

THE HAGUE CONVENTIONS

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XIII THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR  
IX BOMBARDMENT BY NAVAL FORCES IN TIME OF WAR

LECTURE DELIVERED BY REAR ADMIRAL SPERRY

AT

THE NAVAL WAR COLLEGE

July 13 and 14, 1910.

(Ratifications Corrected to December 1, 1910.)

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The Hague Conference of 1907 reviewed and amended the Conventions relating to Maritime and Land Warfare established by the Conference of 1899 and also adopted several new Conventions, most of which have been either ratified or adhered to by the United States, with or without reservation; and a careful study of them is most desirable in order that in preparing plans of campaign the rights and probable treatment of belligerent ships by the several neutral powers may be clearly understood.

The Hague Conference of 1907 was composed of delegations representing 44 states, each state having only one vote; but no state was bound to accept a Convention because of its receiving a majority vote in Conference, for the reason that many differences of interest are fundamental, being based upon geographical situation, political organization or racial peculiarities. It remained, then, to make such agreements as were acceptable to the greatest possible number of states. It seems well to remark here, that an unratified convention may be quite as useful as another, since non-signatory states

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NOTE: References such as Vol. III, p. 131 are to be understood as referring to the official Actes et Documents Deuxième Conférence de la Paix, published at the Hague, 1908.

upon the outbreak of war may declare their intention to conform to it fully or with certain modifications for the war in progress, a course which has notably been followed in the case of the Geneva Conventions of 1864 and 1868, and of the Declaration of Paris:

In considering the application and effect of any one of the more complex Conventions a very careful reading of the Preamble should be included, as it gives an authoritative statement of the intent of the signatories and in some cases indicates the understood limitations upon the discretion allowed.

Each Convention when submitted to the Plenary Conference by the Commission which prepared it, was accompanied by a Report to the Conference giving a brief history of the evolution of each article in committee, the most important votes, the reservations made, if any, by the several delegations and such explanations of questions which it was thought might arise, as were deemed necessary. While this General Report is not a document signed by the Delegations, it is an official explanation of the Convention, read and accepted as such both in the Commission and in the Conference. The aim of this lecture is to supply from the Reports to the Conference and other sources such comments as are deemed necessary for a clear understanding of the several Conventions.

The theory of limiting war by making its operations almost impossible has been advocated; but the great loss of life in war is not from bullets but from disease, which riots in the enforced idleness of a long and ineffective war, and the great loss of wealth is due to the withdrawal of men from productive labor. The rights of the person and of humanity have been amply safeguarded in the several Hague and Geneva Conventions, and beyond such considerations the

national right of self preservation must prevail. The security of these rights depend upon varying geographic and strategic considerations, and from first to last there was not a vote given in the Conference which did not recognize that fact. If it should be found in war that the national delegates <sup>have</sup> ~~had~~ unduly hampered the rights of self preservation by some altruistic conventional obligation they will certainly be considered neither intelligent nor patriotic, and such conventions would place a premium upon bad faith.

The great problem which all the powers now have in mind is the control of the Pacific, and all discussions relating to the supply and provisioning of belligerent vessels in neutral ports have had that in view whether avowedly or not. Great Britain has a chain of fortified ports for supply and refreshment all the way from Gibraltar to Hong Kong, and having no need of neutral assistance would restrict to the utmost limit the giving of such aid to her possible antagonists. Naturally the position of Japan, a purely Eastern power, would be the same, even if she were not the ally of Great Britain. On the other hand Russia, seeking to dominate China and desiring to cut the sea communications of Japan, naturally desires all possible neutral assistance to advance her fleet into the Pacific, and her ally, France, takes the same view. It is well to note here that the liberality of the assistance extended to Russia by France in the late war was perfectly consistent with her immemorial policy, which was developed during the wars of the 17th and 18th centuries, and of the early part of the 19th century, when the French and all other Continental navies were dominated by the British navy, to the enemies of which they extended all possible aid.

THE HAGUE CONVENTION NO. III.  
RELATIVE TO THE OPENING OF HOSTILITIES.

Article 1.

The Contracting Powers recognize that hostilities between them must not commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war.

Article 2.

The state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification which may even be given by telegraph. Neutral Powers, nevertheless, cannot plead the absence of notification if it is established beyond doubt that they were in fact aware of the state of war.

Article 3.

Article 1 of the present Convention shall take effect in case of war between two or more of the Contracting Powers.

Article 2 is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.

This Convention rather states a general principle than defines a duty in set terms. It has been ratified (Dec. 1, 1910) by Germany, United States, Austria, Denmark, France, Great Britain, Mexico, Netherlands, Norway, Russia, Sweden, Bolivia, Salvador, Switzerland, China and Haiti. The failure of Japan to ratify is natural in view of the incidents of the late war. France ratified all the Conventions except XII in November 1910.

Bitter controversies with charges of bad faith have raged over the question whether or not hostilities must be preceded by a declaration; but only two points are established: first, that in the 18th and 19th Centuries all of the Great Powers have repeatedly commenced hostilities without a declaration; second, that to strike in time of a profound peace which has not been disturbed

by such demands, discussions or recriminations as usually afford more or less adequate warning, would be considered infamous. (Vol. 1, p. 131.)

Several propositions (1) were put forth at the Hague to establish a definite period subsequent to the declaration during which hostilities should not commence, but they failed of adoption for obvious reasons. In these days of rapid transport and instantaneous communication, military situations both on land and sea may be altered in the gravest way within twenty-four hours, and after war has been declared it would be useless and dangerous to deny to belligerents the right to interfere with each other.

The explanation given in the Report to the Conference is that: "The notice must be previous in the sense that it must precede hostilities. Must a fixed time elapse between the reception of the notice and the opening of hostilities? The French proposition does not prescribe any delay, which implies that hostilities may commence when the notice has reached the adversary.

\* \* \* \* The French Delegation considered that the necessities of modern war did not allow a demand that the party which wished to attack should delay any longer than absolutely indispensable in order that the adversary might know that force was about to be employed against him. The principle of the French proposition has not been contested." (Rapport à la Conférence, Vol. 1, Actes et Documents, page 133.)

These explanations make it evident that the hostilities may commence without other declaration than such an

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(1) The Netherland's Delegation proposed 24 hours delay but their amendment was lost in Committee. Vol. III, pp. 176 and 254.

ultimatum as has been described and that in the absence of such an ultimatum no more delay is required than that necessary to allow an unequivocal declaration of war, including a statement of the grounds for such action, to reach the adversary either by telegraph or by such means of transmission as may be chosen.

The notification of the declaration to neutrals has long been customary but is now of particular importance to belligerents as well as neutrals, since belligerent merchant vessels unaware of the outbreak of hostilities will now be exempt from capture under the terms of Article 43 of the Declaration of London, if that Declaration is ratified.

#### THE HAGUE CONVENTION NO. XIII.

##### THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR.

This Convention is most important for officers engaged in the study of naval strategic positions and in the preparation of plans of campaign, since it defines more or less completely and precisely the treatment which belligerent vessels of war may expect within neutral jurisdiction.

Projects were submitted to the III Commission, in which this convention was prepared, by Japan, Spain, Russia and Great Britain. The Russian project followed the French practice of liberal treatment, while Japan adhered to the elaborate British project containing 32 articles based in part on the Three Rules of the Treaty of Washington, 1871. These Rules which were accepted as a guide in the Alabama Claims Arbitration are of such importance that they are given for your information.

## TREATY OF WASHINGTON, 1871.

## Article VI.

In deciding the matters submitted to the Arbitrators, they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the Arbitrators shall determine to have been applicable to the case.

## Rules.

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 vessels having specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Second, 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 the renewal or augmentation of military supplies or arms, or for the recruitment of men.

Third, 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.

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a state-

ment of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.

In accepting what have been generally considered ex post facto rules, Great Britain became charged with a heavy indemnity which was duly paid, and as the Rules accord with her strategic advantage now, just as clearly as they did in 1871, they naturally form the basis of the British proposition at The Hague. It was the avowed purpose of Great Britain and the United States in 1871 to present the Three Rules to all the Great Powers as the basis of an international agreement, but the intention was never carried out principally because of the difficulty of construing the expression "due diligence", which the Arbitrators in their Decision and Award commented upon as follows, but not to the general satisfaction:

And whereas the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed from a failing to fulfill the obligations of neutrality on their part. \* \* \* (Wharton's Digest, Vol. III, page 632.)

The British delegation at The Hague having in mind their expensive and somewhat humiliating experience as a



neutral power submitted a project embodying the Three Rules, several articles of which read very much like a penal code for neutrals; but it is to be noted that for the expression "due diligence" and the interpretation given to it by the Arbitrators, the radically different phrase "according to the means at its disposal" has been substituted as a measure of the proper effort for the protection of neutrality. This is an important limitation of the responsibility of the weaker neutral states.

Articles 1, 2, and 3 of Convention XIII are as follows:

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.

All acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent vessels of war in the territorial waters of a neutral Power, constitute a violation of neutrality and are strictly forbidden.

Article 3.

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

If the prize is not within the jurisdiction of the neutral Power, the captor Government, on demand of that Power, must liberate the prize with its officers and crew. (1)

It is always and entirely within the power of a belligerent to abstain from a violation of neutrality, even in territorial waters where no compelling force is

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(1) The Senate advised adherence "with the understanding that the last clause of Article 3 implies the duty of a neutral Power to make the demand."

at hand, and therefore Article 1 and 2 are positive as to the duty of the belligerent, while article 3 relating to the duty of neutrals is tempered by the phrase already noted.

As to the question whether there is any distinction between ports and territorial waters in the matter of the respect due to neutrality on the part of a belligerent, the following quoted from the Report to the Conference (Vol.1, p.298) seems to be conclusive. "It has sometimes been asked whether there is any occasion to distinguish between ports and territorial waters. The distinction is comprehensible as to what concerns the duty of the neutral, who cannot be responsible in the same degree for what happens in his territorial waters, over which he often has only a feeble control, as for what takes place in the ports subject to his immediate authority. The distinction is not recognized as to the duty of the belligerent which is the same everywhere."

#### Article 4.

A Prize Court cannot be set up by a belligerent on neutral territory or on board a vessel in neutral waters.

Article 4 is so worded as not to interfere with the constitution of the International Prize Court by the Neutral Powers, even in time of war, as provided for in the Convention No. XII; but up to Dec. 1st, 1910, no power had ratified that Convention.

#### 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 telegraph stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.

Article 5 gave occasion for much discussion as to what operations amounted to the use of a port as a base, and the prohibition of wireless stations was introduced as an example of an act which was not permissible. As for making the neutral port a rendezvous, the uncertainty is practically removed, as will be seen later, by the provision of Article 15 of this Convention, restricting the number of belligerent vessels which may lie in a neutral port to three, in default of special provisions to the contrary.

In Committee the British Delegation proposed an Article, 5<sup>b</sup>, as follows:-

"Belligerent vessels are also forbidden to re-victual (ravitailler) in neutral waters from the auxiliary vessels of their fleet", and this was accepted in the Committee, but the British Delegation, while maintaining its views, decided not to insist upon the insertion of the article in view of the opposition manifested by Russia.

No definition of the operations constituting the use of a port, or of waters, as a base being practicable the question remains for determination when a particular case arises: such determination "to take into consideration the general principles of the law of nations as suggested in paragraph 3 of the preamble of the Convention (Vol.1, p.301).

#### Article 6.

The supply, on whatever ground, directly or indirectly, by a neutral Power to a belligerent Power, of vessels, stores or war material of any kind whatever, is forbidden.

It is a well settled principle of international law and practice that the supply of war or other material to a belligerent by private parties does not compromise the neutrality of their government, but it is quite the contrary when such

supplies, being the property of the neutral government itself, are furnished either directly or indirectly to a belligerent. A government can control the disposition of its own property absolutely, but it would be dangerous to peace if a neutral government were subject to reclamations for the acts of its traders. The right of visit, search and capture is permitted to belligerents for the express purpose of relieving neutral governments of such responsibility.

#### Article 7.

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

Article 7 presents no new features and is in accord with the present state of the law. It is to be noted, however, that the terms of Article 7 implies the right of the neutral power to prohibit such trade at discretion.

The question of the treatment to be accorded to neutral vessels engaged in "unneutral service", that is, carrying supplies direct to the fleet of a belligerent, or subject to the orders of its commander for any purpose, was not entered upon at The Hague: it was, however, one of the matters embodied in the Declaration of London, 1909.

#### Article 8.

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of every vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been within the said jurisdiction adapted, entirely or in part, for use in war.

Article 8 embodies the first of the Three Rules of the Treaty of Washington modified by the substitution of the phrase "employ the means at its disposal" in place of "use due diligence". In Committee Brazil proposed an amendment to this article which would permit a neutral to deliver, after the declaration of war, vessels of war building within its jurisdiction for a belligerent, completed, armed and manned, provided they had been contracted for more than six months previous to the declaration. The proposition was rejected. It was said that at the time, Brazil had a large number of vessels building abroad.

#### Article 9.

A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent ships of war or of their prizes.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

The original draft of Article 9 opened with the statement "A neutral state may, under stated conditions, permit access to its ports x x x" which in form was objected to by the United States Delegation as implying that sovereign rights were conferred by the Convention, but the article as adopted is unobjectionable.

#### Article 10.

The neutrality of a power is not affected by the mere passage through its territorial waters of ships of war or prizes belonging to belligerents.

Article 10 was the result of the discussion of Article 32 of the British project which was as follows:

"None of the provisions of the preceding Articles shall be interpreted to prohibit the simple passage through neutral waters, in time of war, of a vessel of war or of an auxiliary vessel of a belligerent."

To this the delegations of Sweden and Denmark made substantially the same objection: that it might seem to forbid, for instance, the closing of certain passages within their territorial waters, such closing being the best and surest way of fulfilling the duty of safeguarding their neutrality as required by the terms of the Convention itself. The United States and Japan declined to accept any obligations not to close passages, because of the numerous straits between the islands of the Philippine group and between the Japanese Islands.

It was held that the British proposal might be construed to prohibit the closing of a passage for any reason, and in Article 10, as finally accepted, the question is left open. Turkey made a reservation because of existing treaty obligations in regard to the passage of the Dardanelles.

#### Article 11.

A neutral Power may allow belligerent ships of war to employ its licensed pilots.

Article 11 does not make it the duty of the neutral to furnish pilots, but if there are any at hand their services may be extended to the belligerent without offense. In the discussion in committee it was accepted that a neutral might even oblige a belligerent vessel to use licensed pilots in certain waters.

#### Article 12.

In the absence of special provisions to the contrary in the laws of the neutral Power, belligerent ships of war are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

Article 12, relating to the sojourn of belligerent ships in neutral waters was the subject of prolonged discussion and great difficulty. It is well to note at once that the article as adopted by the Conference provides that "in the

absence of special provisions to the contrary" belligerent vessels of war are forbidden to remain in a neutral port for more than twenty-four hours. This is in the interest of neutrals, who, having ratified the Convention, need take no action on the outbreak of war unless they desire to mitigate the rule; and the duty of compliance is laid upon the belligerent without special warning (Vol. 1. p. 308).

In the four proposals submitted for discussion, Great Britain, Japan and Spain concurred in the provision that the stay must be limited to twenty-four hours except under special conditions; but Russia stated broadly "it belongs to the neutral to establish the length of the sojourn of a belligerent ship in neutral ports and territorial waters", and adds in a succeeding paragraph "the sojourn may be prolonged if the state of the weather, the need of supplies or injuries hinder the putting to sea". Russia in Committee also proposed the following terms for Article 12:

"In default of other regulations by the neutral powers it is forbidden to vessels of war of the belligerents to remain in neutral ports, roadsteads, or waters, longer than is necessary to complete the supplies indicated in Article 19 of the present Convention. (Article 19 relates to coal and supplies.)"

The German delegation also opposed the British proposition and submitted the following:

It is forbidden to belligerent ships to remain in the ports, anchorages, or territorial waters of a neutral state, which are in immediate proximity to the theater of war, except in cases covered by the present convention."

For regions outside the "theater of war" the German delegation accepted the French rule which specifies no limit of time provided the belligerent ships respect the regulations of the neutral port. The expression "theater of war" was defined by the German delegation as employed in a special sense, meaning "a portion of the sea where warlike operations have just taken place, or are about to take place, or where such operations may occur because of the presence or approach of the forces of both belligerents."

The German proposition of "zones" as it has usually been called was debated at great length, both in committee and in the Commission, and was rejected mainly because of the difficulties and uncertainties which it would entail for both belligerents and neutrals. Every aspect of the matter was discussed at meetings spread over more than four months, but the vital strategic interests of the several Powers differed so absolutely that no common rule could be made to cover them. Article 12 makes for peace in that the discretion of the neutrals is fully acknowledged and there is no recognized ground of offense as long as the rule is applied impartially.

#### Article 13.

If a Power which has been informed of the outbreak of hostilities learns that a belligerent ship of war is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local regulations.

In connection with Article 13 the question naturally arises whether a belligerent vessel is required to depart before notice is received, but the terms of Article 12 certainly impose the obligation to depart with or without notice.

#### Article 14.

A belligerent ship of war must not prolong its stay in a neutral port beyond the period allowed by law, except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the limit of the length of time which such vessels may remain in neutral ports, roadsteads, or waters, do not apply to ships of war devoted exclusively to religious, scientific, or philanthropic purposes.

(See Article 1, paragraph 2, adaptation of Geneva Convention to Maritime War.)

The length of the sojourn of a belligerent vessel and the reasons for which it might be prolonged brought forward diverse propositions. The Japanese proposition permitted a prolongation only be reason of stress of weather: the Spanish



mentioned injuries, stress of weather or other force majeure: the Russian, stress of weather, lack of supplies or injuries. Injuries and stress of weather were accepted by the Committee without difficulty as legitimate grounds for delay, though the Japanese delegate remarked that the claim of injuries might give rise to abuses and suggested that a maximum prolongation be set to cover all cases. Various objections to the Japanese proposition presented themselves, notably the unequal facilities in different ports, and it was rejected. (Vol. 1, p. 311)

It will be recollected that in Committee Russia proposed to introduce into Article 12 a positive statement that the sojourn in neutral waters might be prolonged in order to allow time to take on board the quantity of coal and supplies allowed, and that this was not accepted: but it is also to be noted that paragraph 1 of Article 14 specifies only ports. The Report to the Conference remarks that a neutral state should be held responsible only for what it knows or can know, and that such knowledge is more readily obtained for ports than for territorial waters generally. (Vol. 1, p.311.) The effect of Articles 1, 12, 14 and 18 taken together, seems to be that while under the general provision of Article 1 it would be a violation of neutrality for the belligerent to remain in neutral waters longer than permitted by the terms of this Convention, or by the special regulations of the neutral state, yet the neutral in that case would not necessarily be liable to reclamations, and the belligerents would have to settle their own differences: but the neutral may thereafter forbid access to the offending belligerent under Article 9.

#### Article 15.

In the absence of special provisions to the contrary in the laws of the neutral Power, the maximum number of ships of war belonging to one belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

Article 15 was the subject of considerable discussion, it being objected that the number three did not correspond to any of the units into which a fleet is divided, although three had been the number usually specified by the Powers in time of peace. As adopted the article protects weak neutrals by requiring no definite action on their part, and is "a guarantee against the concentration of belligerent ships in a neutral port to the extent of making it serve as a base of operations". (Vol. 1, p. 312.)

#### Article 16.

When ships of war of both belligerents are present simultaneously in the same neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of a ship belonging to one belligerent and the departure of a ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of the period allowed by law is permitted.

A belligerent ship of war can not leave a neutral port or roadstead less than twenty-four hours after the departure of a merchant-ship flying the flag of its adversary.

Four propositions were introduced in Committee for the determination of the order of departure of vessels of different belligerents from a neutral port: (a) the neutral government to regulate the order; (b) priority of demand to determine; (c) the vessel of the least force to depart first; (d) the order of arrival to determine the order of departure. The last principle was adopted as the simplest, but it is obvious that in practice it may be necessary to modify it in the case of a vessel whose sojourn has been lawfully prolonged. A belligerent vessel of war cannot follow a merchant vessel of the other belligerent to sea within less than twenty-four hours, but the merchant vessel, may, if she so desires, quit the port less than twenty-four hours after a vessel of war. The priority rule applies only to vessels of war, since there is no conventional limit to the stay of merchant ships

in neutral ports.

#### Article 17.

In neutral ports and roadsteads belligerent ships of war can carry out only such repairs as are absolutely necessary to render them seaworthy, and can not add in any manner whatsoever to their fighting force. The neutral authorities shall decide what repairs are necessary, and these must be carried out with the least possible delay.

In the discussion of Article 17 a proposition was made that the neutral power should not permit the repair of damages received in battle, but it was held that it would not only be difficult to determine the cause of the damage but that such proceedings would be unduly inquisitorial. The article mentions only ports and roadsteads for the reason, as stated in the Report to the Conference (Vol.1, p.315), that few repairs could be executed in unsheltered anchorages and that it would not be practicable for the neutral to control what was done throughout the whole extent of his territorial waters. As a matter of fact important repairs might be effected in unsheltered anchorages in good weather with the aid of a repair ship, but the general policy which prevailed was to lighten the responsibility of the neutral for what took place in his territorial waters as much as practicable, laying the duty of respecting neutrality upon the belligerent.

#### Article 18.

Belligerent ships of war cannot make use of neutral ports, roadsteads or territorial waters for replenishing or increasing their supplies of war material, or their armament or for completing their crews.

#### Article 19.

Belligerent ships of war cannot revictual in neutral ports or roadsteads except to complete their normal peace supply.

Similarly, these vessels can take only sufficient fuel to enable them to reach the nearest port of their own country. They may, on the other hand, take the fuel necessary to fill up their bunkers properly so-called when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, ships are not supplied with coal until twenty-four hours after their arrival, the lawful duration of their stay is extended by twenty-four hours.

The two questions of vital importance are: first, the length of the sojourn of a belligerent in a neutral port, and, second, the limitations to be placed upon the supplies of coal and provisions allowed. We have seen that after long discussion the most that could be accomplished as to the sojourn, was to limit it to twenty-four hours in default of another regulation. The right of self-preservation is involved in the question of sojourn and supplies, and the necessary measures for the security of these rights vary according to differences of geographical position, which must endure as long as the present political divisions of states are maintained and as long as vessels of war must have fuel and food.

The discussion in committee was separated into the two questions of food and fuel and the first paragraph of Article 19 allowing the normal peace supply of provisions was accepted without difficulty; but, as was to be expected, the supply of fuel was a matter of great difficulty and long discussion. Briefly the Russian proposition, supported by Germany and France, permitted the utmost liberality, while the proposition of Great Britain, supported by the United States and Japan, was the strict rule of enough to reach the nearest home port. Throughout all the discussions in committee there was not a vote given by any of the great powers which was not based on strategic considerations looking to security and control, usually in the Pacific. The United States followed Great Britain not only because their rules have always been substantially the same, but also

because at the present time they are mutually bound by the Treaty of Washington; and, moreover, because it seems clear that the United States, after the opening of the Panama Canal, will have a secure route into the Pacific with sufficient coaling stations of her own on the way to the Philippines.

In discussing that portion of the British proposition which is embodied in the first clause of paragraph 2, Article 19, the British delegate stated that enough fuel to reach the nearest home port was a perfectly simple rule and involved no obligation on the part of the neutral to exercise any surveillance over the destination of the ship, nor conversely, any obligation on the part of the ship to proceed to any particular destination. (Vol. 1, p. 316). This statement being embodied in the Report to the Conference, read and approved in the Commission and in the Plenary Conference, may be held to settle a question which has often arisen in War College discussions.

It is important to note another discussion which took place in committee and which bears upon the question whether the sojourn may be prolonged in order to take on board the amount of supplies allowed. Article 19 of the Committee's draft of the Convention contained a clause stating that "revictualling and the taking on board of fuel do not give the right to prolong the legal sojourn" (Vol. 1, p. 317). Russia moved to strike this out as it might subject a neutral to very serious reprisals if she should force a belligerent vessel to put to sea with coal insufficient for her safety. Japan pointed out that if the amendment were accepted there would be an uncertainty as to whether, under the terms of Article 12 forbidding a prolongation of the sojourn "except in cases covered by this Convention", the sojourn might not be extended to take the supply allowed under Article 19, but

the clause was nevertheless struck out. Considering that the amendment was proposed by Russia, and was passed after its obvious effect on Article 19 had been pointed out, there appears to be no question that the stay can lawfully be prolonged by the neutral authority under the terms of the Convention, both for supplies and for coal.

The last paragraph refers to a provision of the Italian Code which forbids the supply of coal until twenty-four hours after arrival.

#### Article 20.

Belligerent ships of war which have taken fuel in a port of a neutral Power can not within the succeeding three months replenish their supply in a port of the same Power.

Several ameliorations of the rule prohibiting a second supply of coal to be taken in any port of the same neutral power were proposed in Committee: one, that it should not be allowed "without special permission", which was the instruction issued by the British Foreign Office in February 1904: another that a second supply might be taken in a port of the same power distant not less than 2000 miles from the place of the first supply. The discussion was exhaustive, but the stricter form was finally adopted. Great Britain proposed to add to Article 20 a clause forbidding the furnishing of supplies in a neutral port to a vessel of war if she were going to meet the enemy or engage in the operations of war, and Japan supported the amendment with the addition of a prohibition in case the destination were "doubtful or unknown". The amendment was rejected.

#### Article 21.

A prize can be brought into a neutral port only on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

There has always been great diversity in the practice of maritime powers as to admitting prizes into their ports, but the uniform rule laid down in Article 21 was accepted without difficulty, referring, as it does, only to an entry which is a matter of necessity and right not requiring previous permission.

#### Article 22.

A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

Article 21 regulates the treatment to be accorded to a prize which has entered in accordance with the terms of the Convention, but Article 22 deals with the case of a prize which without permission has entered contrary to the prescribed rule.

#### Article 23.

A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

If the prize is convoyed by a ship of war, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

The admission of prizes into neutral ports, there to be held pending the action of a prize court must be at the option of the neutral power and is closely related to a proposition positively to forbid the destruction of neutral prizes prior to adjudication, which was supported by Great Britain and the United States. Had that proposition been accepted, as it was not, it would have been reasonable to permit the sequestration of neutral prizes in neutral ports. Article 23 permitting the admission into neutral ports was accepted in the Commission by a considerable majority including Austria, France, Germany, Italy, and Russia, with several such states as Bolivia and Panama, whose interest was more or less in-

direct.

The object of the article as stated in the Report to the Conference was to "render more rare if not prevent" (Vol. 1, p. 320) the destruction of neutral prizes, but it makes no distinction between enemy ships which may lawfully be destroyed and neutral vessels. Article 23 was reserved by the United States in adhering to the Convention. It is doubtful whether its terms will materially diminish the destruction of neutral prizes as the access to neutral ports remains optional, as before, and small, or indifferent neutral states will certainly hesitate to open their ports to such troublesome guests. In the past the practice has been the occasion of many abuses. The United States reserved Article 23.

#### Article 24.

If, notwithstanding the notification of the neutral authorities, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either in another ship or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

The only question which gave rise to much discussion in the matter of the internment of war vessels was as to the manner of the detention of the officers and men. As far as possible the maritime conventions of The Hague were assimilated in terms to those relating to warfare on land, but in this particular case, the internment prescribed on land entails the transfer of the people interned into the interior. The reason for this in land warfare is obvious, but the same reasons do not apply in the case of vessels and



therefore the word detained was used in place of interned. The Japanese delegation, probably having in mind the fact that the Russian crews received on board neutral ships of war in the harbor of Chemulpo in 1904 were actually allowed to return to Russia without any regular agreement, desired to insert in the last paragraph of Article 24 a provision that the persons detained should not be allowed to leave the neutral territory without the consent of the adverse belligerent, but the amendment was rejected. The same question arose in the II Commission at the Hague as to the land rule, with a like result.

The report of the sub-commission to the II Commission observes, however, that a neutral power desiring to relieve itself of all responsibility may well procure the assent of the adverse belligerent before granting such permission.

The duty laid upon the commander of the interned ship to facilitate such measures as the neutral authorities may consider necessary to render the ship incapable of taking the sea during the war is notable.

#### Article 25.

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violations of the provisions of the above articles in its ports or roadsteads, or in its waters.

The second of the Three Rules of the Treaty of Washington is embodied in Article 25, but for the phrase "due diligence" has been substituted the words "such surveillance as the means at its disposal allow".

#### Article 26.

The exercise by a neutral Power of the rights laid down in the present Convention can never be considered as an unfriendly act by one or the other belligerents who has accepted the Articles relating thereto.

The Japanese Delegation proposed an additional article as follows: "A neutral state if it considers it necessary

"in order better to safeguard its neutrality is free to maintain or establish stricter rules than those which are laid down in the present Convention", but the proposition was not accepted. (Vol. 1, p.323). It was pointed out as a sufficient safeguard that under Article 9 access might be forbidden to belligerent ships, or that such condition might be imposed as the neutral desired; that under Article 12 the sojourn might be restricted; that under Article 15 the number of belligerent vessels allowed in port at the same time might be reduced, and that except under the conditions of necessity specified in Article 21 entrance might be forbidden to all prizes. It is important, however, to observe the general declaration in the 6th paragraph of the Preamble that "these rules ought not to be, in principle, changed during the course of war by a neutral Power, save in a case where the experience acquired has demonstrated the necessity for such change for the protection of its rights." This paragraph implies the right desired by Japan, and her delegation, in abandoning the proposed article, stated that it was with that understanding.

Articles 27 and 28 need no particular comment and are as follows:

Article 27.

The Contracting Powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating, in their respective countries, the status of belligerent ships of war in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other Contracting Powers.

Article 28.

The provisions of the present Convention do not apply except between Contracting Powers, and only if all the belligerents are parties to the Convention.

M. Louis Renault stated on the part of the Drafting Committee, that the Convention would not even apply to neutral states unless both belligerents were Contracting Parties. (Vol. 1, p.325).

This finishes a discussion of the text of the Convention, which it is hoped will prove useful in the study of the present condition of international law and of the attitude of the Great Powers in relation to the questions of sojourn and supply in neutral ports.

The last paragraph of the Preamble contains a provision that the rules of the Convention, if accepted, shall "involve no encroachment upon the stipulations of existing treaties"; but it is evident, nevertheless, that the situation may become complicated. Great Britain and the United States are bound by the Treaty of Washington, and for that reason as well as for others, the United States Naval Delegate recommended that the whole Convention be reserved for consideration at Washington, commenting as follows in making an individual report to the Secretary of State:

The lack of conventional agreements regulating the exercise of neutrality has more than once threatened to involve the whole world in war, and perhaps the rules adopted by this Conference, if they were un-animously approved by the maritime Powers, might be accepted as possibly promoting peace, since practically they certify the right of neutrals to do as they please within very wide limits without fear of reclamation; but there is no question that they are not in accord either with the practice of the United States or with its strategic situation.

The report of the Delegation as a whole was prepared by Mr. James Brown Scott, Technical Delegate and Solicitor of the Department of State, in February, 1908, after the Delegation had dispersed, and was signed only by Mr. Joseph H. Choate. It recommended acceptance of this Convention and in accordance therewith the Senate "advised adherence" which was proclaimed by the President on the 23rd day of

February 1909, Article 23 excepted.

The following Powers have ratified or adhered to the CONVENTION CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN MARITIME WAR up to December 1st, 1910. The United States, France, Germany, Austria, Denmark, Mexico, The Netherlands, Norway, Russia, Sweden, Salvador, Switzerland, China and Haiti.

Germany reserved Articles 11, 12, 13 and 20.

#### THE HAGUE CONVENTION IX

##### BOMBARDMENT BY NAVAL FORCES IN TIME OF WAR

War on land and on the seas is no longer conducted by mercenaries nor by disorderly, undisciplined bands of adventurers and freebooters whose motive is private gain, but by regularly organized and disciplined forces supposed to make no effort except for legitimate military ends. Such military considerations as the avoidance of disorder and of the unnecessary aggravation of the enemy population, and the preservation of the resources of the country for the use of the armed forces have actually led to a considerably measure of immunity for private property and it is formally protected from pillage. Article 52 of the Hague Convention, Rules of War on Land, 1907, for the first time, makes payment obligatory when private property is taken for use by the enemy. Cruel and useless operations such as the bombardment of undefended coasts, or of undefended towns by either land or sea forces, are repugnant to public sentiment and it is also recognized that in naval warfare ammunition must be carefully husbanded for conflict with the enemy's fleet. The time was thus ripe, when the Second Hague Conference met, for the formulation of such public sentiment into certain prohibitory agreements, notably as to bombardments.

## 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 harbor.

The contention was made by the British Naval Delegate that paragraph 2 of Article 1, in effect classes a town with a mine protection as undefended, and a proposition was made to strike out this paragraph, but it was defeated. This point was discussed at the Naval War College in 1903, and the conclusion which was as follows seems sound.

"The harbor of an unfortified town is supposed to contain submarine mines making entry dangerous. \* \* \*

The refusal of assurance to the commanding officer leaves him no alternative other than to assume that the town is defended against approach from the sea. Such being the case he is justified in bombarding the town after due notice, either in order to obtain an answer to his reasonable request for information, or as a measure of war." (International Law Discussions, U.S. Naval War College, 1903, p.27.)

## Article 2.

Military works, military or naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ship of war in the harbor, 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 delay, if all other means are impossible, and 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 military necessity, demanding immediate action, permits no delay, it is nevertheless understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph the first, and that the commander shall take all requisite measures in order that the town may suffer as little harm as possible.

#### Article 3.

After explicit notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be proceeded with, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for the provisions or supplies necessary for the immediate needs 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.

The exceptions under which the bombardment of an undefended town is permissible are given in Articles 2 and 3. Attention is invited to the last part of paragraph 2, Article 3. "They (requisitions) shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts". This is the same as the provision of the Rule for Land Warfare, 1899, which did not make payment obligatory; but in the Convention of 1907, respecting the Laws of War on Land, Article 52, was amended so as to read "their receipt shall be acknowledged, and the payment of the amount due shall be made as soon as possible." The omission from this Convention of the same amendment was perhaps due to an oversight, as the general opinion seems to be that the comparative facility and good will with which supplies may be procured from the enemy population, when paid for, amply compensate for the expenditure. Payment should be made notwithstanding the omission.

#### Article 4.

The bombardment of undefended ports, towns, villages, dwellings, or buildings on account of non-payment of money contributions is forbidden.

Article 4 as originally drafted forbade bombardment

for refusal to pay "ransom", but as it was pointed out that such an expression might be held to imply a right to demand ransom, the word contribution was substituted.

## Chapter II. General Provisions.

### Article 5.

In bombardments by naval forces all necessary measures must be taken by the commander to spare as far as possible buildings devoted to religion, to the arts and sciences, or to charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on condition 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 colored triangular portions, the upper portion black, the lower portion white.

### Article 6.

Unless military exigencies render it impossible, the commander of the attacking naval force, before commencing the bombardment, must do everything in his power to warn the authorities.

### Article 7.

It is forbidden to give over to pillage a town or place even when taken by assault.

Articles 5 and 6 need no particular comment. Article 7 was reinforced in Committee by the introduction of the word even, so as to make the prohibition absolute.

The bombardment of undefended places is now so regulated that, it is hoped, it will never occur except for such imperative and substantial military reasons as will justify the action; but in addressing such a body of officers as are here assembled comment may go farther. To justify the bombardment of a city, even when fortified and defended, there should be good military reasons and not a mere desire to inspire terror and inflict damage in the hope of intimidation. It does not take long for citizens to discover that there is a limit to the damage which may be done by naval bombardment,

and if no military end is furthered their bitter resentment is certain to be shared by the civilized world: again, if the fleet has the power of dismantling the fortifications, but no military force is present which can be landed to take possession and restore order in the unfortunate city, such action might be little less than barbarous. The predicament under such conditions is well illustrated by the situation at New Orleans in 1862 when Farragut's fleet anchored in front of the city, April, 25th, after passing the river forts. The army coming overland did not arrive until May 1st, the city was in a state of furious excitement, and the officers who were sent on shore to take possession and hoist the flag on the U.S. Custom House and other public buildings were in no little danger of assassination. Had they been attacked, and had a city full of women and children been bombarded, it would have been revolting, and no commander should lightly place himself in such a dilemma.

Officers should never fail to remember that the great powers which they must exercise in war for the sake of their country, entail also an equally heavy burden of responsibility that no suffering or distress be inflicted except for a lawful and adequate military advantage.



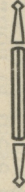
Phelps, W. W.

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Newport, R. I.

Thursday, 8 September, 1921.

By

W. W. Phelps, Captain, U. S. N.

Chief of Staff