Of the foregoing treaties, ratifications have been exchanged of 10, as follows:

Bolivia, January 8, 1915; Costa Rica, November 12, 1914; Denmark, January 19, 1915; France, January 22, 1915; Great Britain, November 10, 1914; Guatemala, October 13, 1914; Norway, October 21, 1914; Portugal, October 24, 1914; Spain, December 21, 1914; Sweden, January 11, 1915.

THE PURCHASE OF VESSELS OF WAR IN NEUTRAL COUNTRIES BY BELLIGERENTS

The recent attempt of a belligerent engaged in the European war to place contracts with American manufacturers for the construction and purchase of submarines and its abandonment at the suggestion of President Wilson raise interesting and somewhat technical questions involving the neutral obligations of the United States, especially as a submarine may be completely constructed, launched and leave the jurisdiction of the United States under its own steam, or in tow, or it may be carried as cargo in parts or as a whole on board a merchant vessel. The remarkable evolution in the types of the engines of modern warfare is so recent and rapid that questions concerning them are likely to arise at any time for which no authoritative precedent may be found, and the present question, if it had not been settled by the voluntary action of the manufacturers,[1] would have necessitated the application of principles rather than an appeal to precedents for its solution.

[1] The official statement which ended the incident, issued by the Secretary of State on December 7, 1914, reads: "When information reached the State Department that the Fore River Company was planning to build a number of submarines for one of the allies, inquiry was made to ascertain the facts. As a result of the inquiry, Mr. Schwab called at the State Department last week with his attorney, and laid before the department what his company had planned to do, stating that before undertaking the work he had secured the opinion of a number of international lawyers, and was keeping within the requirements of neutrality as outlined by them.

"I stated to him that the President, basing his opinion upon information already obtained, regarded the work, as contemplated, a violation of the spirit of neutrality, but told him I would lay his statement before the President, and then give him a final answer.

"On Friday I had a conference with the President, and he instructed me to inform Mr. Schwab that his statement only confirmed him in the opinion previously formed that the submarines should not be built. Within a few minutes after my return from the White House, Mr. Schwab called me by long-distance telephone, and told me

In 1879 there occurred a case which may be considered somewhat of a precedent, in which Mr. Evarts, Secretary of State, held that the shipment to one of the belligerents in the war between Chile and Peru of a torpedo launch in sections, ready to be set up, or even as a completed sea-going vessel, would not be a violation of the neutrality laws of the United States.[2] But a different attitude was assumed by Great Britain during the Spanish-American War, when that Government prohibited the completion of a cruiser and the departure from its jurisdiction of a nearly completed torpedo boat, which had been purchased by the United States about a month before the commencement of hostilities.[3]

Submarines and other war vessels sold in parts or even completed and launched or ready for launching may be considered as articles of commerce and as such the traffic in them may be claimed to be not different from nor subject to stricter prohibitions than traffic in other articles of commerce used exclusively for warlike purposes, such as explosives, guns, ordnance, airships, etc., the sale of which is not made illegal by either municipal or international law, but which are subject to seizure as contraband of war outside the territorial jurisdiction by an enemy of the purchasing government. "It is fully recognized," says Hall,[4] "that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man of war, is a proper subject of commerce. There is nothing to prevent its neutral possessor from selling it, and undertaking to deliver it to the belligerent either in the neutral port or in that of the purchaser, subject to the right of the other

that he submitted to the President's views of the subject, and that I could announce that his firm would not build submarines for any belligerent country for delivery during the war. This closes the submarine incident." (Washington *Post*, Dec. 8, 1914, p. 3.)

[2] Moore, International Law Digest, Vol. VII, p. 960.

[3] *Ibid.*, Vol. VII, p. 861. The sale to Russia during the Russo-Japanese War by the North German Lloyd and German Hamburg-American Steamship Companies of a number of merchant vessels adaptable to warlike purposes is not generally criticized on the ground that Germany allowed the sale by its subjects and delivery to one of the belligerents of vessels which were easily converted into warships, but, owing to its interest in the vessels, which practically formed a part of her auxiliary navy, the objection is made that Germany was a party to the sale, and thereby violated her duty as a neutral nation. Hershey, Essentials of International Public Law, sec. 462, note 6, and citations there given. This author erroneously states that the vessels were sold to Japan.

[4] International Law, 6th ed., p. 606.

belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters." For this reason, the Declaration of London characterizes as absolute contraband, "war ships, including boats, and their distinctive component parts, of such a nature that they can only be used on a vessel of war," and these articles are likewise included in the lists of absolute contraband issued by the belligerents on both sides of the present struggle.

On the other hand, it is a fundament of neutrality that a neutral government may not allow its territory to be made a military or naval base for operations against a state with which it is at peace, and the United States Government assumed and for many years maintained a position on this question in advance of other nations. It was forced to declare its attitude early in its history, when the French minister, the notorious citizen Genet, in 1793 persisted in fitting out and arming privateers in American ports to cruise against the British. President Washington's Cabinet, which included Thomas Jefferson and Alexander Hamilton, on August 3, 1793, adopted rules as to the "equipment of vessels in the ports of the United States by belligerent Powers," which made unlawful, among other acts, "the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive," and "equipments of vessels in the ports of the United States, which are of a nature solely adapted to war." These rules were embodied in Hamilton's circular to the collectors of customs in the ports of the United States issued on August 4, 1793,[5] and the Governors of the several States were requested to be on their watch against such enterprises and to seize such vessels found within their jurisdiction.[6] These Executive orders and subsequent proclamations of neutrality issued by President Washington proved to be inadequate to maintain the high standard of neutral conduct adopted by Washington and his Cabinet, and he appealed to Congress for legislation. His appeal resulted in the passage of the first neutrality law of the United States on June 5, 1794.

Section 3 of this statute prohibited the fitting out and arming within the United States of vessels intended to commit hostilities against a state with which the United States is at peace. This inhibition has been carried through the various revisions and amendments of the neutrality laws and now appears, with slight changes of phraseology, as Section 11

[5] Moore, Digest of International Law, Vol. VII, pp. 890–891.

[6] *Ibid.*, p. 889.

of the Penal Code of the United States which went into effect on January 1, 1910. The section reads as follows:

Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be so employed, shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer and the other half to the use of the United States.[7]

The statute has been the subject of much judicial interpretation, in which the question of intent has been the determining factor. Dana, commenting upon this provision of the law as interpreted by the courts, says, in his notes to Wheaton's "Elements of International Law" (1866):

An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in performance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent.[8]

The cases under the statute have therefore been decided accordingly as the evidence showed an intent formed within the limits of the United States to employ the vessel in the prohibited service.[9]

[7] United States Statutes at Large, Vol. 35, Part 1, p. 1090; R. S. 5283.

[8] Page 563, note.

[9] The *Laurada* (1900), 98 Fed. Rep. 983.

The legal requirement of strictly construing penal statutes has apparently in some cases caused the courts on the evidence submitted to place a narrower construction upon the statute than was intended by its framers and considering its history. The Executive branch in interpreting the Government's neutral obligations, has not, however, been hampered by any such requirement. During the Civil War it demanded of Great Britain the full performance of her duty as a neutral, the same as the United States had accorded to her three-fourths of a century before during her contest with France. The famous *Alabama* case, which was submitted to the arbitration of the Geneva Tribunal under the Treaty of Washington of 1871 was a result of this demand. Due to the insistence of the United States, the first rule of that treaty stated that a neutral government is bound

> 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.[10]

The *Alabama* was a cruiser constructed in England for the Confederate States, and, although the Federal authorities had furnished the British Government with evidence of the hostile purpose for which the cruiser was intended, she was allowed to escape, but before taking on her equipment and armament, which were afterward supplied to her outside of British territorial waters by other ships from England. The arbitral tribunal, by an award dated September 14, 1872, allowed the United States the sum of $15,500,000 for the damages done to its commerce by the *Alabama* and sister ships, on the ground that "the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said No. 290 [the *Alabama*], to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable." [11]

[10] Moore, International Arbitrations, Vol. I, p. 550.

[11] *Ibid.*, p. 655. The words "due diligence" were defined by the Tribunal as being the amount of diligence which "ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may

As to the effect of the first rule of the Treaty of Washington upon the doctrine of intent applied by the United States courts in interpreting the neutrality act, Dr. Freeman Snow,[12] a leading authority, says:

> In considering this question, it should be remembered that, by the introduction of steam as the motive power of ships, and of iron and steel as the material of their construction, the conditions of maritime warfare have been very radically changed. What might have been a reasonable rule as applied in the time of sailing ships might now, in the age of swift ironclads, be intolerably oppressive. In the cases of the *Santissima Trinidad*, *U. S.* v. *Quincy*, and the *Meteor*, the courts were dealing with small sailing vessels, which had been converted into privateers, the possession of which by one or the other belligerent made very little difference in the general result of the struggle; whereas, the possession of an ironclad ship might very well turn the scale one way or the other, as indeed it did in the war between Chile and Peru, in 1880–1881. This great power of inflicting injury upon one of the belligerents, it is fair to say, ought not to be permitted to neutral citizens; and the neutral nation is alone in a position to restrain them.
>
> In view of these facts, it is believed that the doctrine set up by the United States Neutrality Act and by the Federal Courts, that the "intent" of the owner or shipbuilder is the criterion by which his guilt or innocence is to be judged, is wholly inadequate; it would not for a moment stand the test of the rule of "due diligence," as applied by the Geneva Tribunal.

The rules of the Treaty of Washington were not generally accepted as a statement of existing law between states,[13] but it was admitted that they showed evidence of a usage which might eventually ripen into law, which would prohibit the construction and fitting out of vessels of war in neutral countries, and the growth of such a usage was approved by leading writers. Thus Hall, in the 4th Edition of his work, says:

> That the usage which is in course of growth extends the duties of a neutral state into new ground is plain; but it does not follow that the extension is either unhealthy or unnecessary. Though an armed ship does not differ in its nature from other articles merely contraband of war, it does differ from all in the degree in which it approaches to a completed means of attacking an enemy. The addition of a few trained men to its equipage, and of as much ammunition as can be carried in a small coasting vessel, adapts it for immediate use as part of an organized whole of which it is the most important element. The same cannot be said of any other article of contraband. It is neither to be expected nor wished that belligerent nations should be patient of

be exposed, from a failure to fulfil the obligations of neutrality on their part." *Ibid.*, p. 654.

[12] Snow, *Cases*, note on pp. 437–438. *Cf.* Scott, *Cases*, 720.

[13] For a collection of views of leading publicists on the rules, see Moore, Arbitrations, Vol. I, pp. 670–678.

the injury which would be inflicted upon them by the supply of armed vessels to their enemies as mere contraband of war.[14]

Since Hall wrote, the first rule of the Treaty of Washington has been incorporated almost literally in the Hague Convention of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War, the only notable modification being the substitution for "due diligence" of the phrase "to employ the means at its disposal." Article 8 of that convention reads:

> A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any 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 any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.[15]

This convention has been adhered to by the United States and has been signed and ratified by all the great Powers, except Great Britain and Italy, which have signed but not ratified it.

It will be observed that the question of intent as modified in the first rule of the Treaty of Washington has been carried into the Hague Convention, but the determination of this question, which is a matter of evidence, would not seem to be nearly so difficult now as it formerly was. "Under the new rule it is no longer a question of the intent of the person arming and equipping the vessel, but of the intent of those for whom the vessel is being so armed and equipped. In other words, the probable destination or use of the vessel is made the test as to whether it should be permitted to leave port, irrespective of the intent of the ship-builder or temporary owner. The old distinction between the *animus vendendi* and the *animus belligerandi* is thus done away with." [16] The radical and distinctive changes which have been made in the character and construction of warships in recent years should make the securing of evidence of intent a simple matter compared to what it was when the statute was drawn. At that time vessels of war were not easily distinguishable from merchant vessels, except for their armament, which might even be portable, and mere evidence of construction and build offered little indication as to the purpose for which the vessel was to be

[14] Page 639.

[15] Scott, The Hague Peace Conferences of 1899 and 1907, Vol. 2, p. 511.

[16] Fenwick, The Neutrality Laws of the United States, p. 119.

used. Now, however, warships constitute a distinct type and their build is easily distinguishable from vessels intended for commerce. In view of the changed conditions, Hall thinks that the doctrine should be founded upon the character of the vessel itself and not upon the question of intent. "Experts are perfectly able," he says, "to distinguish vessels built primarily for warlike use; there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral government from a duty which it can easily perform." [17]

Furthermore, owing to their enormous cost, it is hardly probable that a private individual or firm would undertake *bona fide*, upon his or its initiative, to construct a war vessel of any design and take the chance of selling it in the market, and thus bring the transaction within legitimate dealing in contraband. The business of building modern warships seems to be confined to the construction of ships under government contract and often as the result of competitive bidding. Such a contract from a belligerent country would seem to be conclusive evidence of an intent to construct the ship for hostile purposes. Oppenheim [18] thus states the proposition:

> If a subject of a neutral builds armed ships to order of a belligerent, he prepares the means of naval operations, since the ships on sailing outside the territorial waters of the neutral and taking in a crew and ammunition can at once commit hostilities. Thus, through carrying out the order of the belligerent, the neutral territory concerned has been made the base of naval operations. And as the duty of impartiality includes the obligation of the neutral 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.

The application of the foregoing remarks to submarines supplied under the circumstances referred to in the beginning of this comment remains to be considered. It will be observed that the American Neutrality Act, the rule of the Treaty of Washington, and the Hague Convention apply to *vessels*. It will also be noticed that the terms "vessel" and "ship" are used interchangeably.[19] There does not seem to be any room for doubt

[17] International Law, 4th ed., p. 640.

[18] International Law, 2d ed., Vol. 2, p. 405.

[19] See quotations from international law writers in this comment, the Declaration of London, and the official lists of contraband issued by the Governments. See also Swan *v.* United States, 19 Court of Claims, 51, 62, holding that within the meaning of the Prize Act of 1864 the terms "vessel" and "ship" are synonymous.

that a submarine completed and launched is a vessel within the meaning of the statute and conventions. In the official definition of the words used in the laws of the United States, it is provided that "the word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (R. S., Sec. 3), and Section 30 of the British Foreign Enlistment Act of 1870, which corresponds to the Neutrality Act of the United States, contains the following definition: "'Ship' shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft, or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water." [20] In the case of United States *v.* Steever,[21] it was held that a torpedo steam launch attached to a division of a naval squadron is a ship.

In the statutory and judicial definitions of the term "vessel" or "ship," the means of propulsion are considered immaterial, so that it would make no difference if the submarine leaves American jurisdiction under its own power or in tow.

It seems unnecessary to discuss the peculiar efficiency of submarines as engines of war. All of these vessels of a design which may be practicably operated are used solely as vessels of war, and their effectiveness for such use has been strikingly demonstrated within the last few months in the North Sea and adjacent waters.

Precedent and authority are lacking for determining whether a submarine or other small sea-going craft would be regarded as a vessel if it were carried in completed form as cargo on board a merchant ship. The Supreme Court of the United States has decided in the case of Tucker *v.* Alexandroff [22] that a ship does not become such in a legal sense until it is launched. "A ship is born when she is launched," said the court, "and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction." It is not believed, however, that this

[20] British and Foreign State Papers, Vol. 60, 278, 289.

[21] 113 U. S. 747.

[22] 183 U. S. 424, at 438.

decision could be appealed in order to justify an attempt to evade the neutral obligations of the United States by taking from its stocks a completed submarine, fit to take the water, and merely placing it upon another vessel instead of launching her within American jurisdiction in the element which it is ultimately intended to navigate. A complete and flagrant evasion of the statute might be accomplished in this way by launching the submarine beyond the three-mile limit from the deck of the merchant vessel upon which it is carried as cargo. The comprehensive definition of a vessel in the Revised Statutes of the United States, above quoted, which includes water craft not only used, but *capable of being used*, as a means of transportation on water, would seem to include for the purpose of the neutrality laws a vessel fit to take the water, although not actually launched. The British definition of a ship, also above quoted, which includes any craft made to move on or under water or both, would also seem to cover such a case.

Finally, as to the supplying of submarines in parts. Unlike the British Foreign Enlistment Act, which makes illegal the building,[23] agreement to build, equipment, or dispatching of a ship intended for use, or which there is reasonable ground to believe will be used in the prohibited service, the American neutrality statute, the rule of the Treaty of Washington, and the Hague Convention appear to apply only to the fitting out and arming of a vessel, and it is not seen how parts of a vessel can by any interpretation be regarded as a ship or vessel upon which the statute or conventions may operate. Thus, in a case arising in Oregon in 1884, the court, in construing a State law which required the transfer of a vessel to be in writing, defined a vessel as any structure made to float on the water, for the purpose of commerce or war, and held that the term did not apply to an incomplete portion thereof requiring the construction of other parts;[24] and in a criminal case in Massachusetts[25] it was held that a boat in an unfinished state and wholly unfit for the carriage of men or goods on water is not a vessel. As has been pointed out, the reason underlying the development of the special rule with respect to armed ships, which abridges the common law privileges of neutrals to engage in contraband, is that an armed vessel is a completed means of attacking an enemy or preying upon his commerce,

[23] This word is interpreted by the statute (Sec. 30) to include any act towards or incidental to the construction of a ship.

[24] Yarnberg *v.* Watson (1884), 4 Pac. 296.

[25] Commonwealth *v.* Francis, Thach. Crim. Cas. 240.

and the issuance of such an effective unit of naval warfare from neutral ports lays the neutral government open to the charge of allowing its territory to be made a base of naval operations. This reason obviously does not exist in the case of parts of a war vessel, which are incapable of use in hostile operations until assembled and given the character of a vessel. The award in the *Alabama* case and the decisions in United States *v.* Quincy (6 Peters, 445), which held that it is not necessary that the vessel should be armed or in condition to commit hostilities on leaving the United States to constitute a violation of the statute; the City of Mexico (28 Fed. Rep. 148), that it is not necessary that the vessel shall have been armed or manned before leaving the United States if the intention existed to arm and man her afterward; United States *v.* Laurada (85 Fed. Rep. 760), that it is not necessary that the furnishing, fitting out or arming should be completed within the limits of the United States; and the statement of Secretary Evarts in 1878 that a vessel constructed in a United States port for a hostile attack on a friendly sovereign will be arrested under our neutrality laws, even though she is not yet complete and the intention is to send her to a foreign port for completion,[26] all refer to the departure of a vessel, and, in view of what has been above stated as to the legal interpretation of that term, they would not seem to cover a vessel shipped in parts and incapable when leaving the United States of taking the sea, although the parts may be so constructed as to show that they are eventually intended for warlike purposes and notwithstanding any intention on the part of the builder that they should be assembled within another jurisdiction and made susceptible of hostile use.

[26] Moore, Digest, Vol. VII, pp. 896, 897, 905. See to the same effect the following statement of Dana in his notes to Wheaton's Elements of International Law (8th ed., 1866, p. 563): "No cases have arisen as to the combination of materials which, separated, cannot do acts of hostility, but, united, constitute a hostile instrumentality; for the intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for these acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise."