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NEUTRAL RIGHTS UNDER INTERNATIONAL LAW
IN THE EUROPEAN WAR, 1939-1941*

By C. H. McLAUGHLIN†

When the present European war broke out in September, 1939, the Government of the United States immediately declared its neutrality by a presidential proclamation designed to bring into effect such restrictions upon belligerent and neutral conduct within the United States as this Government was required by international law to impose, and further to restrict the activities of persons subject to its jurisdiction in accordance with those terms of the Penal Code of the United States which imposed domestic standards of neutral conduct.1 On the same day the president, acting under authority of the Neutrality Law of May 1, 1937, then still in force, declared the existence of a state of foreign war and thus invoked the provisions of the Law which imposed an embargo upon arms, ammunition, and implements of

*Although the present article is confined to an examination of neutral rights, with emphasis upon the rights claimed by the United States and other American states, it is not intended to imply that neutral claims to respect for rights recognized in the past can be considered apart from the reciprocal duty to observe recognized neutral obligations. Rather than include the entire subject in a single unwieldy article, the writer has preferred to deal with the question of neutral obligations in a separate paper entitled "Abuse of Neutral Obligations under American Security Legislation, 1939-1941." This will appear in a subsequent issue.

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war.\(^2\) Other sections of the same statute, which regulated travel by citizens of the United States upon vessels of belligerent states, extension of credits to belligerents, and contributions for relief in belligerent countries, were brought into effect soon after by executive orders.\(^3\)

Thus the United States gave formal notice to belligerents of its intention to remain neutral, and to claim the rights and accept the obligations inherent in the status of neutrality. The same position was announced by the other member-states of the Pan American Union, and of course by many European states, including the traditionally neutral group adjacent to the North Sea and its connecting waters.\(^4\) Nor is there doubt that these neutrals sought to impose internationally accepted standards of conduct upon their nationals and to implement these by any necessary domestic prohibitory and penal laws. It was legislation of this type

\(^2\)Act of May 1, 1937, sec. 1, 50 Stat. at L. 121; Proclamation No. 2349 of September 5, 1939, 1 Bulletin 208, 4 Fed. Reg. 3819. Also supplementary proclamations Nos. 2354 and 2360 of September 8 and 10, 1939, to extend the provisions of No. 2349 to the Union of South Africa and Canada; 1 Bulletin 211, 246; 4 Fed. Reg. 3852, 3857.

\(^3\)Sections 9 and 3. Regulations of September 5 and 6, 1939 with supplementary regulations of September 9 and 11 including the Union of South Africa and Canada: 1 Bulletin 219, 220, 247 (travel on belligerent vessels), 221, 247 (credits to belligerents), 222, 224, 248 (contributions for relief); 4 Fed. Reg. 3838, 3882, 3891 (travel on belligerent vessels), 3852, 3890 (credits to belligerents), 3839, 3882, 3891 (contributions for relief).

\(^4\)With reference to the American states it is sufficient to refer to the General Declaration of Neutrality of the American Republics, which was incorporated as the fifth resolution in the Final Act (October 3, 1939) of the Consultative Meeting of Foreign Ministers of the American Republics, held in the City of Panamá. For discussion see infra, sec. V. The German Government is reported to have given assurances on August 26, 1939 to Belgium, the Netherlands and Switzerland, and on August 29 to Denmark and Lithuania, of its intention to respect their borders; London Times, August 28, 1939, p. 9, N. Y. Times, August 27, 1939, p. 32, Christian Science Monitor, August 30, 1939, p. 7. The foreign ministers of Norway, Denmark, Sweden and Finland met at Oslo August 30, 1939 to discuss their common neutrality; N. Y. Times, August 31, 1939, p. 2. Neutrality declarations were issued by Denmark, Latvia and Finland on September 1, 1939 (N. Y. Times, September 2, 1939, pp. 2, 6), by the Netherlands on September 3 (N. Y. Times, September 4, p. 15), by Norway on September 8 (London Times, September 9, p. 7). Norway, Denmark, Sweden and Finland held further conferences on neutrality in Brussels (with Belgium), September 12 (communiqué issued September 16; N. Y. Times, September 17, 1939, p. 44), in Copenhagen September 18 (communiqué issued September 19; text in London Times, September 20, 1939, p. 10), in Stockholm October 18-19 (communiqué issued October 20; text in N. Y. Times, October 20, 1939, p. 6). On all these occasions the will to remain neutral was expressed. For lists of declarations of neutrality by other states, see 34 A. J. I. L. 131, 132, 133. For an up-to-date collection of neutrality regulations, including domestic legislation, of various states see Delik and Jessup, Neutrality Laws, Regulations and Treaties (2 vols.); also C. C. H. War Law Service.
which the president’s first proclamation of neutrality brought into effect.

Of course a state may voluntarily impose upon its nationals more stringent standards of conduct than those required by international law. In the Neutrality Act of 1937, and in the Act of November 4, 1939, which superseded it, the United States did this. Without relinquishing its status as a neutral a state can modify this second type of domestic legislation in time of war, or even repeal it altogether, provided such modifications do not impair the observance of the obligations imposed by international law and are not adopted in order to produce a change of conditions of advantage to one belligerent as against the other. This is not the place to examine the controversial question whether the repeal by the Neutrality Law of 1939 of the arms embargo contained in the Neutrality Law of 1937, or the recent repeal of those sections of the Neutrality Law of 1939 requiring transfer of title prior to the export of goods to belligerents, authorizing the president to declare combat areas into which American vessels were forbidden to go, and prohibiting the arming of American merchant vessels, complied with these conditions. The presumption is that at worst they were unneutral acts but not an abandonment of neutral status. On the other hand it can be confidently asserted that the enactment of the Lend-Lease Law of March 11, 1941 was a legislative and executive commitment to a regular course of action clearly unneutral. The Government of the United States as distinct from its nationals has in recent months freely, continuously, and with all the resources at its command, engaged in a deliberate course of unneutral service calculated to aid Great Britain and the Union of Soviet Socialist Republics against their enemies. An anomalous situation thus exists in which the original neutrality proclamation has not been revoked and United States nationals continue to be restrained from unneutral conduct, yet the Government of the United States has announced its intention continuously to ignore its own neutral obligations. That such a condition can long continue seems improbable. It is fair to assume that this country is virtually at the end of its official period

6 An Act Further to Promote the Defense of the United States, and for other purposes. Approved, March 11, 1941. Public Law 11, 77th Congress, 1st Session [H. R. 1776]. For discussion see the article referred to in footnote, p. 1, designated by asterisk.
of neutrality and that the time is therefore ripe for a general re-
view of the problems of neutrality which have arisen during it.

If it be too early to predict what effect recent developments
will have upon the future law of neutrality, it is at least possible
to clarify the issues by examining these developments against a
background of previous international usage. Regardless of the
character of our domestic neutrality and defense legislation, the
rights and obligations of belligerents and neutrals respectively
continue to be determined by international law, which in turn re-
fects the practice of states. Therefore it is entirely pertinent to
inquire whether the current practice of belligerents and neutrals
is in accordance with accepted usage, and what steps are appro-
priate to preserve a practical balance between belligerent and
neutral rights. Close factual similarities between the position of
neutrals of the western hemisphere today and their position dur-
ing the first years of the World War, suggest that the present
situation is peculiarly a continuation of the World War con-
troversy over neutral rights. Had some new equilibrium been
struck then between the rights of belligerents and neutrals, it
might now be taken as a standard or at least a point of departure
in appraising present conduct. Instead, we have now a recurrence
of many issues upon which no agreement could then be reached,
and toward the solution of which no substantial international
action was taken during the two decades which followed.

It is not possible here to enter into a detailed review of the
World War controversy over neutral rights. It will perhaps
suffice to indicate some of the issues which emerged and their
relation to the conduct of hostilities today. The World War dif-
fered from earlier wars and resembled the present European war
in that it was conducted as a totalitarian enterprise, in the sense
that each belligerent endeavored to weld into a single offensive
weapon not merely its military and naval establishments, but
every financial, economic or human resource at its disposal. From
the standpoint of the neutrals this of course meant that strenuous

7Some of the source materials for this will be indicated in subsequent
notes. For commentary consult Morrissey, The American Defense of
Neutral Rights, 1914-1917 (1939); Neutrality: Its History, Economics and
Law. Vol. III: the World War Period, by Turlington (1936); Borchard
and Lage, Neutrality for the United States (1940); Savage, Policy of
the United States toward Maritime Commerce in War, Vol. II: 1914-1918
(U. S. Department of State, Publication No. 835; Washington, Govern-
ment Printing Office, 1936); Draft Convention, with Comment, on Rights
and Duties of Neutral States in Naval and Aerial War, prepared by the
Research in International Law of the Harvard Law School [Professor
efforts were made to intercept virtually all of their commerce with the enemy. The British Government, having at its disposal sufficient naval strength to accomplish the physical interception of most neutral cargoes proceeding directly or indirectly to the Central Powers, found the existing international law of neutrality an obstacle to the complete effectiveness of such interception. It therefore insisted upon severe reductions in the classes of non-contraband goods, and adopted an attitude with respect to continuous voyage which had the practical effect of eliminating any distinction between absolute and conditional contraband. Moreover, the physical enforcement of its program was effected by a contraband control system which ignored the existing limitations upon visit and search, or diversion of neutral ships. On the other hand the German Government sought to isolate the British Isles by unrestricted mine and submarine warfare, which produced indiscriminate destruction of belligerent and neutral shipping alike, and seriously restricted the normal movements of neutral commerce in the danger zones. Each sought to justify its interference with neutral rights upon the ground that its safety depended upon retaliation in kind against the illegal warfare of the enemy. Let us consider these points in their relation to current practice.

I. MINES, SUBMARINES, BOMBING PLANES

The use of submarine contact mines during the Russo-Japanese War of 1904-1905 pointed the danger to neutral commerce which would result from any extensive employment of such mechanisms. The problem of regulating their use was therefore considered at the Hague Conference of 1907, where an admittedly inadequate convention was devised. According to its terms unanchored mines could be sown only if constructed so as to become ineffective within one hour after they were released from control, anchored mines only if they became harmless immediately upon breaking loose from their moorings. In no case could mines be

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8Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines. Signed at The Hague, October 18, 1907. Scott, The Hague Conventions and Declarations of 1899 and 1907, 151-156. At the beginning of the World War six of the Great Powers (Austria-Hungary, France, Germany, Great Britain, Japan, United States) had ratified; Italy had signed but not ratified; Russia had not signed.

9"Article 1. It is forbidden—

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;
2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;
3. To use torpedoes which do not become harmless when they have missed their mark."
laid off the ports or coast of an enemy solely to intercept commercial shipping. Because of the failure of Russia to ratify the Convention, even these restrictions were not brought into force during the World War. On August 7, 1914, the German Government notified neutrals of its intention to lay mine barrages outside ports which might serve as bases for enemy forces. Shortly after this the British Government informed the United States that Germany was sowing mines indiscriminately in the North Sea, and that she felt free under the circumstances to retaliate in kind. Despite a denial of this charge by Germany and a suggestion by Secretary of State Bryan that Germany's conduct, even if illegal, would not justify the British in taking like measures, the British Government nevertheless gave notice of a "danger area" (later expanded to include the whole North Sea), where it proposed to lay extensive mine fields dangerous to neutral commerce. Germany in turn declared the whole of the waters adjacent to Great Britain and Ireland a war zone where she would feel free to sow mines and engage in unrestricted submarine warfare. The Netherlands and the Scandinavian countries promptly protested against the British position, but the United

10Article 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping. France and Germany signed the Convention under reservation of Article 2.

11Article 7. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

12Foreign Relations of the United States [hereafter cited as For. Rel.], 1914, Supplement, 454; Savage, Policy of the United States towards Maritime Commerce in War, Vol. II: 1914-1918 (U. S. Department of State, Publication No. 835) [hereafter cited as Savage], Document No. 5, p. 185; Ambassador Gerard's telegram to Secretary of State Bryan inaccurately summarized the German verbal note as follows: "Foreign Office informs me German ports strewn with mines and request that shippers be warned in time against navigating in ports which might serve as bases for foreign forces."

13Memorandum, British Chargé d'Affaires (Barclay) to Bryan, August 11, 1914. For. Rel., 1914, Supplement, 455. See also the formal British condemnation of German methods in Sir Edward Grey's note to Ambassador Page, September 26, 1914. Ibid., 460-462.

14Bernstorff to Bryan, September 10, 1914. For. Rel., 1914, Supplement, 459. See also the formal reply to the British protest, Gerard to Bryan, November 13, 1914, Ibid., 467-469.


States declined to join them in this.\textsuperscript{18} To Germany the United States did protest immediately and vigorously, but the emphasis of its note was so emphatically upon the unrestricted submarine warfare that the mine problem was scarcely noticed.\textsuperscript{19} Only after a delay of more than two years did this Government make any protest to Great Britain, and the effect of this was nullified by our entrance into the war and subsequent participation in the North Sea mine barrage. At the end of the war no definition had been given to the rights of neutrals with respect to mine warfare, and no subsequent agreement was reached.

Losses from mines have occurred throughout the present war, but were particularly heavy during November and December, 1939, and January, 1940. For the period of eight months after the beginning of the war neutral tonnage losses about equalled those of Great Britain and France, and the number of ships lost by neutrals was greater.\textsuperscript{20} This fact might be taken in itself as prima facie evidence that the mines were not laid in accordance with the standards suggested by the Hague Convention. Such a conclusion is reinforced by the facts available to us. Many vessels were sunk in ordinary shipping lanes either by floating mines or by mines anchored there without any notification to neutrals of their position.\textsuperscript{21} This statement is borne out not only by the data with respect to sinkings, but inferentially by the character of the defense made by the German Government to protests by neutral states. Although spokesmen for the German Admiralty denied that mines were placed in commercial shipping lanes, their remarks were apparently to be interpreted in the light of their explanation that commercial shipping lanes to England no longer existed, ordinary lanes having acquired a military character because of Great Britain's extensive use of the convoy system, the arming of its merchantmen, and the use of airplane and submarine patrols to

\textsuperscript{18}Schmedeman (U. S. Minister in Norway) to Bryan, November 6, 1914, For. Rel., 1914, Supplement, 456; Bryan to Schmedeman, November 10, 1914, ibid., 466. Mr. Bryan stated "that this Government does not see its way at present time to joining other governments in protesting to the British Government against their announcement that ships entering the North Sea after November 5 do so at their own peril."

\textsuperscript{19}Bryan to Gerard, February 10, 1914. For. Rel., 1915, Supplement, 98-100; Savage, Document 49, pp. 267-269. This was the well-known "strict accountability" note.

\textsuperscript{20}Great Britain and France, 51 ships, tonnage 177,225; neutrals, 71 ships, tonnage 183,712.

\textsuperscript{21}The heavy losses in November (23 ships, tonnage 88,469), and December (38 ships, tonnage 96,639), 1939, and January, 1940 (24 ships, tonnage 72,657), were virtually all reported to have occurred in main shipping lanes and channels around the British Isles and in the North Sea.
The whole of the British coast and its approaches were thus characterized as a military zone, and the mine-laying program justified as a counter-action or measure of retaliation against the convoy and control-port system of the British. This was, of course, another instance of attempting to justify flagrant violations of neutral rights upon the ground of reprisal against an enemy whose conduct was thought to be illegal. Indefensible in principle, such retaliation was the more repugnant in practice because of the terrible character of the weapon employed and the increasing efficiency of mine-sowing by submarine and airplane. Fortunately, these factors have been offset to some extent by the development of new protective devices. Neutral states ought not to forget that their previous failure to insist upon clarification of their rights is an element contributing to the present unhappy result. Because of the exclusion of American merchantmen from the danger zone the United States suffered only one loss by mine, but in view of its refusal to protest during the World War it cannot avoid a share of the moral responsibility for the losses of the other neutrals.

On February 2, 1940 the Government of Venezuela transmitted to the Inter-American Neutrality Committee a memorandum suggesting that the committee consider the problem of automatic contact mines and propose regulations calculated to prevent abuses in the use of them. It was the view of the Venezuelan Government that the rules of the Eleventh Hague convention of 1907 on mine warfare had reflected the interests of belligerents;

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22 See notices of formal protests by Norway, Denmark, Sweden; N. Y. Times, March 1, 1940, and statements of German Admiralty spokesmen, ibid., November 23, 1939, p. 1, November 24, 1939, p. 4. To a Netherlands query whether it had mined the area in which the S.S. Simon Bolivar was sunk the German Government replied that for military reasons it could not answer the question; Netherlands Orange Book, April, 1940.

23 As to control ports see infra, sec. III.

24 The mines employed were of the magnetic variety, set off by the attraction of steel ships' hulls. Defensive equipment in the form of demagnetizing belts attached to ships was not immediately available. German planes even sowed mined in the Thames estuary, according to reports of November 23, 1939 (N. Y. Times, November 24, 1939, 1:8), and the use of submarines was usual. See speech of Prime Minister Chamberlain, November 26, 1939, idem, November 27, 1939, p. 1.

25 The American Pioneer Line Steamer City of Rayville was sunk by an explosion near the coast of Australia, about 120 miles from Melbourne, on November 8, 1940, 3 Bulletin 407. The probable cause was a submarine mine. N. Y. Times, November 9, 1940, 3:2; Nov. 10, 1:3; Nov. 11, 2:2; Nov. 12, 10:4, Nov. 14, 3:8.

26 For the organization and status of the Committee see infra, sec. V.
it was now thought desirable that neutrals should reconsider these rules in the light of their proved ineffectiveness in safeguarding neutral commerce. To the Venezuelan Government, the only solution apparent lay in restricting the use of mines to defensive purposes. In the course of its deliberations the committee submitted this proposal to various naval experts, including the Brazilian Admiral, Alvaro de Vasconcellos, and discovered a natural reluctance to approve the assertion of a principle which might later become embarrassing in the event of wars involving their states and requiring naval operations. According to the American member of the committee it "was prepared to accept the principle that mines should be employed for defensive purposes only, and that unanchored mines should be employed only during a naval combat and then subject to the conditions prescribed by the Hague Convention," but divided "upon the proposal to prohibit the use of anchored mines on the high seas or in the territorial waters of the enemy for the purpose of maintaining a commercial blockade. The difficulty here was the uncertainty attaching to the term 'high seas,' in view of the claims to the extension of the marginal sea beyond the three-mile limit and to the inclusion of bays and estuaries within territorial waters." In the end the committee "preferred to leave the subject open for further consideration at a later date." Even if the American Republics were now able to agree upon new regulations of mine warfare, it could scarcely be expected that belligerent assent to them could be obtained. Nevertheless, the effort to reach a formula might serve the useful purpose of reopening and emphasizing a valid neutral interest which would otherwise seem in some danger of being irrevocably surrendered by default.

28Charles G. Fenwick, The Inter-American Neutrality Committee (1941) 35 A. J. I. L. 12, 32. It is impossible here to enter upon a statement of the various claims to an extension of marginal seas beyond the three-mile limit, which is fully recognized by all states as at least a minimum limit. Readers desiring to pursue this matter are referred to the following: Harvard Research Draft on Territorial Waters (1929) 250-262; draft of materials and bases of discussion prepared by Preparatory Committee of the League of Nations for the use of the Conference for the Codification of International Law held at the Hague in 1930, L. of N. pub. C. 74 M. 39. 1929 V, pp. 22-34, 128-142; report of second committee of the same Conference, L. of N. pub. C. 351 (b) M. 145 (b), 1930 V, p. 123 et seq.; ibid., C. 230 M. 117, 1930 V, pp. 3, 15-17; Acts of the Conference, I, 134-137; Hackworth's Digest of International Law, I, 623-642; Gilbert Gidel, Le droit international public de la mer, Paix: Part II, La mer territoriale et la zone contiguë (1934) Book I, Ch. 2, pp. 62-152.
To the status of the submarine in naval warfare much attention has been given. Because of the dramatic impact which unrestricted submarine warfare made upon American sensibilities during the World War, the Government of the United States not only protested sharply against it, but made it the immediate occasion of entering the war against Germany. A prohibition against the use of submarines was inserted into the Treaty of Washington of 1922, but this was not signed by Germany, and in any case never entered into force because of the failure of one of the signatories to ratify it. However, an apparent solution was reached in 1936, when Germany signified its acceptance of the restrictions upon submarine warfare contained in Article 22 of the London Treaty on Limitation of Naval Armament of 1930. A protocol incorporating this article had been accepted in 1930 by Great Britain, France, Italy, Japan and the United States. The language of these restrictions deserves attention:


"Article I. (1) [Affirms rules of international law as to visit and search, and provision for the safety of crews and passengers, before sinking merchant vessels.]

(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

"Article IV. The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally adopted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and invite all other nations to adhere thereto."

Under the terms of Article 6 the Treaty was not to enter into force until ratifications of all the signatories were deposited. The United States, Great Britain, Japan and Italy ratified, but the fifth signatory, France, did not.


32 It was ratified, however, only by Great Britain, Japan and the United States. When the London Naval Treaty of 1930 expired in 1936 the British Government proposed that a separate protocol embodying Part IV, which was not affected by the expiration of the main body of the 1930 Treaty, should be adopted. A procès-verbal was accordingly signed at London on
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"Article 22. The following are regarded as established rules of International Law:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

"The High Contracting Parties invite all other Powers to express their assent to the above rules."

It is only fair to state that the possibility of warning, visit or search by a submarine is not dependent solely upon the commander's willingness in good faith to observe the law. Because of its relatively slight construction the submarine cannot safely approach a vessel mounting guns of even small calibre. When it has disclosed its position and come within range for purposes of visit and search it may easily be crippled or sunk by a well-directed shell. It will then have sacrificed the advantage of secrecy of movement which normally compensates for its lack of defensive strength. Consequently, the possibility of meticulous observance of the rules imposed by the Convention of 1930 is intimately related to the problem of armed merchantmen.²² Pre-

¹¹November 6, 1936, by the United States, Australia, Canada, France, Great Britain, India, Irish Free State, Italy, Japan, New Zealand, and the Union of South Africa. Other governments were invited to adhere. (See U. S. Treaty Information Bulletin, No. 86 [November 1936], 11-12, 35-36.) The following have signified their adherence (to November 1, 1941): Afghanistan, Albania, Austria, Belgium, Brazil, Bulgaria, Costa Rica, Czechoslovakia, Denmark, Egypt, Estonia, Finland, Germany, Greece, Guatemala, Haiti, Holy See, Hungary, Iran, Iraq, Latvia, Lithuania, Mexico, Nepal, The Netherlands (including Netherlands Indies, Surinam, Curaçao), Norway, Panama, Peru, Poland, El Salvador, Saudi-Arabia, Siam, Sweden, Switzerland, Turkey, U. S. S. R., Yugoslavia. (Compiled from notices in U. S. Treaty Information Bulletin and Department of State Bulletin.) The 1936 rules were invoked in the International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines, signed at Nyon September 14, 1937. Great Britain, Treaty Series, No. 38 (1937), Cmd. 5568.

²²On armed merchantmen see generally Draft Convention on Rights and Duties of Neutral States in Naval and Air War, Article 2 and Comment, op. cit., 224; Savage, 68-72, and documents cited therein; Borchard and Lage, Neutrality for the United States (1940), 83-124; Naval War College; International Law Situations, 1927 (1929) 73 ad fin.; Higgins,
sunably a state may arm its merchant vessels for strictly defensive purposes without giving them the character of warships. But what is to be the definition of defensive armament for purposes of submarine attack? Since there is little possibility that an armed merchant vessel could defend itself successfully against a modern warship in any of the categories of surface vessels, and there is no longer any necessity for defensive equipment against privateers or pirates, it must be concluded that the compelling motive for arming merchantmen today is the fact that under favorable conditions they may be a match for submarines or bombing planes. During the unrestricted submarine warfare of the World War there was indeed ample justification for the arming of merchant vessels, for failure to strike before the submarine could release its torpedoes meant disaster. But the question arises whether the arming of merchant vessels may not sever the slender thread of confidence upon which the faithful observance by submarine commanders of the rules of warning, visit and search must


34Opinion of Parker, Umpire, Construing the Phrase "Naval and Military Works or Materials" as Applied to Hull Losses, Mixed Claims Commission, United States and Germany, March 25, 1924; Decisions and Opinions, 1923-1925, 75, at 86-88, 99-100. Also in (1924) 18 A. J. I. L. 614, at 622-624, 632-633. The opinion of Chief Justice Marshall in The Nereide, (1815) 9 Cranch (U.S.) 388, is not understood to be contra. In holding that a neutral cargo found on board an armed enemy merchant vessel is not liable to condemnation as prize, the Court remarked (p. 430): "The Nereide was armed, governed, and conducted by belligerents. With her force, or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty." Yet it was also said of the ship: "She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character." The language seems to imply that armed merchantmen are belligerent in the sense that they may be sunk or captured by the enemy and may in turn sink or capture the enemy if attacked, but not in the sense that they are free to cruise as warships.


hang. If some merchant vessels are armed, will there not be a
strong temptation to torpedo any particular ship without warning
rather than risk coming to the surface to identify it and make
inquiries? This question needs to be considered not so much
from the standpoint of the United States today, when our interest
lies in protecting shipments of contraband goods, as from the
standpoint of our more nearly neutral position in the early months
of the war or the standpoint of genuinely neutral states today.

As might be expected in a conflict in which censorship and
propaganda combine to produce deliberate distortion of the facts,
the evidence as to the methods of naval warfare now employed
is conflicting and unreliable, so that conclusions with respect to
certain controversial incidents must be tentative. Since the concern
of this paper is primarily with the effect of these methods of war-
fare upon American shipping, the difficulties in the way of ob-
taining accurate information are of course somewhat reduced.
The writer did attempt during the first eight months of the war
(September 3, 1939-April 30, 1940) to compile accurately all
reported sinkings of merchant vessels of whatever nationality,
tabulating the sinkings for each month according to the registry
of the vessels and the manner of their destruction, without making
any effort to press a particular incident into one category or an-
other when the evidence seemed insufficient. The compilation
was discontinued because of a growing disposition upon the part
of controlled news sources to suppress the details needed to give
such a tabulation utility. Some impressions derived from the
figures for the period covered may, however, prove of interest.

During September, 1939 the German submarine campaign in-
flicted heavier losses than during any subsequent month of the
period. Although it would be too much to say that there was
precise observance of the terms of the 1936 Protocol in every
case, yet the preponderance of evidence during September and
October pointed to a sincere effort by U-boat commanders to
comply with the obligations of warning, visit and search, and
provision for the safety of the crews of torpedoed ships. In a
number of instances survivors from torpedoed vessels, or cap-
tains of neutral ships which picked them up, praised the U-boat

The data were taken chiefly from the news accounts of individual
sinkings in the New York Times, and checked for completeness against the
Times's tabulation from the same materials. Minor discrepancies appeared,
apparently because of occasional failure by the Times to correct its tabu-
lation in the light of later news about ships presumed to be lost. The
Times discontinued its regular tabulations in the summer of 1940.
commanders for their solicitude in providing for the comfort of those in the lifeboats, signaling for assistance, towing boats toward port, or standing by until they were picked up. Unfortunately, these good reports were neither universal nor long continued. In several cases crews were obliged to take to their lifeboats in very heavy seas or bitterly cold weather, and were left to drift for days before being picked up or reaching land. The probability that

37 The following examples may be noted:

S. S. Olivegrove (British): The submarine commander ordered the crews of the Olivegrove into their lifeboats, then torpedoed the vessel. Gave crew navigating instructions, checked their compass, to tow them into port, fired rockets guiding S. S. Washington (U. S.) to the scene, although not certain she was a neutral ship. These facts supplied by the captain of the Washington. N. Y. Times, September 9, p. 1, col. 3-4.

S. S. Winkleigh (British): Crew ordered into boats and captain taken aboard submarine for examination of ship's papers and questioning. Commander of submarine was solicitous about the comfort of the crew and gave them four loaves of bread. They were picked up after six hours by the liner Staatendamn. N. Y. Times, September 15, p. 18, col. 1.

S. S. Firby (British): Submarine fired five warning shells, which injured four of the ship's crew. Lifeboats were launched and pulled alongside the submarine. Its commander gave the Firby's captain a stiff drink, and the submarine crew turned over nine loaves of black bread and bandages for the injured men. The submarine commander then sent an S.O.S. directly to the British Admiralty, stating his position before torpedoing the ship. This was later acknowledged by Mr. Churchill in a speech to the Commons. N. Y. Times, September 15, p. 18, col. 2; September 27, p. 4, col. 5-6.

Trawler Rudyard Kipling (British): The submarine towed a lifeboat containing the trawler's crew to within five miles of the Irish coast. N. Y. Times, September 18, p. 18, col. 3.

S. S. Kafiristan (British): The submarine commander offered to tow the lifeboats toward Ireland. He sent out a call for help and remained with the ship's boats until the liner American Farmer (U. S.) arrived, using rockets and blinker to help it locate them. During the rescue a bombing plane appeared and bombarded the submarine. It waited until a lifeboat alongside had pulled away, then submerged. The captain of the American Farmer said the rescued ship's crew "cheered the submarine commander." N. Y. Times, September 18, p. 8, col. 3; September 25, p. 3, col. 1.

S. S. Blairlogie (British): Submarine fired warning shells, ordered crew to abandon ship. When all were off it was torpedoed. The submarine commander then inquired if any were wounded, gave the ship's crew gin and cigarettes, and fired three rockets to attract help. The lifeboats drifted nearly twelve hours, however. The crew were picked up in good shape, and expressed appreciation of the submarine commander's thoughtfulness. N. Y. Times, September 19, p. 20, col. 5.

S. S. Diamantis (Greek): The submarine, with a crew of 21, took the ship's crew of 37 aboard and carried them into Dingle, Ireland, a thirty-six hour run. Food was shared. N. Y. Times, October 7, p. 2, col. 6.

These cases serve to indicate that submarines, although poorly adapted to the rescue of crews of torpedoed ships, can when disposed to do so act in substantial compliance with the treaty requirements if there is no resistance from the ships.

38 The following examples may be noted:

S. S. Hazelside (British): Torpedoed off Cork. Members of the crew reported that the submarine shelled the ship without warning. Twenty-two were able to get into the boats, but eleven of the crew were killed and the
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some were lost altogether is sufficiently indicated by the large number of vessels never accounted for. During October, 1939 the known sinkings by submarines diminished substantially, but there were cases of sinkings produced by explosions of uncertain origin. If these were the result of torpedoes, they were obviously cases of sinking without warning. It must be observed, however, that they may well have marked the beginning of mine warfare, for many cases of destruction by mines were reported during the following month. The North Sea neutrals (i.e., Norway, Sweden, Denmark and the Netherlands) lost more tonnage as a group by such explosions than did either Great Britain or France, whereas the known submarine sinkings of September and October, 1939 showed no such indiscriminate disregard of the neutral character of vessels.

Indeed, during the first four months of warfare the submarine campaign appears to have been directed primarily against British vessels. Where neutral vessels were sunk there was often some evidence that the cargoes were of contraband character and that the ships could not be taken into port.40 Thereafter, the character

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39September, 11, tonnage 27,720; October, 2, tonnage 7,049; November, 7, tonnage 13,661; December, 12, tonnage 16,647; January, 5, tonnage 10,515; February, 18, tonnage 41,715; March, 18, tonnage 45,231; April, 6, tonnage 8,539; total for period, 79, tonnage 171,077.

40Thus in the case of the Gertrud Bratt (Swedish) it appeared that the cargo was wood pulp, i.e. cellulose, consigned to England. Although the Swedish Government complained that this was not in the German contraband list, the German official comment that it was comprised in the category of "all materials suitable for the production of gunpowder and explosives" seems justified. N. Y. Times, September 25, p. 3, col. 3; September 27, p. 10, col. 1. In the case of the Danish ship Vendia the German Admiralty stated that it was torpedoed after it had tried to ram the submarine; this was denied by the captain of the Vendia. Ibid., October 3, p. 5, col. 1. The Swedish ship Gun was carrying powder and munitions, but its captain
of the attacks on neutral shipping changed sharply. Upon the
pretext that ships forfeited their neutral character by touching
at British control bases, even under coercion, submarines sank
ships which had left such bases, or were proceeding to them, or
were likely to be diverted into them, without regard to the nature
of the cargo or more than perfunctory inspection of ship's
papers. In response to protests from the governments of Nor-
way and the Netherlands, the German Government insisted
upon the propriety of such conduct, perhaps under the impression
that it would stiffen neutral resistance to the contraband control
measures of the British Government. If the forcible diversion
of neutral ships into British control ports be illegal, it is in any event
no violation of neutral duty. Nor is intent to call voluntarily at a
British port a ground for sinking without regard to the character
of the cargo. However small their number may be, it is not to be
supposed that there are not some classes of goods which would
have to be regarded as non-contraband by even the most captious
stated they were destined for Antwerp and that the submarine commander
merely glanced at the ship's papers and declared they were false. The
latter also charged that the captain of the Gun had tried to ram him, which
the captain told him was a lie. The facts of the incident are controversial.
N. Y. Times, October 6, p. 2, col. 2. In the case of the Greek ship
Diamantis (see note 37 supra) no question of the propriety of the sinking
seems to have been raised.

Such cases include the Holland-Amerika liner Burgerdijk, bound
from New York to Rotterdam and carrying a general cargo including no
contraband. She was sunk without examination of her papers, on the ground
she was likely to put into a British control port. Netherlands Orange Book,
issued April 1940; N. Y. Times, February 14, p. 5, col. 3; February 15, p. 1,
col. 5, p. 3, col. 3; February 16, p. 9, col. 3; February 17, p. 3, col. 5. The
Norwegian Cometa was torpedoed in or near the roadstead of Kirkwall,
a British contraband control port. Norwegian sources asserted her papers
were in unexceptionable form. N. Y. Times, March 28, p. 4, col. 1.

See the Netherlands' protest on the case of the Burgerdijk, Nether-
lands Orange Book, April, 1940; New York Times, February 16, p. 9,
col. 3-4; and of the Arendskirk, ibid.; N. Y. Times, February 20, p. 5, col.
2-3; also Norwegian protests reported, N. Y. Times, February 17, p. 3,
col. 5; London Times, March 23, p. 5.

N. Y. Times, February 17, p. 3, col. 5. The German Government also
specifically claimed the right to sink American or other neutral vessels
which entered the British control base at Gibraltar. Ibid., February 15, p. 1,
col. 5; February 28, p. 6, col. 3. To meet this threat the British Govern-
ment offered to convoy neutral ships even though ultimately destined for a
neutral port beyond England. This offer was not accepted by The Nether-
lands or the United States. To have accepted belligerent convoy would of
course have subjected such neutral ships to the danger of being sunk without
warning. Ibid., February 16, p. 1, col. 5; p. 8, col. 1.

For some account of similar attempts during the Napoleonic Wars
to penalize neutral vessels for compliance with illegal control measures of
the enemy see McLaughlin, Legislative Neutrality in the United States,
(1938) 22 MINNESOTA LAW REVIEW 603, 612.
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of belligerents. The German Government's position is therefore an indefensible evasion of the responsibilities it undertook, and can only be regarded as a subterfuge under which virtually unrestricted submarine warfare can be waged against all shipping to or from North European ports.

Equally insupportable are the Reich's pretentions to a right of indiscriminate attack upon commerce of all nationalities in certain zones defined by it. On August 17, 1940 the German Government declared a total "blockade" of the British Isles. In practice this was merely a zone of submarine and airplane operations which failed completely to meet the legal requirements of a blockade. It in fact resembled the war zones declared by Germany during the World War, in which enemy merchant vessels were torpedoed on sight and a notable carelessness about distinguishing neutral ships regularly prevailed. The legality of such attacks was not then conceded and cannot now be admitted. In the present war the German Government seems to assume the right to sink all ships in its zone of operations, whether enemy or neutral, merely upon the strength of having warned them to keep out of the zone. It had the further assurance to announce on March 25, 1941, that in consequence of the illegal occupation of Iceland by British troops and its use as a base by "blockade runners," it would be necessary to extend the German zone of operations so as to include the island. In fact the extension defined in the official proclamation took in not only Iceland but the greater part of the North Atlantic, its northern boundary running north of Iceland to the territorial waters of Greenland, and its western limit from Greenland to a point over nine hundred miles west of Bordeaux, France; thence, east to the French coast.

45For present contraband lists see infra, pp. 42-45.
46Text in New York Times, August 18, 1940, p. 25.
47For these see infra, p. 33.
49Thus Chancellor Hitler, commenting on naval operations in this area in a speech of January 30, 1941, declared: "They [the American people] should not deceive themselves about us. Whoever imagines he can aid England must, in all circumstances, know one thing: every ship, whether with or without escort, that comes before our torpedo tubes will be torpedoed." New York Times, January 31, 1941, 2:2-8. For statements by official spokesmen of the German Government justifying the torpedoing of various ships without warning because they were found within the zone, see note 52, infra.
50Text in New York Times, March 26, 1941, 1:3-4. The proclamation defined the zone as follows: "From a point 3 degrees east on the Belgian coast and on this meridian to a point 62 degrees north; from there to a
tion that any belligerent has the right to interfere with neutral merchant vessels in an area of the high seas of such great magnitude and commercial importance by any means not fully recognized by international law is wholly inadmissible. Yet the German Government has repeatedly advanced it in attempted justification of submarine attacks.

Early in September, 1939 the British Government announced its intention to arm merchant vessels for defense against submarine and aerial attack. Apparently it relied upon the distinction between offensive and defensive armament which Secretary Lansing advanced during the World War. A number of fast convertible ships were heavily armed and commissioned as auxiliary cruisers for blockade and patrol duty. Other merchant ves-

point 68 degrees north and 10 degrees west; then west on the 68th degree of latitude to the three mile zone of Greenland; then south along the three mile zone to a point 65 degrees 24 minutes north and 35 degrees west; from there south to a point 58 degrees 50 minutes north and 38 degrees west; from there to 45 degrees north 20 degrees west; then east along the 45th degree of latitude to 5 degrees west; from there to the French coast at 47 degrees 30 minutes north and 2 degrees 45 minutes west." The German Government never officially communicated this proclamation to the Government of the United States. See statement by President Roosevelt in connection with the torpedoing of the U. S. destroyer, Kearny; N. Y. Times, October 20, 1941, 1:8.

No doubt of this even as to the whole of the high seas was entertained prior to the World War. Thus the Naval War College declared in 1914, "The right of innocent use of the high sea has long been recognized as paramount to any right of a belligerent to exclude innocent vessels from a given area, except for immediate military reasons." International Law Topics and Discussions 1914, p. 117. See also remarks of Sir Ernest Satow of the British delegation at the Second Hague Peace Conference, Deuxième Conférence Internationale de la Paix, Actes et Documents, I, 281; Scott, Reports to Hague Conferences 691. The comparatively limited war zones of the World War were sharply protested by neutrals, Harvard Draft, Neutrality, 409 et seq., and therefore cannot be said to have obtained legal recognition, although attempts to justify them have of course been made, e.g. Fleischmann in his edition (12th ed.) of Liszt, Das Völkerrecht, sec. 64, B, 2. A fortiori a claim to include most of the North Atlantic in a war zone can only be regarded as extravagantly presumptuous.

See, for example, the German statements on the sinking of American-owned vessels in the area; references in notes 80, 82, 85, 87 and newspaper accounts of same dates. Also President Roosevelt's comments in his radio address of September 11, 1941, N. Y. Times, September 12, 1941, 1:6-7.

See Mr. Churchill's statement in Commons, September 26, 1939, in which he indicated the entire mercantile marine would be equipped with defensive armament against submarines and aircraft. N. Y. Times, September 27, p. 4, col. 1-2.


Such a converted ship was the auxiliary cruiser Rawalpindi, sunk off Iceland, November 23, 1939, by the pocket battleship Deutschland. For some
vessels, to which it was apparently not intended to give the character of warships, were equipped with anti-aircraft guns and other guns up to 6-inch calibre mounted in the sterns. It is perhaps indicative of the British Government’s definition of defensive armament that Captain Gibbons of the *Aquitania* explained to New York reporters that the two twelve-pound guns carried at the stern of his ship “were legally defensive, so long as they pointed aft, and could not swing further forward than the beam.”

Perhaps such a circumstance would be some evidence of the defensive character of this equipment, but it is not possible to say that any such test has been accepted as conclusive, or indeed that any absolute distinction between offensive and defensive armament is possible. It is believed that German officials were on solid ground in refusing to recognize such a distinction and in indicating that they did not consider submarines bound by the 1930 and 1936 protocols in dealing with armed merchantmen. The German Government appears also to have acted with propriety and moderation in publishing lists of armed vessels which its account of the conversion of ships of this type into cruisers, particularly for blockade duties as part of the Northern Patrol, see *N. Y. Times*, December 4, p. 8, col. 4-5.

56 *N. Y. Times*, September 17, 1939, p. 45, col. 3. Compare the Memorandum of the Department of State in Reference to the Status of Armed Merchant Vessels, September 19, 1914. For. Rel., 1914, Supplement, 611-612; Naval War College, International Law Topics, 1916, p. 93; 2 Deák and Jessup, Neutrality Laws, Regulations and Treaties, 1254-1255, where the following are given as indications that armament will not be used offensively:

1. That the caliber of the guns carried does not exceed six inches.
2. That the guns and small arms carried are few in number.
3. That no guns are mounted on the forward part of the vessel.
4. That the quantity of ammunition carried is small.
5. That the vessel is manned by its usual crew, and the officers are the same as those on board before war was declared.
6. That the vessel intends to and actually does clear for a port lying in its usual trade route, or a port indicating its purpose to continue in the same trade in which it was engaged before war was declared.
7. That the vessel carries passengers who are as a whole unfitted to enter the military or naval service of the belligerent whose flag the vessel flies, or of any of its allies, and particularly if the passenger list includes women and children.

8. That the speed of the ship is slow.”

57 This view is generally accepted in the United States today. See the Draft: Convention on Rights and Duties of Neutral States in Naval and Aerial War, op. cit., 224-231; Hyde, *International Law*, secs. 742, 743; Borchard and Lange, *Neutrality for the United States* (1940) 83-124.
warships would feel free to sink without warning. In the absence of data concerning the armament carried by the ninety-odd vessels included in the three lists which were published, it is of course not intended to express any view as to the propriety of the individual designations. Nor is there any intention to question the right of the belligerent governments to arm their merchantmen and thus to encourage resistance to attack. But it is believed self-evident that the presence of a considerable number of merchant ships so equipped must have increased the reluctance of submarine commanders to approach vessels the identity of which was uncertain, and must therefore have increased the danger to legitimate neutral trade.

In view of this situation there was a real question during the early months of the war whether the United States ought, in common with other neutral states, to have excluded armed merchantmen from its ports. This was a question both of law and of policy. No prohibition against such exclusion exists in international law, and our domestic legislation specifically authorizes the president to exclude submarines or armed merchant vessels under appropriate circumstances. A more difficult point is the question whether neutrals are under a positive obligation to exclude armed merchantmen except for admissions under the severe restrictions applicable to warships. Much confusion exists on this point because of the equivocal position assumed by the United States during the World War. In a notice of September 19, 1914 Mr. Lansing, no doubt with attacks by surface vessels in mind, sought to distinguish offensive from defensive armament. After reconsidering the problem in the light of German submarine warfare he perceived the impossibility of maintaining such a distinction and therefore proposed to the belligerents the adoption of an agreement “that merchant vessels of belligerent

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59N. Y. Times, November 14, p. 6, col. 5-6; November 19, p. 35, col. 3; December 5, p. 16, col. 6.
60A state has the right to exclude all foreign ships from its ports, as Japan did prior to Perry’s expedition in 1853. The only question which could arise would be in the case of exclusions discriminating against one or more powers, which might be unneutral conduct. That would not be the case in a general exclusion of all belligerent armed merchantmen.
61Neutrality Act of November 4, 1939 (citations in note 5), sec. 11. That is, admission for some brief period, such as twenty-four hours, and under restrictions preventing extensive repairs or the taking on of food and fuel supplies in excess of those needed for return to a belligerent port, or re-entry into the neutral port within the succeeding three months. See Hague Convention XIII (1907).
nationality should be prohibited and prevented from carrying any armament whatever." This suggestion was not accepted. Having ably exposed the illogical character of the distinction between offensive and defensive armament, Mr. Lansing was hardly in a position to return to his 1914 position, and seems not to have been disposed to do so. But President Wilson had come to believe that it was a point of honor for the United States to insist upon the right of American citizens to travel without molestation upon armed merchant vessels of the belligerents. Lansing was

The Central powers were to promise, in return, not to torpedo enemy merchant vessels without placing persons on board in safety. Lansing to Spring-Rice, January 18, 1916. For. Rel., 1916, Supplement, 146-148; Savage, 441-444. For an indication that the position of September 19, 1914 had been taken without consideration of the submarine problem, see Lansing's letter of September 12, 1915, to the President. Savage, 384-385.

In January, 1916 Lansing had before him the secret instructions of the British Admiralty to merchant vessels, directing them to fire upon pursuing submarines without waiting for hostile acts (issued in February and May, 1915). These were found by the Germans on the captured steamer Woodfield and published in German White Book on Armed Merchantmen, with facsimiles of the Secret Orders of the British Admiralty (n. d.); also in Gerard to Lansing, February 14, 1916, For. Rel., 1916, Supplement, 187-198.

His position seems to have been that the 1914 stand was in accord with accepted principles of international law, but that submarine warfare destroyed the condition upon which those principles were erected. This is evident from the note of January 18, 1916. He prepared a memorandum dated March 25, 1916, but made public April 27, 1916 (For. Rel., 1916, Supplement, 244-248; Savage, Document 187, pp. 487-492), "to show the consistency of the statements in the letter of January 18 with the accepted rules as to the arming of merchant vessels." Savage, Document 184 p. 484. It is therefore clear that Lansing thought his proposed modus vivendi a logical result of applying the international law principles to the new situation. He cannot but have thought the position of the United States incongruous after the rejection of his proposal.

The president's view was stated in his letter to Senator Stone, Chairman of the Committee on Foreign Relations, February 24, 1916. For. Rel., 1916, Supplement, 177-178; Savage, Document 173, pp. 461-463. The problem of American travel on belligerent armed merchantmen had become a Congressional issue after the German warning of February 8, 1916, that "German naval forces will receive orders, within a short period, paying consideration to the interests of the neutrals, to treat such vessels as belligerents. The German Government brings this state of things to the knowledge of the neutral powers in order that they may warn their nationals against continuing to entrust their persons or property to armed merchantmen of the powers at war with the German Empire." Ibid., 163-166, at 165. The Gore-McLemore Resolutions of February, 1916, providing in one case for travel at risk, in the other for warning against travel on belligerent vessels, were tabled in the face of strong administration pressure. See Lansing's Memorandum on House Resolution 147, sent to Representative Flood in order to fortify him with arguments against the Resolution (Lansing Papers, 1914-1920, I, 343-347). Also Lansing's circular telegram of March 4, 1916, to ambassadors in European belligerent countries, apprising them of the legislative situation with respect to the Gore Resolution. For. Rel., 1916, Supplement, 186-187. For critical comment see Borchard and Lage, Neutrality for the United States (1940) 113-117.
therefore obliged against his own judgment to notify the belligerents that the United States considered armed merchantmen entitled to the presumption of peaceful character unless conclusive evidence of aggressive purpose could be shown. Such "peaceful armed merchantmen" were not liable to attack without warning or to internment by neutral states as warships.  

This position is believed to be quite unsound. It may be admitted that armed merchantmen are not public naval vessels, since they lack commissions as such. But it does not follow that they are not subject to attack without warning, so long as they are capable of hostile action which may result in the destruction of a warship which accosts them. On the other hand it seems somewhat extravagant to say that their presence in a neutral port presents the same problem as the presence of warships. So long as they are armed only for the purpose of protecting themselves while engaged in commercial operations, are not commissioned as cruisers, and do not engage in raiding forays, they would not by their frequent visits to a neutral port or long continuance there tend to convert it into a base of belligerent naval operations. The contrary tendency in the case of warships is understood to be the primary basis of their exclusion. It would seem probable that regulatory measures short of exclusion might provide a sufficient safeguard against abuse of a port's neutrality by armed merchant vessels. In the light of these considerations it is believed that the United States was under no legal obligation to exclude armed enemy merchantmen from its ports. That is not to say that as a matter of policy it ought not to have exercised its privilege to do

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67 Memorandum on the status of armed merchant vessels, made public April 27, 1916. For. Rel., 1916, Supplement, 244-248; Savage, Document 187, pp. 487-492. See also the memorandum of March 4, 1916 on the right of American citizens to travel upon armed merchant ships, which was obtained from special advisers and transmitted to the House Committee on Foreign Affairs. This opinion offers a very strained construction of the decision in the case of the Nereide, and argues that because neutral goods were not condemned passengers must equally be entitled to full provision for their safety; hence the United States ought not to abandon insistence upon the right of American citizens to travel without molestation on belligerent armed ships. The memorandum omitted to mention that part of Marshall's opinion in which the Nereide was said to be "subject to all the dangers of the belligerent character." (See footnote 34, above), i.e., subject to sinking without warning. It is not clear, however, how far this episode influenced or reflected Mr. Lansing's views.

68 And hence, of course, authority to carry on hostile cruising operations as raiders. See letter of Lawrence Brown to the editor of the New York Times, November 1, 1939. This statement is not thought to be inconsistent with assimilation of armed-belligerent merchantmen to the category of warships for the purpose of applying regulations as to the use of neutral ports and waters, e.g., Harvard Draft, Neutrality, Article 2 (p. 224).
so. Any conclusion on this point must reflect one's opinion upon the question whether German submarine warfare would have been conducted legally but for the presence of armed merchantmen. If that question were answered in the affirmative it would follow that states genuinely concerned to preserve their neutral position ought to have opposed the arming of merchantmen by excluding them from their ports. It seems doubtful, however, in view of the early arming of British merchantmen, whether there was any really satisfactory evidence on the point. Certainly no contribution toward the solution of the whole problem has been made by neutral states during the present war.

The recent decision of the Congress of the United States to repeal sec. 6 of the Neutrality Act of 1939, which prohibited the arming of American merchant vessels, was reached after the administration had declared that a condition of virtually unrestricted submarine warfare existed. The full extent to which the facts supported such a view is not perfectly clear, but even when certain lacunae in the published reports are taken into account, there seems to be enough evidence of wanton illegality in the destruction of American-owned ships to justify such a conclusion. Whether a right to sink these ships existed because of carriage of contraband is a separate question the determination of which is not necessary to a conclusion upon the legality of the methods employed by submarines in the exercise of their rights.

For more than a year following the outbreak of the war no American-owned vessel was sunk by belligerent action. No doubt

69 Act approved November 17, 1941; N. Y. Times, November 18, 1:6. President Roosevelt used very strong language in his radio address of September 10, 1941, to describe German submarine attacks on American vessels. Referring to the attack on the destroyer Greer he said, “This was piracy—legally and morally. It was not the first nor the last act of piracy which the Nazi Government has committed against the American flag in this war. Attack has followed attack.” After reviewing the sinking of various American merchantmen and referring to the German zone of operations he proceeded, “Actually they are sinking ships at will and without warning in widely separated areas both within and far outside of these far-flung pretended zones. ... Unrestricted submarine warfare in 1941 constitutes a defiance—an act of aggression—against that historic American policy [preservation of freedom of the seas]. It is now clear that Hitler has begun his campaign to control the seas by ruthless force and by wiping out every vestige of international law and humanity.” 5 Bulletin 193-197. Secretary of State Cordell Hull spoke of the sinking of the tanker I. C. White on September 27, 1941 as “another act of lawlessness, piracy and attempted frightfulness.” Statement at press conference as reported by Bertram D. Hulen. N. Y. Times, October 5, 1941, 1:5. Referring to the attack on the destroyer Kearny he observed that it would be useless to “send diplomatic notes to an international highwayman.” Idem, October 21, 1941, 1:6-7.
this was due in part to United States neutrality legislation, under which American merchantmen were prohibited from carrying cargoes to belligerent ports and were excluded from combat areas in North European, Mediterranean and Red Sea waters, as proclaimed by the president.\textsuperscript{70} Since November 9, 1940, however, ten American-owned merchant vessels have been sunk, eight by submarines:

1. The \textit{City of Rayville}, a freighter of United States registry, struck a mine near Australia on November 9, 1940, and sank.\textsuperscript{71}

2. The \textit{Charles Pratt}, a tanker owned by the Panama Transport Company, a subsidiary of Standard Oil Company of New Jersey, but operated under Panamanian registry, was torpedoed by an unidentified submarine and sunk on December 21, 1940. According to the captain's report she was bound from Aruba, a Netherlands island near Venezuela to Freetown, Sierra Leone (a British possession), and carried 5,000,000 gallons of oil. The possibility that ground for condemnation, perhaps for sinking,\textsuperscript{72} might have been demonstrated by a properly conducted visit and search, is of course apparent. But no visit or search was attempted; instead the ship was torpedoed without the slightest warning and despite the fact that visibility was excellent and large Panamanian flags were painted on both sides of the ship. Two of the crew were lost; the others succeeded in getting off in two lifeboats from

\textsuperscript{70}Neutrality Law of 1939 (citations in note 5), sec. 3. For proclamations defining the combat areas, see 1 Bulletin 454-455; 2 Idem 378-379 (No. 2394), 641-643 (No. 2410); 4 Idem 450-451 (No. 2474).

\textsuperscript{71}For details see note 25, supra.

\textsuperscript{72}Despite continuing controversy it is now generally admitted that a neutral prize may under certain conditions be destroyed without the necessity of condemnation by a prize court. The Declaration of London (1909) provided that in case of "exceptional necessity" a captured vessel which was liable to condemnation might be destroyed if observance of the normal duty to take it into port for prize court proceedings would involve danger to the safety of the captor vessel or to the success of the naval operations in which it was engaged (Articles XLVIII and XLIX). The Declaration permitted condemnation of the vessel if the contraband it carried, reckoned either by value, weight, volume, or freight, formed more than half the cargo (Article XL). It further provided that before destruction of the neutral prize its crew and passengers must be put into a place of safety (Article L). In correspondence over the destruction of the American vessel \textit{William P. Frye} by a German cruiser during the World War, the United States showed a disposition to admit the reasonableness of these provisions of the Declaration of London. Lansing, Secretary of State to Gerard, Ambassador to Germany, October 12, 1915; U. S. For. Rel., 1915, Supplement, 570. See generally Harvard Research, Neutrality, 562-578. There is of course nothing in these rules which would justify destruction of a prize when those aboard could only be set adrift in lifeboats in mid-ocean.
which they were picked up after five and six days respectively.\footnote{For the facts see N. Y. Times, January 3, 1941, 6:3; March 3, 1941, 3:5; March 21, 1941, 4:5.}

3. The Robin Moor (formerly the Exmoor), a freighter of United States registry, was torpedoed, shelled and sunk by a German submarine in the South Atlantic, May 21, 1941. The submarine signaled the ship with a blinker light to stop and to "send a boat with papers." A lifeboat was lowered and the chief officer proceeded to the submarine, but without the ship's papers. He informed the submarine commander that the Robin Moor was an American ship carrying a cargo of general merchandise to South Africa, and that no heavy machinery or motors, except those of automobile pleasure cars, were included.\footnote{Chief officer's statement as reported in Associated Press dispatch from Cape Town, June 16, 1941.} The submarine commander then stated that he would sink the ship and allowed thirty minutes from the time of the lifeboat's return for removal of the crew and passengers. No examination of ship's papers or cargo was made. The lifeboats remained together for twenty-four hours at the scene of the sinking because the submarine commander said he would wireless their position in order to expedite rescue. Thinking it useless to wait longer they made for the Brazilian coast, and all were picked up after from two to three weeks.\footnote{These facts are derived from the report made by the United States Consul at Pernambuco (Walter J. Linthicum) after taking the depositions of survivors. 4 Bulletin 716-717.}

A full list of cargo carried, as copied from the ship's manifest, was published by the operators; it included hundreds of items of very diversified personal, domestic, and industrial equipment apparently all consigned to civilians in South Africa and Portuguese East Africa. Scattered lots of lubricating oils, shotgun and rifle ammunition and a dozen .22 calibre rifles consigned to sporting goods stores, six gas masks for workers in ammonia plants, 459 automobiles and trucks (several shipments unassembled), and chemical supplies for industrial and agricultural use, were included. There were no munitions or military supplies.\footnote{See list taken from ship's manifest in N. Y. Times, June 14, 1941, 3:1-6. See also the statement of Under Secretary of State Sumner Welles, as to the character of the cargo, 4 Bulletin 717.} Quite apart from any question of contraband\footnote{On contraband see infra, section II.} it is clear that the destruction of the Robin Moor without provision for the safety of the survivors was in violation of the submarine protocol signed by Germany in 1936. On this unassailable ground the president rested his formal protest and demand for reparation,
made on June 20 in the form of a message to Congress and later handed to the German Chargé d'Affaires.\textsuperscript{78}

4. The \textit{Sessa}, of Panamanian registry, a former Danish vessel acquired from the Danish Government under authority of the Act of June 6, 1941, permitting the requisition of ships of foreign registry lying idle in American waters,\textsuperscript{79} was torpedoed, shelled, and sunk at 10 P. M. on August 17, 1941. She was then about 300 miles southwest of Reykjavik, Iceland, carrying a cargo of foodstuffs, cereal, lumber, and other general goods consigned to the Government of Iceland. She carried no arms, ammunition, or implements of war. The mate reported that visibility was so low it was doubtful if the submarine could have identified the ship's markings. No warning was given, and the ship sank two minutes after being torpedoed, so that boats could not be launched. Only three of the crew of twenty-seven survived.\textsuperscript{80}

5. The \textit{Steel Seafarer}, of United States registry, was sunk in the Red Sea near Suez, the night of September 5, 1941, by a bombing plane.\textsuperscript{81}

6. The United States-owned freighter \textit{Montana}, a former Danish ship requisitioned by the Maritime Commission and placed under Panamanian registry, was torpedoed and sunk on September 12, 1941, midway between Iceland and Greenland. The cargo consisted of 1,500,000 feet of lumber consigned to the Government of Iceland, to be discharged at Reykjavik and three other Iceland ports. The crew was observed by aircraft to have taken to the boats. No further details of the sinking were reported.\textsuperscript{82} The Government of Panama is reported, however, to have made an official protest to the Reich on the sinking of the \textit{Sessa} and the \textit{Montana}, asserting that these vessels carried no war materials, were outside the war zone defined by Germany in August, 1940, and were sunk without warning.\textsuperscript{83}

\textsuperscript{78}Bulletin 741-742. The German Chargé (Thomsen) merely replied that "I do not find myself in a position to pass on . . . the text sent to me of a message to Congress. . . ." On September 19, 1941 Secretary of State Hull informed the German Embassy that the United States would accept a lump sum of $2,967,092.00 in full payment of claims, if made within ninety days. To this Herr Thomsen replied on September 26 "that the two communications made are not such as to lead to an appropriate reply by my Government." 5 Bulletin 363-364.

\textsuperscript{79}Act of June 6, 1941; Public Law 101, 77th Congress, 1st Session. The president authorized the Maritime Commission to take over idle vessels pursuant to the terms of the Act by an executive order (No. 8771) of the same date, 4 Bulletin 701.

\textsuperscript{80}Summary of facts in 5 Bulletin 199, 232.

\textsuperscript{81}For details see infra, note 104.

\textsuperscript{82}Summary of facts in 5 Bulletin 200.

\textsuperscript{83}N. Y. Times, September 17, 1941, 8:6.
7. The United States-owned freighter *Pink Star*, a former Danish ship requisitioned by the Maritime Commission and operated by it under Panamanian registry, was torpedoed and sunk on September 19, 1941, between Greenland and Iceland. Twenty-three survivors reached Reykjavik. No information about the cargo was issued, but President Roosevelt admitted in a press conference that the ship was with a Canadian convoy and was armed, probably with an anti-aircraft gun. Although he seemed disposed to brush these facts aside, they of course afford the German Government a strong justification for sinking the ship without regard to ordinary neutral rights.

8. The *I. C. White*, an American-owned tanker of Panamanian registry, was torpedoed and sunk in the South Atlantic on September 27. She had been turned over to Great Britain under the Lend-Lease Law, and was being operated under British orders although the registry was Panamanian and the crew American. She was bound from Curaçao to Cape Town. The submarine was not seen and no warning was given. The ship's navigation lights were burning and two spotlights illuminated the Panamanian flag at the flagstaff. Three of the crew were lost because of difficulty in launching the boats, the rudder having jammed so as to cause circling, and the throttle having stuck at full speed. The remainder were picked up a week later.

9. The United States-owned freighter *Bold Venture*, a former Danish vessel requisitioned by the Maritime Commission and placed under Panamanian registry, was sunk in waters south of Iceland on October 16, 1941. The manner of sinking was not reported by the Department of State, but the ship was understood

84N. Y. Times, September 24, 1941, 1:8.
85A summary of the facts appeared in a Department of State press release, 5 Bulletin 231, but no mention of the convoy or armament was included. The Maritime Commission could have armed the *Pink Star* because it was under Panamanian registry, and hence not affected by the prohibition in the Neutrality Law of 1939 (Section 6). Subsequently, on October 6, 1941, the Panama Cabinet Council issued an order declaring that it could not authorize the arming of merchant vessels under Panamanian registry, "since the position of neutrality maintained up to the present by all American republics does not justify such a procedure." The order indicated that the Council had considered the cases of the *Pink Star* and the *I. C. White*. N. Y. Times, October 7, 1941, 1:3. Following a coup d'état the reorganized Panamanian Government reconsidered this position and on October 20 withdrew the prohibition. Ibid., October 21, 1941, 3:6. At the beginning of September, 1941 there were 82 vessels aggregating 420,000 tons which had been transferred from United States to Panamanian registry. N. Y. Times, September 8, 1941, 4:3.
86Summary of facts in 5 Bulletin 264.
to have been in a convoy (whether neutral or belligerent, not stated) and she carried cotton, steel, copper, and general cargo.\textsuperscript{87}

10. The freighter \textit{Lehigh}, United States registry, was torpedoed and sunk in the South Atlantic on October 19, 1941. She was traveling from Bilbao, Spain, to a Gold Coast port in ballast, there to pick up a cargo of ore consigned to the United States. The manner of sinking was not indicated. President Roosevelt is reported to have told a press conference that the attack constituted piracy and showed that the Axis was waging unrestricted warfare to control the seas.\textsuperscript{88}

It is unnecessary to examine here the three recent submarine attacks involving the United States destroyers \textit{Greer}, \textit{Kearny}, and \textit{Reuben James},\textsuperscript{89} but it may be remarked that the \textit{Greer}, as part of our "neutrality patrol," was pursuing the submarine which attacked it and broadcasting its position;\textsuperscript{90} the \textit{Kearny} had left a convoy which it was escorting and had gone to the defense of a belligerent convoy which was under attack;\textsuperscript{91} and the \textit{Reuben James} was also engaged in convoy duty.\textsuperscript{92} Such operations were clearly warlike, since either deliberately aggressive or undertaken in defense of ships of foreign registry.\textsuperscript{93} They indicate that the United States has gone far beyond mere insistence

\textsuperscript{87}5 Bulletin 316; N. Y. Times, October 22, 1941, 1:8; A.P. dispatch from Boston, November 14.
\textsuperscript{88}N. Y. Times, October 22, 1941, 1:8.
\textsuperscript{89}See the article referred to in footnote, p. 1, asterisk, for discussion of these incidents.
\textsuperscript{90}Statement of Admiral Harold A. Stark, Chief of Naval Operations, to the Senate Naval Affairs Committee. Text in N. Y. Times, October 15, 1941, 6:1.
\textsuperscript{91}Statement of Ensign Henry Lyman, Time Magazine, November 10, 1941, 25.
\textsuperscript{92}According to the Navy Department's announcement, N. Y. Times, November 1, 1941, 1:8. See also for a German view of the incident, ibid., 4:1.
\textsuperscript{93}This statement is of course made upon the assumption, explicit in German statements and not denied by government spokesmen here, that the convoys involved were vessels of foreign registry bound for belligerent ports under protection of warships some of which were belligerent. It can surely be assumed that had the convoys consisted solely of vessels of United States registry bound for Iceland (such vessels were then prohibited by the Neutrality Law of 1939, sec. 2(a), from proceeding to belligerent ports) under protection solely of United States warships, such a fact would have been stated by this government.

Presumably, the torpedo attack upon the United States Navy tanker \textit{Salinas} on September 28, 1941, in waters southwest of Iceland, was not an exception. The official statement issued by the Navy Department indicated that the vessel was in a convoy when attacked (N. Y. Times, November 5, 1941, 1:2-3); although it was not engaged in actively hostile operations on its own account, it was an auxiliary ship designed to service warships engaged in such operations. The \textit{Salinas} carried two five-inch guns and an anti-aircraft battery. It was crippled but reached port safely.
upon and protection of its neutral rights. It is not intended to express an opinion upon the desirability of such a naval policy; only to point out that the situation in the North Atlantic has now reached a point at which the balance between neutral and belligerent can no longer be effected within the framework of the international law of neutrality. With the repeal of sections 2 and 3 of the Neutrality Law of 1939 it has again become permissible for American ships to carry contraband cargoes to Great Britain through the waters where these incidents have occurred. Apparently it is the intention of the administration to organize such commerce upon a large scale as a public enterprise. Under such circumstances the arming of American merchantmen becomes incidental to a larger policy, so that the question can hardly be discussed upon the same footing as that which it occupied a year ago. German methods of conducting submarine warfare were perhaps not the sole or principal factor in producing this change of American policy, but it is nevertheless certain that they fell far short of the international standards which the German Government had undertaken to observe.

A third offensive mechanism, the modern bombing plane, has been brought to an extraordinary level of technical efficiency and destructive power during the two decades since the World War. Restrictions upon the use of bombing planes have been directed primarily to assuring the safety of civilian populations and confining attacks to "military objectives."

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94 Act approved November 17, 1941, repealing sections 2, 3, and 6 of the Act of November 4, 1939.

95 Secretary of the Navy Knox stated at a press conference that guns and gun crews could be put aboard as rapidly as the ships could put into port for the installations. N. Y. Times, October 16, 1941, 4:1. Navy gun crews must be used to avoid the imputation of piracy. Something of the size of the trade which will have to be carried to the Allies can be gathered from the fact that Congress has appropriated in all $12,985,000,000 under the Lend-Lease Law. According to the president's second Lend-Lease report (Senate Doc. 112, 77th Congress, 1st Session), over six and one-quarter billion dollars had then been allocated for specific materials and services; over three and one half billion dollars of contractual commitments for production had been made. Already defense articles and services amounting to $486,721,838 had been furnished.

96 See the draft code of Rules of Aerial Warfare produced by the International Commission of Jurists at The Hague in 1923, Articles, 22, 23, 24. Cmd. 1924, No. 2201; (1923) 17 A. J. I. L., Supplement, 245-260. Also the Resolution adopted by the General Commission of the Disarmament Conference, July 23, 1932 (League Document, 1932, ix, 63, pp. 268-271), in which it is proposed that "air attack against the civilian population shall be absolutely prohibited." The problem is fully discussed by Spaight, Air Power and War Rights (1924), chs. VIII, IX, X, XI; Spaight, Air Power and the Cities (1930) passim; Royse, Aerial Bombardment (1928), passim.
has perhaps been less disagreement in principle than difficulty in defining practice. Objectives of military value are frequently occupied by civilian staffs or workers, thus raising the question whether the character of the occupants is to be assimilated to that of the objective, or vice versa. Even a well-defined military objective may be so situated that its attempted demolition is extremely dangerous to adjacent property or civilians. These are problems of general interest but not primarily problems of neutral rights, for aërial bombardment in land warfare is likely to be confined to belligerent states. There is, indeed, the problem of protecting neutral air space against incursions of reconnaissance planes, or bombing and pursuit planes in transit to belligerent objectives. But there would appear to be no question, despite frequent violations, that neutral states have the right to prevent such encroachments.

President Roosevelt has actively urged belligerents in recent wars to refrain from bombardment of civilian populations. See his message of September 1, 1939 to the governments of Great Britain, France, Italy, Germany and Poland, and the affirmative replies thereto. 1 Bulletin 181-183. Ambassador Anthony J. Drexel Biddle reported indiscriminate German bombing in the Polish campaign. Ibid., 249-250. This was denied by the German Government. New York Times, September 14, 1939, p. 1, col. 8; September 17, 1939, p. 27, col. 1. On December 1, 1939 the president addressed appeals like those of September 1 to the governments of Finland and the U. S. S. R. 1 Bulletin 609-610. The Finnish Government assented to the message (ibid., 650-651), but no formal reply was received from the Soviet Government. On December 2 the president urged a "moral embargo" against exportation of airplanes, aeronautical equipment, and materials essential to airplane manufacture "to nations obviously guilty of...unprovoked bombing." Ibid., 685-686. A prohibition against divulgence to such states of technical information useful in production of high-quality aviation gasoline was added. Ibid., 714. This "moral embargo" was lifted as against the U. S. S. R. on January 21, 1941 (4 Bulletin 107).

See Spaight, Air Power and War Rights (1924) ch. XX; 1923 draft code of Rules of Aërial Warfare (cited, note 96 above), Articles 39, 40, 42. Cf. Article 14 of the Havana Convention of 1928 on Maritime Neutrality, which prohibits belligerent planes from flying above neutral territory or territorial waters "if it is not in conformity with the regulations of the latter." (Ratified by the United States in 1932. Treaty Series, No. 845; 47 Stat. 1989; Treaties, Conventions, etc. between the United States and Other Powers, IV, 4743; 4 Hudson, International Legislation, 2401). Such regulations are, however, very general, and the Convention recognizes the right of neutral states to enact them. Examples of aërial attacks on neutrals are the bombing of Esbjerg, West Jutland, Denmark on September 4, 1939 by an unidentified squadron of planes (N. Y. Times, September 5, 1939); the bombing of Pajala, Sweden, by Russian planes on February 21, 1940, which the Soviet government first denied as "a malicious fabrication," then admitted and expressed regret for as a "mistake" (N. Y. Times, March 6, 1940); the shooting down of two Belgian patrol planes over Belgian territory by a German bomber, which thought it was being attacked by British planes (N. Y. Times, March 3 and 4, 1940); a clash between a German and a Dutch plane over Netherlands territory reported on February 25 (N. Y. Times, February 21, 1940);
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The problem of special interest here is the status of the bomb- ing plane with reference to neutral commerce on the high seas. Like the submarine, the airplane fights under highly specialized conditions which make warning, visit and search difficult. Its offensive strength as against a ship lies in speed, maneuverability, and the effectiveness of its bombing or strafing. As soon as it alights upon the water it loses all the advantages of its special techniques and places itself at the mercy of a vessel carrying any armament. If it is operating with a squadron of planes it may of course be possible for one to conduct the visit and search while the others cover it from the air. But it seems desirable to have some rule governing the situation of an attack at sea by land planes, or by a single plane not working in conjunction with other aerial or naval units, or by planes operating under conditions of sea which make landing impossible. The present alternatives appear to be three: sinking merchantmen without visit and search; forcible diversion of ships into control ports or toward enemy warships without preliminary examination; or prohibition of any action by planes against merchant vessels under such circum- stances. The first two alternatives are now forbidden to warships. It appears to the writer that they ought also to be forbidden to aircraft. In the interval since the World War there has been some discussion of these questions, but no affirmative action which might clarify the status of the bombing plane today. 99

Beginning in December, 1939, and continuing thereafter, the first indications of the possible use of bombing planes against merchant shipping in the present war appeared in a very un-

and the dropping of bombs in Dublin and elsewhere in Ireland (N. Y. Times, January 4, 1941, p. 1; January 8, p. 4; June 2, p. 1). Bombing of Egyptian cities need not be included in view of the use of Egyptian territory as a base of British military operations.

99See the draft code of Rules of Aërial Warfare of 1923, and the Resolutions adopted by the General Commission of the Disarmament Conference, July 23, 1932, cited in note 96, above. The rules with respect to submarine warfare in the procès-verbal of November 6, 1936 (note 32, supra) were applied to aircraft in the Mediterranean as a result of an agreement of September 17, 1937 supplementary to the Nyon Agreement of September 14, 1937 (Great Britain, Treaty Series, No. 39, Cmd. 5569). The most realistic suggestions as to visit and search by aircraft are to be found in Articles 54 and 109, and the comments thereto, of the Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War, op. cit., 548-552, 778-782. It may be doubted, however, whether con- trol over the movements of a ship for six hours without diverting it from its course (Article 109) would afford a compromise of much practical value to the airplane. It is quite possible that aircraft are too ill adapted to visit and search under difficult landing conditions to make any con- cession of this sort worthwhile.
pleasant form. German planes attacking trawlers in the North Sea were reported to have machine-gunned defenseless crews, then to have bombarded the vessels.\textsuperscript{100} The number sunk was small, but included ships of neutral as well as belligerent states. The German Government took the position that the trawlers were auxiliary vessels of the British Navy engaged in mine sweeping or patrol duty, but no evidence of this appeared.\textsuperscript{101} Certainly no effort was made to examine the ships or divert them into port for search. By the German High Command these air raids were described as "counter-blockade" raids, and it was also stated that aerial attacks had been made upon ships in convoy.\textsuperscript{102} Thereafter there was intermittent use of bombers against British convoys, sometimes with great effectiveness. According to British figures about one quarter of the British ships lost have been destroyed by enemy air attack, and a considerable number of neutral ships have also been sunk.\textsuperscript{103} These facts suggest the serious situation which might result if the powerful German air force were instructed to attack without warning or search all neutral vessels complying with British contraband-control measures, or entering German zones of operation. Since this policy already governs its submarine operations the German Government would presumably not think it objectionable in principle. It is therefore quite possible that neutral states may have further reason to regret their failure to insist upon an official definition of their rights. Already, one ship of United States registry, the \textit{Steel Seafarer}, has been sunk in the Red Sea without warning by an unidentified bombing plane thought to be German.\textsuperscript{104} Another, the \textit{Arkansan}, was

\textsuperscript{100}N. Y. Times, December 20, 1939, 7:1; Dec. 23, 3:1; February 5, 1940, 1.

\textsuperscript{101}The Netherlands Orange Book of April 1940 lists thirteen cases of attack upon Dutch fishing boats by airplanes thought to be German. Data on ship sinkings collected by the writer (see p. 13 and note 36, supra) include Norwegian, French and Danish ships sunk by bombers during the first three months of 1940.

\textsuperscript{102}N. Y. Times, February 5, 1940, p. 3.

\textsuperscript{103}See Brodie, New Tests of Sea and Air Power, Current History, October, 1941, 99. The German High Command's claims on British and Allied shipping sunk in the first two years of the war (N. Y. Times, September 5, 1941, 4:7) are obviously extravagant, but may be approximately accurate in showing the Luftwaffe accounted for about one-quarter of the total.

\textsuperscript{104}Sunk near Suez, September 5, 1941. According to affidavit of the master, the plane attacked without warning, apparently having dropped down with motors cut off. The moon was full, there were no clouds, and visibility was perfect, so that the ship's markings could have been seen easily. No positive identification of the plane was made, but the third officer thought it "probably a Junkers 88 or at any rate a German and not
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damaged by shell fragments during an air raid over Suez.103 Such incidents do not suggest a disposition to observe reasonable substitutes for those rules of visit and search, and provision for the safety of crew and passengers, which are supposed to govern operations by warships.106

II. BLOCKADE, CONTRABAND, CONTINUOUS VOYAGE

The three elements in the international law of neutrality which formed a basis for the traditional compromise between neutral and belligerent claims were the rules of blockade, contraband, and continuous voyage. Even to summarize the history of these rules would require a great deal of space,107 but the present issues cannot be understood without at least a brief indication of the situation produced by the World War.

The modern law of blockade, as expressed in the Declaration of Paris of 1856, required that "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."108 This stipulation was of course designed to prevent the sort of retaliation upon neutral commerce for failure to observe a mere paper blockade which characterized the Napoleonic wars.109 It reduced the

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103 See Harvard Research, Neutrality, 392-402; for a summary, see McLaughlin, Legislative Neutrality in the United States (1938) 22 MINNESOTA LAW REVIEW 603-606, 612-615.
test of legal blockade to the factual inquiry whether ingress and egress to ports of the blockaded coast were actually prevented. Equally well settled was the rule that a blockade must be confined to enemy coasts, and cannot prevent access to neutral ports.110

A legally binding blockade ought not to be confused with the so-called blockade of Germany by Great Britain during the World War, which was effected not by a physical blockade of the German coast but by interception at any point on the high seas of neutral ships engaged in trade with the Central Powers or with the ports of neutral states adjacent to them.111 Although this ac-

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110 See Declaration of London of 1909 (Scott, The Declaration of London, A Collection of Official Papers, [1919] p. 114), Article 1. Although the Declaration never took effect as conventional law, the codification of the law of blockade contained in it is for the most part declaratory of existing rules of law, and the following articles are therefore transcribed:

"Article 1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

"Article 2. In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

"Article 3. The question whether a blockade is effective is a question of fact.

"Article 5. A blockade must be applied impartially to the ships of all nations.

"Article 9. A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name.

"It specifies—

"(1) The date when the blockade begins;

"(2) The geographical limits of the coastline under blockade;

"(3) The period within which neutral vessels may come out.

"Article 11. A declaration of blockade is notified—

"(1) To neutral Powers, by the blockading Power by means of a communication addressed to the Governments direct, or to their representatives accredited to it;

"(2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

"Article 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade."

111 Good summaries of the controversy over the so-called long distance blockade may be found in Harvard Research, Neutrality, 403-409; 2 Oppenheim, International Law (6th ed.), secs. 390a, 390b, 390c; 2 Hyde, International Law, secs. 829-832 incl. See also Savage, op. cit., Vol. II, and Morrissey, op. cit. These measures were instituted by the Order in Council of March 11, 1915, which does not employ the word "blockade." See text in Ambassador in Great Britain (Page) to the Secretary of State (Bryan), March 15, 1915; For. Rel., 1915, Supplement, p. 143; Savage, II, Document 54 (p. 274). A decree in the same sense was issued by the President of France on March 13; Verzijl, Le droit des prises de la grande guerre (1924) sec. 322.
tion was officially described as a blockade, and the disclaimer by Great Britain of the customary right to condemn ships for attempted breach of blockade was stated to be a matter of grace,\textsuperscript{112} it does not appear that a blockade binding under the test of the Declaration of Paris was in fact instituted. The true character of the action is indicated by a recital in the Order in Council of March 11, 1915, where it is asserted that unrestricted submarine and mine warfare by Germany "give to His Majesty an unquestionable right of retaliation."\textsuperscript{113} However, in reply to a critical communication from the Secretary of State Sir Edward Grey declined to admit

"... that a belligerent violates any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances render such an application of the principles of blockade the only means of making it effective... The only question then which can arise in regard to the measures resorted to for the purpose of carrying out a blockade upon these extended lines is whether, to use your excellency's words, they 'conform to the spirit and principles of the essence of the rules of war'; and we shall be content to apply this test to the action which we have taken in so far as it has necessitated interference with neutral commerce."\textsuperscript{114}

It was also suggested that the policy of the United States during the Civil War afforded a similar instance of the extension of the law of blockade to meet the necessities of a new situation.\textsuperscript{115} It is believed, however, that the Civil War cases were situations in which the rule of continuous voyage was applied

\textsuperscript{112}The British Foreign Secretary announced the policy to Ambassador Page in the following words: "The British fleet has instituted a blockade, effectively controlling by cruiser 'cordon' all passage to and from Germany by sea." Parl. Papers, Misc. No. 6 (1915), Cmd. 7816, p. 26. It was also observed that it was the object of the Order in Council, "succinctly stated, to establish a blockade to prevent vessels from carrying goods for or coming from Germany." Yet the British Government "felt most reluctant at the moment of initiating a policy of blockade to exact from neutral ships all the penalties attaching to a breach of blockade. In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral sea-borne commerce they declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargoes which belligerents have always claimed in respect of breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory." Page to Bryan, March 15, 1915; For. Rel., 1915, Supplement, 143; Savage, II, Document 54 (p. 274).

\textsuperscript{113}Ibid.

\textsuperscript{114}Note of July 23, 1915 inclosed in Page to Bryan, July 24, 1915; For. Rel., 1915, Supplement, 170.

\textsuperscript{115}Ibid. Particular reference was made to the case of The Springbok, (1866) 5 Wall. (U.S.) 1, 18 L. Ed. 480.
to shipments of absolute contraband, and afford little evidence of an effort to extend this rule to cases in which violation of the blockade was the only factor. The position taken by the British Government during the World War was really a deliberate confusion of blockade with the right to intercept contraband. By designating its arrangements as a blockade it sought to justify condemnation of all German imports and exports, including non-contraband goods, and conditionally contraband goods not shown to be consigned to the military forces or governmental agencies of the enemy; yet by its failure to prevent access to the German coast and ports, its disclaimer of intention to seek condemnation of the neutral ships engaged in such commerce, and its extension of the system to neutral ports, it clearly showed that its measures constituted a contraband control scheme rather than a blockade.

From an early period it was recognized that a belligerent was under no obligation to permit neutral ships to carry military equipment and supplies to the enemy forces. The legitimacy of neutral commerce with a belligerent could of course be subjected to two tests: first, whether the commodities having a destination in enemy territory were of a character designed primarily or exclusively for military use; second, whether commodities adapted to either military or civilian use were in fact consigned to the enemy forces or merely to enemy territory. Military equipment and supplies, such as arms, ammunition, ordnance, military clothes, horses and cavalry equipment, naval stores, saltpeter and sulphur, have long been regarded as contraband because, irrespective of other circumstances, their character is in itself a sufficient guaranty that they will be utilized for military purposes if sent to enemy territory. This is the foundation of

116 This is clearly the case in The Bermuda, (1865) 3 Wall. (U.S.) 514, 18 L. Ed. 200; The Springbok, (1866) 5 Wall. (U.S.) 1, 18 L. Ed. 480; and The Peterhoff, (1866) 5 Wall. (U.S.) 28, 18 L. Ed. 564. But the case of The Pearl, (1866) 5 Wall. (U.S.) 574, may be an application of the continuous voyage doctrine to blockade, as is the lower court case of The Dolphin, (D. Fla. 1863) 7 Fed. Cas. No. 3975. See the careful analysis of these cases in 2 Hyde, International Law, secs. 809, 810; also Gantenbein, Doctrine of Continuous Voyage, ch. II. Lansing replied to the British arguments in detail in a note to Sir Edward Grey inclosed in a letter of October 21, 1915 to Ambassador Page; For. Rel., 1915, Supplement, p. 578; Savage, II, Document 131 (p. 390).


118 List of contraband articles in treaties, referred to in note 117. Grotius distinguished three kinds of articles: those useful only in war, which could not be furnished to a belligerent without becoming identified
the category of goods which is now called absolute contraband, a term used in order to distinguish such articles from goods which may or may not be contraband, depending upon whether their destination at the time of seizure is shown to be military or civilian. With respect to the latter class of goods there was always a question of fact to be determined by a prize court upon the basis of such evidence of intended destination as might be available. If the papers were in proper order and showed a civilian consignee with respect to whom there were no suspicious circumstances, the goods would be released. But evidence that the goods were consigned to a military base or besieged place was taken by early courts as a sufficient indication that they would pass to the enemy forces, and irregularities in the bills of lading, evidence of deviation by the vessel, or of collusion to aid the enemy, were also thought sufficient to justify condemnation of the cargo. Out of this method of dealing with such merchandise has come the modern conception of conditional contraband. Its importance can be measured by the fact that foodstuffs have traditionally been included in that category. So have many products which have since become essential to modern technical warfare, such as cotton and cellulose for munitions; coal, fuel oil, and gasoline for operation of naval vessels, of motorized army equipment, and of aircraft.

with his cause; goods useful only for civilian purposes; and goods susceptible of either military or civilian use, as money, provisions, ships, and naval equipment. De jure belli ac pacis (1625) iii. c. 1, sec. 5. See Moore, International Law and Some Current Illusions (1924) ch. II (Contraband).

For early cases illustrating the development of these rules see Parkman v. Captain Allan, (Ct. of Sess. Scot. 1668) 14 Morison 11865; 1 Stair, Institutions of the Law of Scotland 502, 529, 550; Gilbertson v. Blinn and His Owners, (Ct. of Sess. Scot. 1669) 14 Morison 11879, 1 Stair 626; The Marlborough Prize, (Adm. 1741) in Pratt, Contraband of War 24; Med Guds Hielpe, (Adm. 1745) Pratt, Contraband of War 191, 1 Roscoe, Reports of English Prize Cases 1; T'Slots Copenhagen, (Adm. 1745-46) Pratt, Contraband of War 40; The Vryheid, (Adm. 1778) Hay and Marriott 188, 1 Roscoe 13; The Jonge Margaretha, (1799) 1 C. Rob. 189, 1 Roscoe 100; The Sarah Christina, (1799) 1 C. Rob. 237, 1 Roscoe 125; The Imina, (1800) 3 C. Rob. 167, 1 Roscoe 289; The Twendre Brodre, (1801) 4 C. Rob. 33, 1 Roscoe 332; The Neptune, Jeffries master, (1797) 4 Moore, International Adjudications 372; 4 Moore, Arbitrations 3844-3856; The Commercen, (1816) 6 Fed. Cas. No. 3,055. Jessup and Deák, loc. cit.; Moore, loc. cit.

See the full discussion in 2 Hyde, International Law 580-597.

Cf. U. S. contraband lists of the Civil and Spanish American Wars in Hyde, II, note 2, p. 598. During the Russo-Japanese War the Russian Government declared coal, naphtha, alcohol, and other fuel, absolute contraband. In the diplomatic discussions which ensued, however, it became clear that there was still general opposition to such a view. Naval War College, International Law Topics and
Prior to the World War the distinction between absolute and conditional contraband was quite generally recognized. During the course of the Boer War Lord Salisbury had stated the views of the British Government with respect to foodstuffs as follows:

"Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure." 122

American and British pressure also led the Russian Government to abandon its intention to treat rice and foodstuffs as contraband during the Russo-Japanese War. 123 In the Declaration of London of 1909 there was a specific enumeration of fourteen general groups of commodities which the signatories recognized as conditional contraband, liable to capture if "destined for the use of the armed forces or of a government department of the enemy state." 124

Discussions (1905) 31-47. Both fuel and foodstuffs were retained in the list of goods conditionally contraband in the U. S. Naval Instructions of June 30, 1917:

"24. The articles and materials mentioned in the following paragraphs (a), (b), (c), and (d), actually destined to territory belonging to or occupied by the enemy or to armed forces of the enemy, and the articles and materials mentioned in the following paragraph (e) actually destined for the use of the enemy government or its armed forces, are, unless exempted by treaty, regarded as contraband:

"(a) All kinds of arms, guns, ammunition, explosives, and machines for their manufacture or repair; component parts thereof; materials or ingredients used in their manufacture; articles necessary or convenient for their use.

"(b) All contrivances for or means of transportation on land, in the water or air, and machines used in their manufacture or repair; component parts thereof; materials or ingredients used in their manufacture; instruments necessary or convenient for carrying on hostile operations.

"(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers, and other articles, machines, or documents necessary or convenient for carrying on hostile operations.

"(d) Coin, bullion, currency, evidences of debt; also metal, materials, dies, plates, machinery, or other articles necessary or convenient for their manufacture.

"(e) All kinds of fuel, food, foodstuffs, feed, forage, and clothing, and articles and materials used in their manufacture."

Although many belligerents abandoned this position during the World War they have returned to it in the present conflict, at least in so far as formal contraband lists are concerned. Cf. recent lists quoted infra, pp. 42-45.

122 Communication to Mr. Choate, U. S. Ambassador at London, January 10, 1900; For. Rel., 1900, 555.
123 Hay to McCormick, American Ambassador at St. Petersburg, No. 143, August 30, 1904, For. Rel., 1904, 760; 7 Moore, Digest 688. See also the case of The Arabia, (1904) 1 Hurst and Bray, Russian and Japanese Prize Cases. 42-53, referred to in Hay's note. The revised Russian regulations were contained in instructions of September 30, 1904 and memorandum of October 22, 1904. 1 Hurst and Bray, Appendix G.
124 Charles's Treaties, 268; Naval War College, International Law Topics 1909, p. 169. Esp. Articles XXXIII, XXXIV, XXXV.
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This apparent harmony of opinion on the subject failed, however, to withstand the test of war. Confronted with an enemy which had enlisted the whole of its human and economic resources into a tremendous war organization, which was dependent upon foreign imports for many vital materials, and which had instituted commodity controls assuring the utilization of these imports in accordance with the military program, the British Government swung around to the position that it was no longer realistic to attach significance to the distinction between military forces and civilians, or to suppose that consignments to enemy civilians of goods in the conditional contraband list could escape requisition by the state. It therefore ceased to attach value to the distinction between absolute and conditional contraband, and published an enormously expanded contraband list every item of which it regarded as liable to condemnation if destined directly or ultimately to enemy territory. This position was opposed by the United States, but generally adopted by the other belligerents. It appears to rest upon a real change in the factual situation, now further accentuated by the political organization and controlled economy of totalitarian states, but whatever conclusion may be reached on principle it is probably futile now to expect any return to the former distinction.

Perhaps one reason for the belligerent desire to shift goods from the conditional to the absolute contraband list lay in the fact that commodities in the latter list, even though shipped to neutral ports, could be condemned under the rule of continuous voyage if an ultimate destination in enemy territory could be established. But the Civil War precedents for the doctrine of continuous voyage had involved no application of the rule to conditional contraband. Even if the propriety of such an exten-

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126 The British contraband lists were varied and expanded by successive orders, the final one being the proclamation of July 2, 1917 (London Gazette, July 3, 1917).
127 In the U.S. Naval Instructions of June 30, 1917 foodstuffs, fuel and clothing were designated contraband only “when actually destined for the use of the enemy government or its armed forces, unless exempted by treaty.” (No. 24, p. 15).
128 Thus in The Peterhoff, (1866) 5 Wall. (U.S.) 28, 18 L. Ed. 564 the absolute contraband was condemned, the conditional contraband released, in a continuous voyage situation. Some doubt may perhaps be entertained that the court correctly distinguished the two categories, however. While the Civil War cases contain no deliberate application of continuous voyage to conditional contraband, it is not suggested that the Supreme Court was
sion were admitted it would logically have to be confined to cases where a destination for the enemy forces or governmental agencies could be shown. But in this class of cases evidence of the character of the goods and the possibility of continuous transportation to a neighboring belligerent was usually much easier to obtain than evidence of positive intent to forward them to enemy territory or evidence that they would ultimately reach enemy armed forces or governmental agencies rather than civilian consignees. This difficulty was avoided in the British prize courts by the application of novel orders instituted by the British Government. Early in the war it issued an order in council authorizing condemnation of conditional contraband consigned to neutral ports if the ship's papers disclosed an ultimate consignee in enemy territory, or a consignment to order, or failed to disclose any consignee. The burden of proving an innocent destination was shifted to the owners in such cases. Thus, for the first time, a presumption against the innocence of goods shipped to a neutral country and capable of civilian use was entertained. The practical effect of such rules of evidence was to facilitate extension of the continuous voyage doctrine to conditional contraband without even the natural requirement of proof of hostile use. Thus no significant distinction remained between the treatment of absolute and conditional contraband in cases of this type. Although protest against these practices was made by Secretary Lansing the issue unfortunately became submerged in the controversy over the British “blockade” of Germany. For under the Order in Council of March 11, 1915 all German imports and exports could be intercepted even though routed through the ports of adjacent neutrals. Since a legitimate blockade could not prevent access to neutral ports, this interference constituted either a novel extension of blockade or a distortion of the continuous voyage doctrine antagonistic to such an application, only that proof of military or governmental destination of conditional contraband was not made.

The writer perceives little difficulty in admitting it, provided there is no relaxation of the rules requiring proof by the captor of military or governmental destination.

Order in Council of October 29, 1914; For. Rel., 1914, Supplement, 262.

Technically, this is perhaps not a correct statement, since the creation of a presumption which must be rebutted is not identical with a shift in burden of proof. But the practical result in these cases was the same.

Lansing to Page, October 21, 1915, inclosing note to Sir Edward Grey, For. Rel., 1915, Supplement, 578; Savage, II, Document 131 (p. 390). Despite emphasis upon the blockade question paragraphs 8 to 15 incl. of the note meet the burden of proof issue squarely.
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trine even more serious than that already described. The anomalous character of these British measures was of course inconsistent with the principles of either blockade or continuous voyage.

It is perhaps unnecessary to repeat the familiar point that the great extension of the contraband list by the British, especially when coupled with an application of the principle of ultimate destination, necessarily destroyed the practical value of the rule that blockades to be binding must be effective. Although the British chose to refer to their control measures as a blockade it was obvious that the right they asserted to intercept all goods proceeding directly or indirectly to enemy territory could be exercised without resort to blockade by the simple expedient of expanding the contraband list to include them. It only remained for the British Government to establish effective measures for the interception of neutral vessels, a comparatively simple task in view of the narrowness of the sea lanes left free from mines in the combat zones. Interception of enemy exports still constituted a legal problem unless the legality of the so-called blockade were admitted, but this could be dealt with on the catch-all ground of reprisal against the enemy’s illegal methods of warfare. The system as a whole was thoroughly destructive of the accepted rules of blockade, contraband and continuous voyage. On the other hand it was apparently prompted by a sincere conviction that the recognition of any substantial list of conditionally contraband or free goods


134 See especially the treatment of this by Moore, loc. cit.

135 It is clear that the British prize courts never attempted an extension of the law of blockade to cover this situation but relied upon reprisal. Thus in The Stigstad, [1916] P. 123, [1919] A. C. 279, and The Leonora [1918] P. 182, [1919] A. C. 974, recitals in the orders in council were held to be conclusive evidence that cause for reprisals existed, but no attempt was made to justify the measures applied under the orders other than as a mode of retaliation. In The Zamora [1916] 2 A. C. 77, where the holding also recognized the sufficiency of the evidence that reprisals were justified, the court indicated by way of dictum that it was not bound by an order in council contrary to international law, and might find that the means of reprisal adopted were unlawful because an unreasonable inconvenience to neutrals. There is no case in which such a holding was thought proper, nor in the nature of things was there likely to be one since the court was confined to the Government’s recitals in the order. It could easily make these as strong as might be necessary to convince the court of the justice of retaliatory measures. See also The Noordam, No. 2, [1920] A. C. 904.
under traditional rules had become incompatible with the successful prosecution of war under modern conditions. Any future reconstruction of the international law of neutrality must take as its premise either an affirmative or a negative view of the validity of that conclusion.  

For the present the situation is very similar to that during the World War. Since the belligerents did not then make any concession to the protests of the United States or other neutrals, and no subsequent agreement upon these issues was reached, it was to be expected that the World War measures would be revived in so far as the belligerents considered them effective. The contraband lists which have been issued no longer contain an exhaustive recital of hundreds of specific commodities as did the British list of April 13, 1916, but are brief lists of broad categories of goods. Since the present lists of most of the belligerent members of the British Commonwealth of Nations are identical in form, it is sufficient to set forth the list issued by the United Kingdom.

"Schedule I."

"Absolute Contraband."

"(a) All kinds of arms, ammunition, explosives, chemicals, or appliances suitable for use in chemical warfare and machines for their manufacture or repair; component parts thereof; articles necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

"(b) Fuel of all kinds; all contrivances for, or means of, transportation on land, in the water or air, and machines used in their manufacture or repair; component parts thereof; instruments, articles, or animals necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

"(c) All means of communication, tools, implements, instru-

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136 See infra, section V of this paper, for the premises upon which the Harvard Research Draft on Neutrality is based. With these the writer is in substantial agreement.

137 About one hundred and seventy groups of articles were included, each containing many items.

ments, equipment, maps, pictures, papers and other articles, machines, or documents necessary or convenient for carrying on hostile operations; articles necessary or convenient for their manufacture or use.

"(d) Coin, bullion, currency, evidences of debt; also metal, materials, dies, plates, machinery, or other articles necessary or convenient for their manufacture.

"Schedule II.

"Conditional Contraband.

"(e) All kinds of food, foodstuffs, feed, forage, and clothing and articles and materials used in their production."

It may be thought an evidence of moderation that foodstuffs have been retained as conditional contraband. But, as was indicated above, the presumptions and rule on burden of proof which were applied by British prize courts during the World War practically nullified the effect of the distinction, and this result may be expected in current prize cases. There has not yet been any declaration of a "blockade" of German imports by means of unrestricted interception on the high seas, which probably means that the British Government feels able to accomplish substantially the same result through condemnation of contraband and therefore prefers to act under this color of right. Since the present government can take account of the experience of the World War and count upon a well defined attitude in its prize courts, it has sufficient assurance of obtaining effective results without experimentation along novel lines.

Although new legislation, the Prize Act of 1939 (2 & 3 George VI, ch. 65; September 1, 1939), has been enacted, and the Prize Court Rules of 1939 (S. R. & O., 1939, II, 2798-2904 [No. 1466/L.23]) have been issued pursuant thereto, there appears to be no change in the basic rules with respect to contraband or prize court procedure. The principal effect of the new legislation and regulations is to include aircraft and their cargoes within the rules applicable to ships. Due to the unfortunate use of incorporation by reference upon a large scale in the new legislation some incongruities have been produced, but they are not such as to affect matters under discussion here. See Parry, The Prize Act 1939, (1940) 3 Modern L. Rev. 298-302. Very few recent prize cases have been reported, and they are not of general interest. In The Gabbiano, [1940] P. 166, 109 L. J. P. 74, 56 T. L. R. 774, the question was whether the particular form of shipping contract and bill of lading left the title to the cargo in the claimant shippers, so that their action in ordering diversion of the ship into an English port for discharge of the cargo, which before the outbreak of the war had been cleared for Stettin, was sufficient to save it from condemnation in prize as enemy property. The Alwaki, [1940] P. 215, 109 L. J. P. 103, 56 T. L. R. 981, raises the question whether a provision of the Prize Court Rules of 1939, allowing a presumption of enemy ownership if no claimant has established a claim within six months after service of the writ (Ord. XV, r. 9), can be applied in all its implications in view of the fact that a period of one year is generally recognized by international
The German Prize Law Code of August 28, 1939, as amended, contains two articles defining absolute and conditional contraband, respectively:

"Article 22.

"(1) The following articles and materials will be regarded as contraband [absolute contraband] if they are destined for enemy territory or the enemy forces:

1. Arms of all kinds, their component parts and their accessories.
2. Ammunition and parts thereof, bombs, torpedoes, mines and other types of projectiles; appliances to be used for the shooting or dropping of these projectiles; powder and explosives including detonators and igniting materials.
3. Warships of all kinds, their component parts and their accessories.
4. Military aircraft of all kinds, their component parts and their accessories; airplane engines.
5. Tanks, armored cars and armored trains; armor plate of all kinds.
6. Chemical substances for military purposes; appliances and machines used for shooting or spreading them.
7. Articles of military clothing and equipment.
8. Means of communication, signaling and military illumination and their component parts.
10. Fuels and heating substances of all kinds, lubricating oils.
12. Apparatus, tools, machines and materials for the manufacture or for the utilization of the articles and products named in numbers one to eleven."

"(2) It is immaterial whether shipment is direct or whether transshipment or transportation by land is necessary.


\textsuperscript{141}\textit{Prins Knud}, (1941) P., 11 February, 1941; 85 Sol. J. 167, illustrates the disposition of the court to give effect to the government's policy against condemnation in prize of Danish vessels seized after the German occupation of Denmark, provided the interests of British subjects having claims against the vessels (in this case, a salvage claim) are adequately protected. Although the implications of the case of The \textit{Alhakki} may be of some general interest, these cases cannot as a whole be said to contribute much to the questions which have been discussed above.

\textsuperscript{142}Article 22 as here printed is an amendment promulgated by the Government of the Reich on September 12, 1939. 1 Bulletin 285.
“ARTICLE 24.

“(1) Likewise to be considered as contraband [conditional contraband] are all articles and materials which:

1. Are susceptible of use for warlike as well as for peaceful purposes and are included in a list published by the Government of the Reich and

2. Are destined for the use of the enemy forces or the government agencies of the enemy state.

“(2) On condition of reciprocal procedure on the part of the enemy the articles and materials named in par. 1 will not be considered as contraband if they are to be discharged in a neutral port.

“(3) Par. 2 does not come into consideration if the enemy territory has no seacoast.”

On September 12, 1939 the Reich Government, acting under Article 24, announced as conditional contraband, "foodstuffs (including live animals), beverages and tobacco and the like, fodder and clothing; articles and materials used for their preparation or manufacture.”

The net result seems to approximate the British list quite closely, despite differences in phraseology. Enemy destination of absolute contraband is considered proved when the papers show goods are to be discharged in an enemy port or delivered to enemy forces, or when the vessel is to call only at enemy ports, or to touch at intermediate enemy ports before reaching the neutral port or ports to which the goods are ostensibly consigned. Enemy destination of conditional contraband is to be presumed if the shipment is consigned to an enemy authority, an enemy fortified place or base of operations or military supply, or an agent in enemy territory known to furnish materials to enemy forces or government agencies. From a practical standpoint these provisions are of course likely to affect neutral trade far less than British contraband controls, for the Reich's geographical position and specialized navy make destruction of neutral ships much easier than capturing and bringing them into port for condemnation by a prize court.

At the Consultative Meeting of Foreign Ministers of the American Republics held in Panamá soon after the outbreak of the war a resolution was adopted expressing "opposition to the placing of foodstuffs and clothing intended for civilian popula-
tions, not destined directly or indirectly for the use of a belligerent government or its armed forces, on lists of contraband." The resolution also declared the belief that the granting of credits to belligerents for the acquisition of such merchandise, whenever permitted by domestic legislation, would not be contrary to international law. The Inter-American Neutrality Committee was directed to study the commercial situation of raw materials, whether mineral, plant, or animal, produced by the American Republics, and to recommend such individual or collective action as might reduce the unfavorable effects on free movement of these commodities, of contraband declarations and other economic measures of the belligerent countries. Such a resolution reveals a singular failure to appreciate the true nature of the situation. As has been indicated, foodstuffs and clothing had already been placed on the list of conditional contraband by the major belligerents, which thereby indicated at least formal recognition of the immunity of such goods when proceeding to a legitimate civilian consignee. If the Consultative Meeting understood that the real difficulty lay in the presumptions as to destination which would be entertained by the prize courts it gave no indication of it. On the other hand the Neutrality Committee evidently appreciated the difficulties involved, for it proceeded warily by passing the problem on to a sub-committee and requesting the several American Governments to transmit their views upon the classification of commodities into absolute and conditional contraband.

Reference has already been made to the so-called German blockade of the British Isles, and its expansion into a war zone including much of the North Atlantic ocean. Continued British commerce on a scale sufficient to maintain wartime production and to feed a large population despite the absence of most of the essential supplies from the domestic raw materials list, is a sufficient commentary upon the effectiveness of this "blockade." The use of the term serves only as a convenient cloak for types of illegal warfare in these waters which are intolerable to neutral states. Perhaps the reductio ad absurdum of all paper blockades was reached when the Government of Italy on August 20, 1940

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146 Ibid., secs. 2 and 3.
147 See the comments of Professor Fenwick, the American member of the Committee, (1941) 35 A. J. I. L. 35-37.
148 Supra, pp. 17-18.
declared a "blockade" of the whole of the British Empire and Egypt.\textsuperscript{149}

With respect to German exports the British have adopted a policy like that of the World War. By an Order in Council of November 27, 1939;\textsuperscript{150} headed "Reprisals Restricting German Commerce," the seizure of goods of German ownership or of German origin, whether carried directly from German or German-occupied territory or from a neutral port, was authorized.\textsuperscript{151} The basis for this measure is stated to be his Majesty's "unquestionable right of retaliation" against German submarine warfare conducted in violation of the rules contained in the submarine protocol of 1936, and the laying of mines indiscriminately and without notification, contrary to the requirements of the Hague Convention (No. 8) of 1907. In response to an inquiry from the American Embassy at London it was indicated that "in very exceptional circumstances" exemptions from the operation of the order might be obtained by application to the British Ministry of Economic Warfare.\textsuperscript{152} Vigorous protests against the British measure were presented by the Scandinavian States, Denmark, The Netherlands, Belgium, Japan, Italy, the U. S. S. R., and the United States. All pointed out the impropriety of reprisals or retaliatory measures which injured important neutral interests as well as those of Germany.\textsuperscript{153} Japan based its protest not only upon international

\textsuperscript{149} Bulletin of International News, September 7, 1940, p. 1187.
\textsuperscript{150} Text in S. R. & O., 1939, II, 3606 (No. 1709); CCH War Law Service, 65,557; N. Y. Times, November 29, 1939, p. 2; London Times, same date, p. 4. The French Government issued a similar decree on November 27. See 2 Oppenheim, International Law (6th ed.) 655-656.
\textsuperscript{151} The Order in Council, undoubtedly founded upon the form of the Order of March 11, 1915, authorized the forcible discharge from vessels which sailed from enemy ports after December 4, 1939, of goods laden in such ports; also of goods of enemy origin or ownership found in vessels which had picked them up elsewhere than in enemy ports. Such goods are detained or sold under the direction of the prize courts. Goods detained and proceeds of goods sold may be disposed of at the conclusion of peace "in such manner as the court may in the circumstances deem just."
\textsuperscript{152} Bulletin 5: "Such exemptions will only be given in very exceptional circumstances. It is not possible to define the facts on which an exception will be made because, as you will appreciate, this will depend upon the particular circumstances of each case. When, however, any application for exemption is made the fullest possible information should be supplied, including in particular all details of the shipment desired, together with the names and addresses of consignor and consignee, the origin of the goods, the contract under which they were purchased, dates on which payment therefor is due, and the dates on which any payments therefor have been made."
\textsuperscript{153} November 23, 1939 the Netherlands made a formal démarche to the British Foreign office in view of its announced plans, reserving all rights under international law. N. Y. Times, November 25, 1939, p. 1. Italy pro-
law but upon special undertakings made by the British Government to the Japanese Government, and was reported to be considering retaliatory measures against Anglo-French shipping in Far Eastern waters. But the sharpest conflict occurred when the British Government notified Italy (then neutral) of its intention to intercept all exports of German coal to Italy after March 1, 1940. Despite strong protests, thirteen Italian colliers which left the Netherlands with German coal after the date set were taken into the Downs and released only on the ground that there had been a misunderstanding as to the final sailing date. Thereafter an agreement between the Governments of Great Britain and Italy was reached whereby Italy undertook to cease importation of German coal in Italian ships.

What significance this agreement may have as a precedent is not clear, but it may be doubted that any admission of the legality of the British control measures was involved. Secretary Hull's note of December 8, 1939, pointed out that American ships were then prohibited by domestic law from trading with North European ports between Bergen, Norway and northern Spain, hence could not commit any breach of a blockade against Germany. On the other hand no question of contraband arose with respect to German exports to the United States. This government therefore objected to diversion of American ships carrying goods of German origin or ownership, and reserved all its rights and those of its nationals, to the extent they might be infringed. The position taken by these protests seems unassailable in law. In practice they have produced no abandonment by the British Government of its obnoxious practices nor any admission of their impropriety as measures of reprisal. Since the neutral states are apparently not disposed to reinforce their formal protests by any positive measures, it seems not improbable that the matter will rest there for the duration of the war. The British reprisals might then become the subject of international claims by neutral states to obtain contested on November 24; Japan and Sweden, on November 25; Norway, November 27; Germany, November 29. Ibid., November 25, 1939, p. 1; N. 26, pp. 1, 37; N. 30, p. 3. On December 7 the United States reserved the right to claim reparation for damages, ibid., December 9, 1939, p. 4 (text). On December 10 the U. S. S. R. did the same, ibid., December 11, 1939, p. 10.

156 Bulletin 651-652.
pensation for damage to their commerce. Even if it should prove possible to obtain damages from the British Government for its violation of neutral rights, that must prove a poor and tardy substitute for the habitual respect for those rights which a more vigorous neutral policy might have produced.

(To be concluded)

The possibility of this is now remote in view of the fact that several of these states are now occupied areas, and nearly all others are belligerents or allies of belligerents or intervening states. Claims of this sort are now more likely to be adjusted in the general settlement at the end of the war, and legal liability avoided or imposed accordingly as Great Britain may win or lose.