It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the state which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment.

(2) *Responsibility of Intermediate Commanders for Acts Ordered by their Superiors to be Carried out by their Subordinates.* A military commander is often faced with the problem of carrying out an act ordered by one of his superiors to be executed by one of his subordinates. Criminal responsibility of the intermediate commander can arise in one of three similar circumstances. The first is where the intermediate commander receives an order to be carried out by his subordinates which requires his implementation. In other circumstances the intermediate commander may transmit an illegal order through the chain of command from his superior to his subordinates without any action on his part. If he knows that the order is illegal, then he is faced with several alternatives. He can refuse to pass the order on. He may pass the order on with a written or oral directive that it is not to be carried out. Finally, he can pass the order on without comment. The problem becomes even more acute when an order is given from a superior to one of the intermediate commander's subordinates without the intermediate commander having been consulted in the matter. The discussion of the problem in the *Von Leeb Case* is a good guide to the general approach to be taken in such matters.[76]

It is urged that a commander becomes responsible for the transmittal of any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far-reaching. The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the commander without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command.

Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.

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[76] *U.S. v. Von Leeb, op. cit.*, n. 37, pp. 510–512.

Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers—not lawyers. Military commanders in the field with far-reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.

(3) *Responsibility of Chiefs of Staff and Other Staff Officers.* In general, they were not held responsible for orders of a command nature which went out over their signature unless it was shown that they personally had something to do with initiating, drafting, or implementing the criminal order. Of course, their responsibility with respect to the administration of their own staff departments is the same as that of any other military commander. The court in the *Von Leeb Case* has an excellent comment on the responsibility of a chief of staff under these circumstances.[77]

Since a chief of staff does not have command authority in the chain of command, an order over his own signature does not have authority for subordinates in the chain of command. As shown by the record in this case, however, he signs orders for and by order of his commanding officer. In practice, a commanding officer may or may not have seen these orders. However, they are presumed to express the wishes of the commanding officer. While the commanding officer may not and frequently does not see these orders, in the normal process of command he is informed of them and they are presumed to represent his will unless repudiated by him. A failure to properly exercise command authority is not the responsibility of a chief of staff.

In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitely upon his commander.

(4) *Responsibility of Subordinates for Acts Committed Pursuant to Superior Orders.* Generally speaking, subordinates are criminally responsible for acts committed by them pursuant to orders which are criminal on their face. This problem will be

[77] *Ibid.*, p. 514. The extent of the responsibility of staff officers was extensively argued by counsel on both sides. For extracts from final briefs on this point see *ibid.*, pp. 446–457.

discussed later under the specific affirmative defense of superior orders.

3. *Crimes Against Humanity*

None of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law. Such a contention was made by the prosecution before the IMT, but the Tribunal disposed of this charge by holding that the language of the London Charter limited its jurisdiction to such crimes as were committed in the course of or in connection with aggressive war. Again the "Flick Case" and in the "Ministries Case" the prosecution raised the same question; in each indictment and entire count was devoted to the charge of prewar atrocities, chiefly against Jews. Although the language of Law No. 10 defining "crimes against humanity" differed in certain particulars from the comparable definition in the London Charter, the "Flick" and "Ministries" tribunals followed the decision of the IMT and declined to take jurisdiction of the charge.

However, in two other Nuremberg cases where the question was raised only collaterally, the Nuremberg tribunals made significant and important observations on this question. Thus, in the "Einsatzgruppen Case" the Jewish exterminations of which the defendants were accused occurred during and after 1941, but it was charged that these murders constituted not only "war crimes" but also "crimes against humanity." Since no acts prior to 1939 were involved the Tribunal had no occasion to pass upon the question of construction of Law No. 10 which confronted the "Flick" and "Ministries" tribunals. But in convicting the defendants of "crimes against humanity" the court expressly stated that "this law is not limited to offenses committed during war, . . ."

"So, too, in the "Justice Case," where "crimes against humanity" committed after 1939 were also charged against the defendants, the Tribunal stated that: ". . . it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law." [78]

B. The Defenses

Persons accused of war crimes interposed a number of defenses to their actions during the course of the trial. There were a number of affirmative defense which were designed to show that the defendant was not criminally responsible for his acts despite the fact that the acts complained of may have actually taken place. These affirmative defenses fell, generally speaking, into two classes. On the one hand were those affirmative defenses which normally negate criminal responsibility under the general principle of municipal criminal law common to the civilized states of the world. These include the defenses of insanity, self-defense, mistake of fact (where applicable), and the like. On the other hand, there were certain defenses which are peculiar to war crimes trials. These two types of defenses will now be discussed.

[78] Taylor, *Final Report, op. cit.*, pp. 224–226.

1. *Defenses Normally Available Under Municipal Criminal Law*

a. *Self-defense.* The plea of self-defense may be successfully put forward in war crimes trials in much the same circumstances as in trials held under municipal law. In the case of *United States v. Krupp*, the Court implied that it would accept a defense of self-defense defined as executing "the repulse of a wrong" and even a defense of necessity which is "the invasion of a right."[79] Another case was the trial of Weiss and Mundo before the United States General Military Government Court at Ludwigsburg, Germany, November 1945.[80] Here two German policemen were acquitted of shooting a captured American airman whom they believed to be drawing a pistol.

b. *Mistake of fact.* The German commander in Finland carried out a "scorched earth" policy under the mistaken impression that he was being pursued by Russian troops. The court commented as follows:[81]

> . . . The destruction was as complete an an efficient army could do it. Three years after the completion of the operation, the extent of the devastation was discernible to the eye. While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so. Gun emplacements, foxholes, and other defense installations are still perceptible in the territory. In other words there are mute evidences that an attack was anticipated.
>
> There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

c. *Ignorance of the law.* In general, under municipal law systems, ignorance of a published law is not an excuse for the commission of an offense. However, international law does not in some cases possess either the exactness or the degree of publicity which pertains to municipal law. Consequently, the accused was not found guilty of a violation where he had little opportunity of discovering either the law's existence or its proper interpretation. For example, in the *Scuttled U-Boats Case*[82] the accused contended

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79 *U.S. v. Krupp, op. cit.*, n. 34, pp. 1435–1439. The defendants were not as successful in proving the necessity as were those in *U.S. v. Flick op. cit.*, n. 26, pp. 1200–1202

80 XIII *Law Reports of Trials of War Criminals*, pp. 149–151.

81 *U.S. v. List, op. cit.*, n. 40, p. 1296.

82 *Trial of Oberleutnant Grumpelt*, I *Law Reports of Trials of War Criminals*, pp. 55–70. See also *U.S. v. Sawada et al.*, V *LRTWC* at p. 8 wherein the conviction of one Tatsuta was reversed because it was not shown that the defendant had knowledge that the Enemy Airmen's Act under which he executed American airmen was illegal. (Also reported in *Annual Digest* 1946, pp. 302–304.)

that he was not aware of the capitulation of Germany. Consequently, he had no reason to believe that the orders he carried out by scuttling the U-Boats were contrary to international law. The judge advocate in this case when advising the court made the following statement:

> Do you think it is at all reasonably possible that the accused had heard nothing at all which would put him upon his guard as regards the handing over of the submarines, remembering that he was with this security flotilla, and was in a naval port at a time when rumours were presumably going round like wildfire? Are you satisfied that the man's state of mind at the time in question was this: "I honestly believed I had an order: I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible"? Gentlemen, that is a matter for you to consider.
>
> The Defence suggests if you look at the evidence as a whole that that is a reasonable possibility. I am going to tell you that in my view, *if the accused did not have any knowledge of these terms* and that he did believe honestly that he had an order of this kind and that he carried it out; well, then, gentlemen, you will be entitled to acquit him.[83]

Another situation where the defense of mistake of law may arise occurs where military authorities in occupied countries are bound by international law to respect the municipal law of that country.[84] The administrative personnel of the military occupiers may be unable to comprehend fully the legal doctrines of the countries in which they are exercising authority. In a case dealing with this subject, the court did not allow ignorance of the local law as an excuse but did consider it as a mitigating factor.[85]

d. *Plea of duress.* The plea of duress is likely to be used in a case where a subordinate has committed a war crime because of command of his superior officer. The plea, as asserted in the case of alleged war crimes, is subject to a number of limitations which are generally similar to those imposed under municipal law. The general theory behind this plea is aptly stated in the case of *United States v. Ohlendorf* in which the court said:[86]

> But it is stated that in military law *even if the subordinate realises that the act he is called upon to perform is a crime,* he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

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83 *Ibid.*, pp. 69–70.
84 Art. 43, Hague Regulations of 1907 and Art. 64, Geneva Civilian Convention of 1949.
85 *U.S. v. Flick*, XI *Trials of War Criminals*, p. 1208.
86 IV *Trials of War Criminals*, p. 480.

Nor need the peril be that imminent in order to escape punishment.

In the *Von Leeb Case* the court made this statement with respect to the plea of duress:[87]

> The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.

In order succesfully to use the defense, the defendant must have an honest belief that he is to be subjected to a serious wrong if he does not carry out the act in question. Furthermore, this threatened harm must be more serious than the harm which will result to others from the act to be performed.[88]

2. *Defenses Peculiar to Alleged War Crimes*

a. *General.* There are a number of defenses which were employed with varying degrees of success in the war crimes trials following World War II which are unique and unlike those normally employed in municipal law criminal cases.

b. *The Doctrine of Military Necessity.* This doctrine has been used as an excuse for violations of the laws of war for many centuries. When used as an excuse it amounts to no more than a rationalization for a violation not otherwise justified. In the modern period, an improper use of the doctrine of military necessity has been termed "Kriegsraison." The doctrine when advanced in the various war crimes trials following the Second World War was universally condemned.

> The doctrine of military necessity has been widely urged. In the various treaties on international law there has been much discussion on this question.
>
> It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. We content ourselves on this subject with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations. . . .[89]

c. *The obsoleteness of the law.* This plea was put forward in the *Krupp*,[90] *I.G. Farben*,[91] *Flick*,[92] and *Milch*[93] trials. It was

87 XI *Trials of War Criminals*, p. 509.
88 See XV *LRTWC*, pp. 170–175, wherein the United Nations War Crimes Commission discussed the criteria used by the war crimes courts when dealing with the defense of duress.
89 *U.S. v. Von Leeb, ibid.*, p. 541.
90 X *LRTWC*, pp. 138–184.
91 X *LRTWC*, pp. 48–49.
92 IX *LRTWC*, p. 23.
93 VII *LRTWC*, pp. 44, 64–65.

usually associated with the law of war relating to economic offenses against property in occupied areas. The war crimes courts were ready to admit that international custom may change and that the advancement of science may render obsolete or inapplicable certain rules relating to the actual conduct of hostilities. However, such acknowledgment of the dynamic nature of international law did not amount to an abandonment of the stability of many notions, first codified in 1907. The Hague Regulations on the protection of property in occupied areas was upheld as still valid and binding upon the States of the world.

d. *Act was done in accordance with municipal law.* This plea did not constitute a defense. It was treated by the courts in much the same fashion as the plea of superior orders, that is admissible as a circumstance possibly justifying mitigation of sentence.[94]

Allied Control Council Law No. 10 authorized punishment for crimes against humanity "whether or not in violation of the domestic law in the country where perpetrated." Field Manual 27–10 has summarized the rule as follows:

> The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.[95]

e. *Act was done in an official capacity.* A traditional doctrine of international law was that individuals acting in their official capacity were mere instruments of the State. Thus, their acts were the responsibility of the State and not of the individual actor. In such a case an *individual* could not be held responsible under the criminal law of another State even if the act was illegal.[96] This rule was not accepted as applicable to a charge of war crimes, crimes against peace or crimes against humanity during the various war crimes trials following World War II. Control Council Law No. 10 in Article II, 4(a), provides that:

> The official position of any person, whether as Head of State or as responsible official in a Government Department does not free him from responsibility for a crime or entitle him to mitigation of punishment.

Field Manual 27–10 states as follows:

> The fact that a person who committed an act which constitutes a war

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94 XV *LRTWC*, p. 160.

95 FM 27–10, *The Law of Land Warfare* (1956), para. 511.

96 A celebrated example in American history arose out of the Caroline incident in 1837. British subjects came across the border into New York and destroyed the steamer Caroline which they suspected of transporting insurgents across the river into Canada. One person on the Caroline was killed. Great Britain adopted the act as its own. Later, one Alexander McLeod came to New York from Canada on a visit. He was arrested and tried for murder. The British Government asked for the immediate release of McLeod on the grounds that the destruction of the Caroline was a public act and therefore could only be the subject of discussion between the two national governments, and could not justly be made the ground for legal proceedings in the United States against the persons concerned. (The incident is reported in Hyde, *International Law Chiefly as Interpreted and Applied by the United States* [1945], I, p. 821).

crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act.[97]

f. *Act was performed as a legitimate reprisal measure.* This plea could be an important one since a reprisal by the very definition of the term is an act contrary to international law.[98] Consequently, if other requirements were present this defense would justify any violation of the laws of war except where reprisals themselves are specifically prohibited. In World War II reprisals against prisoners of war were in and of themselves forbidden.[99] Reprisals against civilian persons in occupied areas are now prohibited by the Geneva Convention for the Protection of Civilians in Time of War of 1949.[100] But such was not the law in World War II. It was precisely in this area that most of the pleas of legitimate reprisals were employed in the trials following World War II. Normally, the reprisal consisted of killing civilians under circumstances which would have violated the laws and customs of war except for the fact that such killings were purportedly ordered as reprisal for illegal acts by the civilian populace against the Occupying Power. The court found that such reprisal action was either taken for acts on the part of the population which were not illegal[101] or that the reprisal action was out of proportion to the original wrong.[102]

g. *Defense of superior orders.* At the time World War II was in progress, there was a substantial difference of opinion as to whether the plea of superior orders was a legitimate defense to prosecution for a violation of the laws of war. The traditional doctrine of the nineteenth century was to place the responsibility for violation of the laws of war on the superior who ordered a criminal act rather than the subordinate who actually committed it. However, the German Field Manual and German legal authorities were among the first to assert that this was not a valid defense where the order was obviously illegal. On the other hand, the British *Manual of the Law and Usages of War on Land,* paragraph 448, and the 1940 United States Army Field Manual on *Rules of Land Warfare,* paragraph 347, both declare that a person who committed a war crime under superior orders was not personally responsible for his act. For purposes of the trials following World War II, the plea was not acceptable. Thus, Article 8 of

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97 *Op. cit.*, n. 95, para. 510.
98 FM 27-10 (1956), para. 497(a).
99 *GPW* (1929) Art. 2.
100 *GC,* Art. 33.
101 *In re Rauter,* XIV *LRTWC* 89, at pp. 101, 107, 108, 123, 124.
102 *U.S. v. List,* XI *Trials of War Criminals,* p. 1270. Trial of Generals Von Mackensen and Maelzer VIII *LRTWC* 1-8, at pp. 4-7. On the law of reprisals in 1945 and the law today see generally Albrecht "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949," 47 *Am. J. Int'l L.* 590 (1953).

the London Charter provided that the plea of superior orders did not free an individual from responsibility. However, the Charter did allow the courts to consider this circumstance in mitigation of the sentence.

The plea is valid if the accused does not and should not have known that the order was illegal. Many courts use the language "illegal on its face" to express the proposition that the illegality of the order must be obvious before the accused should be held liable for an act committed pursuant to that order. The reasoning is justified on the grounds that soldiers acting in wartime are trained to follow orders of their superiors relatively automatically, and wound not normally be expected to question those orders except where their invalidity was fairly obvious. *Field Manual 27–10, July 1956,* states the American view in paragraph 509:

> *a.* The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
>
> *b.* In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (*e.g.*, UCMJ, Art. 92).

CHAPTER 9
NEUTRALITY

I. THE CONCEPT OF NEUTRALITY

A. Its Meaning

The Department of the Army Field Manual on the law of war defines neutrality by outlining the duties of belligerents and neutrals in their relationship toward each other.

> Traditionally, neutrality on the part of a State not a party to the war has consisted in refraining from all participation in the war, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents. It is the duty of belligerents to respect the territory and rights of neutral states.[1]

B. The Development of the Law of Neutrality

"Modern neutrality dates from the latter part of the Middle Ages. Prior to that time neutrality was unknown for the reason that belligerents did not recognize an attitude of impartiality on the part of other powers; under the laws of war observed by the most civilized nations of antiquity, the right of one nation to remain at peace while neighboring nations were at war was not admitted to exist. Efforts made by nations from time to time to adopt an attitude of impartiality were successfully resisted by the belligerents, who proceeded on the theory that any country not an ally was an enemy. No intermediate relation was known to the pagan nations of those earlier times, and hence the term 'neutrality' did not exist.

"During the sixteenth century, however, neutrality as a concept in international law began to be recognized. In 1625 Hugo Grotius, sometimes referred to as 'the father of international law,' published his celebrated treaties on the laws of peace and war. While his treatment of the subject of neutrality is brief and necessarily so because of the undeveloped status of the law of his time, he nevertheless recognized the possibility of third parties remaining neutral. He did not, however, have that conception of neutrality to which we have been accustomed in more recent times. He stated that it was the duty of those not engaged in a war 'to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered.'

[1] FM 27–10, *The Law of Land Warfare* (1956) para. 512.

"Since the days of Grotius, neutrality has passed through several stages of evolution. Few nations have done more toward its development than has the United States. In 1794 Congress passed our first neutrality act, temporary in character, covering a variety of subjects. In 1818 permanent legislation on these subjects was passed. This legislation formed the basis of the British act of a similar character of 1819, known as the British Foreign Enlistment Act. [Other legislation has been passed by Congress from time to time, the principal provisions of which are codified in 22 U.S.C. 441–465, and 18 U.S.C. 956–968.]

"The Second Hague Peace Conference of 1907 concluded two conventions concerning neutrality—Convention V with respect to the rights and duties of neutral powers and persons in war on land, ratified by the United States, and Convention XIII concerning the rights and duties of neutral powers in naval war, adhered to by the United States with the exception of article XXIII.

"The Second Hague Peace Conference of 1907 was followed by the London Naval Conference of 1908–9, devoted primarily to the field of prize law and belligerent interference with neutral maritime commerce. The Declaration of London which it drew up was never brought into force.

"In the years following 1918 interest in neutrality declined and less attention was paid to the subject by international lawyers. In many quarters attention was focused first upon the League of Nations and its system of 'collective security', and later upon the renunciation of war as a national policy under the Kellogg-Briand pact.

"With the progressive deterioration of the international situation in the years after 1931, popular interest in neutrality reappeared. Movements for legislation to keep the United States out of future wars gathered momentum and the term *neutrality* was applied to most of these plans."[2]

C. Neutrality and Collective Security

1. *Under the League of Nations*

"So far as I am aware, not a single party to the Versailles Treaty or a single member of the League of Nations has ever taken the position that the law of neutrality is a thing of the past. The principal Powers in the League have on occasion taken precisely the opposite position. All the judges of the World Court, in the Kiel Canal case, unhesitatingly concurred in the view that the law of neutrality remained unmodified; no one thought of

[2] Hackworth, *Digest of International Law* (Wash. U.S. Gov. Printing Office, 1943) VII, p. 844–847; hereinafter cited as Hackworth, *Digest* VII.

doubting its continuing force. Up to the time of my resignation from the Court in 1928 no such doubt had been whispered; nor am I aware that any has since been suggested.

"The supposition that the law of neutrality imposes moral indifference to the merits of armed conflicts and makes any intervention in them unlawful, I can only call baseless. The law of neutrality does not require a neutral state to remain so. A neutral may, should it so desire, enter the conflict; but it cannot be both in and out. The law of neutrality merely applies the rule of common honesty. Parties to an armed conflict are entitled to know who are in it and who are not. No matter how it is viewed, the demand that the law of neutrality shall be considered as obsolete is so visionary, so confused, so somnambulistic that no concession to it can be rationally made."[3]

The contrary view was taken by Henry L. Stimson, President Wilson and various members of the League of Nations.

Henry L. Stimson, former Secretary of State, said in an address before the American Society of International Law on Apr. 26, 1935:

". . . The very conception of collective action against a breach of the peace involves a change in the old-fashioned conception of the attitude of a neutral. One can hardly be neutral in thought or in action between a sheriff's posse and a breaker of the peace, and in domestic law to assist a felon is a crime in itself."[4]

President Wilson asserted in 1917 that "neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its people."[5]

In March, 1920, at its second session, the League of Nations Council affirmed that the conception of "neutrality of the members of the League is incompatible with principal that all members will be obliged to cooperate in enforcing respect for their engagements." In 1929 the British Foreign Office officially declared that "as between members of the League there can be no neutral rights because there can be no neutrals."[6]

2. *Under the United Nations*

Although the advent of the League raised the question of compatibility of the Covenant's provisions with the established law of neutrality, the problem did not assume any immediacy for the United States until the signing of the Charter in 1945. Now,

[3] Moore, "An Appeal to Reason," *Foreign Affairs* 547, 568 (1933) quoted in Hackworth, *Digest* VII, p. 848.

[4] *Proceedings of the American Society of International Law* (1935), p. 121 at 127.

[5] Message to Congress of Apr. 2, 1917, Cong. Rec. vol. 55, pt. 1, p. 119; 1917 *Foreign Relations of the United States*, Supp. 1, p. 199.

[6] Quoted in Hackworth, *Digest*, VII, p. 849.

because of obligations assumed by membership in the United Nations, if a State is called upon by the Security Council to take forceful measures constituting war under Article 42 of the Charter, that State has lost its right to neutrality, and if it actually takes the measures directed, it ceases to be neutral. On the other hand, if hostilities actually break out, States may have an obligation to remain out of the fighting if the Security Council calls upon only certain States to take forceful measures or action is taken through a regional arrangement.[7]

If hostilities are in progress and measures falling within Article 41 of the Charter are directed by the Security Council, a State complying with such directions would not become a belligerent but would necessarily have to qualify its neutrality by reason of the fact that it would in so doing abandon its attitude of impartiality.

D. Non-Belligerency

"Despite its alliance with Germany, the Italian Government announced on September 1, 1939 that 'Italy will not take any initiative in Military operations'. The Attitude assumed by Italy after the outbreak of war in Europe in September 1939 was described by the press as "non-belligerency". The Grand Council of Fascism approved a resolution on December 6, 1939 which reaffirmed the decision reached by the Council of Ministers on September 1, establishing Italy's 'non-belligerence'. In his speech of December 16, 1939 Count Ciano, Italian Minister of Foreign Affairs, referred to Italy's having declared her non-belligerency upon the failure of her efforts to avert the outbreak of war."[8]

Robert R. Wilson, writing in late 1940 of the use of the term *non-belligerency* in the war in Europe, said:

> The term was apparently first used, in the period after the outbreak of the war in September, 1939, to describe the status and attitude of Italy before that country became a belligerent. In the intervening months it has found frequent employment in a somewhat confused treaty situation, wherein arrangements of alliance do not necessarily bring a state into war that is being fought by its ally. . . .
>
> 'Non-belligerency' had connoted various shades of partiality toward the contending parties, but stops short of war in the full legal sense. Whether it is more than a mere journalist's contrivance, unknown to the law, or 'only a euphemism designed to cover violations of international law in the field of neutral obligation' [as stated by Herbert W. Briggs, 34 A.J.I.L.

[7] The subject of neutrality and the U.N. Charter is considered in Lalive, "International Organization and Neutrality," 24 *Brit. Y.B. Int'l L.* 72 (1947); FM 27-10, *op. cit.*, n. 1, para. 513; Fenwick, *International Law* 3d ed. (N.Y.: Appleton-Century-Crofts, 1948) p. 621 and Potter, "Neutrality, 1955," 50 *A.J.I.L.* 101-102 (1956): Such requirements seriously affect such "permanent neutrals" as Switzerland and Austria. See Verdross, "Austria's Permanent Neutrality," 50 *A.J.I.L.* 64 (1956); and Goodrich and Hambro, *The Charter of the United Nations*, 2d rev. ed. (Boston: World Peace Foundation, 1949), pp. 108, 132.

[8] Hackworth, *Digest*. VII, p. 349.

(1940) 569n.], the term would seem to emphasize the idea that legal neutrality implies, as a minimum, some kind of peace—in the sense of absence of an actual contest of armed forces—whatever commitments short of this the state at peace may have toward one or more of those at war. The notion of neutrality as merely non-involvement in direct hostilities is inconsistent with the traditional concept, and if it should come to have this meaning the concept would have strikingly narrowed. . . . The attempted distinction between 'perfect' and 'imperfect' neutrality has long been familiar. But, even without dependence upon a basis of reprisals for treaty violations, such definitely partial attitudes as have characterized the states commonly called 'non-belligerent' in the present war may conceivably presage the time when differential treatment may be a matter of right as well as practice.[9]

II. NEUTRAL RIGHTS

A. Inviolability of Territory and Territorial Waters

Hague Convention V of 1907 provides in Article I that "The territory of neutral Powers is inviolable."[10]

The joint declaration by the American Republics with regard to the invasion of Belgium, Luxembourg, and the Netherlands, released by the President of Panama May 19, 1940, read:

"The American Republics in accord with the principles of international law and in application of the resolutions adopted in their inter-American conferences, consider unjustifiable the ruthless violation by Germany of the neutrality and sovereignty of Belgium, Holland and Luxembourg.

"In paragraphs four and five of the Ninth Resolution of the Meaning of Foreign Ministers held at Panama in 1939 entitled 'Maintenance of International Activities in accordance with Christian Morality', it was established that the violation of the neutrality or the invasion of weaker nations as a measure in the conduct and success of war warrants the American Republics in protesting against this infraction of international law and the requirements of justice.

"The American Republics therefore resolve to protest against the military attacks directed against Belgium, Holland and Luxembourg, at the same time making an appeal for the reestablishment of law and justice in the relations between countries."[11]

"Generally speaking, it may be said belligerents should abstain in neutral waters from any act which, if it were tolerated by the neutral State, would constitute failure in its duties of neutrality. It is important, however, to say here that a neutral's duty is not necessarily measured by a belligerent's duty; and this is in harmony with the nature of the circumstances. An absolute obligation can be imp ed upon a belligerent to refrain from certain acts

9 Wilson, "'Non-Belligerency' in Relation to the Terminology of Neutrality," (1941) quoted in Hackworth, *Digest* VII, pp. 350–351.

10 Hague Convention No. V of 18 October 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (36 Stat. 2310; Treaty Series 540); FM 27–10, *op. cit.*, para. 516.

11 2 *Dept. of State Bulletin* 568 (1940).

in the waters of a neutral State; it is easy for it and in all cases possible to fulfil this obligation whether harbours or territorial waters are concerned. On the other hand, the neutral State cannot be obliged to prevent or check all the acts that a belligerent might do or wish to do, because very often the neutral State will not be in a position to fulfil such an obligation. It cannot know all that is happening in its waters and it cannot be in readiness to prevent it. The duty exists only to the degree that it can be known and discharged. . . .

"Sometimes it is asked whether a distinction should be made between harbours and territorial waters; such a distinction is recognized with respect to the duties of a neutral, which cannot be held to an equal degree of responsibility for what takes place in harbours subject to the direct action of its authorities and what takes place in its territorial waters over which it has often only feeble control; but the distinction does not exist with respect to the belligerent's duty, which is the same everywhere." [12]

B. The Dresden

"On March 9, 1915 the German cruiser *Dresden* arrived in Cumberland Bay in the Chilean Juan Fernandez Islands, cast anchor, and asked permission to remain eight days to repair her engines. The maritime governor of the port refused to grant the request, considering it unfounded, and ordered the vessel to leave within 24 hours or be subject to internment. At the end of the period he notified the captain of the vessel that the penalty of internment had been incurred. On March 14 a British naval squadron arrived and opened fire on the *Dresden* while she lay at anchor some 500 meters from shore. The *Dresden* raised a flag of truce and sent an officer to inform the British squadron that she was in neutral waters. The British squadron ordered the *Dresden* to surrender or be destroyed; the captain of the *Dresden* thereupon blew up his own ship, and the crew made their way ashore. The Chilean Minister to Great Britain in a note of March 26 protested the action of the British squadron, saying:

> The act of hostility committed in Chilean territorial waters by the British naval squadron has painfully surprised my Government.
>
> The internment of the "Dresden" had been notified to her captain by the Maritime Governor of Juan Fernandez, and the Government of the Republic, having been informed of what had occurred, would have proceeded to the subsequent steps had it not been for the intervention of the British naval squadron. Having regard to the geographical position of the islands of Juan Fernandez and to the difficulty of communications

[12] Scott, *Reports to the Hague Conferences of 1899 and 1907*, (Published by Carnegie Endowment for International Peace [Oxford University Press] 1917), 840–841, quoting the report of the Third Commission on rights and duties of neutral powers in naval war.

with the mainland, the only authority able to act in the matter did everything possible from the outset, and the internment of "Dresden" was as effective and complete as the circumstances would permit when she was attacked by the British naval squadron. Even supposing that the British force feared that the "Dresden" intended to escape and to ignore the measures taken by the Maritime Governor of Juan Fernandez, and that this apprehension was adduced as the reason which determined its action, it should still be observed that the close watch which the British naval squadron could itself exercise precluded the possibility of the attempt. . . . The Officer in command of the squadron acted *a priori* without pausing to consider that his action constituted a serious offence against the sovereignty of the country in whose territorial waters he was at the time.

"On March 30 Sir Edward Grey wrote that on the facts set forth the British Government was prepared to offer a full and ample apology to the Chilean Government. By way of explanation he said:

. . . Such information as they have points to the fact that the "Dresden" had not accepted internment, and still had her colours flying and her guns trained. If this was so, and if there were no means available on the spot and at the moment for enforcing the decision of the Chilean authorities to intern the "Dresden," she might obviously, had not the British ships taken action, have escaped again to attack British commerce. It is believed that the island where the "Dresden" had taken refuge is not connected with the mainland by cable. In these circumstances if the "Dresden" still had her colours flying and guns trained, the captain of the "Glasgow" probably assumed, especially in view of the past action of the "Dresden" that she was defying the Chilean authorities and abusing Chilean neutrality, and was only awaiting a favourable opportunity to sally out and attack British commerce again.

If these really were the circumstances, His Majesty's Government cannot but feel that they explain the action taken by the captain of the British ship." [13]

C. The Altmark

"The German steamer *Altmark*, previously a merchant tanker but at the time in question a naval auxiliary, armed with anti-aircraft guns and flying the German official service flag as a vessel used for public purposes, entered Norwegian territorial waters on February 14, 1940 with the intention of skirting the Norwegian and Swedish coasts until she reached a German port. She brought from the South Atlantic as prisoners 299 British seamen who had been taken from vessels sunk by the German cruiser *Admiral Graf Spee*. Shortly after entering Norwegian waters she was hailed by a Norwegian naval vessel which inspected her papers. At that time the captain of the *Altmark* said that the ship was on her way from Port Arthur, Texas, to Germany. The next day another Norwegian naval vessel sought to inspect her but was refused the

[13] Hackworth, *Digest*, VII, pp. 370–371.

right. Among other questions the captain of the *Altmark* was then asked whether there were on board any persons belonging to the armed forces of another belligerent or seamen resident in or nationals of another belligerent country, and to these, he answered 'No'. At this time it was learned that the *Altmark* had been using her wireless transmitter within Norwegian waters, but the captain said that he was unaware of any prohibition against this and thereupon ceased doing so. A Norwegian torpedo boat was escorting the *Altmark,* and a second joined them February 16. That day British naval and air forces approached, and the British commanding officer suggested that the *Altmark* be taken under joint British and Norwegian escort to Bergen for full examination, but the Norwegian commander refused. The Norwegian authorities apparently remained unaware that prisoners were aboard the *Altmark.* British destroyers which had entered Norwegian territorial waters retired upon the protest of Norwegian officials but that night they forced the *Altmark* into Joesing Fjord. While the Norweigan torpedo boats stood by, forces from the British destroyer *Cossack* boarded the *Altmark,* which had gone aground in the fjord. Fighting ensued in which seven Germans were killed or died of wounds and one British national was wounded. The prisoners were rescued and taken aboard the *Cossack,* and the British forces departed from Norwegian water with the prisoners.

"On February 17 the German Minister delivered the following protest to the Norwegian Foreign Office:

> I protest most energetically against the assault on the German steamer Altmark by the English destroyer Cossack in inner Joesing Fjord, which is within Norwegian territorial waters, as the consequence of which Germans were killed and wounded.
>
> I protest against this unheard-of violation of international law in Norwegian coastal waters and also that the Norwegian Government failed to give our ship adequate protection. This violation can be paralleled only by the bombardment of Copenhagen in 1807. It is unique in world history and, reserving the right of further demands on the part of my government, I must insist that the steamer Altmark immediately be restored to its original condition as far as possible in view of the losses suffered, that the damage be repaired and that all possible measurses be taken against the perpetrators.

"On February 17 Lord Halifax asked the Norwegian Minister to call at the British Foreign Office, where he gave him a note in which it was said:

> It was notorious that the Altmark had participated in depredations of the Graf Spee, to which she had been acting as an auxiliary.
>
> We had the best of reasons, confirmed by the British subjects taken off the Graf Spee, and previously imprisoned in the Altmark, for knowing that there were some 300 or 400 British subjects aboard who had for long been living under intolerable conditions. . . .

The record of the ship must have been well known to the Norwegian Government, and in the view of H.M. Government it was incumbent on the Norwegian authorities when she entered Bergen and requested passage through Norwegian territorial waters to subject her to a most careful search. . . .

Reports received by His Majesty's Government indicated that the examination had been perfunctory, as shown by the fact that no prisoners had been discovered.

So far as the facts were at present known to His Majesty's Government it appeared to them that the Norwegian Government had failed in their duty as neutrals.

If they had in fact found British prisoners on board, what would they have done with them? Either they would have released them or would at any rate have held them pending full examination of the position.

His Majesty's Government felt therefore that they had every right to complain of the inaction of the Norwegian Government.

As stated above, 300 British had been kept for weeks and months in close confinement, and if these prisoners had found their way to a camp in Germany the Norwegian Government would have been responsible for the fate of these men.

Meanwhile the case against the ship itself was such that His Majesty's Government were justified in pressing that the Altmark should be interned.

"On this same date the Norwegian Government protested the British action, and on February 19 the Norwegian Minister of Foreign Affairs (Koht) said in the Storting that—

since the "Altmark" flew the naval ensign and counted as a warship, it should according to International Regulations be exempt from inspection, and the most that the senior officer of the Norwegian naval forces was entitled to was to verify that the ship was such as it claimed to be.

It is obvious that an attack of this nature in Norwegian territorial waters of necessity shocked the Norwegian Government, and immediately on the morning following it prepared to protest as vigorously as possible against such illegal conduct carried out in opposition to International Law." [14]

III. NEUTRAL OBLIGATIONS

A. The Three Rules of Washington

"On August 4, 1914 the British Charge D'Affaires wrote to the Department of State with respect to the possibility that Germany might attempt to equip and dispatch merchant vessels from ports of the United States for conversion on the high seas into armed vessels:

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[14] *Ibid.*, pp. 568–575. The obligations, if any, of Norway have caused considerable debate among international lawyers. "Norway had no obligation to halt the Altmark, to force it to land, to intern it, or to release the prisoners" (1939 U.S. Naval War College, *Int. Law Situations*, pp. 14–15); Similar conclusions were reached by Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 2d rev. ed. (1945), p. 2339, and by Borchard "Was Norway Deliquent in the Case of the Altmark?" 34 *A.J.I.L.* 289 (1910). For contrary view see Waldock, "The Release of the Altmark's Prisoners?" 24 *B.Y.B.I.L.* 216–228 (1947).

As you are aware it is recognised that a Neutral Government is bound to use due diligence to prohibit its subjects or citizens from the building and fitting out to order of belligerents vessels intended for warlike purposes and also to prevent the departure of any such vessel from its jurisdiction. The starting point for the universal recognition of this principle was the three rules formulated in Article VI of the Treaty between Great Britain and the United States of America for the amicable settlement of all causes of difference between the two countries, signed at Washington on May 8, 1871. These rules, which His Majesty's Government and the United States Government agreed to observe as between themselves in future, are as follows:

A neutral Government is bound—

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

The above Rules may be said to have acquired the force of generally recognised rules of International Law, and the first of them is reproduced almost textually in Article VIII of the Hague Convention Number 13 of 1907 concerning the Rights and Duties of Neutral Powers in case of Maritime Warfare, the principles of which have been agreed to by practically every Maritime State.

"He stated that, even if the final completion of the measures to fit out merchantmen to act as cruisers were effected on the high seas, 'His Majesty's Government will . . . hold the United States Government responsible for any damages to British trade or shipping, or injury to British interests generally, which may be caused by such vessels having been equipped at, or departing from, the United States ports.'

"Secretary Bryan declined to enter into a discussion of conversion and the place where it might be exercised, in as much as the contingency had not arisen. He said:

The United States has always looked upon the Three Rules of Washington as declaratory of international law, and as the necessary and natural consequences of the doctrine of neutrality, proclaimed and enforced by the United States since the wars of the French Revolution, to which Great Britain was a party. The Three Rules can, in the opinion of this Government, only be considered as the starting point of the doctrine of that degree of diligence which a neutral should observe in the sense that its recognition by Great Britain in an important international

controversy called marked attention to an existing doctrine, and furnished an incentive to its incorporation and definition in the Hague Convention concerning the Rights and Duties of Neutral Powers in case of Maritime Warfare.

"He stated that the United States was not bound to assume the attitude of an insurer, and therefore it could not agree with the British statement concerning its responsibility."[15]

B. Transfer of Over-Age Destroyers

By an arrangement embodied in notes exchanged by the Secretary of State and the British Ambassador on September 2, 1940, the Government of the United States transferred 50 over-age destroyers to the British Government in return for the right to lease naval bases in certain British colonial possessions in the Atlantic. Attorney General Jackson, on August 27, 1940, had advised President Roosevelt of the legality of the proposed transaction but had stated that certain small patrol boats then under construction could not be so transferred. In his opinion dealing with "The questions of constitutional and statutory authority", with which alone he said he was concerned, the Attorney General said:

> Whether the statutes of the United States prevent the dispatch to Great Britain, a belligerent power, of the so-called "mosquito boats" now under construction or the over-age destroyers depends upon the interpretation to be placed on section 3 of title V of the act of June 15, 1917, c. 30, 40 Stat. 217, 222. This section reads:
>
> > During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel, built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.
>
> This section must be read in the light of section 2 of the same act and the rules of international law which the Congress states that it was its intention to implement. (H. Rept. No. 20, 65th Cong., 1st Sess., p. 9.) So read, it is clear that it is inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into, vessels of war with the intent that they should enter the service of a belligerent. If the section were not so construed, it would render meaningless section 2 of the act which authorizes the President to detain any armed vessel until he is satisfied that it will not engage in hostile operations before it reaches a neutral or belligerent port. The two sections are intelligible and reconcilable only if read in light of the traditional rules of international law. These are clearly stated by Oppenheim in his work on International Law, 5th ed., vol. 2, sec. 334, pp. 574–576:

[15] Hackworth, *Digest* VII, pp. 415–416.

Whereas a neutral is in no wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent has been adapted to warlike use. The difference between selling armed vessels to belligerents and building them to order is usually defined in the following way—

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port. . . .

On the other hand, if a subject of a neutral builds armed ships *to the order of a belligerent*, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made the base of naval operations; and as the duty of impartiality includes an obligation to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war. This distinction, although of course logically correct is hair-splitting. But as, according to the present law, neutral States need not prevent their subjects from supplying arms and ammunition to belligerents, it will probably continue to be drawn.

Viewed in the light of the above, I am of the opinion that this statute does prohibit the release and transfer to the British Government of the so-called 'mosquito boats' now under construction for the United States Navy. If these boats were released to the British Government, it would be legally impossible for that Government to take them out of this country after their completion, since to the extent of such completion at least they would have been built, armed, or equipped with the intent, or with reasonable cause to believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States.

This will not be true, however, with respect to the over-age destroyers, since they were clearly not built, armed, or equipped with any such intent or with reasonable cause to believe that they would ever enter the service of a belligerent.

In this connection it has been noted that during the war between Russia and Japan in 1904 and 1905, the German Government permitted the sale to Russia of torpedo boats and also of ocean liners belonging to its auxiliary navy. See Wheaton's International Law, 6th ed. (Keith), vol. 2, p. 977.

* * * * * * *

. . . the dispatch of the so-called "mosquito boats" would constitute a violation of the statute law of the United States, but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery.[16]

C. Passage Through Neutralized Waterways

1. *The Panama Canal*

In the course of its judgment in the case of the *S.S. Wimbledon*, the Permanent Court of International Justice said:[17]

For the regime established at Panama, it is necessary to consult the Treaty between Great Britain and the United States of November 18th, 1901, commonly called the Hay-Pauncefote Treaty, and the Treaty between the United States and the Republic of Panama of November 18th, 1903. In the former, while there are various stipulations relating to the "neutralization" of the Canal, these stipulations being to a great extent declaratory of the rules which a neutral State is bound to observe, there is no clause guaranteeing the free passage of the canal in time of war as in time of peace without distinction of flag and without reference to the possible belligerency of the United States, nor is there any clause forbidding the United States to erect fortifications commanding the Canal. On the other hand, by the Treaty of November 18th, 1903, the Republic of Panama granted to the United States "in perpetuity the use, occupation and control" of a zone of territory for the purposes of the canal, together with the use, occupation and control in perpetuity of any lands and waters outside the zone which might be necessary and convenient for the same purposes; and further granted to the United States in such zone and in the auxiliary lands and waters "all the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority". The Treaty further conceded to the United States the right to police the specified lands and waters with its land and naval forces "and to establish fortifications for these purposes". In view of these facts, it will be instructive to consider the view which the United States and the nations of the world have taken of the rights and liabilities of the United States as the builder and owner of the Panama Canal exercising, subject always to the stipulations of existing treaties, sovereign powers and exclusive jurisdiction over the Canal and the auxiliary territory and waters.

By the Proclamation issued by the President of the United States on November 13th, 1914, for the regulation of the use of the Panama Canal and its approaches in the world war, express provision was made for

[16] 30 Op. Att. Gen. 484, 494–496 (1940), quoted in part in Hackworth, *Digest* VII, pp. 419–421. For comments with respect to this transaction, see Briggs, "Neglected Aspects of the Destroyer Deal," 34 *A.J.I.L.* 569 (1940); Wright, "The Transfer of the Destroyers to Great Britain," 34 *A.J.I.L.* 680 (1940); and Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," 34 *A.J.I.L.* 690 (1940).

[17] Permanent Ct. of Int. Justice, Judgment, Aug. 17, 1923, Ser. A, No. 1, pp. 15, 26–28; I Hudson, *World Court Reports* (1934) 176–177. The case before the court concerned the use of the Kiel Canal in Germany for the transportation of ammunition from France to Poland during the Polish-Soviet war.

the passage of men-of-war of belligerents as well as of prizes of war, and no restriction whatever was placed upon the passage of merchant ships of any nationality carrying contraband of war. But, by the Proclamation of May 23rd, 1917, issued after the entrance of the United States into the war, the use of the canal by ships, whether public or private, of an enemy or the allies of an enemy, was forbidden, just as, by Article 380 of the Treaty Of Versailles, the Kiel Canal is closed to the vessels of war and of commerce of nations not at peace with Germany.

In the Proclamation of May 23rd, 1917, the carriage of contraband is not mentioned; but, by the Proclamation of December 3rd, 1917, issued under the Act of Congress of June 15th, 1917, the Secretary of the Treasury was authorized to make regulations governing the movement of vessels in territorial waters of the United States; and by a subsequent Executive Order, issued under the same law, the Governor of the Panama Canal was authorised to exercise within the territory and waters of the Canal the same powers as were conferred by the law upon the Secretary of the Treasury. By a Proclamation of August 27th, 1917, it was made unlawful to take munitions of war out of the United States or its territorial possession to its enemies without licence.

It has never been alleged that the neutrality of the United States, before their entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of war or by belligerent or neutral merchant vessels carrying contraband of war.

2. *The Suez Canal*

In the course of its judgment in the case of the *S.S. Wimbledon*, the Permanent Court of International Justice also commented upon the neutral status of the Suez Canal:

> By the Convention of Constantinople of October 29th, 1888 the Governments of Austria-Hungary, France, Germany, Great Britain, Italy, Holland, Russia, Spain and Turkey, declared, on the one hand, that the Suez Maritime Canal should "always be free and open, in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag" including even the vessels of countries at war with Turkey, the territorial sovereign, and on the other hand, that they would not in any way "interfere with the free use of the canal, in time of war as in time of peace," the right of self-defense on the part of the territorial sovereign being nevertheless reserved up to a certain point; no fortifications commanding the canal may be erected. In fact under this regime belligerent men-of-war and ships carrying contraband have been permitted in many different circumstances to pass freely through the Canal; and such passage has never been regarded by anyone as violating the neutrality of the Ottoman Empire.[18]

The Suez Canal, however, has also not remained open to all shipping. World War I is a good illustration. Following the outbreak of the World War the Egyptian government on August 15, 1914, issued a proclamation authorizing the British military forces to exercise any right of war in the Egyptian ports and territories. Moreover, the General Officer commanding British troops issued an order that no enemy vessel was to enter the Canal. In May

18 *Ibid.*, at pp. 25–26.

1915 the Porte of Turkey issued a circular to the neutral powers declaring it was necessary to extend hostilities to the Canal, because the British government, contrary to the provisions of the 1888 Convention, had stationed troops of war along the Canal and fortified it.

"Not only did the Egyptian authorities close the Canal to enemy warships, but British warships exercised the right of search within a distance of three miles from the Canal. The Egyptian government contended that this practice was justified on the ground that it was necessary to make sure that ships passing into the Canal did not carry materials likely to damage it. If the search demonstrated merely the presence of contraband, the vessel was allowed to proceed untouched through the Canal, but the contraband was then seized outside by British warships. The closing of the Canal to enemy warships, despite the provisions of Article 1 of the Convention of Constantinople, as well as exercising the right of search within the three mile limit, was therefore somewhat justified on the grounds of the defense of the Canal."[19]

IV. INTERFERENCE WITH NEUTRAL TRADE

A. Contraband

1. *Nature of Contraband*

Contraband is (a) certain kinds of neutral property, (b) specifically enumerated and announced by a belligerent, (c) which are destined for the enemy.[20]

Traditionally the contraband list divided the contraband items into two categories, absolute and conditional contraband. Absolute contraband consisted of goods which were subject to seizure if destined for anyone in the enemy territory. Conditional contraband consisted of goods which were subject to seizure only if destined for the enemy Government or the enemy armed forces.[21]

Neutral ships were stopped on the high seas and searched. If contraband was found it was confiscated and the ships liable to seizure.[22]

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19 Hackworth, *Digest* II, p. 825, quoting Buel, *The Suez Canal and League Sanctions*. Egypt has since also closed the Canal to Israeli shipping of all types because she considers herself technically at war with Israel, and to a Portuguese warship during the conflict between Portugal and India over Goa in December 1961.

20 Lauterpacht, *International Law, War* II, 7th ed. (London: Longmans, 1952), 800; NWIP 10-2, *Law of Naval Warfare* (1955), para. 631.

21 See Stone, *Legal Controls of International Conflicts* (New York: Rinehart, 1954), 401–483 for a discussion of the shift from conditional to absolute contraband and the rapid shrinkage of items not included in either category.

22 Lauterpacht, *op. cit.*, n. 20, pp. 828–830.

2. *Contraband in World War I*

"In giving notification of a revised contraband list in April 1916 the British Government explained:

> . . . The circumstances of the present war are so peculiar that His Majesty's Government consider that for practical purposes the distinction between the two classes of contraband has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy Government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for Government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same, and our treatment of them must be identical.

"The United States instructed the Ambassador in London to communicate to the Foreign Office a formal reservation, in regard to this announcement, in the sense that, in view of the established practice of a number of maritime nations, including Great Britain and the United States, of distinguishing between absolute and conditional contraband, the Government of the United States is impelled to notify the British Government of the reservation of all rights of the United States or its citizens in respect of any American interests which may be adversely affected by the abolition of the distinction betwen these two classes of contraband, or by the illegal extension of the contraband lists during the present war by Great Britain or her allies."[23]

"When testifying before the Senate Committee on Foreign Relations on January 18, 1936, Secretary Hull stated:

> . . . When the United States entered the war it issued instructions for the Navy, June 30, 1917, which set forth a general list of contraband which may be considered almost as inclusive as the British list of 1916. In this American contraband list there was no expressed distinction between absolute and conditional contraband. Destination was the deciding factor.
>
> . . . I should like to say that the situation when the war ended apparently was that the whole law . . . on the subject of contraband, absolute and conditional, had been merged into the one subject of contraband, absolute. The question of destination to some extent figured. . .[24]

"Upon the entry of the United States into the World War of 1914–18, Secretary Lansing suggested to President Wilson a general form of contraband list as preferable to a detailed one. President Wilson indicated his approval of the suggested list, with certain clarifications, and the list appeared as articles 24 and 25 of the *Instructions* for the Navy of June 1917. It read:

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23 Hackworth, *Digest* VII, pp. 15–16.
24 *Ibid.*, p. 17.

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, articles or animals necessary or convenient for their use.

(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.[25]

3. *Search for Contraband in World War II*

"On September 10, 1939 the British Ambassador informed the Department of State as follows:

. . . His Majesty's Government in the United Kingdom intend to use their best endeavours to facilitate innocent neutral trade so far as is consonant with their determination to prevent contraband goods reaching the enemy. They will be compelled to use their belligerent rights to the full, but they will at all times be ready to consider sympathetically any suggestions put forward by neutral governments designed to facilitate their bona fide trade.

In order to secure their objects, His Majesty's Government have established contraband control bases at Weymouth, Ramsgate, Kirkwall, Gibraltar and Haifa. Vessels bound for enemy territory or neutral ports affording convenient means of access thereto are urgently advised to call voluntarily at the appropriate base, in order that their papers may be examined, and that, when it has been established that they are not carrying contraband of war, they may be given a pass to facilitate the remainder of their voyage. Any vessel which does not call voluntarily will be liable to be diverted to a Contraband Control base if an adequate search by His Majesty's ships at sea is not practicable.

Every effort will be made to expedite the examination of vessels, particularly those which call voluntarily for the purposes."[26]

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[25] *Ibid.*, p. 23.

[26] *Ibid.*, pp. 7–8. Search was facilitated greatly by the issuance of certificates by the British to neutral ships *before* they departed their home port indicating that such ships were not carrying contraband. On the subject of these certificates in World War I see Kittredge, *The "Navicert" System During the World War* (Washington: Carnegie Endowment, 1938).

4. *Destination*

Goods, even war materials, are not to be regarded as contraband *ipso facto*. They become such only because of their destination to a belligerent. Difficulties, however, frequently arise by reason of the fact that the goods may be consigned to a neutral country but with a belligerent as the ultimate or supposed ultimate destination, hence the origin and application of the doctrine of continuous voyage or ultimate destination.

a. *The Kim.*

In holding that certain cargoes of foodstuffs (primarily pork products) shipped by American firms on Scandinavian vessels and destined to Copenhagen which were seized by the British, were liable to condemnation as contraband, Sir Samuel Evans said:

> Two important doctrines familiar to international law come prominently forward for consideration: the one is embodied in the rule as to "continuous voyage,"[26a] or continuous "transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.
>
> The doctrine of "continuous voyage" was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband; but it was so applied and extended by the United States Courts against this country in the time of the American Civil War; and its application was acceded to by the British Government of the day; and was, moreover, acted upon by the International Commission which sat under the Treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American and a British delegate, unanimously disallowed the claims in *The Peterhoff*, which was the leading case upon the subject of continuous transportation in relation to contraband goods. . . .
>
> I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African war with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, these will be contraband of war, and confiscation will be justified."
>
> It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use.
>
> A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land."

[26a] For a comprehensive treatment of the subject of continuous voyage as it developed in World War I see Briggs, *The Doctrine of Continuous Voyage* (Baltimore, Johns Hopkins Press, 1926).

As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband except where the enemy country had no seaboard. As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist, the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.[27]

b. *Trade statistics as a presumption of destination.*

In reply to the protest of the United States against the stoppage of cargoes of conditional contraband *en route* from the United States to neutral European countries, the British Foreign Office, in notes of January 7, 1915 and February 10, 1915, set forth trade statistics and, in the latter note, stated the conclusion that "The inference may fairly be drawn from these figures . . . that not only has the trade of the United States with the neutral countries in Europe been maintained as compared with previous years, but also that a substantial part of this trade was, in fact, trade intended for the enemy countries going through neutral ports by routes to which it was previously unaccustomed."[28]

B. Blockade

1. *Definition*

A blockade is a belligerent operation intended to prevent vessels of all states from entering or leaving specified coastal areas which

[27] *Ibid.*, pp. 43–45. For a discussion of the case see Anderson, "British Prize Court Decision in the Chicago Packing House Cases," 11 *A.J.I.L.* 251 (1917).

[28] Hackworth, *Digest*, VII, p. 50.

are under the sovereignty, occupation, or control of the enemy.[29] A blockade, in order to be binding, must be effective.[30] This means that a blockade must be maintained by a force sufficient to render ingress and egress to or from the blockaded area dangerous.[31] The penalty for an attempt to run a blockade is confiscation.[32] The penalty for blockade running has nothing to do with the type of goods on the vessel. It is not to be confused with the rules surrounding the carriage of contraband.

2. *The Long Distance Blockade*

a. *World War I.*

The United States replied to the British order in Council of March 1915 as follows:

> The note of His Majesty's Principal Secretary of State for Foreign Affairs which accompanies the order in council, and which bears the same date, notifies the Government of the United States of the establishment of a blockade which is, if defined by the terms of the order in council, to include all the coasts and ports of Germany and every port of possible access to enemy territory. But the novel and quite unprecedented feature of that blockade, if we are to assume it to be properly so defined, is that it embraces many neutral ports and coasts, bars access to them, and subjects all neutral ships seeking to approach them to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain, and to unusual risks and penalties.
>
> It is manifest that such limitations, risks, and liabilities placed upon the ships of a neutral power on the high seas, beyond the right of visit and search and the right to prevent the shipment of contraband already referred to, are a distinct invasion of the sovereign rights of the nation whose ships, trade, or commerce are interfered with.
>
> The Government of the United States is, of course, not oblivious to the great changes which have occurred in the conditions and means of naval warfare since the rules hitherto governing legal blockade were formulated. It might be ready to admit that the old form of "close" blockade with its cordon of ships in the immediate offing of the blockaded ports is no longer practicable in face of an enemy possessing the means and opportunity to make an effective defense by the use of submarines, mines, and aircraft; but it can hardly be maintained that, whatever form of effective blockade may be made use of, it is impossible to conform at least to the spirit and principles of the established rules of war. If the necessities of the case should seem to render it imperative that the cordon of blockading vessels be extended across the approaches to any neighboring neutral port or country, it would seem clear that it would still be easily practicable to comply with the well-recognized and reasonable prohibition of international law against the blockading of neutral ports by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon.[33]

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29 *Law of Naval Warfare, op. cit.*, n. 20, para. 632a.
30 Declaration of Paris (1856), Art. 4.
31 *Law of Naval Warfare, op. cit.*, n. 20, para. 632d.
32 *Ibid.*, para. 632g(4).
33 Hackworth, *Digest*, VII pp. 121–122.

b. *World War II.*

"By an Order in Council of November 27, 1939 Great Britain applied as a measure of reprisal to goods outbound from enemy ports, or of enemy origin or ownership, treatment similar to that imposed by the order of March 11, 1915. The order charged that German submarine and mine operation violated international law and, in retaliation, it restricted German commerce by ordering that:

1. Every merchant vessel which sailed from any enemy port, including any port in territory under enemy occupation or control, after the 4th day of December, 1939, may be required to discharge in a British or Allied port any goods on board laden in such enemy port.

2. Every merchant vessel which sailed from a port other than an enemy port after the 4th day of December, 1939, having on board goods which are of enemy orgin or are enemy property may be required to discharge such goods in a British or Allied port.

3. Goods discharged in a British port under either of the preceding articles shall be placed in the custody of the Marshal of the Prize Court, and, unless the Court orders them to be requisitioned for the use of His Majesty's Government, shall be detained or sold under the direction of the Court. The proceeds of goods so sold shall be paid into Court.

On the conclusion of peace such proceeds and any goods detained but not sold shall be dealt with in such manner as the Court may in the circumstances deem just; provided that nothing herein shall prevent the payment out of Court of any such proceeds or the release of any goods at any time (a) if it be shown to the satisfaction of the Court that the goods had become neutral property before the date of this order, or (b) with the consent of the proper officer of the Crown.

4. The law and practice in Prize shall, so far as applicable, be followed in all cases arising under this Order.

5. Nothing in this Order shall affect the liability of any vessel or goods to seizure or condemnation independently of this Order.

6. For the purposes of this Order the words "goods which are of enemy origin" shall include goods having their origin in any territory under enemy occupation or control, and the words "goods which . . . are enemy property" shall include goods belonging to any person in any such territory.[34]

"On August 17, 1940 the German Government issued a declaration announcing a 'total blockade' of the British Isles. The declaration charged Great Britain with violation of international law in her measures against German and neutral commerce and justified the blockade as retaliation in kind. It stated that the whole area around the British Isles had been mined and that any neutral ship entering the specified waters in the future was liable to destruction. Germany declined for the future all responsibility for damages suffered by ships or injuries to persons in those waters." [35]

[34] *Ibid.*, p. 138.
[35] *Ibid.*, p. 142.

APPENDIX A

THE DECLARATION OF PARIS (1856)

(Moore, *Digest of International Law*, VII, 561–562.)

Considering that maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the plenipotentiaries assembled in congress at Paris cannot better respond to the intentions by which their Governments are animated, seeking to introduce into international relations fixed principles in this respect;

The above-mentioned plenipotentiaries, being duly authorized, resolved to correct among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

1. Privateering is and remains abolished;

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

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

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

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

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

The present declaration is not and shall not be binding, except between those powers which have acceded, or shall accede, to it.

Done at Paris, the 16th of April, 1856.

(Signed by Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey. Acceded to by 42 other States. The United States did not formally adhere to this convention. See Hyde, *International Law*, (1945), pp. 1917–1919 for an account of the United States position).

APPENDIX B

THE DECLARATION OF ST. PETERSBURG (1868)

(III Phillimore, *International Law*, 3d ed [1885] pp. 160–162)

On the proposition of the Imperial Cabinet of Russia, and International Military Commission having assembled at St. Petersburg in order to examine into the expediency of forbidding the use of certain projectiles in times of war between civilized nations, and that Commission having, by common agreement, fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the undersigned are authorized by the orders of their Governments to declare as follows:

Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavor to accomplish during War is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or renders their death inevitable;

That the employment of such arms would therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in case of War among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

They will invite all the States which have not taken part in the deliberations of the International Military Commission assembled at St. Petersburg, by sending Delegates thereto, to accede to the present engagement.

This engagement is obligatory only upon the Contracting or Acceding Parties thereto, in case of war between two or more of themselves: it is not applicable with regard to non-Contracting Parties, or Parties who shall not have acceded to it.

It will also cease to be obligatory from the moment, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents.

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science my effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

Done at St. Petersburg, the twenty-ninth of November (eleventh of December), One thousand eight hundred and sixty-eight.

(Signatories were Great Britain, Austria and Hungary, Bavaria, Belgium, Denmark, France, Greece, Italy, Netherlands, Persia, Portugal, Prussia, Russia, Sweden and Norway, Switzerland, Turkey, and Wurtenberg (The United States was not a party to this Declaration).

APPENDIX C

THE STATUS OF ENEMY MERCHANT SHIPS AT THE OUTBREAK OF HOSTILITIES. HAGUE CONVENTION VI OF 18 OCTOBER 1907

Anxious to ensure the security of international commerce against the surprises of war, and wishing in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect, and have appointed the following persons as their plenipotentiaries:

(Here follow the names of plenipotentiaries.)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Article 2

A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, cannot be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

Article 3

Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on

the high seas while still ignorant of the outbreak of hostilities, cannot be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such cases provision must be made for the safety of the persons on board as well as the security of the ship's papers.

After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war.

Article 4

Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.

The same rule applies in the case of cargo on board the vessels referred to in Article 3.

Article 5

The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war-ships.

Article 6

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.

Article 7

The present Convention shall be ratified as soon as possible. The ratifications shall be deposited at The Hague. The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be at once sent by the Netherland Government through the diplomatic channel to the Powers invited to the Second Peace

Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall at the same time inform them of the date on which it received the notification.

Article 8

Non-signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies its intention in writing to the Netherlands Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

That Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, stating the date on which it received the notification.

Article 9

The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of that deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

Article 10

In the event of one of the contracting Powers wishing to denounce the present Convention the denunciation shall be notified in writing to the Netherlands Government, which shall at once communicate a certified copy of the notification to all the other Powers, informing them of the date on which it was received.

Article 11

A registry kept by the Minister for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 7, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 8, paragraph 2) or denunciation (Article 10, paragraph 1) have been received.

Each contracting Power is entitled to have access to this register and to be supplied with certified extracts from it.

In faith of which the plenipotentiaries have appended to the present Convention their signatures.

Done at The Hague, October 18, 1907, in a single original, which shall remain deposited in the archives of the Netherland

Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

(The United States is not a party to this Convention.)

APPENDIX D

THE CONVERSION OF MERCHANT SHIPS INTO WARSHIPS
HAGUE CONVENTION NO. VII OF 18 OCTOBER 1907

Whereas it is desirable, inview of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected;

Whereas, however, the contracting Powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a war-ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules:

Being desirous of concluding a Convention to this effect, have appointed the following as their plenipotentiaries.

(Here follow the names of plenipotentiaries.)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibilities of the Power whose flag it flies.

Article 2

Merchant ships coverted into war-ships must bear the external marks which distinguish the war-ships of their nationality.

Article 3

The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

Article 4

The crew must be subject to military discipline.

Article 5

Every merchant ship converted into a war-ship must observe in its operations the laws and customs of war.

Article 6

A belligerent who converts a merchant ship into a war-ship must, as soon as possible, announce such conversion in the list of war-ships.

Article 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.

Articles 8–12

(Similar to Articles 7–11, Hague Convention VI.)
(The United States is not a party to this Convention.)

APPENDIX E

LAYING OF AUTOMATIC SUBMARINE CONTACT MINES. HAGUE CONVENTION NO. VIII OF 18 OCTOBER 1907

(36 Stat. 2332; Treaty Series No. 541; Malloy, Treaties, Vol. III, p. 2304)

His Majesty the German Emperor, King of Prussia; (etc.):

Inspired by the principle of the freedom of sea routes, the common highway of all nations;

Seeing that, although the existing position of affairs makes it impossible to forbid the employment of automatic submarine contact mines, it is nevertheless desirable to restrict and regulate their employment in order to mitigate the severity of war and to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war;

Until such time as it is found possible to formulate rules on the subject which shall ensure to the interests involved all the guarantees desirable;

Have resolved to conclude a Convention for this purpose, and have appointed the following as their plenipotentiaries;

(Here follow the names of plenipotentiaries.)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

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.

Article 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.

Article 3

When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.

Article 4

Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.

Article 5

At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

Article 6

The contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention; and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the *material* of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

Articles 7–10

(Similar to Articles 6–9, Hague Convention VI.)

Article 11

The present Convention shall remain in force for seven years, dating from the sixteenth day after the date of the first deposit of ratifications.

Unless denounced, it shall continue in force after the expiration of this period.

The denunciation shall be notified in writing to the Netherland Government, which shall at once communicate a duly certified copy of the notification to all the Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and six months after the notification has reached the Netherland Government.

Article 12

The contracting Powers undertake to reopen the question of the employment of automatic contact mines six months before the expiration of the period contemplated in the first paragraph of the preceding Article, in the event of the question not having been already reopened and settled by the Third Peace Conference.

If the contracting Powers conclude a fresh convention relative to the employment of mines, the present Convention shall cease to be applicable from the moment it comes into force.

Article 13

A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 8, paragraphs 3 and 4, as well as the date of the notifications of adhesion (Article 9, paragraph 2) or of denunciation (Art. 11, paragraph 3) have been received.

Each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

Done at The Hague, October 18 1907. . . .

APPENDIX F

BOMBARDMENT BY NAVAL FORCES

HAGUE CONVENTION NO. IX OF 18 OCTOBER 1907

(26 Stat. 2351; Treaty Series No. 542; Malloy, Treaties, Vol. II, p. 2314)

(Here follows the list of Sovereigns and Heads of States who sent Plenipotentiaries to the Conference.)

Animated by the desire to realize the wish expressed by the First Peace Conference respecting the bombardment by naval forces of undefended ports, towns, and villages;

Whereas it is expedient that bombardments by naval forces should be subject to rules of general application which would safeguard the rights of the inhabitants and assure the preservation of the more important buildings, by applying as far as possible to this operation of war the principles of the Regulation of 1899 respecting the Laws and Customs of Land War;

Actuated, accordingly, by the desire to serve the interests of humanity and to diminish the severity and disasters of war;

Have resolved to conclude a Convention to this effect, and have, for this purpose, appointed the following as their Plenipotentiaries:

(Here follow the names of Plenipotentiaries.)

Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:

Chapter I. The Bombardment of Undefended Ports, Towns Villages, Dwellings, or Buildings

Article 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour.

Article 2. Military works, military or naval establishments, depots of arms or war material, workships or plants which could be utilized for the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other

means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all measures in order that the town may suffer as little harm as possible.

Article 3. After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

Article 4. Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

Chapter II. General Provisions

Article 5. In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.

Article 6. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

Article 7. A town or place, even when taken by storm, may not be pillaged.

Chapter III. Final Provisions

Article 8. 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.

Articles 9–13. (Similar to Articles 7–11, Hague Convention VI.)

APPENDIX G

CERTAIN RESTRICTIONS WITH REGARD TO THE EXERCISE OF THE RIGHT OF CAPTURE IN NAVAL WAR. HAGUE CONVENTION NO. XI OF 18 OCTOBER 1907

(36 Stat. 2396; Treaty Series 544; II Malloy, Treaties, 2341)

His majesty the German Emperor, King of Prussia; (etc.):

Recognizing the necessity of more effectively ensuring than hitherto the equitable application of law to the international relations of maritime Powers in time of war;

Considering that, for this purpose, it is expedient, in giving up or, if necessary, in harmonizing for the common interest certain conflicting practices of long standing, to commence codifying in regulations of general application the guarantees due to peaceful commerce and legitimate business, as well as the conduct of hostilities by sea; that it is expedient to lay down in written mutual engagements the principles which have hitherto remained in the uncertain domain of controversy or have been left to the discretion of Governments;

That, from henceforth, a certain number of rules may be made, without affecting the common law now in force with regard to the matters which that law has left unsettled;

Have appointed the following as their plenipotentiaries:

(Here follow the names of plenipotentiaries.)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Chapter I. Postal Correspondence

Article 1. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

Article 2. The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of mari-

time war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

Chapter II. The Exemption from Capture of Certain Vessels

Article 3. Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their applicances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

Article 4. Vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture.

Chapter III. Regulations Regarding the Crews of Enemy Merchant Ships Captured by a Belligerent

Article 5. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

Article 6. The Captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of war.

Article 7. The names of the persons retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the same persons.

Article 8. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

Articles 9–14. (Similar to Articles 6–11, Hague Convention VI)

APPENDIX H

THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR

HAGUE CONVENTION NO. XIII OF 18 OCTOBER 1907

(36 Stat. 2415; Treaty Series No. 545; Malloy, Treaties, Vol. II, p. 2552)

His Majesty the German Emperor, King of Prussia; (etc.);

With a view to harmonizing the divergent views which, in the event of a naval war, are still held on the relations between neutral Powers and belligerent Powers, and to anticipating the difficulties to which such divergence of views might give rise;

Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

Seeing that, in cases not covered by the present Convention, it is expedient to take into consideration the general principles of the law of nations;

Seeing that it is desirable that the Powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;

Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;

Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in a case where experience has shown the necessity for such change for the protection of the rights of that Power;

Have agreed to observe the following common rules, which cannot however modify provisions laid down in existing general treaties, and have appointed as their plenipotentiaries namely:

(Here follow the names of plenipotentiaries.)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral

waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

Article 2

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Article 3

When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crews, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew. (U.S. Reservation, to last paragraph of this Article.)

Article 4

A prize court cannot be set up by a belligerent on neutral territory or on a vesel in neutral waters.

Article 5

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

Article 6

The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.

Article 7

A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to any army or fleet.

Article 8

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its