war. The captor must decide, according to circumstances, if it is best to keep them or send them to a port of his own country, to a neutral port, or even to a hostile port. In the last case prisoners thus repatriated can not serve as long as the war lasts.

"ART. X. (Excluded.)

"ART. XI. The rules contained in the above articles are binding only on the contracting powers in case of war between two or more of them.

"The said rules shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a noncontracting power."

ARTICLE 31.

The object of a visit and search of a vessel is—

(1) To determine its nationality.

(2) To ascertain whether contraband of war is on board.

(3) To ascertain whether a breach of blockade is intended or has been committed.

(4) To ascertain whether the vessel is guilty of unneutral service or is engaged in any capacity in the service of the enemy.

The right of search must be exercised in strict conformity with treaty provisions existing between the United States and other states and with proper consideration for the vessel boarded.

ARTICLE 37.

Blockade is a measure of war 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.

ARTICLE 43.

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.

(Articles of the code will need to be renumbered in accordance with changes suggested above.)

The remaining clauses of paragraph 3 of the programme will be discussed in the order in which they occur.

THE SPECIAL OPERATIONS OF MARITIME WARFARE, SUCH AS THE BOMBARDMENT OF PORTS, CITIES, AND VILLAGES BY A NAVAL FORCE.

The scope of the foregoing clause is not quite clear. It is a legitimate act of war for a fleet, acting independently, to attack a fortified place on shore. As the rules of international law stood in 1899 a fortified place might be attacked from land or sea, or by the combined operations of land and naval forces. The fact that it was for-

tified constituted notice to its inhabitants that it was likely to be made the subject of open assault or that siege operations, with a view to its reduction, might be undertaken at any time. If, in view of such notice, they elected to remain and subject themselves to the loss or injury which inevitably attend siege operations, they did so with full knowledge of the consequences.

The rules which are embodied in articles 26 and 27 of the Rules of War on Land represent the best practice in respect to bombardment as it stood at the date of their adoption; and it is not believed that the incorporation of such practice into a convention regulating the operations of war on land operated to change or modify the existing rule in its application to operations undertaken by a fleet with a view to the reduction of a fortified place. Indeed, there is strong ground for the belief that articles 26 and 27, inasmuch as they contain no express terms of restriction, have equal application to all bombardments, whether from batteries on land, from ships at sea, or from batteries and ships in combined land and naval operations.

This subject has been discussed to some extent in recent years from the point of view that bombarding coast towns and cities is a means of injuring the enemy.

' In 1882 Admiral Aube, in an article on naval warfare of the future, expressed his opinion that 'armoured fleets in possession of the sea will turn their powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and will burn them and lay them in ruins, or at the very least will hold them mercilessly to ransom;' and he pointed out that to adopt this course would be the true policy of France, in the event of a war with England. There is no reason to believe that either political or naval opinion in France dissented from these views; very shortly after their publication Admiral Aube was appointed Minister of Marine, and he was allowed to change the shipbuilding programme of the country, and to furnish it with precisely the class of ships needed to carry them out. During the English Naval Manœuvres of 1888 an attempt was made to bring home to the inhabitants of commercial ports what the consequences of deficient maritime protection might be, by inflicting imaginary bombardments and levying imaginary contributions upon various places along the coast. Mr. Holland objected to these proceedings on the ground that they might be cited by an enemy as giving an implied sanction to analogous action on his part. A correspondence followed, in which several naval officers of authority combated Mr. Holland's objections, partly on the ground that, in view of foreign naval opinion on the subject, an enemy must be expected to attack undefended English towns, partly on the ground that attack upon them would be a legitimate operation of war. Still more significant is the fact, which has become known, that in 1878 it was intended by the Russian Government that the fleet at Vladivostok should sail for the undefended Australian ports and lay them under contribution immediately on the outbreak of hostilities. (Hall, p. 433; Revue des Deux Mondes, tom. L, p. 331.)

The French government, on being asked by the British Government whether it accepted responsibility for Admiral Aube's articles, dissociated itself from him; but a repudiation, which was immediately followed by his appointment as

Minister of Marine and by the adoption of a scheme of naval construction in accordance with his views, could have no serious value. His proposals met with the approval of the newspaper press. They were supported and exceeded in various articles spread over a considerable space of time by 'Un Officier de la Marine' in the Nouvelle Revue, and in the Revue des Deux Mondes by M. Charmes, whose position and influence in the Foreign Office renders his utterances noticeable. The only voice raised against them was that of Admiral Bourgois in 1885 (Nouvelle Revue). (Hall, p. 433, note.)

On this subject Hall says:

It was seen in a former section that some naval officers of authority are disposed to ravage the shores of a hostile country and to burn or otherwise destroy its undefended coast towns; on the plea, it would appear, that every means is legitimate which drives an enemy to submission. It is a plea which would cover every barbarity that disgraced the wars of the seventeenth century. That in the face of a continued softening of the customs of war it should be proposed to introduce for the first time into modern maritime hostilities a practice which has been abandoned as brutal in hostilities on land, is nothing short of astounding. Happily, before things of such kind are done, states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth. (Hall, p. 536.)

It is sufficient to say, in conclusion, that such a use of naval force as is indicated above has never been regarded as a legitimate operation of war. The existing practice in that regard is very clearly stated in paragraph 4 of the Rules for the Conduct of Naval Operations as prepared by the Naval War College at its session of 1903.

The bombardment by a naval force of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval forces are withheld, in which case due notice of bombardment shall be given.

NAVAL REQUISITIONS AND CONTRIBUTIONS.

Considerable discussion has been given in recent times to the levying of requisitions and contributions by fleets or vessels of war where there has been no landing of naval forces and no part of the enemy's territory is in the military occupation of such forces in the sense in which that term is used in article 42 of The Hague convention.

As to the levying of requisitions, it may be said that if a fleet finds itself in need of food, clothing, coal, or other munitions of war which can be obtained in the coast cities that are commanded by its guns, it has the same right to obtain them by force as would a land contingent under the same circumstances. And it does not matter whether the services or articles needed are obtained by manual taking,

as when they are requisitioned by a detachment of the land forces, or by a threat of bombardment. On this point Hall says:

It is only in exceptional and unforeseen circumstances that a naval force can find itself in need of food or of clothing; when it is in want of these, or of coal, or of other articles of necessity, it can unquestionably demand to be supplied wherever it is in a position to seize; it would not be tempted to make the requisition except in case of real need; and generally the time required for the collection and delivery of large quantities of bulky articles, and the mode in which delivery would be effected, must be such that if the operation were completed without being interrupted, sufficient evidence would be given that the requisitioning force was practically in possession of the place. In such circumstances it would be almost pedantry to deny a right of facilitating the enforcement of the requisition by bombardment or other means of intimidation. (Hall, p. 435.)

The levying of contributions on land is regulated by the requirements of article 58 of The Hague convention, which provides that:

Failing a special convention, the neutral state shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace, the expenses caused by the internment shall be made good.

The foregoing conforms substantially to the rules of international law on the subject of contributions as they were generally understood and practiced at the date of the adoption of the present convention. The levying of contributions would also seem to be, in all its essential incidents, a land undertaking; and if such a levy were attempted by a naval commander his acts in respect thereto would properly conform to the corresponding practice on land. On this point Hall says:

Ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions; because they render needless the use of violent means of enforcement. If devastation and the slaughter of non-combatants had formed the sanction under which contributions are exacted, contributions would long since have disappeared from warfare upon land. It is not to be denied that contributions may be rightly levied by a maritime force; but in order to be rightly levied, they must be levied under conditions identical with those under which they are levied by a military force. An undefended town may fairly be summoned by a vessel or a squadron to pay a contribution; if it refuses a force must be landed; if it still refuses like measures may be taken with those which are taken by armies in the field. The enemy must run his chance of being interrupted, precisely as he runs his chance when he endeavours to levy contributions by means of flying columns. A levy of money made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right. (Hall, p. 436.)

PLACING OF TORPEDOES.

This subject is so fully covered in the report of the discussions at the Naval War College that it is unnecessary to make further allusion to it in this place. That some international action is necessary, with a view to a conventional prohibition of the use of floating topedoes, save such controllable automobile types as are launched from the tubes of battle ships or torpedo boats, is indicated by the number of merchant ships that have been and are still being destroyed in the China Sea and its adjacent waters as a result of contact with drifting mines. I am advised that navigation is unsafe at all times, but especially at night, due to the mines which were torn loose from their moorings during the operations of the Russo-Japanese war.

TRANSFORMATION OF MERCHANT VESSELS INTO WAR VESSELS.

It is a fundamental rule of international law that a state, in virtue of its sovereignty and independence, can not be restricted in the choice of means to which it resorts for defending its citizens and their property from unlawful aggression.

The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in condition to repel aggression from without is wanting in its principal duty to the members of which it is composed and to the chief end of its institution. All means which do not affect the independence of other nations are lawful to this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

I Phillimore, secs. 210–220.
I Twiss, secs. 106, 108–110.
Walker, sec. 32.
I Halleck, Ch. IV, secs. 1–7, 18–27.
Wheaton, sec. 60.
Woolsey, secs. 17, 37.
Pradier-Fodére, secs. 211–235.

In its exercise of the right of self-preservation a state organizes its land and naval forces in time of peace or war, maintains them at such strength as it may deem adequate to its needs, and protects its coasts, harbors, and land frontiers by such works of defense as it may deem necessary to secure them from attack. The military establishment that is maintained by a particular state is determined by its geographical situation, by its institutions, its military policy, the character of its foreign relations, and to some extent by its financial resources. Any limitation upon such establishments must of necessity be strictly internal in character. External dictation in such matters is ordinarily not permissible.

Armaments suddenly increased to an extraordinary amount [however] are calculated to alarm other nations, whose liberty they appear to menace. It has

been usual, therefore, to require and receive amicable explanations of such warlike preparations; the answer will, of course, much depend upon the tone and spirit of the requisition.

Davis's International Law, p. 93.
I Phillimore, p. 253.

The conversion of merchant vessels into war vessels is an illustration of the right of a state to make a rapid increase in its naval establishment in time of public emergency by acquiring merchant vessels from private owners and converting them to naval uses with a view to their employment as a part of its naval establishment. This right was exercised to its fullest extent by the United States during the war of the rebellion. A state may also cooperate in the construction and maintenance of the vessels composing its merchant marine in time of peace, upon the condition that the vessels shall be partly adapted to naval uses at the time of their construction and may afterward be acquired by the government whose flag they carry, either by charter or purchase, in the event of a necessity arising for their employment as a part of the regular or volunteer naval establishment.

Such an arrangement was established by the Act of May 10, 1892, which contained the requirement that—

> Any steamships so registered under the provisions of this act may be taken and used by the United States as cruisers or transports upon payment to the owners of the fair actual value of the same at the time of taking, and if there shall be a disagreement as to the fair actual value at the time of taking between the United States and the owners, then the same shall be determined by two impartial appraisers, one to be appointed by each of said parties, who, in case of disagreement, shall select a third, the award of any two of the three so chosen to be final and conclusive. (Sec. 4, Act of May 10, 1892, 27 Stat. L., 28.)

Similar arrangements have been made by other powers with a view to accomplish a similar purpose, and in view of its entire legitimacy at international law it is not believed to be the policy of the United States, in view of its moderate naval establishment, to give its support to a proposition looking to the voluntary relinquishment of any portion of its present power to expand its naval force to meet the necessities of the public defense.

THE LENGTH OF TIME TO BE GRANTED TO MERCHANT SHIPS FOR THEIR DEPARTURE FROM PORTS OF THE ENEMY AFTER THE OPENING OF HOSTILITIES.

This proposition relates to the time to be allowed for the departure of merchant vessels of the enemy. It also seems to relate to the departure of war vessels from neutral ports after the opening of hostilities has brought the obligations of the neutral state into active operation.

In respect to the time allowed for the departure of belligerent merchant vessels, it may be said that the question is to some extent regulated by treaty; in a majority of cases, however, it is made the subject of regulation in suitable proclamations issued by the belligerent powers. The tendency for many years past has been in the direction of greater liberality of treatment than formerly prevailed in respect to enemy's subjects and their property who are in the territory of a belligerent at the outbreak of war. On this point Hall, a writer of standard authority, says:

It is a more real question whether, or to what extent, a usage of permitting enemy subjects to remain in a country during good behaviour is becoming authoritative. The origin of the practice is not remote. It may fairly be inferred from the manner in which Vattel mentions the permission to remain which was given by the English government at the opening of the war of 1756 to French persons, then in the country that the instance was the only one with which he was acquainted. When a custom began to form it is difficult to say, because residence was no doubt often tacitly allowed where evidence of permission is wanting; but in recent wars express permission has always been given, and the sentiment of the impropriety of expulsion has of late become so strong that when in 1870 the government of the National Defense in France so far rescinded the permission to remain which was accorded to enemy subjects at the beginning of the war as to expel them from the department of the Seine, and to require them either to leave France or to retire to the south of the Loire, it appeared to be generally thought that the measure was a harsh one. It is scarcely probable that the feeling which showed itself would have been entertained unless public opinion was not only moving in advance of the notion that persons happening to be in a country at the outbreak of war between it and their own state ought to have some time for withdrawal, but was already ripe for the establishment of a distinct rule allowing such persons to remain during good behaviour. In the particular case some injustice was done to the French government. The fear that danger would arise from the presence of Germans in Paris may have been utterly unreasonable; but their expulsion was at least a measure of exceptional military precaution. The conduct of the government may have been foolish, but it was not wrong. Any right of staying in a country during good behaviour which may be acquired by enemy subjects, must always be subordinate to considerations of military necessity; and whatever progress may have been made in the direction of acquiring the right itself, there can be no doubt that it is not yet firmly established. (Hall, pp. 393–395.)

As to vessels and cargoes and the time allowed for their departure, there is a tendency in the direction of greater strictness. This is due to the fact that the existing systems of cable communication have now been extended to all principal ports of the civilized world.

In view of the want of uniformity in the existing practice, I am unable to see that a necessity exists for making this matter the subject of conventional regulation. If a rule is prescribed which will include all cases within its uniform operation, there can be no objection to its being regarded with favor by the delegation of the United States.

A recent statement of the practice in this regard will be found in Hall, who says:

Enemy's vessels which at the outbreak of war are on their voyage to the port of a belligerent from a neutral or hostile country, and even vessels which without having issued from an enemy or other foreign port have commenced lading at that time, are occasionally exempted from capture during a specified period. At the beginning of the Crimean war an Order in Council directed that 'any Russian merchant vessel which prior to the date of this Order shall have sailed from any foreign port bound for any port or place in her Majesty's dominions shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.' France gave a like indulgence; and in 1870 German vessels which had begun to lade upon the date of the declaration of war were allowed to enter French ports without limit of time, and to reissue with a safe-conduct to a German port. In 1877 also, Turkish vessels were permitted to remain in Russian ports until they had taken cargo on board and to issue freely afterwards. [In 1898 President McKinley issued a proclamation on April 20, allowing Spanish merchant vessels in United States ports to load their cargoes and depart up to May 21, with permission, if met at sea by a man of war, to continue their voyage should their papers be found on examination to be satisfactory. Spanish vessels sailing from a foreign to an United States port prior to the declaration of war were permitted to enter, discharge cargo, and depart without molestation. The corresponding Spanish proclamation merely gave a period of five days for United States vessels anchored in Spanish ports to depart.] (Hall, pp. 452–453; Taylor, 462–560.)

As to the presence of belligerent armed vessels in a neutral port at the outbreak of war, it is sufficient to say that from the date of actual hostilities the rules governing their presence in a friendly port in time of peace give place to those established by the neutral in view of the existing war. A belligerent vessel found in the enemy's port at the outbreak of hostilities becomes a proper object of attack and of lawful capture.

INTERNMENT OF VESSELS OF WAR.

It has been seen that a belligerent armed vessel may seek an asylum in a neutral port from the perils of the sea or to escape a superior force of the enemy. It has long been established that a land force which takes refuge in neutral territory shall be immediately disarmed and interned, at the expense of the government under whose flag they serve. This rule has been so widely accepted that it was incorporated as article 57 of the Rules for the Conduct of Warfare on Land which were adopted by the first peace conference in 1899. A similar requirement was embodied in the Geneva Convention of 1906.

While it would seem that a similar rule should have been developed in respect to the detention of ships of war which entered

neutral ports under like circumstances, such in fact has not been the case. This is due, in part, to the fact that the rigorous enforcement of neutral obligations has operated to prevent hostilities in neutral territorial waters, and in part to the fact that a limited right to enter neutral ports in time of war, under circumstances analogous to their corresponding right of admission in time of peace, has always been recognized. On the other hand, the rule that belligerent troops shall not enter neutral territory in time of war has always been rigorously enforced, and the admission of military forces to the territory of a foreign state in time of peace is a matter of the rarest and most infrequent occurrence. The case is well stated by Hall, who says:

> Marine warfare so far differs from hostilities on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a state as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigour of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbour without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety, she may take in such provisions as she needs, and if a steamer she may fill up with enough coal to enable her to reach the nearest port of her own country; nor is there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her. To disable a vessel, or to render her permanently immoveable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency towards the enforcement of a harsher rule becomes more defined with each successive war. (Hall, Int. Law, p. 626.)

During the recent war in the East asylum was sought in ports of the United States in two cases. The Russian cruiser *Lena* entered the port of San Francisco under circumstances warranting the Government in directing her disarmament and internment until the close of hostilities (For. Rel., 1904, pp. 428–785). Subsequently the squadron of Admiral Nebogatoff sought similar refuge in the port of Manila, where the alternative was presented of leaving the port or of being interned. In both cases the action taken by the Government of the United States was in vindication of its rights as a neutral state, and the precedent established will probably be followed in future wars.

The practice seems to have obtained such general sanction among maritime powers as to warrant its discussion with a view to determining the propriety of establishing a rule which shall govern neutral states in the execution of their neutral obligations in this regard. Whether in addition to internment the expedient of disarmament shall be resorted to is a matter for the conference to determine upon a full discussion of the experience gained in recent naval warfare. It is

sufficient to say in conclusion that, while a powerful state may not need the support of a rule requiring disarmament, such a requirement will operate powerfully to assist a state whose naval establishment is small in the performance of the obligations with which it is charged by the law of nations.

NEUTRALITY.

Before passing to a discussion of the changes which may properly be incorporated in the existing rules of international law on the subject of neutrality, it will be proper to make a brief statement as to the rules of international law which now regulate the rights and duties of neutrals.

The existing rules on that subject are the result of a compromise between the conflicting interests of belligerent and neutral states. When a condition of public war exists, it matters not whether the war be external or internal in character. All states that are not belligerent parties to its operation pass to and occupy the status of neutrals. This results from the mere existence of a state of war, and represents a status which can not possibly exist in time of peace.

The rules of neutrality rest upon the fundamental principle that all states which hold aloof and take no part in an existing war continue to maintain their ordinary relations of friendship and amity with both belligerents. This means that their commercial and diplomatic intercourse continue without interruption, except as to certain illicit trade in which neutral subjects participate at their peril, which will presently be described.

Upon the outbreak of war certain commercial undertakings in which neutral subjects are engaged become unlawful, and if they continue to engage in them they do so at their peril. This prohibited trade includes the shipment of certain articles, denominated contraband of war, to ports or places in belligerent territory. There is also included within the scope of the prohibition all trade and commercial intercourse with certain belligerent ports, coasts, or places against which a blockade has been established.

In other words, save for the restrictions above described, neutral subjects may continue during the war the undertakings in which they were engaged before it existed. The belligerents, to prevent themselves from being injured as a result of the continuance of the prohibited trade, are given the right to seize articles of contraband on the high seas, or in belligerent territorial waters, which are consigned to ports of the enemy. They may also capture all vessels and cargoes which attempt to enter a belligerent port against which an effective blockade has been established.

To make these restrictions effective they are permitted to exercise the belligerent right of search; that is, to stop and search all mer-

chant vessels, whether belligerent or neutral, with a view to determine the character, nationality, and destination of vessels and cargoes and their consequent liability to capture and condemnation. The right of search must be exercised on the high seas or in the territorial waters of a belligerent; it can never be exercised in the territorial waters of a neutral state.

If a neutral state were to engage in contraband trade or in trade with a blockaded port, or were to render any assistance to either belligerent in the prosecution of the war, it would be guilty of unneutral service, and might find itself involved in the operations of war as a belligerent party. In England and the United States and among some of the states of Continental Europe it has never been regarded that a neutral subject who engaged in contraband trade or in commerce with a blockaded port involved the state of which he was a citizen in any violation of its neutral duties or obligations.

The policy of the United States in this regard is fully set forth in the reply of Secretary Jefferson to the British minister of May 15, 1793, in which it was said:

> Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal disarrangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned, and, that even private contraventions may work no inequality between the parties at war, the benefit of them will be left equally free and open to all. (VII Moore's Digest, p. 955.)

In 1827 Secretary Clay advised the Spanish chargé d'affaires in the following sense:

> If vessels have been built in the United States and afterwards sold to one of the belligerents and converted into vessels of war, our citizens engaged in that species of manufacture have been equally ready to build and sell vessels to the other belligerent. In point of fact both belligerents have occasionally supplied themselves with vessels of war from citizens of the United States. And the very singular case has occurred of the same shipbuilder having sold two vessels, one to the King of Spain and the other to one of the southern republics, which vessels afterwards met and encountered each other at sea.
>
> During the state of war between two nations the commercial industry and pursuits of a neutral nation are often materially injured. If the neutral finds some compensation in a new species of industry, which the necessities of the belligerents stimulate or bring into activity, it can not be deemed very unreasonable that he should avail himself of that compensation, provided he confines himself within the line of entire impartiality, and violates no rule of public law. (Ibid., p. 950.)

In a reply to Señor Tacon, Secretary Clay said a little later in the same year:

Shipbuilding is a great branch of American manufactures, in which the citizens of the United States may lawfully employ their capital and industry. When built they may seek a market for the article in foreign ports as well as their own. The Government adopts the necessary precaution to prevent any private American vessel from leaving our ports equipped and prepared for hostile action, or, if it allow, in any instance, a partial or imperfect armament, it subjects the owner of the vessel to the performance of the duty of giving bond, with adequate security, that she shall not be employed to cruise or commit hostilities against a friend of the United States.

It may possibly be deemed a violation of strict neutrality to sell to a belligerent vessels of war completely equipped and armed for battle, and yet the late Emperor of Russia could not have entertained that opinion, or he would not have sold to Spain during the present war, to which he was a neutral, the whole fleet of ships of war, including some of the line.

But if it be forbidden by the law of neutrality to sell to a belligerent an armed vessel completely equipped and ready for action, it is believed not to be contrary to that law to sell to a belligerent a vessel in any other state, although it may be convertible into a ship of war.

To require the citizens of a neutral power to abstain from the exercise of their incontestable right to dispose of the property, which they may have in an unarmed ship, to a belligerent, would in effect be to demand that they should cease to have any commerce, or to employ any navigation in their intercourse with the belligerent. It would require more—it would be necessary to lay a general embargo, and to put an entire stop to the total commerce of the neutral with all nations; for, if a ship or any other article of manufacture or commerce, applicable to the purpose of war, when at sea at all, it might directly or indirectly find its way into the ports, and subsequently become the property of a belligerent.

The neutral is always seriously affected in the pursuit of his lawful commerce by a state of war between other powers. It can hardly be expected that he should submit to a universal cessation of his trade, because by possibility some of the subjects of it may be acquired in a regular course of business by a belligerent, and may aid him in his efforts against an enemy. If the neutral show no partiality; if he is as ready to sell to one belligerent as the other; and if he take, himself, no part in the war, he cannot be justly accused of any violation of his neutral obligations. (Id., 950–951.)

At the outbreak of war each neutral state issues a proclamation declaring trade in contraband and commerce with blockaded ports unlawful, and warns its citizens against engaging in either form of commercial intercourse, notifying them that if they do so it is at their own risk, and that they can not look to the Government to protect them in their illegal undertaking.

LIABILITY OF PRIVATE PROPERTY TO CAPTURE AT SEA.

The liability of private property to capture at sea was recognized as a legitimate belligerent right before the rules of modern international law, as we now understand them, came into being. It even antedates the distinction of contraband of war, having been

recognized in the "Consolato del Mare" by the requirement that the goods of an enemy were liable to capture and those of a friend were exempt from capture, whatever the character, as belligerent or friendly, of the vessel in which they were being conveyed to their destination.

The subsequent history of the practice of maritime capture is so fully and accurately set forth in Wheaton's International Law, chapter 3, sections 442 to 475, that it is not necessary to follow it in detail. It is sufficient to say that, at the outbreak of the Crimean war, England claimed that enemy's goods in neutral ships were liable to capture, while France contended that neutral goods in enemy's ships were similarly liable. With a view to render the operations of that war as little onerous as possible, and to preserve the commerce of neutrals from destruction, the British Government on March 28, 1854, announced that it waived its right to capture enemy's goods on neutral ships, and the French Government, on March 29, 1854, gave a corresponding immunity to neutral goods on enemy's ships; but these restrictions upon the right of maritime capture were declared in each case to be operative only during the period of the existing war.

The temporary immunity thus created in behalf of private property was given a permanent character in the declaration of Paris, which contained the following provisions on the subject of maritime capture:

1. Privateering is, and remains, abolished.

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

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

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

The governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success. (Davis' Int. Law, p. 536–537.)

The declaration of the six powers which participated in the Paris conference was communicated to other states, and in a memorandum of the French minister of foreign affairs to the Emperor, under date of June 12, 1858, it was represented that thirty-six powers, then sovereign and independent, had signified their full adherence to the four clauses of the declaration. Spain and Mexico adopted the last three as their own, but, on account of the first article, involving a renunciation of privateering, declined to accede to the entire declaration. The United States adopted the second, third, and fourth

clauses, independently of the first, offering, however, to adopt that also with the following amendment or additional clause:

> And the private property of subjects or citizens of belligerents on the high seas shall be exempt from seizure by a privateer, except it be contraband.

As the matter stood in 1861, the United States, Mexico, and Spain were the three principal powers that declined to adhere to the declaration. When the United States proposed to become a party to the undertaking at the outbreak of the civil war, the condition was imposed that its adherence should include the States in rebellion, a condition which, in the opinion of the United States Government, was impossible of performance.

Although the United States, Spain, and Mexico were not signatory parties to the declaration, the fact that its rules have been accepted and acted upon by belligerents for half a century has operated to give it the substantial force of a rule of international law independently of its obligatory character as an international agreement; and it may well be doubted whether any state upon becoming a belligerent would consider the propriety of establishing a different rule in respect to the liability of private property to capture in maritime warfare than is embodied in the rules of the Declaration of Paris.

Under the rules set forth in the Declaration of Paris neutral goods in enemy's ships and enemy's goods in a neutral ship are exempt from capture, provided they are not contraband of war. It is also understood that the immunity granted by the declaration will not protect either ships or property which attempt to violate a legally established blockade. But the rules of the declaration permit the private property of an enemy to be confiscated if it be captured on the high seas in an enemy's ship. In other words, enemy's goods in neutral ships and neutral goods in enemy's ships, not being contraband or engaged in an attempt to break a blockade, are exempt from capture, but enemy's goods in an enemy's ship are still liable to capture on the high seas in time of war.

It has been seen that such immunity from capture as is enjoyed by neutral private property at sea has been due to a compromise between the conflicting claims and interests of belligerents and neutrals. The question of maintaining the rights of neutral merchantmen at sea became an important one during the last quarter of the eighteenth century and the first decade of the nineteenth century, a period which was marked with unusual disturbance of neutral commerce, due to the issue of the celebrated orders in council by the English Government and the retaliatory Berlin and Milan decrees of the Emperor Napoleon.

As the result of a succession of victories at sea, terminating with the battle of Trafalgar, the naval supremacy of Great Britain had been fully established. As a consequence of his successful military

operations, the supremacy of the Emperor had been equally established on the Continent. The decrees and orders in council, while intended by the governments which adopted them to harass and injure the enemy and to place him in a position of disadvantage, operated in fact to impose very onerous restrictions upon neutral commerce, which were vigorously opposed by the neutral powers, especially Russia, the Scandinavian kingdoms, and the United States, and finally led to the alliance which has become known as the "armed neutrality."

The restrictions upon neutral commerce bore heavily upon the maritime trade of the United States and were keenly felt during the period of the government under the Articles of Confederation. They finally led to the negotiation of several treaties having for their purpose the securing of an increased measure of immunity for their maritime commerce in any future wars in which the signatory parties might become engaged.

The United States, by a resolution of Congress dated October 5, 1780, gave its adherence to the principle claimed by the armed neutrality. Mr. Adams communicated this action of Congress to the Dutch Government, as well as to the ministers of Russia, Sweden, and Denmark, in March, 1781; but as none of the governments in reference were prepared to recognize the United States no further action was taken. (Schuyler, American Diplomacy, p. 374.)

The first treaty regulating the liability of private property to capture negotiated by the United States was that with France of February 6, 1778, which contained the following requirement:

> It is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies. (Treaty of February 6, 1778, Treaties and Conventions, p. 303.)

The treaty of 1782 with the Netherlands contains substantially the same requirements as that with France of 1778. (Treaties and Conventions, 749.) The same is true of the treaty with Sweden of 1783. (Treaties and Conventions, 1042.) The treaty with Prussia of 1785, in the negotiation of which Doctor Franklin was the dominating influence, and which was signed at The Hague, provided that should either of the parties be engaged in war with any other power—

> The free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may

navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy. (Art. XII, Treaty of September 10, 1787, Treaties and Conventions, 902.)

It also provided that contraband goods destined for the enemy should not be confiscated, but might be detained upon reasonable compensation being awarded to the owners; such contraband goods might also be appropriated and used by the captors by paying the current price therefor at the place of destination. (Art. XIII, ibid.) This treaty expired by its own limitation in October, 1796, but Article XII was renewed in Article XII of the treaty of May 1, 1828 (Treaties and Conventions, 916), subject to the qualification, however, that its terms should not affect treaties entered into by either party with other powers during the interval between the expiration of the treaty of 1799 and the date of operation of the treaty of May 1, 1828. (Treaties and Conventions, 920.)

In the treaty of 1794, commonly known as "Jay's treaty" (Treaties and Conventions, 379), the United States were obliged to accept the principle, as far as England was concerned, that the flag did not cover the cargo, and this is the only treaty of the United States in which this principle is incorporated. Article XVII, treaty of November 19, 1794 (Treaties and Conventions, 389), Article VII and XI to XXVIII, inclusive, Article XVIII and the additional article having expired by their own limitation.

The treaty of 1785 with Prussia having expired by its own limitation in 1796, John Quincy Adams was sent to Prussia in 1799 with a view to negotiate a new commercial treaty. In the negotiation he was to consult the representatives of the United States, and his instructions were to negotiate a treaty which was in opposition not only to his own views but to those which the United States had previously expressed and have subsequently insisted upon. (Schuyler, 377.) The principle of free ships, free goods, which we had recognized in all our treaties and desired to become universal, we found of no value so long as it was not universally recognized by maritime nations. In fact, it had been observed by other powers only when it would operate to the detriment of the United States and not to our benefit.

Mr. Adams was therefore instructed to propose the abandonment of this article. The Prussian negotiators objected to give it up entirely, on the ground of the confusion which it would cause in the commercial speculation of companies and the rejection of claims prosecuted by them in the admiralty courts of France and Great Brit-

ain relating to captures and collisions with the northern powers, which were sustaining this principle at this very moment by armed convoys, and proposed a qualification. After a long discussion, in which Mr. Adams fully carried out the views of our Government, the treaty was agreed upon with the following article:

Experience having proved, that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves or jointly with other Powers alike interested, to concert with great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. (Treaties and Conventions, p. 911.)

After the treaty was approved the following clause was added to Article XII:

And if in the interval either of the contracting parties should be engaged in a war to which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves towards the merchant vessels of the neutral Power as favourably as the course of the war then existing may permit, observing the principles and rules of the law of nations generally acknowledged. (Art. XII, treaty of 1799 with Prussia, Treaties and Conventions, p. 911.)

The period between 1790 and 1799 was one during which the maritime commerce of the United States was placed at a peculiar disadvantage on account of the British orders in council and the Berlin and Milan decrees of the Emperor Napoleon. With a view to assert and protect the rights of neutrals three embargoes were laid by the United States during this period. The first was imposed in the Act of January 4, 1794 (1 Stat. L., 374); another was imposed in the Act of December 27, 1807 (2 Stat. L., 451), and a third in the Act of April 4, 1812 (2 Stat. L., 700). The infringement of neutral rights at which this legislation was directed was one of the principal causes of the war of 1812.

During the war of 1812 prize courts in the United States enforced the generally acknowledged rule of international law that enemies' goods in neutral vessels were liable to capture and confiscation, except as to those powers with whom we had supported the contrary rule that free ships make free goods. (Schuyler, p. 380.)

Mr. Adams's activity continued during the war between France and Spain in 1823. President Monroe (apparently at the suggestion of Mr. Adams) instructed our ministers at Paris, London, and St. Petersburg to propose the abolition in future hostilities of all private war at sea. (Schuyler, p. 381.) In a dispatch to Mr. Rush at London in 1823, Mr. Adams says:

The result of the abolition of private maritime war would be the coincident abolition of maritime neutrality. By this the neutral nations would be the

principal losers, and sensible as we are of this we are still anxious, from higher motives than mere commercial gain, that the principle should be universally adopted. We are willing that the world, in common with ourselves, should gain in peace whatever we may lose in profit. (Schuyler's American Diplomacy, p. 381.)

England absolutely refused to discuss the question of the abolition of privateering without discussing other maritime questions. Chateaubriand, in replying to Mr. Sheldon, our chargé d'affaires at Paris, was apparently willing to accede to this proposal, provided all governments did the same. He said:

If the trial successfully made by France can induce all governments to agree on the general principle which shall place wise limits to maritime operations, and be in accordance with the sentiments of humanity, his Majesty will congratulate himself still more in having given the salutary example, and in having proved that, without compromising the success of war, its scourge can be abated. (Schuyler, p. 382.)

Count Nesselrode, in replying to Mr. Middleton, said:

"The principle will not be of great utility except so far as it shall have a general application."

The Emperor sympathizes with the opinions and wishes of the United States, and "as soon as the powers whose consent he considers as indispensable, shall have shown the same disposition, he will not be wanting in authorizing his ministers to discuss the different articles of an act which would be a crown of glory to modern diplomacy." (Ibid.)

The negotiations with Russia went on through different ministers—Randolph, Buchanan, and Wilkins—to the end of 1835, but the reply was always in the same sense, that a general understanding was necessary before making any special treaties. Attempts to renew negotiations on this subject with Great Britain were made by Mr. Gallatin in 1826 and Mr. Barbour in 1828, but without success.

It would thus appear that the discussion of the question of securing an immunity of private property from capture at sea grew out of the interests of the sea-borne commerce of the United States. That it continued for nearly half a century was due to the fact that it received the constant and powerful support of John Quincy Adams, who interested himself in the negotiation of treaties having for their purpose to diminish the restrictions to which neutral trade was subject in time of war. It ceased to engage public attention during the administration of President Monroe, and remained dormant until it was revived, over a quarter of a century later, in connection with the adoption of the rules regulating maritime captures which were embodied in the Declaration of Paris of 1856.

During the period of agitation above described, the question of securing a greater immunity from capture to private property at sea was always discussed in connection with the abolition of privateering. This was largely due to the fact that the enormous loss of property

afloat, between 1750 and 1815, was generally conceded to have been due to the depredations of privateers. (Lawrence's Wheaton, note 192, p. 628.) The great fleets set forth from time to time by the British and French Governments, commanded by Nelson, Collingwood, Villeneuve, and others, for the most part sought to engage and destroy the fleets of the enemy, or in the general operations of maritime warfare, being rarely employed for the express purpose of making captures of merchant vessels and their cargoes. If an immunity from such losses was to be obtained, it could only be accomplished by the abolition of privateering. That this view was shared by the Government of the United States is indicated by its legislation of 1797 in a statute the title of which discloses its purpose to prevent citizens of the United States from privateering against nations in amity with the United States or against its citizens, and which provided that:

If any citizen or citizens of the United States shall, without the limits of the same, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming any private ship or vessel of war, with intent that such ship or vessel shall be employed to cruise or commit hostilities, upon the subjects, citizens, or property of any prince or state with whom the United States are at peace, or upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel for the intent aforesaid, or shall purchase an interest in any vessel so fitted out and armed, with a view to share in the profits thereof, such person or persons so offending shall, on conviction thereof, be adjudged guilty of a high misdemeanor, and shall be punished by a fine not exceeding ten thousand dollars, and imprisonment not exceeding ten years. (Act of June 14, 1797, 1 Stat. L., 520. See also Acts of June 5, 1794; June 14, 1797; Apr. 24, 1800; Mar. 3, 1817.)

This was repealed by the Act of April 20, 1818, in which, however, the provision in respect to privateering against citizens of the United States without the limits of the United States was reenacted; and it was also forbidden for any person within the United States to fit out any ship or vessel to cruise or commit hostilities against the subjects, citizens, or property of any foreign power or state with whom the United States were at peace. (Sec. 3, Act of Apr. 20, 1818, 3 Stat. L., 448.)

During the war between the United States and Mexico efforts were put forth by the latter state with a view to induce the subjects of neutral European states to take commissions for privateers. England and France prohibited their subjects from accepting the offers made to them, and the ordinances of neutral states during the war generally forbade their subjects from accepting letters of marque from belligerents, although they are in a majority of cases without any adequate sanction for their enforcement. (Lawrence's Wheaton, note 192, p. 634; Hautefeuille, Droits des Nations Neutres, tome IV, p. 252.)

At the outbreak of the war with Mexico the President, in his message to Congress, announced that he had called the attention of the Government of Spain to the requirements of the Fourteenth article of the treaty between the United States and Spain of October 20, 1795 (Treaties and Conventions, 1010), and recommended to Congress to provide by law for the trial and punishment, as pirates, of Spanish subjects who should be found guilty of privateering against the United States. Such an act in furtherance of existing treaties was adopted on March 3, 1847 (9 Stat. L., 175).

During the Crimean war the states who were belligerent parties—Russia, Turkey, England, France, and Sardinia—issued no letters of marque to private individuals, and the other powers strictly prohibited their subjects from participating in the operations of that war by accepting letters of marque, or in any other way aiding the belligerents. The attention of the United States Government was drawn to the subject by both England and France, and Mr. Marcy replied that:

> The laws of this country impose plain restrictions, not only upon its own citizens but upon all persons who may be residents within any of the Territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking part in any foreign war.

At the close of the Crimean war the instrument which has become known as the "Declaration of Paris" was signed by the plenipotentiaries of the powers represented at the congress of Paris and the adhesion of other powers was invited. From a memorandum which was prepared by Count Walewski, which was approved by the French Emperor on June 12, 1858, it appears that the declaration, in all its parts, had then received the adhesion of thirty-eight states, including the Germanic Confederation. Spain and Mexico declined to accede to the first article, but declared that they appropriated the other three as their own, and the United States would be ready to grant their adhesion if it were added to the convention that the private property of citizens, subjects of the belligerent powers, would be exempt from seizure at sea by the war navies respectively.

In a circular note to the American ministers abroad, under date of July 14, 1856, the Secretary of State, Mr. Marcy, informs them that:

> The diplomatic representatives of several of the European powers, which were parties to the late Paris Conference, have very recently presented to this government "the declaration relative to neutral rights", adopted at that conference, and, on behalf of their governments, asked the adhesion of the United States to it. Mr. Marcy, in his answer of the 28th of July, 1856, to Count Sartiges, while objecting to the indivisibility of the four articles, for two of which the United States were then negotiating, suggests that, as neither this limitation nor the one restricting negotiations to their adoption as an entirety, is any part of the "declaration", any nation is at liberty to accede to it, in whole or in part. He considers that the article on blockades does nothing towards

relieving the subject from the embarrassment attending on determining what fulfills the conditions of the definition, and, that so far as privateering is concerned, as the right to resort to privateers is as clear as the right to use public armed ships and as incontestable as any other right appertaining to belligerents, the proceedings of the Congress are in the nature of an act of legislation and seek to change a well settled principle of international law. The analogy of privateers to volunteers on land, with the difficulty of defining what particular class of maritime force should be regarded as privateers, and the preponderance which the adoption of the rule would give to a nation having a powerful military marine over one with an equal commercial one, but whose policy discarded a permanent navy, are fully discussed. The conclusion was that the United States would not surrender the practice of privateering, unless, in belligerent operations, the government and nation were entirely separated, and war was confined in its agencies and effects to the former. (Lawrence's Wheaton, p. 638, note.)

This matter is very fully discussed in note 192 to Lawrence's edition of Wheaton, and in note No. 173 of Dana's edition of the same author, a perusal of which is earnestly commended to the delegation.

The statement has been made from time to time that it had been the "traditional" policy of the United States to secure, by diplomatic negotiation and in the exercise of its treaty-making power, a complete immunity from capture in behalf of belligerent private property at sea.

It is the function of a state, indeed, it is the chief purpose of its organization, to secure the protection of the personal and property rights and interests of its citizens, and this protection is extended not only at home but elsewhere and includes such of their property in ships or goods as is afloat on the high seas in time of war.

It has been seen that, during the period of the confederation and in the early history of the Government under the Constitution, the United States was unable, on account of the weakness and insufficiency of its naval establishment, to afford adequate protection to the vessels flying its flag which were engaged in maritime commerce. For that reason it endeavored to cooperate with other powers, similarly circumstanced, in resisting the efforts which were being put forth to restrict and hamper the maritime trade of neutral states by extending the liability to capture of neutral ships and cargoes in a manner not warranted by the rules of international law as then understood and practiced. That it was its first duty to protect the sea-borne commerce of its citizens was never for a moment forgotten or denied. The existing rule of international law which exempts from capture enemy goods in neutral ships and neutral goods in enemy ships, regards enemy goods in enemy ships as still liable to capture in time of war. The reason of this rule is somewhat inadequately set forth by Wheaton, who says:

The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unre-

laxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property. (Dana's Wheaton, sec. 355, p. 450–451.)

Dana, in his note on the subject of the liability of enemy property to capture, says:

The text does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text-writers. War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him, for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property,—from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life noncombatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among noncombatants. But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is res omnium, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for the purposes of war, is prima facie a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore some are of this character, and some are not. There are very serious

objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the prima facie right of capture. To merchandise at sea, these objections apply with so little force that the prima facie right of capture remains. (Dana's Wheaton, p. 451, note 171.)

Hall, a writer of standard authority, says on this subject:

Finally, is there any moral reason for which maritime states ought to abandon their right of capturing private property at sea? Is the practice harsher in itself than other common practices of war; or, if it be not so, is it harsher in proportion to the amount of the stress which it puts upon an enemy, and so to the amount of advantage which a belligerent reaps from it? The question hardly seems worth answering. It is needless to bring into comparison the measures which a belligerent takes for the maintenance of his control in occupied country, or to look at the effects of a siege, or a bombardment, or any other operation of pure military offense. It is enough to place the incidents of capture at sea side by side with the practice to which it has most analogy, viz. that of levying requisitions. By the latter, which itself is relatively mild, private property is seized under conditions such that hardship to individuals—and the hardship is often of the severest kind—is almost inevitable. In a poor country with difficult communications an army may so eat up the food as to expose the whole population of a large district to privations. The stock of a cloth or leather merchant is seized; if he does receive the bare value of his goods at the end of the war, which is by no means necessarily the case, he gets no compensation for interrupted trade and the temporary loss of his working capital. Or a farmer is taken with his carts and horses for weeks or months and to a distance of 100 or 200 miles; if he brings back his horses alive, does the right to ask his own government at some future time for so much daily hire compensate him for a lost crop, or for the damage done to his farm by the cessation of labour upon it? It must be remembered also that requisitions are enforced by strong disciplinary measures, the execution of which may touch the liberty and the lives of the population; and that in practice those receipts which are supposed to deprive requisitioning of the character of appropriation are not seldom forgotten or withheld. Maritime capture on the other hand, in the words of Mr. Dana, 'takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance,' which by modern trading custom is invariably employed to protect the owner of property against maritime war risks, and which effects an immediate distribution of loss over a wide area. Mild however as its operation upon the individual is, maritime capture is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be. In deranging the common course of trade, in stopping raw material on its way to be manufactured, in arresting importation of food and exportation of the produce of the country, it presses upon everybody sooner or later and more or less; and in rendering sailors prisoners of war it saps the offensive maritime strength of the weaker belligerent. In face of the results that maritime capture has often produced it is idle to pretend that it is not among the most formidable of belligerent weapons; and in face of obvious facts it is equally idle to deny that there is no weapon the use of which causes so little individual misery.

Legally and morally only one conclusion is possible; viz. that any state which chooses to adhere to the capture of private property at sea has every right to do so. It is at the same time to be noted that opinion in favour of the contrary principle is sensibly growing in volume and force; and it is especially to be

noted that the larger number of well-known living international lawyers, other than English, undoubtedly hold that the principle in question ought to be accepted into international law. It is easy in England to underrate the importance of continental jurists as reflecting, and still more as guiding, the drift of foreign opinion. (Hall's Int. Law, pp. 446–448.)

In a note this writer says:

The question whether it is wise for states in general, or for any given state, to agree as a matter of policy to the abolition of the right of capture of private property at sea, is of course entirely distinct from the question of right. It may very possibly be for the common interests that a change in the law should take place; it is certainly a matter for grave consideration whether it is not more in the interest of England to protect her own than to destroy her enemies' trade. Quite apart from dislike of England, and jealousy of her maritime and commercial position, there is undoubtedly enough genuine feeling on the continent of Europe against maritime capture to afford convenient material for less creditable motives to ferment; and contingencies are not inconceivable in which, if England were engaged in a maritime war, European or other states might take advantage of a set of opinion against her practice at sea to embarrass her seriously by an unfriendly neutrality. The evils of such embarrassment might, or might not, be transient; there are also conceivable contingencies in which the direct evils of maritime capture might be disastrous. In the Contemporary Review for 1875 (Vol. XXVI. pp. 737–751) I endeavoured to show that there are strong reasons for doubting whether England is prudent in adhering to the existing rule of law with respect to the capture of private property at sea. The reasons which were then urged have grown stronger with each successive year; and the dangers to which the practice would expose the country are at length fully recognised. That there is not a proportionately active wish for the adoption of a different rule is perhaps to be attributed to a doubt as to what the action of foreign powers would be under the temptation of a war with England.

At the meeting of the Institute of International Law, held at the Hague in 1875, the following resolutions were adopted:—

'Il est à désirer que le principe de l'inviolabilité de la propriété privée ennemie naviguant sous pavillon ennemi soit universellement accepté dans les termes suivants, empruntés aux déclarations de la Prusse, de l'Autriche, et de l'Italie en 1866, et sous la réserve ci-après;—les navires merchands et leurs cargaisons ne pourront être capturés que s'ils portent de la contrebande de guerre ou s'ils essauent de voiler un blocus effectif et déclaré.

'Il est entendu que, conformément aux principes généraux qui doivent régler la guerre sur mer aussi bien que sur terre, la disposition précédente n'est pas applicable aux navires marchands qui, directement ou indirectement, prennent part ou sont destinés à prendre part aux hostilités.'

At the meeting of the Institute at Turin in 1882 a clause, asserting that 'la propriété privée est inviolable sous la condition de réciprocité et sauf les cas de violation de blocus,' &c., was inserted in a project for a Reglèment international des prises maritimes, there adopted. Annuaire de l'Institut, 1877, p. 138, and 1882–3, pp. 182–5.

The Hague resolution, which merely expressed a desire for alteration in the law, was passed without a division, though under protest from the English members; at Turin, the more positive resolution was only carried by ten votes to seven, two English members being present. The difference is indicative of the stage at which opinion on the question has arrived.

M. Geffcken stands almost alone in urging, in an able note to Heffter (p. 319, ed. 1883), the adoption of the principle of immunity upon practical rather than upon legal or moral grounds. (Ibid.)

Atlay, the most recent English commentator of Wheaton, says:

The indiscriminate seizure of private property on land would cause the most terrible hardship, without conferring any corresponding advantage on the invader. It can not be effected without in some measure relaxing military discipline, and is sure to be accompanied by violence and outrage. On the other hand, the capture of merchant vessels is usually a bloodless act, most merchant vessels being incapable of resisting a ship of war. Again, property on land consists of endless varieties, much of it being absolutely useless for any hostile purpose, while property at sea is almost always purely merchandise, and thus is part of the enemy's strength. It is, moreover, embarked voluntarily, and with a knowledge of the risk incurred, and its loss can be covered by insurance (*h*). An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods, he can enfeeble the enemy and terminate the war. But in a maritime war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce (*i*). If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation (*k*). The United States proposed to add to the Declaration of Paris a clause exempting all private property on the high seas from seizure by public armed vessels of the other belligerent, except it be contraband; but this proposal was not acceded to (*l*). Nor does it seem likely, for the reasons stated above, that maritime nations will forego their rights in this respect.

On the other hand, the enormous extension of railways, the increase of the practice of marine insurance, and the dependence of the greatest naval power in the world upon an ocean-borne food supply, have deprived many of the older arguments in favour of the retention of the claim to capture private property at sea of their force, while at the same time it has inclined many persons in Great Britain, more especially those interested in shipping, to look favourably on a proposed abandonment of the claim. A nation which could blockade and harass its enemy's coasts, cut him off from his colonies, interdict the transport of his troops by water, and dominate by the guns of its fleet many most important strategical positions, would remain no mean ally and no contemptible foe, even apart from the power, as illustrated in Egypt in 1881, and in the recent South African War, of making its base of operations wherever ships can float, and of transporting its armies to whatever striking point was required. The preponderating importance of the commerce of Great Britain, and the protection afforded under the neutral flag by the Declaration of Paris, also materially affect the consideration of this question as a matter of policy (*m*). It may be answered, again, that French predominance on the sea in 1870–71, as against Germany, was undisputed, but little harm was inflicted on German commerce; and the depredations of *The Alabama*, so often cited by the other side, were mainly possible because *British* ports all over the world, and *British* coaling stations all over the world, were open to her for refuge, for coaling, as a base of operations, and even to refit.

The United States gave expression to the principle of exemption of private property at sea from capture, for which it has long contended, in its treaty with

Italy of 26th February, 1871. The maritime code of the latter country enunciates the same principle, on the condition of reciprocity. In the Austro-Prussian war of 1866, the principle of inviolability was adhered to by both parties. Germany proclaimed the same principle in 1870. The minister of the United States was instructed to express the gratification of his government; but the position of Prussia, though consistent with former policy, was no sacrifice of Prussian interests. The proclamation was not conditional upon reciprocity; but France captured German trading ships, and the Germans abandoned their proclamation in January, 1871 (*n*). (Atlay's Wheaton, pp. 498–499.)

The case is well stated from another point of view in a note to Baker's edition of Halleck, in which it is said:

This proposition can be well illustrated by assuming the accomplishment of the proposed change, the realisation of the ideal which the reformers have conceived; that is, contest between combatants alone, while all else in the state goes on as usual. A war is declared between two powerful maritime nations. It produces no direct change in the peaceful avocations of life; agriculture, manufactures, commerce, flourish as before. The people are not hindered in their productions and exchanges, and are thus enabled to respond to the demands of the government, and to furnish all the material supplies necessary to sustain the struggle. It is true that producers are withdrawn from time to time from the orderly activities of life and are converted into military nonproducers. But the vacancy thus made is not felt, because the articles which were before produced at home are now brought from abroad, by means of the free commerce which is thus quickened into extraordinary activity. Under these circumstances the war is reduced to a mere duel between hostile armies. The nation has only to furnish men, and the contest will be continued until one country has been swept of its able-bodied citizens. That nation will certainly be victorious which can bring forward and sacrifice the greatest number of soldiers. This is not an imaginary picture. The essential fact was shown to be true in the history of the Confederacy. Levy after levy was made, army after army took the field; but as soon as Sherman ravaged the sources of supply in Georgia and Carolina, the whole hostile array collapsed. (II Halleck, p. 81, note 3.)

The existing practice, which makes enemy property in enemies' ships the subject of lawful capture and confiscation in time of war, would thus seem to have the sanction of the highest expert opinion and to constitute a form of international restraint which involves a minimum of the loss and suffering which invariably attend the operations of war upon whatever element they be undertaken.

It would also appear that although efforts were put forth in the early history of the Government under the Constitution with a view, through an exercise of the treaty-making power, to secure to private property as extensive an immunity from capture as possible, it has been seen that these efforts were desisted from early in the nineteenth century, largely because other powers were indifferent or were indisposed to make the matter the subject of treaty stipulation. Taken in connection with our subsequent history, the efforts so put forth can hardly be said to constitute the traditional policy of the United States in respect to the protection of private property at sea in time of war.

If the immunity of private property from capture at sea does not result from a conventional undertaking to that end, that immunity must be secured by the maintenance of an adequate naval establishment.

The foreign trade of the United States is largely carried on in foreign bottoms, so that in the event of maritime war our goods would be largely exempt from capture, either as enemy goods in neutral ships or as neutral goods in enemy ships. Were the United States to occupy the position of a belligerent, the amount of its merchandise afloat in American bottoms, which would be liable to capture as enemy goods in enemy ships, would be relatively small.

The statistics of our maritime commerce are interesting. In 1856 steam vessels having an aggregate capacity of 89,715 tons were engaged in foreign commerce, and this carrying capacity had increased to 596,594 tons in 1905. Steam vessels having a capacity of 583,362 tons were engaged in the coasting trade in 1855, and their capacity had increased, under the favoring legislation of Congress, to 3,140,314 tons in 1905. The total tonnage, sail and steam, carrying the American flag which was engaged in both foreign and coastwise trade increased from 4,871,653 tons in 1856 to 6,456,543 tons in 1905. That this increase is an extremely moderate one is indicated by the fact that during the same period the production of cotton increased from 3,655,557 bales to 13,565,885 bales; the production of coal from 6,927,580 tons to 314,562,880 tons; the output of pig iron from 788,915 tons to 22,992,380 tons; of steel (1867–1905) from 19,643 tons to 13,859,887 tons; of copper from 4,000 tons to 302,740 tons; while the railroad mileage increased from 22,016 miles in 1856 to 212,349 miles in 1905. Between 1877 and 1897 the sail-borne foreign commerce in American vessels had diminished from 1,865,688 tons to 582,717 tons; its steam tonnage had increased from 1,092,103 to 3,537,470 tons. In the same interval the sail-borne foreign commerce had decreased from 4,016,210 to 1,487,218 tons, but its steam tonnage had increased from 3,432,487 to 19,185,894 tons.

In determining the future policy of the United States in this regard certain acts and facts must be taken into consideration. It is proper to note, in the first place, that there has been an expression of legislative will upon the subject of immunity which is embodied in the following enactment of Congress:

> It is the sense of the Congress of the United States that it is desirable, in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents. (Joint Resolution No. 36, April 28, 1904, 33 Stat. L., 592.)

It is also proper that attention should be invited to the fact that the instructions communicated to the delegation of the United States to the first peace conference contained the following clause:

Since the conference has its chief reason of existence in the heavy burdens and cruel waste of war, which nowhere affect innocent private persons more severely or unjustly than in the damage done to peaceable trade and commerce, especially at sea, the question of exempting private property from destruction or capture on the high seas would seem to be a timely one for consideration.

As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the conference the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent powers which such property already enjoys on land as worthy of being incorporated in the permanent law of civilized nations. (Foreign Relations, 1899, p. 513.)

In the execution of the foregoing instructions, President White brought the matter to the attention of the conference a memorial, which was submitted to the conference on June 20, 1899. This instrument sets forth that:

It is proper to remind Your Excellency, as well as the Conference, that in presenting this subject we are acting not only in obedience to instructions from the present Government of the United States but also in conformity with a policy urged by our country upon the various Powers at all suitable times for more than a century. (Holls' Peace Conf. at The Hague, p. 307; Official Records of The Hague Conf., pp. 43–46.)

After referring to the efforts which had been put forth from time to time by the United States Government to secure the adoption of a conventional rule on this subject, the memorial goes on to say:

In this rapid survey of the course which the United States have pursued during more than a century, Your Excellency will note abundant illustration of the fact above stated—namely, that the instructions under which we now act do not result from the adoption of any new policy by our Government, or from any sudden impulse of our people, but that they are given us in continuance of a policy adopted by the United States in the first days of its existence and earnestly urged ever since. (Ibid., p. 310.)

The following proposition was then submitted for the action of the conference:

The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempted from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers. (Ibid., p. 311.)

In concluding the remarks with which President White submitted the matter to the consideration of the conference the following language was used:

The American Delegation is not, in this matter, advocating the particular interests of our own country. We know well that under existing circum-

stances if war should break out between two or more European Powers, there would immediately be an enormous transfer of freight and vessels to neutral countries, and that from this the United States, as in all probability one of these neutral countries, would doubtless reap enormous pecuniary advantages. But my Government lays no plans for gaining advantages of this sort. Might I not be permitted here to say that a characteristic trait of my fellow citizens has been imperfectly understood in Europe. Europeans suppose generally, that the people of the United States are an eminently practical people. That is true, but it is only half the truth. The people of the United States are not only devoted to practical aims, but they are even more devoted to ideals. There can be no greater error in considering the United States, or in dealing with them, than to suppose that American citizens are guided solely by material interests. Our own Civil War shows that, from first to last, material considerations were entirely subordinate to ideal, and that nearly a million of lives, and almost ten thousand millions of dollars, were freely sacrificed to maintain the ideal of our union as a Nation and not as a mere confederation of petty states.

I do not say this boastfully, but I say it that you may know what I mean when I say that the people of the United States are not only a practical people, but idealists as regards this question of the immunity of private property on the high seas. It is not a question of merely material interest for us; it is a question of right, of justice, of progress toward a better future for the entire world, and so my fellow countrymen feel it to be. (Ibid., p. 319–320; Official Records of The Hague Conference, pp. 43–46.)

As a mark of its appreciation of the presentation made by the chairman of the American delegation, the conference adopted a minute directing that his address should be printed in extenso in its official report.

While a more careful consideration of the historical aspects of the case and an examination of the prospective needs of our mercantile marine may warrant some modification of policy in respect to the liability of private property to capture at sea, it may perhaps be doubted whether, in view of the considerations above presented, the Government of the United States is in a position to advocate a policy differing materially from that which was made the subject of formal instructions to its delegates to the first peace conference, in 1899.

But this question, like many others having to do with the external political relations of the United States, has undergone marked change within the last decade, and a method of solution which promised well in 1899 may fail to meet and satisfy the conditions of urgency which confront us in 1907. The acquisition of considerable possessions beyond the seas, the development of their political interests and material resources, the adoption of a definite policy of canal construction at the Isthmus of Panama, the new problems which confront us in the Pacific, in which our trade interests and treaty relations are becoming constantly more intricate and difficult, the impending extension of our merchant marine, involving the acquisition of foreign markets, to which the question of equality of commercial

opportunity is closely allied, together with the cultivation of intimate and harmonious relations with the republics of Central and South America—all suggest the necessity of revising the policy of naval defense to which the Government of the United States has adhered for more than a century.

The desire of those who are charged with the responsibility of government, with the direction of its foreign policy, and with the development of its complicated material and commercial interests to refrain from participating in questions of purely European and Asiatic concern is no less strong to-day than it was when the policy of abstention was first announced by President Washington. But the questions which concern Europe and Asia alone are steadily diminishing, both in number and importance, while those which concern this Government as a riparian proprietor in the Pacific and as a competitor for trade throughout the civilized world charge the political departments of the Government with the study and solution of new and unfamiliar problems, of which it can only be said that they are of the most far-reaching importance and that they greatly exceed in difficulty any of those which were encountered by that Government during the first century of its constitutional history.

In closing the discussion of the subject of immunity it is proper to say that the representatives of the United States at the first peace conference brought this question to the attention of the conference in a formal memorial which embodied a resolution establishing an immunity from capture in behalf of enemy private property on the high seas in time of war. This memorial and resolution were supported and elucidated in an able address by the Hon. Andrew D. White, the president of the delegation. No action was taken by the conference upon the memorial and resolution so presented, which was dismissed with the recommendation which was embodied in the acte finale that the subject be commended to the attention of a future conference.

Accepting the action, or inaction of the conference, as an indication of the nonexistence of a disposition on the part of the states represented to accord an immunity from capture to enemy's private property at sea, the United States has proceeded with the development of her naval defenses, and she is now fully able to protect her merchant marine at all times and under all circumstances, and in affording to her citizens and their property the protection to which they are entitled, she no longer stands in need of the support of treaty stipulations. This Government is willing to consider, however, any proposition which may be submitted to the conference having for its object to secure to the noncontraband commerce of neutrals and the seaborne private property of belligerents a greater immunity from capture or destruction than they now enjoy; but, in view of the urgent

presentation of the case which was made at the former conference, it does not feel called upon at this time to renew an appeal which, at its first presentation, fell upon deaf and inattentive ears, and failed to obtain the consideration which, in view of its importance, it was entitled to receive.

THE RIGHTS AND DUTIES OF NEUTRALS.

In discussing the rights and duties of neutrals from the point of view of their conventional regulation, it should be borne in mind that the conduct of neutral states is regulated in part by the rules of international law and in part by the decisions of prize courts. In addition to this a neutral state finds it necessary from time to time, on account of some act committed by a belligerent, to vindicate its own sovereignty and independence. The act of a neutral in forbidding its territory to be used as a recruiting ground by either belligerent, or its ports or territorial waters to be used as bases of hostile expeditions, are acts done in furtherance of the rules of international law. A resort to force to prevent captures being made in neutral waters and the issue of regulations governing the presence of belligerent war ships in neutral ports, or determining the length of their sojourn, or the time or order of their departure, are measures resorted to with a view to vindicate neutral sovereignty.

The only advantage to be gained by bringing rights and duties of the classes above described within the scope of the conventional law of nations is to obtain uniformity of practice and to give the rules so adopted the formal sanction of a treaty obligation. When they are well understood and are given general and uniform operation by neutral states, the advantage of giving them the form and sanction of treaty stipulations is not clear, for if they are still in process of development and are likely to undergo amelioration or modification, due to the improvements that are constantly being made in the instrumentalities of maritime warfare, and in the means of telegraphic communication, that development is likely to be arrested by giving to a recognized principle the obligatory force of a treaty stipulation.

When an act done by a belligerent is of such a character as to justify a neutral in making a demand of restitution, or in using force to vindicate its sovereignty, a conventional rule is objectionable, since it is for the neutral to determine, from the circumstances of a particular case, whether its rights of sovereignty and independence have been invaded or injuriously affected and whether, in view of all the facts, it is necessary or expedient to vindicate them by a resort to force. The neutral state whose sovereignty has been invaded is best able to judge whether a case exists authorizing a demand for restitution or a resort to a forcible remedy. The rights of neutral

states from this point of view are not increased by the existence of war and, for that reason, there is no necessity for making such an exercise of sovereign rights the subject of conventional regulation.

Where a neutral right or duty grows out of the decisions of prize courts, as for example, the rule for determining when the title to a particular capture vests in the captor's state, or as to the source of the demand for restitution where a capture has been made in neutral waters, it is for many reasons best to leave the matter to the discretion of prize courts and to seek the international rule of action in a preponderance of the decisions of judicial tribunals. If the decisions are at variance, there is reason to believe that greater certainty and uniformity of practice would result from the adoption of a conventional rule, if it is possible to agree upon the terms in which such a rule shall be stated. Such is believed to have been the effect of the adoption of the rule of the Declaration of Paris in respect to the binding character of blockades, as it makes the efficiency of a particular blockade a question of fact and leaves it as an issue to be judicially decided in a prize case involving an alleged breach of blockade either by egression or ingression.

There are some specific rights and duties, however, which may properly be made the subject of further discussion.

BELLIGERENT WAR VESSELS IN NEUTRAL PORTS.

It is a well-established rule of international law that a public armed vessel may enter the port of a friendly power in time of peace; in time of war, however, this right has been made the subject of extensive restriction. As the neutral is at peace with both belligerents, it would seem at first sight that belligerent armed vessels might enter a neutral port, in time of war, under the same conditions and restrictions which surround their entry in time of peace; but experience has shown that such an extensive privilege can not safely be granted by a neutral state in time of war, as such entry may work some advantage to one belligerent at the expense of the other. For example, a belligerent vessel may take advantage of its presence in a neutral port to ascertain what enemy vessels are in port, with a view to follow them out and attack and capture them on the high seas; it may also enter to obtain information of the location, plans, or movements of the enemy's fleets, war ships, or merchantmen. A belligerent vessel may also find it convenient to enter a neutral port for a protracted stay, as to await the assembly of a fleet, or to recruit the health of its crew after long-continued operations at sea, as in maintaining a blockade on a stormy and dangerous coast, or it might enter for the purpose of entering a dry dock or for obtaining extensive repairs. He may also enter a port in stress of weather to escape the perils of the sea, or may take refuge in a neutral port

to avoid a superior force of the enemy. It is now generally settled that the time during which a belligerent armed vessel may remain in a neutral port is a matter which may properly be made the subject of restriction in the port regulations of neutral powers.

The rule adopted by the English Government, which was embodied in an order in council of January, 1862, grew out of the practical blockade of the Confederate steamer *Nashville* in the English port of Southampton by the United States cruiser *Tuscarora*. By this order in council—

Nothing but provisions requisite for the subsistence of the crew and so much coal as would carry the ship to the nearest port of the country, or to some nearer destination, was to be supplied to ships of war or privateers; the coal was only to be supplied once in three months to the same ship, unless this was relaxed by special permission. Similar rules were put in force during the Franco-German war, 1870–1871; in the Spanish-American war of 1898; and in the Russo-Japanese war of 1904. The rule in this latter case limited the supply of coal to "so much as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer named neutral destination." Holland, during the wars between Brazil and Paraguay, and Spain and Chile, prohibited ships of both parties, being in a Dutch harbor at the same time from departing until twenty-four hours after the other. Japan adopted what is practically the British twenty-four hours' rule as far back as 1870.

Smith & Sibley Int. Law, 134.
II Oppenheim, 355.
Hall, 628.

This rule was adopted in substance by the United States in 1870. The rule promulgated by the United States at the outbreak of the Russo-Japanese war in 1904 is worthy of examination as embodying the best and most recent experience in that regard.

Any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of either belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observations upon the ships of war or privateers or merchant vessels of the other belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that from and after the 15th day of February instant, and during the continuance of the present hostilities between Japan and Russia, no ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or waters subject to the jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States. If any ship of war or privateer of either belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters,

except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship of the other belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of the other belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship of war or privateer of either belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of the other belligerent. But if there be several vessels of each or either of the two belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom, shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the respective belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive, if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the government to which she belongs. (Proclamation of February 11, 1904, 33 Stat., 2333–2334.)

Other rules have been developed out of the international experience of neutral states, among which may be noted:

1. When vessels carrying the flags of the opposing belligerents are in a neutral port, the first to depart, whether a ship of war or a merchant vessel, shall not be followed by an armed vessel of the enemy until twenty-four hours shall have elapsed after the departure of the former.

This rule was applied so far back as 1759 by Spain, which laid down the rule that the first of two vessels of war belonging to different belligerents, to leave one of her ports should only be followed by the other after an interval of twenty-four hours (Ortolan II, 257). If the last to leave is a war vessel the rule has been to require the cap-

tain to give his word that he will not commit hostilities against a vessel issuing from a neutral port shortly before him.

Mr. Bernard says:

The rule that when hostile ships meet in a neutral harbour the local authority may prevent one from sailing simultaneously with or immediately after the other, will not be found in all books on international law. It is however a convenient and reasonable rule; it has gained, I think, sufficient foundation in usage; and the interval of twenty-four hours adopted during the last century in a few treaties and in some marine ordinances has been commonly accepted as a reasonable and convenient interval.

Hall, p. 628.

Historical acc. of the Neutrality of Great Britain, p. 273.

2. A belligerent armed vessel shall not anchor or lay off and on outside a neutral port in such a way as to establish a de facto blockade in respect to the merchant or public armed vessels of the enemy which have sought refuge in the port. This was the case of the United States cruiser *Tuscarora* at Southampton.

The *Tuscarora* took up a position outside the harbor, thereby preventing the *Nashville* from landing. The *Tuscarora* always kept up steam, and thus was able to precede the other ship, whenever she attempted to leave. The *Tuscarora* having left, the *Nashville* could not leave for twenty-four hours; before the close of twenty-four hours the *Tuscarora* would return to her anchorage. Repeating this operation, she effectually prevented the *Nashville* from leaving. (Smith & Sibley Int. Law, p. 133–134.)

SUPPLIES OF COAL AND PROVISIONS.

This has been discussed to some extent in connection with the admission of belligerent vessels to neutral ports, and is a matter of constantly increasing importance. The reasons which justify the imposition of restrictions in respect to the obtaining of coal and provisions are well stated by a recent writer:

The importance of a neutral port as a coaling station at the present day can not be exaggerated, but it is equally true that this is a modern feature of maritime warfare. The conditions of modern warfare are not susceptible of adequate consideration under the principle that obtained before the American Civil War, that there was no compulsory restriction on the reception of a belligerent cruiser in neutral ports. When steam is practically the sole means of propulsion, coal is as obviously a necessity to a cruiser as gunpowder and provisions always were and are. Again, since steam has rendered the duration of voyages approximately determinable beforehand, it is only consistent that the supply of provisions meted out to a belligerent cruiser in a neutral port should be equally limited. When a vessel was more or less completely at the mercy of the winds and waves, there was not the same reasonableness in limiting the store of provisions a belligerent vessel might purchase in a neutral port, simply because it was far less possible to state definitely the duration of its voyage to the nearest port in its territory. Further, the political and territorial conditions prevalent between those nations, such as England, France, and Spain, which carried on naval operations in distant regions, suggest that these Powers did not avail themselves of the entire absence of restrictions which

then existed as to the reception of a belligerent vessel in neutral ports. All the above countries were then provided with colonies in distant regions. (Smith & Sibley Int. Law, p. 129.)

Hall says on this point:

A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable. (Hall, Pt. IV, Ch. III, p. 605.)

It is proper to observe that neutral regulations restricting the furnishing of supplies to belligerents are rules made in furtherance of international law, which forbids military and naval expeditions to originate in neutral ports. While a public armed vessel which leaves a neutral port after obtaining coal and supplies does not constitute an original expedition, the mere fact that it has received coal or provisions, or both, prolongs its life as an expedition and enables it to undertake new operations against the enemy. Such is clearly not the case with a port regulation restricting the stay of a belligerent vessel to a definite period of time, which is a measure resorted to by a neutral with a view to prevent the abuse of its hospitality. (VII Moore, 942, 948.)

There is a general tendency on the part of neutrals to restrict the supply of coal furnished to that which is necessary to enable the vessel to reach the nearest port of its own country or to some nearer named neutral destination (Smith & Sibley, 13; proclamation February 11, 1904, 33 Stat. L., 2334; VII Moore, 942, 948). The standard of neutral duty as indicated by the most recent practice in this regard is well stated in the President's proclamation of February 11, 1904, which provides that—

No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the substance of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal she would be entitled to receive, if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission,

until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the government to which she belongs. (33 Stat. L., p. 2334.)

DESTRUCTION OF NEUTRAL VESSELS.

The existing rules in respect to the destruction of prizes were established in the decisions of prize courts, most of which were rendered nearly a century ago, when maritime commerce was carried on in sailing vessels of relatively small tonnage. During the recent war in the East, however, several vessels were destroyed by their captors under circumstances warranting the belief that the act of the commander of the capturing vessel should be made the subject of diplomatic negotiation or of judicial inquiry. These will presently be referred to.

The established rule is that a vessel of war which makes a capture in time of war shall put a prize crew on board and send the captured vessel into a port of the captor's state for adjudication. It has long been recognized that after several prize crews have been furnished the ship's company will be so depleted as to make it impossible to make further detachments for that purpose, in which event the prize must either be released or destroyed.

The captured vessel may carry the enemy's flag, and its cargo may consist of enemy property, in which case the preponderance of opinion is that, in the absence of treaty stipulations to the contrary, it may be destroyed. If the prize carries a neutral flag or there is noncontraband neutral property in the cargo, a different rule prevails.

As the property in an enemy's vessel and cargo is vested in the state to which the captor belongs so soon as an effectual seizure has been made, they may in strictness be disposed of by him as the agent of his state in whatever manner he chooses. So long as they were clearly the property of the enemy at the time of capture, it is immaterial from the point of view of International Law whether the captor sends them home for sale, or destroys them, or releases them upon ransom. But as the property of belligerents is often much mixed up with that of neutrals, it is the universal practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy. And though the right of a belligerent to the free disposal of enemy property taken by him is in no way touched by the existence of the practice, it is not usual to permit captors to destroy or ransom prizes, however undoubted may be their ownership, except when their retention is difficult or inconvenient.

Perhaps the only occasions on which enemy's vessels have been systematically destroyed, apart from any serious difficulty in otherwise disposing of them, were during the American Revolutionary war and that between Great Britain and the United States in 1812–14. On the outbreak of the latter war the American government instructed the officers in command of squadrons to 'destroy all you capture, unless in some extraordinary cases that shall clearly

warrant an exception.' 'The commerce of the enemy,' it was said, 'is the most vulnerable point of the enemy we can attack, and its destruction the main object; and to this end all your efforts should be directed. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigour her destructive power, so long as her provisions and stores can be replenished, either from friendly ports or from the vessels captured.' Under these instructions seventy-four British merchantmen were destroyed. The destruction of prizes by the ships commissioned by the Confederate States of America was not parallel because there were no ports into which they could take them with reasonable safety; and the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary. (Hall, pp. 456–458.)

During the recent war in the East several neutral vessels were destroyed by the Russian cruisers which captured them. These were the *Knight Commander*, *Hip Sang*, *Ikhona*, *St. Kilda*, *Tetardos*, *Thea*, and the *Princess Marie*. In the case of the *St. Kilda*, which had an English register, the Government of Great Britain strongly objected to the act of the Russian naval commander and claimed damages in behalf of the neutral owners.

The *Knight Commander*, a British steamer belonging to a company, sailed from New York on May 6, and from Manila on July 11 for Shanghai and Yokohama with a general cargo. The owners denied there was any contraband on board. Early in the morning of July 24, she fell in with the Russian cruisers of the Vladivostok squadron off the peninsula Idzu, on the eastern side of the gulf near which Yokohama is situate. The Russians ordered the captain and crew to come on board one of the war ships in ten minutes, at the expiration of which they sank the vessel. The European passengers were detained by the Russians, and the crew were placed on board another British steamer, *Tsinan* and taken into Yokohama. The *Knight Commander* was subsequently adjudged a lawful prize by the Vladivostok prize court. No compensation has been offered so far, and, judging from the speeches of the Prime Minister and Lord Lansdowne, the prospect of ever obtaining it is remote. Yet Prof. T. E. Holland stated in the Times, summarizing prize law as understood in this country, that the sinking of a neutral vessel by a captor can only be justified by compensation. On the same day and place as the *Knight Commander* incident occurred, the Vladivostok squadron sank the German steamship *Thea*, chartered by a Japanese firm. The Vladivostok prize court adjudged the *Thea* a lawful prize, because she had lost her status as a neutral ship. But compensation, denied in the case of the *Knight Commander*, was awarded in the case of the *Thea* by the same prize court. From the point of view of international law as understood on the continent, it is certain that at least one condition relied upon to justify the captor in sinking a neutral did not obtain in the case of the *Knight Commander*. This condition is that the captor is short of a prize crew to place on the neutral vessel. It was stipulated in the "Ordonnance de la Marine," of Louis XIV, that a privateer might sink a prize when to place a prize crew on the captured vessel would interfere with further operation. In the case of the *Knight Commander* the captain of the British steamer, *Tsinan*, on which the crew of the *Knight Commander* was placed, noticed that the Russian cruisers were crowded with men. If this be true, a prize crew

could have been placed on the *Knight Commander* without hampering the operations of the Russian squadron. But from the point of view of English prize law as enunciated by Lord Stowell in the case of the *Acteon*, the circumstance that a captor can not spare men to man the vessel captured does not relieve him of the obligation to make full compensation if he sinks a neutral ship. (Smith & Sibley, Int. Law, pp. 186–187.)

It will thus appear that there is great diversity of practice in respect to the destruction of neutral ships, and a corresponding want of uniformity in the decisions of prize courts. In that view of the case there is some force in the suggestion that the adoption of a conventional rule in respect to the circumstances under which a naval commander will be justified in destroying merchant vessels which have been captured by the forces under his command. In this connection attention is invited to the rules recommended for adoption by the Institute de Droit Internationale at its session in Turin in 1882, in which it was suggested that the destruction of a prize would be authorized in any one of the following cases:

1. When it is impossible to keep the prize afloat by reason of its unseaworthy condition or the roughness of the sea.

2. When, on account of inferior speed, the prize is unable to follow her captor and for that reason is liable to recapture.

3. When the approach of a superior force of the enemy gives occasion for the belief that the prize will be recaptured.

4. When the captor is unable to detach an adequate prize crew without depleting his ship's company to such an extent as to imperil the safety of the fleet or vessel under his command.

5. When the home port to which the prize should be sent is too distant from the place of capture.

In view of the diversity and uncertainty of the existing practice, both of governments and prize courts, and of the importance of neutral interests involved, it is suggested that rules following the lines laid down by the Institute de Droit Internationale may well command the support of the delegation.

CONTRABAND OF WAR.

It has frequently been attempted to frame a definition which would include within its scope all neutral property which is captured on the high seas with a hostile destination or which is shown to have been intended for the use of the enemy, but none of the definitions so prepared have received anything approaching universal approval. This has been attempted in treaties, in the works of text writers, in the decisions of prize courts, and, upon at least one occasion, by the Supreme Court of the United States (*The Peterhoff*, 5 Wallace, 58; *The Commercen*, 1 Wheaton, 382), the difficulty in each case being to determine what property, goods, or articles are so obviously

intended for the use of the belligerent as to warrant their confiscation on that ground. The first definition was attempted by Grotius before the distinction of contraband was recognized and before the word came into use as descriptive of the illicit trade of neutral subjects with belligerent ports in time of war. The definition of Grotius has not been materially improved upon. He places all commodities under three heads:

> There are some objects which are of use in war alone, as arms; there are others which are useless in war, and which serve only for purposes of luxury; and there are others which can be employed both in war and peace, as money, provisions, ships, and articles of naval equipment. (Grotius, De Jure Belli et Pacis, liv. iii, ch. i, sec. 5.)

In the doctrine of "occasional contraband" it has been attempted to inject a measure of elasticity into the somewhat arbitrary classifications of neutral property made from time to time in the decisions of prize courts. When the liability to capture is due to and depends upon the destination of the goods or cargo, this liability has been not unreasonably extended by the application of the doctrine of "continuous voyages," which was originated by Sir William Scott in the early part of the nineteenth century and applied in several instances to cases which were decided by the Supreme Court of the United States during the period of the civil war. (*The Springbok*, 5 Wallace, 1; *The Peterhoff*, ibid., 28.)

If prize courts, text writers, and those charged with the exercise of the treaty-making power have failed to deduce a rule of invariable or even of general application, it may well be doubted whether the approaching conference will be any more successful in its endeavors in that direction.

III Phillimore, sec. 236, 243–253.
Vattel, liv. iii, ch. vii, sec. 112.
II Twiss, sec. 121–148.
II Ortolan, pp. 182–187.
Lawrence's Int. Law, sec. 278.
Klüber, sec. 288.
Manning, pp. 352–377.
Dana's Wheaton, note 226.
Lawrence's Wheaton, p. 796, note 229.

The suggestion has been made that the problem can be shortly solved by the adoption of a rule doing away with the distinction of contraband of war; but this would deprive the belligerent of an essential right of self-defense and would be inoperative unless it were coupled with a rule forbidding neutral subjects to furnish articles of contraband to either belligerent. The effect of such a rule would be to involve every neutral state, through its manufacturing

and commercial interests, in the losses incident to wars in which they have neither interest nor concern.

Nor would the adoption of such a rule operate to diminish the burdens which are now borne by the neutral commerce in time of war. In other words, the existing rule forbids a neutral state from rendering any assistance to either belligerent in his military operations, but it does not require a neutral subject, who is habitually engaged in the manufacture and sale of contraband, to discontinue his business in time of war. It makes his property liable to confiscation if captured on the high seas with a belligerent port of destination. If the distinction of contraband is abolished, the effect will be to charge the neutral state with a duty which is now performed by the cruisers of the several belligerents; that is, with the prevention of contraband trade. This is contrary to the traditional policy of the United States and represents a view which can not be accepted by its Government.

Nor will it be calculated to diminish the burdens which belligerents may now impose on neutral commerce in time of war, for it has never been suggested to abolish the right of siege or blockade, and the right of search, with a view to prevent violations of blockade, would continue to exist, and to be effective would have to be exercised to the same extent that is now allowable by the rules of war.

When issue has been fully joined by the belligerents the right of blockade becomes the most efficient instrumentality to which a belligerent can resort to injure the enemy, and, at the same time, prevent himself from being injured by illicit neutral trade. Indeed, a belligerent in exercising his right to prevent contraband trade increases his vigilance in those waters which are adjacent to the enemy's coasts. He may not even attempt to establish a blockade, relying upon the efficiency of his cruisers to intercept neutral merchant vessels as they approach the ports of the enemy. If he establishes a blockade opposite certain ports of the enemy, or against considerable portions of his coast line, his blockading fleets and his commerce-destroying cruisers are operated in close conjunction, the commerce destroyers being a first line of defense, through which neutral vessels must pass, before a breach of blockade can be attempted.

Memorandum upon the Articles of the Russian Programme for the Second Conference at The Hague which Relate to the Laws of Maritime Warfare.

ARTICLE 3.

Framing of a convention relative to the laws and customs of maritime warfare, concerning—

(*a*) The special questions of maritime warfare, such as the bombardment of ports, cities, and villages by a naval force; the laying of torpedoes, etc.

(*b*) The transformation of merchant vessels into war ships.

(*c*) The private property of belligerents at sea.

(*d*) The length of time to be granted to merchant ships for their departure from ports of neutrals or of the enemy after the opening of hostilities.

(*e*) The rights and duties of neutrals at sea, among others the question of contraband, the rules applicable to belligerent vessels in neutral ports; destruction, in cases of vis major of neutral merchant vessels captured as prizes.

(*f*) In the said convention to be drafted there would be introduced the provisions relative to war on land that would be also applicable to maritime warfare.

THE BOMBARDMENT OF PORTS, CITIES, AND VILLAGES BY A NAVAL FORCE.

This subject was discussed by the conference of officers at the United States Naval War College, and a full report, with opinions and authorities cited, will be found upon pages 23 et seq. of the War College publication International Law Discussions, 1903.

The whole tendency of the naval powers is to concentrate expenditure and effort upon operations of direct military value, and both military considerations and humanity imperatively demand the regulation of bombardment by rules analogous to those provided for land warfare by Articles XXV, XXVI, and XXVII of The Hague Convention of 1899. The rule formulated by the conference of officers, 1903 (p. 25, last par. p. 26), appears to be satisfactory as a proposal, and is as follows:

> The bombardment by a naval force of unfortified and undefended towns, villages or buildings is forbidden, though such towns, villages or buildings are

liable to the damages incident to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port and such towns, villages or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice shall be given. The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden.

THE LAYING OF TORPEDOES, ETC.

The war between Russia and Japan ended more than a year since, and yet merchant vessels pursuing their voyages far distant from what was once the location of the mine fields are still being lost by collision with drifting contact mines. Thousands of these were placed by both belligerents, and although they have been diligently sought out for removal many can not be located, and many which have gone adrift from their moorings and have been carried here and there by currents are still a formidable menace.

A discussion of the question will be found upon pages 147 et seq. of International Law Discussions, 1905, and the conclusion formulated by the conference, slightly modified, has received the formal approval of the Navy Department. (Secretary of the Navy to Secretary of State, September 27, 1906.) It is as follows in the approved form:

Unanchored contact mines are prohibited. Anchored contact mines that do not become innocuous on getting adrift are prohibited. If anchored contact mines are used within belligerent jurisdiction or within the area of the immediate belligerent activities, due precautions shall be taken for the safety of neutrals.

THE TRANSFORMATION OF MERCHANT SHIPS INTO WAR SHIPS.

Merchant ships may be divided for the purposes of this discussion into three classes:

(*a*) Those which are the private property of belligerent citizens.

(*b*) Those which are the private property of neutral citizens and in which the neutral government has no interest.

(*c*) Those which are private property of neutral citizens, but in which the neutral government has an interest with the right of purchase or use for war purposes.

Referring to vessels of class (*a*): Each state has the right to use all the material resources of its citizens for either offense or defense, and no interference with its sovereignty is possible or desirable. Attempts have been made by certain writers to confuse the utilization of merchant vessels as men-of-war with privateering, but the essence of privateering lies in the pursuit of private gain and in the lack of subjection to military law of the personnel. It is immaterial whether the vessel was built for war or not as long as she is regularly commissioned as a public vessel.

The legitimacy of the belligerent operations conducted by certain private owned Russian vessels during the late war was not contested upon the ground that they had been or were private owned, but upon the ground that having passed the Dardanelles as merchant ships, and having, without visiting a home port, appeared as armed men-of-war, exercising belligerent rights, they must in fact have had their armament on board and that to pass the Dardanelles practically armed was such a violation or evasion of treaty obligations to which Russia was a party as to deprive them of the character of legitimately commissioned vessels of war.

Vessels of class (*b*), private owned neutral vessels in which the government has no interest, may be freely sold to belligerents, but they are subject to be declared contraband by belligerents, and as such their treatment is determined by the ordinary rules of prize. The Russian declaration of 1904, article 6, is as follows:

> The following articles are deemed contraband of war:
> 6. Vessels bound to an enemy's port, even if under a neutral flag, if it is apparent from their construction, interior fittings, and other indications, that they have been built for warlike purposes and are proceeding to an enemy's port in order to be sold or handed over to the enemy.

It does not seem advisable to make any change in the existing rules as far as the vessels of class (*b*) are concerned. Neutrals desire the maximum possible freedom for their trade in time of war and the minimum chance of being involved in hostilities. The first has been promoted by allowing neutral individuals to trade in contraband at their own risk; the second, by neutral states surrendering to belligerents their natural jurisdiction over their own merchant vessels on the high seas to the extent of permitting visit and search, thus avoiding possible charges of unneutral conduct by reason of the acts of individuals which it would be not only onerous, but practically impossible to prevent in all cases.

Class (*c*), neutral private owned vessels in which the neutral government has a controlling interest.

Vessels of this class are usually built at greater expense than necessary for commercial purposes in order to make them suitable for war purposes by reason of speed, strength, or gun emplacements, and the government has certain contract rights as to their disposition. The release of such contract rights by the government during hostilities should be guarded against by convention in such a manner as to prevent the transfer of these vessels to belligerents, either directly or through third parties. Their situation seems in a measure analogous to that of the *Rappahannock*. In September, 1863, H. B. M. S. *Victor*, a dispatch boat, was condemned and sold. On the 26th of November, 1863, she appeared in the port of Calais as the Confederate man-of-war *Rappahannock*, and in consequence of

this affair the British Government ordered that thereafter no vessels should be sold out of the navy during the war, lest they should reach belligerents.

THE PRIVATE PROPERTY OF BELLIGERENTS AT SEA.

This paragraph is obviously intended to open the way for the discussion of the question of the exemption of private property at sea from seizure, and the attitude of the United States Government is defined in the following resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is desirable, in the interest of uniformity of action by the maritime states of the world in time of war that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

Approved, April 28, 1904.

Before going beyond the formal maintenance of the existing attitude of the Government, it is well to note that the resolution seeks uniformity of action by the maritime states, and that contraband being still subject to capture, a preliminary definition is imperative, unless the purpose of the resolution is to be nullified by as wide an extension of the list of contraband as a belligerent may consider convenient. It is well recognized as lawful for a belligerent to declare such a list of contraband as he may deem suitable to his military situation, and this act, therefore, in itself is not a cause of war, though any state may seek to remove the burden from its commerce by protest, or by war, if the burden is considered intolerable. The belligerent's declaration as to contraband is sometimes referred to as if it were an offense, but in fact the practice is in the interest of trade, since it defines what may be done free from molestation.

The law of blockade will also require further definition, since there will be a great temptation to seize private property under the pretense that an attempt has been made to violate a widely extended blockade.

The present status of private property, both neutral and belligerent, at sea is fairly well settled by the last three articles of the Declaration of Paris, and although the United States has never formally acceded to the declaration, owing to the act of the signatory powers making the four principles, including the abandonment of privateering, one and indivisible, yet there is no doubt that in practice it will adhere to the rules relating to property and blockade, as it did during the Spanish war.

The question of immunity of private property at sea is somewhat fully discussed, with numerous citations of opinion on both sides, in

International Law Topics and Discussions, Naval War College, 1905, Topic I, but the conclusion does not appear entirely satisfactory and its application would still involve a definition of "innocent" or noncontraband.

THE LENGTH OF TIME TO BE GRANTED TO MERCHANT SHIPS FOR THEIR DEPARTURE FROM PORTS OF NEUTRALS OR OF THE ENEMY AFTER THE OPENING OF HOSTILITIES.

The well-settled practice of allowing enemy merchant vessels a reasonable time to depart from a hostile port may well be formulated in a conventional agreement broad and general in terms. It is in the interest of commerce and of both belligenents that while war may threaten, trade shall continue in security, but the facilities of ports for the handling and dispatch of cargo and other conditions vary so greatly that no definite and equitable time can be established. The multiplication of cables and cipher codes have made it unreasonable to allow an enemy's ship, with a sharp-eyed and patriotic crew, to lie for days in a port where the facilities are such that a great cargo can be loaded or discharged in a few hours.

It does not seem advisable to attempt to deal particularly with the class of vessels which, although engaged in commerce, are at the disposition of their governments for war purposes by reason of contracts entered into. Such vessels would probably be withdrawn from their commercial employments when war was imminent, but if allowed to be in an enemy's port on the outbreak of hostilities must take their chances of seizure and condemnation by the prize court.

The suggestion in the programme that time shall be allowed for a merchant vessel to depart from a neutral and friendly port is novel in international law and not fully understood. A merchant vessel is under no obligation whatsoever to depart from a friendly port where she is in perfect safety and may be laid up or sold. She is practically certain in any part of the world to know of the outbreak of war and is therefore in a more favorable situation than a vessel on the high seas, which is lawful prize to an enemy at any moment after the outbreak.

THE RIGHTS AND DUTIES OF NEUTRALS AT SEA—CONTRABAND—THE TREATMENT OF BELLIGERENT VESSELS IN NEUTRAL PORTS—THE DESTRUCTION OF NEUTRAL VESSELS CAPTURED AS PRIZES.

This paragraph covers so vast a subject that it does not seem practicable to do more in this memorandum than touch upon a few points.

The limitation of absolute contraband affects us principally as traders, since we are self-supporting in the matter of food, and our coast is so extensive on the Atlantic and Pacific that it can not be

effectively blockaded on both sides, while our railway system is so complete that other supplies landed at any port are available for use throughout our territory.

The situation in the seas about Great Britain and on the north coast of Europe is far different. To England the question of provisions as contraband is one of overwhelming interest, and from an aggressive point of view it is almost equally so to her European neighbors.

Under the circumstances it would seem desirable for the United States not to put forward any definite proposal until it becomes apparent by informal conferences at The Hague that the vitally interested powers can meet on some common ground. It must be treated not as a matter of principle but as one of policy, the natural right of self-preservation being fully recognized.

The question of the treatment of belligerent vessels in neutral ports obviously covers the case of the internment of war vessels taking refuge or remaining in neutral ports, but as until the recent war there were no precedents, there can not now be said to be any rule sanctioned by long practice, and certainly it seems best to leave the proposal of rules, which are likely to be harsh, to those who were parties to the war and whose sensitiveness would naturally be keen.

The destruction of a neutral vessel which has been seized as prize, without judicial condemnation, is contrary to the opinion of many most responsible jurists and writers and may well be forbidden by convention. It is suggested that no neutral vessel shall be destroyed without adjudication unless the absolute military contraband is equal to at least one-third in bulk of her cargo capacity, and that all other neutral private vessels shall be either sent in for adjudication or dismissed, and that in case any neutral vessel is destroyed, her owners and the owners of all innocent cargo, shall be fully reimbursed, without contest, for losses of every description.

Unneutral service: Many acts which would be, in effect, a direct cooperation by neutrals in the service of the belligerent fleet seem best defined by this term, and as such they have been at various times forbidden by neutral governments; for instance, in 1870, and again in 1904, the British Government forbade the departure of coal-laden steamers consigned to the commanders of belligerent fleets, and the United States Government, in its proclamation of February 11, 1904, gives notice—

that while all persons may lawfully, and without restriction because of the aforesaid state of war, manufacture and sell, within the United States, arms and munitions of war and other articles ordinarily known as contraband of war, yet they can not carry such articles upon the high seas for the use or service of either belligerent, nor can they transport officers or soldiers of either * * * without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

Perhaps one of the surest ways of limiting the area of maritime war is by the denial of coal and other supplies in or directly from neutral ports, and although the subject is surrounded by peculiar difficulties, it seems desirable, if opportunity offers, to establish conventional agreements, however limited they may be, provided the police duties thrown upon neutrals are not so difficult of execution as to risk their entanglement in the war by charges of bad faith or neglect made by an angry belligerent.

The subject of unneutral service in general is quite fully discussed in International Law Topics and Discussions, 1905.

PROVISIONS OF THE HAGUE CONVENTION FOR LAND WARFARE WHICH ARE APPLICABLE TO BE INTRODUCED IN NEW MARITIME CONVENTION.

This presents no particular difficulty and seems to need no comment. The same remark may be made as to the amendment of The Hague Convention for the Adaptation of the Geneva Convention of 1864 to the new Geneva Convention of July, 1906.

In signing The Hague Maritime Convention of 1899 the United States joined Great Britain, Germany, and Turkey in excluding Article X, which is as follows:

> The shipwrecked, wounded, or sick who shall be landed at a neutral port, with the consent of the local authorities, must, in the absence of a contrary agreement between the neutral state and the belligerents, be guarded by the neutral state so that they can not again take part in the military operations. The expense of entertainment and detention shall be borne by the state to which the wounded, shipwrecked, or sick shall belong.

The reports of the proceedings at The Hague do not make clear why this article, which seems humane and in accord with the practice under the Land Convention, was objected to by the United States, and it appears desirable to procure a reconsideration.

In concluding this brief memorandum attention is called to the fact that the International Law Discussions at the United States Naval War College during the years 1903, 1904, 1905, and 1906 were deliberately planned to cover the subjects to be discussed at The Second Hague Conference, as far as they could be foreseen, and the volumes for the last three years are arranged for convenient reference to particular topics. The discussions were intended to be purely and simply contributions to the consideration of the several subjects, and the conclusions do not in any way represent the opinion of the Navy Department.

U. S. NAVAL WAR COLLEGE,
April 30, 1907.

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