The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
SITUATION IV

AIRCRAFT IN NEUTRAL PORTS

States X and Y are at war. Other states are neutral. An aircraft carrier of State X enters a port of State Z with 10 aircraft on board.

A cruiser of State X has on board a disabled aircraft which it desires to transfer to the carrier in exchange for an aircraft in good condition, and to take from the aircraft carrier aircraft fuel and certain parts for repairing disabled aircraft.

May State Z legally decline to permit within its jurisdiction the transfer of the aircraft or the supply of aircraft fuel or parts?

SOLUTION

State Z may legally decline to permit within its jurisdiction the transfer of aircraft or of aircraft fuel or parts.

NOTES

Development of regulations.—The development of regulations relating to aerial warfare has naturally followed the development of instruments of aerial warfare. At different times it has been vigorously maintained that all aerial warfare should be prohibited as a method of placing a limitation on war. Some of the supporters of this argument have contended that an international agreement to confine warfare to land and sea contests and not to extend war to the air would limit armament and the range of hostilities, and that such agreement prior to the extensive preparation for aerial warfare would secure the status quo, avoiding competition in air armament. Some states, however, have been confident that the more economical and effective defense for their territory is by
aircraft, rather than other means. States have accordingly taken advantage of the progress in aviation for military purposes. The call for the peace conference at The Hague in 1899 provided in the first four suggested topics for limitations on aerial and other war.

Discharge of projectiles from balloons, Hague regulations.—The First Hague Conference, in 1899, made the following declaration.

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

This same prohibition was renewed at the Second Hague Conference, in 1907, except that the words "five years" were changed to "for a period extending to the close of the Third Peace Conference."

The essential proposition relating to principle was the prohibition of "the discharge of projectiles and explosives from balloons or by other new methods of similar nature."

Attitude toward declaration of 1899.—The declaration of 1899 prohibiting the discharge of projectiles or explosives from aircraft for a period of five years was ratified by most of the 26 States participating in The Hague Conference of 1899. Great Britain did not ratify this declaration before 1907. Turkey signed but did not ratify. It expired by limitation in 1904 and was not renewed, though the subject was revived at the conference of 1907.

Hague discussion, 1907.—Some of the discussion at The Hague has been considered in the Naval War College International Law Situations, 1912, pages 56-92. These discussions of 1912 were rather with reference to specific situations and not with reference to the general subject.

At The Hague conference of 1907 the Belgian delegate proposed the renewal of the declaration of 1899 to the effect that—
The contracting powers agree to prohibit, for a term of five years, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The Austro-Hungarian delegates, supporting the Belgian proposition, said:

Nous pensons que le résultat tactique que l'on peut obtenir à l'aide de ces engins n'est point suffisant pour justifier la perte de vies, le dommage matériel ainsi que les dépenses causés par leur emploi.

Il est vrai que ni les belligérants, ni les neutres, ne seront à même de défendre leur droit de souveraineté sur les zones atmosphériques qui leur appartiennent et leurs frontières aériennes, d'une manière aussi efficace que leurs populations et leurs biens.

Mais le nouveau moyen de guerre mentionné dans la Déclaration, n'est pas indispensable; et cette circonstance nous permet d'espérer avec certitude que l'esprit d'humanité et de paix, qui plane en pensée, dominante sur cette assemblée, dont elle inspire les décisions—esprit auquel nous avons même déjà sacrifié mainte exigence militaire—se manifestera aussi ici, par l'adoption pour une série d'années limitée, de la mesure, que préconise la proposition belge.

Nous ne désirons nullement entraver les progrès de la science, mais ne voudrions pas en encourager une application qui, sans offrir d'avantage tactique suffisant, augmenterait encore les cruautés de la guerre. (Deuxième Conférence Internationale de la Paix, Tome III, p. 151.)

The Russian delegate proposed to make a permanent agreement as to the prohibition of the discharge of projectiles from balloons against undefended places. The Italian delegation introduced an amendment to the same effect. This part of the regulation was embodied in article 25 of the Laws and Customs of War on Land, prohibiting the attack or bombardment by any means whatever of undefended places.

The Italian delegation also proposed to distinguish among aircraft, suggesting the following:

Il est interdit de lancer des projectiles et des explosifs du haut de ballons qui ne sont pas dirigéables et montés par un équipage militaire.
General de Robilant, in a somewhat long speech, supported the Italian propositions, saying among other things that:

Par la Déclaration de 1899 on interdisait pour un temps déterminé l’usage d’une arme nouvelle qu’on désignait vaguement, vu qu’il était question de ballons ou d’autres modes analogues nouveaux. Cette Déclaration évidemment ne pouvait avoir qu’un caractère provisoire, et représentait exactement l’incertitude qui régnait alors sur la dirigeabilité des ballons et sur la possibilité de l’obtenir.

Depuis lors la situation a changé, une grande puissance, dont l’industrie a toujours été à la tête de tous les progrès, a résolu le problème qui hantait depuis longtemps les hommes de science, et grâce aux moteurs puissants et légers que lui offrent les nouvelles applications de la mécanique et de la métallurgie, elle a trouvé moyen de construire un ballon qui évolue aussi aisément dans l’air qu’un navire sur la mer.

Les autres puissances la suivent de très près leurs ingénieurs s’acharnent dans un labeur ininterrompu à trouver des solutions peut-être meilleures que celles qui existent déjà, et il est probable qu’ils y parviendront. Le progrès n’a point de limites, et ce qui nous étonne et nous paraît extraordinaire aujourd’hui, nous semblera naturel et même banal demain.

Dans ces conditions, du moment où il n’a pas été possible d’interdire d’une façon absolue, quoique pour un temps limité, l’usage des ballons pour certains actes de guerre, mieux vaut le restreindre et le discipliner pour toujours.

Tout progrès scientifique a toujours trouvé son application à l’art militaire; dès qu’on a appris à diriger et à conduire des navires, on s’est empressé de les armer pour l’attaque et la défense; des wagons blindés et armés de canons ont été vus parcourant les chemins de fer dans certaines guerres récentes; demain on aura des automobiles cuirassés armés de canons à tir rapide, si la chose n’est pas déjà faite et il deviendra de plus en plus difficile, comme on l’a vu, d’interdire aux ballons d’être armés à leur tour et de se servir de leurs armes. (Ibid. p. 155.)

Of the 35 delegations voting, 21 votes were favorable, 8 were opposed, and 6 abstained from voting.

The principles of the Italian proposals were embodied in other conventions and the declaration of 1899 was reaffirmed, though the states have been slow to ratify it, but have devoted themselves to the perfecting of their
aircraft and training a military personnel to use them efficiently.

*General restrictions.*—The Hague Laws and Customs of War on Land contain in article 22 the statement that "The right of belligerents to adopt means of injuring the enemy is not unlimited." In 1899, the main argument against the use of aircraft was that their movements could not be controlled with sufficient certainty so that the probability of injury to the enemy would be wholly out of proportion to the suffering that might be caused. Needless suffering was so far as possible to be restricted.

*Attitude toward declaration of 1907.*—The attitude prior to the World War toward the declaration of 1907 prohibiting the discharge of projectiles and explosives from aircraft may be seen in the reluctance of states to ratify this declaration. Only 15 of the 44 states ratified. Of the European states Austria-Hungary and Great Britain, with some of the smaller states, ratified. Germany, France, Italy, Russia, and Spain were among the European states that did not ratify. The United States ratified the declaration. Japan did not ratify. This situation showed that the leading states and many of the smaller states were for the most part disinclined to sign a declaration limiting their right to the free use of aircraft within the laws of war.

*Other restrictions on use of aircraft.*—Beside the declaration prohibiting the discharge of projectiles and explosives from balloons, there are clauses in other Hague agreements which restrict aerial warfare. An amendment to article 25 of the Laws and Customs of War on Land was drawn with the express purpose of applying to aircraft, though it is doubtful whether it accomplished this object. It is as follows, the words in italics being introduced in 1907 as amending the clause of 1899:

The attack or bombardment by any means whatever of towns, villages, or buildings which are not defended is forbidden.
In the use of aircraft from ships it is also reasonable that the rules in regard to naval bombardment should, so far as possible, apply. The restriction in all cases prohibits attack on undefended and unfortified places. Presumably provision should be made for marking by signs visible from above hospitals and public edifices, as in case of naval bombardment.

The prohibition in regard to projectiles discharging asphyxiating or deleterious gases would apply for most states, though the United States did not ratify this declaration of 1899.

The same may be said of the declaration prohibiting expanding bullets.

Institute of International Law, 1911.—At Madrid in 1911, the Institute of International Law, after long discussion, voted upon the status of aircraft in time of peace and in time of war. The regulation voted for the time of war was,

La guerre aérienne est permise, mais à la condition de ne pas présenter pour les personnes ou les propriétés de la population pacifique de plus grands dangers que la guerre terrestre ou maritime. (24 Annuaire de l'Institut de Droit International, p. 346.)

The discussion at Madrid showed a strong sentiment in favor of absolute prohibition of aerial war over land and sea, while at the same time it recognized such a prohibition would be impossible owing to the progress in aerial navigation.

The British members were generally favorable to limitation, and Professor Holland advocated complete prohibition of aerial warfare. Professor Westlake's proposition prohibiting the use of aircraft in time of war except for observation purposes was supported by many members of the institute.

After the discussion had been carried on for a long time

M. Ed. Rolin déclare qu'il admet le principe de la "guerre aérienne," conformément à l'opinion défendue par M. le Rapporteur et entre autres par MM. Politis et Errera. Sans doute l'Institut doit rendre hommage aux considérations humanitaires élevées dont
s'inspirent MM. Westlake, Alb. Rolin et de Labra; mais l'Institut ne doit pas oublier qu'il est une assemblée de juristes; il doit donc examiner la question qui lui est soumise à un point de vue juridique. Or, le principe essentiel des règles de la guerre est que toute cruauté inutile est interdite. Si l'on veut proscire l'emploi des aéronefs comme moyen de guerre, il faut démontrer au préalable que les aéronefs sont des engins inutilement cruels; à défaut de cette démonstration, il faut admettre que la guerre aérienne est licite.

M. le Rapporteur s'associant aux observations de M. Ed. Rolin fait valoir que la guerre aérienne est infiniment moins aveugle que la guerre maritime à certains points de vue: or, l'Institut vient d'admettre l'emploi des mines sous-marines; s'il proscrit celui des aéronefs, on ne manquera pas de conséder cette décision comme illogique. (Ibid. p. 341.)

Several propositions were put to vote. The amendment of Professor Holland, "Tout acte d'hostilité, y compris les actes d'observation, d'exploration ou de communication de la part d'un belligérant, par le moyen d'aéronefs, sont interdits" (ibid. p. 343), was rejected by a vote of 17 to 5.

The proposition of Messrs. Westlake, Alberic Rolin, and Fiore, "Les actes de guerre, sauf ceux d'exploration, d'observation, de communication, sont interdits aux aéronefs" was rejected by a vote of 15 to 9.

Professor von Bar offered a somewhat detailed regulation. This was as follows:

**Article 1.** En général il est interdit de se servir des aérostats, ballons ou aéroplanes comme moyens de destruction ou de combat.

**Art. 2.** Toutefois:

(a) Les aérostats, ballons ou aéroplanes militaires ennemis, si l'on tire sur eux (par des canons placés à terre ou à bord d'un vaisseau) peuvent se défendre.

(b) Les combats en l'air sont permis:

(1) S'il y a combat naval et que les aérostats, ballons ou aéroplanes ne sont éloignés que de vingt kilomètres du lieu du combat.

(2) Dans les mers territoriales des belligérants dans une zone de blocus.

(3) Dans les sphères aériennes enveloppant les territoires des belligérants.
Professor von Bar's proposition was divided for the purpose of vote, and some parts were approved while other parts were rejected. When the proposition as a whole came before the institute, it was rejected by a vote of 13 to 10.

The regulation was finally approved by the institute to the effect that—

Aerial warfare is permitted, but on condition that it shall not involve for peaceful persons and property greater danger than land or maritime warfare.

There were 14 votes for and 7 votes against this regulation.

Attitude of the Interparliamentary Union.—The subject of aerial warfare was particularly brought to the attention of the Interparliamentary Union in 1912 through a proposition of M. Beernaert of Belgium, who had been a member of the Hague Conferences and was familiar with the course of discussion. He proposed that—

La XVIIe Conférence interparlementaire invite le Conseil à faire instituer une Commission de sept membres, chargée d'étudier les questions relatives à l'emploi de la navigation aérienne en temps de guerre au point de vue militaire, et notamment:

I. D'examiner:
   A) S'il y a lieu de provoquer l'interdiction conventionnelle de l'emploi des appareils de navigation aérienne connus ou à inventer encore;
   B) Si, dans tous les cas, semblable emploi ne devrait pas être exclusivement réservé aux États, la course aérienne devant être interdite au même titre que la course maritime;
   C) Si, dans l'hypothèse où l'emploi comme instrument de combat serait prohibé, il y aurait lieu, dans des buts d'utilité militaire, d'autoriser des opérations de vérification, d'investigation ou de contrôle; de déterminer dans ce cas les conséquences de semblable emploi pour les appareils y affectés, tant au point de vue de leur propre défense et d'hostilité éventuelle entre eux, que pour la protection des régions terrestres ou maritimes ainsi exposées;

II. D'étudier les conséquences budgétaires d'un emploi des appareils de navigation aérienne soit comme instruments de combat, soit comme moyens de reconnaissance. (Compte Rendu de la XVIIe Conférence, 1912, p. 16.)
In a report after reviewing the progress of regulation of aerial navigation and the restriction upon aerial warfare, M. Beernaert said:

Sans méconnaître le fondement de ces observations, quelques-uns estiment qu'une interdiction absolue n'aurait guère de chance d'être admise et qu'en renonçant à faire des ballons un engin de guerre, il conviendrait de tenir compte de précédents déjà séculaires et de continuer à en autoriser l'emploi en vue de fournir aux armées d'utiles renseignements sur les forces et les mouvements de leurs adversaires.

Tel fut l'avis exprimé à Madrid par MM. de Bar, Meurer, A. Rolin, Holland, Westlake, etc., et déjà M. L. Bourgeois avait défendu le même sentiment dans son discours d'ouverture de la session de Paris de l'Institut de droit international. Pascal Fiore y a adhéré.

Il faut reconnaître qu'une telle distinction, louable en elle-même, entraînerait certaines difficultés. Les ballons d'une armée se trouveraient presque aussitôt en présence de ballons de l'adversaire, et dès lors quel serait leur rôle? Interdirait-on aux uns et aux autres tout acte d'hostilité réciproque et serait-il défendu de tirer sur eux de terre, en leur attribuant ainsi une sorte d'immunité assez difficile à expliquer? Ou se bornerait-on à ne leur permettre qu'un tir horizontal et l'emploi de balles telles qu'avant de tomber sur le sol, elles devraient avoir perdu toute efficacité?

Cette dernière condition semblerait, dans tous les cas, déjà commandée par les conventions en vigueur au sujet des lois de la guerre. Il est, en effet, interdit d'occasionner aucun dommage aux non-belligérants, et les combattants doivent ménager absolument, en mer, les vaisseaux neutres, et à terre, une série d'établissements et d'institutions d'intérêt public général. Il fraudrait donc qu'au moins dans ces limites les aviateurs fussent maîtres de leur tir, ce qui, pensons-nous, n'est pas encore le cas.

Une autre question d'ordre plutôt subsidiaire mériterait encore de fixer l'attention de l'Union parlementaire.

S'il faut s'incliner devant les progrès de la science, même lorsqu'ils sont meurtriers, si la guerre des airs pouvait être considérée comme un mal inévitable, ne faudrait-il pas au moins que sous toutes leurs formes, avions et dirigeables, fussent l'objet d'un monopole de l'Etat?

Il y a longtemps que nous poursuivons l'interdiction de la course en mer et, sans doute, on serait d'autant plus d'accord pour la proclamer dans le domaine de l'air, que l'on n'aperçoit guère ni les profits qu'on en pourrait tirer, ni les conditions techniques dans lesquelles elle pourrait s'exercer.
Mais, à notre sens, cela ne suffirait pas. Nous estimons que de tels moyens de nuire, et à l’égard desquels la surveillance et la répression serait si difficiles, ne pourraient être laissés à la disposition de particuliers, si sévère que pût être la réglementation à leur imposer. (Ibid. p. 129.)

In the course of consideration of the report of M. Beer-naert much discussion was stirred up by the speech of Baron d’Estournelles de Constant, who was known as a strong friend of peace and a warm supporter of the development of aviation. The part of his speech to which special attention was directed was as follows:

Oui, il est odieux, il est révoltant de penser que la première action d’une admirable création comme celle de l’aviation permettant à l’homme de s’élève dans le ciel, serait de se servir de l’aéroplane pour tuer l’homme, pour verser le sang, pour commettre des meurtres. Et je suis d’accord avec vous. Ne croyez pas que je sois devenu à mon tour inhumain, pour penser que c’est une espèce de profanation de l’aviation que de la faire servir à la destruction humaine.

Nous sommes donc d’accord, c’est entendu. Mais jusqu’au jour où vous aurez appliqué une règle qui puisse s’étendre non pas seulement à l’aviation, mais à tous les autres moyens de destruction, où vous aurez organisé votre défense nationale dans tous les pays, de telle sorte que ce ne soit pas seulement l’aviation qui soit frappée, je maintiendrai mon opinion. Si vous voulez frapper comme création du génie humain l’aviation, si vous voulez frapper cette application que vous considérez comme funeste, je vous le demande, pourquoi est-ce que vous ne frappez pas aussi, pourquoi n’interdisez-vous pas également toutes les autres applications qui sont, après tout, aussi funestes, aussi détestables? Pourquoi est-ce que vous n’interdisez pas les explosifs, les applications de la science chimique? Pourquoi est-ce que vous n’interdisez pas les torpilles, les mines, les torpilliers, les sous-marins, les submersibles? Pourquoi est-ce que vous n’interdisez pas même les automobiles car il y a chez nous, comme dans tous les grands États militaires, il y en a en Allemagne et dans d’autres États, les automobiles militaires cuirassés; il y a tout ce qu’on peut imaginer de plus néfaste dans cet ordre d’idées? Pourquoi donc ne les interdisez-vous pas aussi? Pourquoi n’interdisez-vous pas l’innocente bicyclette qui peut servir, après tout, au meurtre? Pourquoi n’interdisez-vous pas la télégraphie sans fil qui peut, bien plus criminellement encore qu’un aéroplane, par l’ordre d’un homme, par l’ordre d’un chef qui peut se tromper, qui
The position of M. Beernaert was maintained by a very large vote, and the position of M. d'Estournelles de Constant received comparatively few votes.

A vote was also passed looking to the renewal of the convention prohibiting the discharge of projectiles from aircraft.

Development of aircraft.—While balloons were used in the eighteenth century, the development of aerial navigation has been particularly rapid since 1907. Not all states have developed along the same lines, though of course the progress in one state has not been overlooked by others. Germany paid special attention to the perfecting of balloons (dirigibles) which carry heavy burden and sustain a long flight. France emphasized flight by heavier-than-air machines.

As aircraft have developed, new uses have been devised. They have been found particularly useful in some states for locating mines and submarines. With the introduction of radio, the use of aircraft for observation purposes has been much extended. The increasing range of flight and speed has made it possible to report the movements of troops on land and of ships at sea even when at a great distance.

The actual firing upon ships and upon troops has become fairly common. Flights to bridges, depots of supplies, remote towns, etc., have shown the possibilities of the use of aircraft.

It is now clearly established, in spite of earlier opposition, that those using aircraft for the purpose of making observations are not to be treated as spies, but if captured
can only be treated as prisoners of war. This position is the proper one, as there is no deceit involved in this service, and the penalty in case of spying is based on the clandestine nature of the service.

The use of aircraft to disperse troops, as reported in the Turco-Italian War in 1911, was very successful. Upon troops at that time unaccustomed to such instruments of war the effect was terrifying before any projectiles were discharged. After explosives were dropped, many sought flight at once on the reappearance of aircraft.

Even States which had signed the declaration prohibiting till the close of the proposed 1915 Third Hague Conference the discharge of projectiles from aircraft were busy perfecting aircraft, usually under the supervision of military authorities. The World War, which demonstrated the great utility of aircraft, made prohibition improbable. On the other hand, since 1918 great progress has been made in the development of this arm of the military service in many countries.

**Internment in World War.**—During the World War for the first time the question of aircraft in relation to neutral jurisdiction became one of great practical importance. While practice was not, at first, in every instance uniform, gradually it came to be recognized that belligerent aircraft had no right to enter neutral jurisdiction. Some of the neutral states for a time questioned the necessity of denying entry to aircraft, and considered permitting entry on terms analogous to those applied to maritime vessels of war. Switzerland and the Netherlands, from their geographical position as neutral islands surrounded by belligerents, had to face the problem in more varied manifestations. Both states maintained the right to use necessary force to prevent entrance of belligerent aircraft or even to intern aircraft entering under *force majeure.* Disabled belligerent aircraft, aircraft trying to escape from the enemy, aircraft lost in fog or
storm, were with their personnel forced to land and interned by neutral states. Early in the war there was some uncertainty in regard to hydroplanes in Norway, and later Denmark permitted some German deserters to remain after entering Danish jurisdiction in a stolen aircraft. The Netherlands interned American aircraft alighting within Dutch jurisdiction after a battle over the high sea with Germans. The Swiss authorities similarly interned American fliers when returning from an observation flight and forced by motor trouble to land within Swiss jurisdiction. There were many cases in which the crews were interned when the aircraft were destroyed either intentionally or by accident. When aircraft personnel was rescued on the high seas and brought within neutral jurisdiction, the practice was usually to release them.

Italian decree, 1914.—While Italy was still neutral a royal decree was issued September 3, 1914:

ART. 1. It is forbidden for any apparatus or means of aerial locomotion, such as dirigibles, aeroplanes, hydroplanes, balloons, flying kites, or captive balloons, etc., to fly or ascend over any points of territory of the state or colonies or of the territorial seas, except for those established by military authorities and for other aeronautics that are authorized from time to time by the ministers of war and navy. No permission will be granted to any foreigners.

ART. 2. The surveillance of the territory of the state and territorial seas is entrusted to military and naval authorities, to the royal revenue guards, to the coast guards, to the police, and to the political and municipal authorities. Appropriate directions and instructions will be issued from the proper departments. The surveillance over territories of the colonies and over the seas is entrusted to military and naval authorities designated by the governors.

ART. 3. No unauthorized device or means of aerial locomotion, for any reasons whatever, shall make flights over territories but shall descend immediately. Whenever they disregard signals, either over land or sea, to descend, any military officials or Government agents which have been designated by the Government, are authorized to fire upon them, or use any other means found necessary to enforce the above orders.
Art. 4. The military apparatus and those privately authorized to fly shall carry some distinctive mark, which shall be easily visible from the earth, such marks to be established by proper regulations.

Art. 5. The signals to be made to those aerial machines that do not carry such distinctive marks will be as follows: i.e., by waving flags—either white or equally visible color—or by the firing of a gun or by the firing of rockets. Such signals will be repeated at frequent intervals.

Commission of jurists, 1923.—Under the treaty of the Conference on the Limitation of Armament providing for the commission of jurists to consider the rules of warfare, the powers later agreed to limit the work of the commission which assembled December 11, 1922, to rules relating to aerial warfare and the use of radio in time of war. The commission finished its work February 19, 1923, though it said if the “rules are approved and brought into force, it will be found expedient to make provision for their reexamination after a relatively brief term of years to see whether any revision is necessary.” (1924 N. W. C. Int. Law Documents, p. 97.)

In the report of the commission of jurists it was said in regard to belligerent duties:

To avoid any suggestion that it is on the neutral government alone that the obligation is incumbent to secure respect for its neutrality, article 39 provides that belligerent aircraft are under obligation to respect the rights of neutral powers and to abstain from acts within neutral jurisdiction which it is the neutral’s duty to prevent.

It will be noticed that the article is not limited to military aircraft; in fact, the second phrase will apply only to belligerent aircraft of other categories, as it is they alone which may remain at liberty within neutral jurisdiction. All aircraft, however, including military, are bound to respect the rights of neutral powers.

ARTICLE 39

Belligerent aircraft are bound to respect the rights of neutral powers and to abstain within the jurisdiction of a neutral State from the commission of any act which it is the duty of that State to prevent.

The principle that belligerent military aircraft should not be allowed to enter or circulate in neutral jurisdiction met with
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ready acceptance. It is in conformity with the rule adopted by the European States during the recent war.

The immunities and privileges which article 17 confers on flying ambulances will enable the neutral State to admit them to its jurisdiction, if it sees fit.

ARTICLE 40

Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State. (Ibid. p. 131.)

It will be noticed that article 39 applies to "belligerent aircraft" while article 40 applies to "belligerent military aircraft" only. Article 39 includes all aircraft entitled to fly the belligerent's flag. Article 40 includes "belligerent military aircraft" only, and does not cover flying ambulances, other public aircraft such as those engaged in the postal or police service, or private aircraft.

Spaight says of recognizing in time of war rules which have prevailed in time of peace,

In the first place, rules which have been agreed after careful consideration for times of peace ought also to be applicable to times of war unless, and except in so far as, they can be shown to be rendered unsuitable to the changed conditions which war brings about. In the second place, many signatory states are fairly certain to remain entirely outside the struggle in the event of a war, however great, and as between these states the convention will remain in force. It would obviously be inconvenient if the rules governing classification and marks applicable as between these nonbelligerent states were entirely inconsistent with those applicable as between them and the states to whom they stand in the relation of neutrals to belligerents. For these reasons the jurists at The Hague in 1923 followed so far as possible in their rules for the classification of aircraft those already laid down in the convention of 1919. (Air Power and War Rights, p. 92.)

Switzerland and other States found it necessary during the World War to prohibit the entry of all aircraft within its jurisdiction. The possibility of maintaining neutrality in any other manner is doubtful when the nature of aircraft is considered. A night flight over a neutral territory makes it difficult to determine anything definite in regard to the aircraft, and even under favorable condi-
tions aerial control is not easy. If the neutral State is to be secure in the observance of its obligations, the safe procedure will probably be to prohibit the entrance of all aircraft, to require landing at designated places, or otherwise to assure itself of the character of each aircraft.

There are the further problems arising in consequence of easy conversion of aircraft from private to public military service, or vice versa, which may give rise to complications. Certain recent proposals for regulation of aerial navigation have not given these problems consideration.

_Aircraft on board vessels of war._—Military aircraft on board vessels of war under most of the recent codes may be permitted to enter a foreign jurisdiction in time of peace or in time of war. Usually military aircraft are not permitted to fly freely over foreign territory, even in time of peace, and in time of war risks might be much greater. It has been maintained that the interpretation of the words "on board" should be that the entire support of the aircraft should be the physical structure of the vessel of war.

There has been some difference of opinion as to whether an aircraft carrier should be classed as a vessel of war. The treaty limiting naval armament of the Washington Conference, 1921–22, stated, "An aircraft carrier is defined as a vessel of war with a displacement in excess of 10,000 tons (10,160 metric tons) standard displacement, designed for the specific and exclusive purpose of carrying aircraft." The principal naval powers accept the above definition, so that it may be said that at present an aircraft carrier is a vessel of war.

_Aircraft on board a vessel of war._—Aircraft on board a vessel of war would under present conditions be regarded as a part of the fighting equipment of the vessel. As a torpedo might be a part of the equipment for sending a projectile through water, so aircraft might be similarly regarded for the air. Either might properly be classed as a part of the equipment of
the vessel for war. An aircraft carrier might be wholly or almost entirely equipped with aircraft, while a vessel of war of another type might have torpedoes, heavy guns, aircraft, etc. It might be presumed by a neutral that the torpedo, projectile, or aircraft would be separated from the vessel of war only for belligerent purposes, and that when separated from the vessel of war, the responsibility of the neutral in regard to them would be distinct from that for the vessel of war as a unit with its equipment on board.

Report of Commission of Jurists, 1923.—The status of aircraft on vessels of war was considered by the commission of jurists in 1922–23, and their report makes certain explanations in proposing article 41:

The customary rules of international law authorize the admission of belligerent warships to neutral ports and waters. There is no obligation upon neutral states to admit warships belonging to belligerent states, but it is not in general refused. The admission of belligerent military aircraft, however, is prohibited by article 40, and account must therefore be taken of the fact that it has now become the practice for warships to have a certain number of aircraft assigned to them and that these aircraft usually rest on board the warship. While they remain on board the warship they form part of it, and should be regarded as such from the point of view of the regulations issued by the neutral states. They will therefore be allowed to enter the neutral jurisdiction on the same footing as the warship on board which they rest, but they must remain on board the warship and must not commit any act which the warship is not allowed to commit.

Art. 41

Aircraft on board vessels of war, including aircraft carriers, shall be regarded as part of such vessels. (1924 N. W. C. Int. Law Doc. p. 132.)

Conclusion of the report of the commission.—The report of the commission of jurists, 1923, in no way prevents the purchase of contraband as a commercial transaction, and in this category would be aircraft fuel and aircraft parts. The supply of aircraft fuel or parts to a belligerent aircraft on a vessel in a neutral port would,
however, not be such a transaction as is provided for in article 45, the comment upon which is as follows:

No obligation rests on a neutral state to prevent the purchase by a belligerent government of articles of contraband from persons within the neutral jurisdiction. The purchase of contraband under such conditions constitutes a commercial transaction which the neutral government is under no obligation to prevent, although the opposing belligerent may take such means as international law authorises to intercept the delivery of the articles to his enemy. This principle has already been embodied in article 7 of the convention concerning the rights and duties of neutral powers in land war (Convention V of 1907) and in article 7 of the corresponding convention for maritime war (Convention XIII of 1907). To apply it to aerial warfare, the following article has been adopted:

**ARTICLE 45**

Subject to the provisions of article 46, a neutral power is not bound to prevent the export or transit on behalf of a belligerent of aircraft, parts of aircraft, or material, supplies, or munitions for aircraft. (1924 N. W. C. Int. Law Doc. p. 134.)

The supply of war material within a neutral port does not leave the opposing belligerent any means to intercept. Therefore the obligation rests upon the neutral state to use the means at its disposal to prevent such supply. Similarly, the transfer of aircraft from one belligerent vessel to another in a neutral port would not be for any other than military reasons, and should be prevented.

**Neutral jurisdiction.**—The laws of war on land in general provide that belligerent troops may not enter neutral territory, and that if belligerent troops enter upon neutral territory they are to be interned. Vessels of war are, however, usually permitted innocent passage through neutral waters and entrance to neutral ports for a sojourn of not to exceed 24 hours. Belligerent vessels in neutral ports are, of course, secure from attack, even to a greater degree than in their own ports, and are under obligation not to abuse the hospitality for warlike purposes.

The general discussion of the relations of neutrals, particularly in conflicts involving maritime jurisdiction,
was set forth in the report of the Commission on the Rights and Duties of Neutral Powers in Naval War at The Hague Peace Conference in 1907. As translated this report in part reads:

Land warfare regularly pursues its course on the territory of the belligerents. In exceptional circumstances alone is there any direct contact between the armed forces of a belligerent and the authorities of neutral countries; when such contact does take place, as when troops flee into neutral territory, the situation is relatively simple; customary or written positive law applies in a well-defined manner. The case is otherwise in naval war. The war vessels of the belligerents can not always remain in the theatre of hostilities; they need to enter harbours, and they do not always find harbours of their own countries nearby. Here geographical situation exerts a powerful influence upon war, since the ships of the belligerents will not need to resort to neutral ports to the same extent.

Does it result from this that they have a right to unrestricted asylum there and may neutrals grant it to them? This is contested. The distinction just indicated is the natural consequence of what takes place in time of peace. Armed forces of one country never enter the territory of another state during peace. So when war breaks out there is no change, and they must continue to respect neutral territory as before. It is different with naval forces, which are in general permitted to frequent the ports of other states in time of peace. Should neutral states when war breaks out brusquely interrupt this practice of times of peace? Can they act at their pleasure, or does neutrality restrain their liberty of action? While it is understood that when belligerent troops penetrate neutral territory they are to be disarmed, because they are doing something which would not be tolerated in time of peace, the situation is different for the belligerent warship that arrives in a port which it has customarily been able to enter in time of peace and from which it might freely depart.

What reception, then, is this ship to meet with? What shall it be allowed to do? The problem for the neutral state is to reconcile its right to give asylum to foreign ships with its duty of abstaining from all participation in hostilities. This reconciliation, which is for the neutral to make in the full exercise of its sovereignty, is not always easy, as is proved by the diversity of rules and of practice. In some countries the treatment to be accorded belligerent warships in neutral ports is set forth in permanent legislation, e. g., the Italian code on the merchant marine; in others rules are promulgated for the case of each particular war by procla-
tions of neutrality. And not only do the rules promulgated by the several countries differ, but even the rules prescribed by a single country at different times are not identical; moreover, sometimes rules are modified during the course of a war.

The essential point is that everybody should know what to expect, so that there will be no surprise. The neutral states urgently demand such precise rules as will, if observed, shelter them from accusations on the part of either belligerent. They decline obligations that would often be disproportionate to their means and their resources or the discharge of which would require on their part measures that are veritably inquisitorial.

The starting point of the regulations ought to be the sovereignty of the neutral state, which can not be affected by the mere fact that a war exists in which it does not intend to participate. Its sovereignty should be respected by the belligerents, who can not implicate it in the war or molest it with acts of hostility. At the same time neutrals can not exercise their liberty as in times of peace; they ought not to ignore the existence of war. By no act or omission on their part can they legally take a part in the operations of war; and they must moreover be impartial. (Reports of the Hague Peace Conferences, Carnegie Endowment, p. 839.)

XIII Hague Convention, 1907.—Article 1 of XIII Hague Convention concerning the rights and duties of neutral powers in naval war provides:

Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a nonfulfillment of their neutrality.

In commenting on the principle enunciated in article 1, the commission showed that it was not a principle arising in consequence of the existence of war but "inherent in the very existence of states," and, further, the commission said:

The principle is applicable alike to land warfare and to naval warfare, and we are not surprised that the regulations elaborated by the second commission on the subject of the rights and duties of neutral states on land begin with the provision: "The territory of neutral states is inviolable."

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 imposed upon a belligerent to refrain from certain acts in the waters of a neutral state; it is easy for it and in all cases possible to fulfill this obligation whether harbours or territorial waters are concerned. On the other hand, the neutral state can not 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 fulfill such an obligation. It can not know all that is happening in its waters and it can not be in readiness to prevent it. The duty exists only to the degree that it can be known and discharged. This observation finds application in a certain number of cases.

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 can not 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. (Ibid. p. 840.)

This convention also makes other provisions in regard to the belligerent obligations, as in article 18:

Belligerent ships of war can not 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.

Of this article 18 the commission in its report said:

According to the second rule of Washington a neutral Government is bound 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 the recruitment of men.

All were agreed that this rule should be retained, and several proposals include it to a greater or less degree. The only discussion was on the point whether it was necessary to mention territorial waters as well as ports and roadsteads.

The affirmative was adopted by 8 votes (United States, Brazil, Spain, France, Great Britain, Italy, Japan, Turkey); Germany, Denmark, Norway, Netherlands, Russia, and Sweden did not vote.
It has been said that a practice forbidden in ports and roadsteads could not be permitted in territorial waters. This is particularly true because the point of view taken is that of what belligerents may not do. The provision is thus justified more easily than that of the Washington rule which speaks of the obligation of the neutral government. (Ibid. p. 858.)

Transfer in neutral jurisdiction.—An aircraft on board a vessel of war or aircraft carrier is regarded as a part of such vessel as long as it remains on board, in the same manner as a gun would be so regarded. When it is separated from the vessel of war upon which it enters the neutral port it is no longer a part of that vessel. The exchange would not be made except to render the cruiser more efficient as a fighting vessel. If the transfer were to be allowed in the neutral port it could be with greater safety than on the high sea or even in a national port of the belligerent. If such transfers were to be allowed, a neutral port might become the rendezvous for aircraft carriers and cruisers for exchange of disabled and able aircraft, which in effect would be a base of military equipment. The report of the commission of jurists, 1923, provides, in referring to what was formerly known as the rule of "due diligence" mention in article 46:

An exception to the principle that a neutral state is under no obligation to prevent the export of arms and war material, is found in the accepted rule of international law that neutral territory must not be utilised as a base of operations by a belligerent government, and that the neutral state must therefore prevent the fitting out or departure from its jurisdiction of any hostile expedition intended to operate on behalf of one belligerent against the other. Such an expedition might consist of a single aeroplane, if manned and equipped in a manner which would enable it to take part in hostilities, or carrying on accompanied by the necessary elements of such equipment. Consequently, its departure under circumstances which would constitute the despatch of a hostile expedition, must be prevented by the neutral government. (1924 N. W. C. Int. Law Doc. p. 134.)

Unseaworthy vessels of war.—Unseaworthy vessels of war may usually be repaired in a neutral port to make them again seaworthy. Even the boats of a vessel of
war have been allowed necessary repairs. During the World War neutrals prescribed rules in regard to the sojourn of vessels of war for repairs. Brazil allowed vessels of war to remain longer than 24 hours “if the repairs necessary to render the ship seaworthy can not be made within that time,” but in article 13 it was further provided:

The belligerent warships are allowed to repair their damages in the ports and harbors of Brazil only to the extent of rendering them seaworthy, without in any wise augmenting their military power. The Brazilian naval authorities will ascertain the nature and extent of the proper repairs, which shall be made as promptly as possible. (1916 N. W. C. Int. Law Topics, p. 11.)

Rule 13 of the neutrality proclamation of the United States relating to the Panama Canal Zone, November 13, 1914, stated:

The repair facilities and docks belonging to the United States and administered by the canal authorities shall not be used by a vessel of war of a belligerent, or vessels falling under rule 2, except when necessary in case of actual distress, and then only upon the order of the canal authorities and only to the degree necessary to render the vessel seaworthy. Any work authorized shall be done with the least possible delay. (Ibid. p. 99.)

The ship’s boats are necessary for transporting the personnel to and from the vessel of war, for exercising the right of visit, and for other purposes not involving war-like action, and repair to such craft has been permitted in neutral ports as rendering the vessel of war seaworthy and not adding to its fighting strength.

Washington Conference, 1921-22.—In the report of the subcommittee on aircraft which was submitted to the committee on limitation of armament, January 7, 1922, it was said in regard to the question of the use of military aircraft:

It is necessary in the interests of humanity to lessen the chances of international friction, that the rules which should govern the use of aircraft in war should be codified and be made the subject of international agreement.
40. The matter has been considered by this committee in connection with a draft code of "Rules for aircraft in war" submitted for remarks by the subcommittee on the laws of war. The subject appears to the committee to be one of extreme importance and one which raises far-reaching problems, legal, political, commercial, and military; it requires therefore exhaustive discussion by a single committee in which experts on all these issues are assembled.

The representatives of the United States and Japan on this committee are prepared to discuss the rules submitted from a technical point of view as provided for in the agenda under the paragraph on limitation of new types of military arms, but the representatives of Great Britain, France, and Italy are not so prepared. They state that the time between receipt of the agenda of the conference and their date of sailing has not permitted that exhaustive discussion of the subject which would enable them to advance a national viewpoint on a matter which affects so many and varied interests. In some cases the national policy has not yet been determined.

41. This committee recommends therefore that the question of the rules for aircraft in war be not considered at a conference in which all the members are not prepared to discuss so large a subject, but that the matter be postponed to a further conference which it is recommended be assembled for the purpose at a date and place to be agreed upon through diplomatic channels. (Conference on the Limitation of Armament, p. 774.)

The final conclusion of the subcommittee was:

Number and character.—The committee is of the opinion that it is not practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military, excepting in the single case of lighter-than-air craft.

Use.—The committee is of the opinion that the use of aircraft in war should be governed by the rules of warfare as adapted to aircraft by a further conference which should be held at a later date. (Ibid. p. 780.)

A resolution was adopted by the conference, February 4, 1922, establishing a commission of jurists to consider amendment of the laws of war. It provided:

The United States of America, the British Empire, France, Italy, and Japan have agreed:

I. That a commission composed of not more than two members representing each of the above-mentioned powers shall be constituted to consider the following questions:
(a) Do existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since The Hague Conference of 1907, of new agencies of warfare?

(b) If not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the law of nations?

II. That notices of appointment of the members of the commission shall, within three months after the adjournment of the present conference, be transmitted to the Government of the United States of America which after consultation with the powers concerned will fix the day and place for the meeting of the commission.

III. That the commission shall be at liberty to request assistance and advice from experts in international law and in land, naval, and aerial warfare.

IV. That the commission shall report its conclusions to each of the powers represented in its membership.

Those powers shall thereupon confer as to the acceptance of the report and the course to be followed to secure the consideration of its recommendations by the other civilized powers. (Ibid. p. 1640.)

It was also resolved by the conference:

That it is not the intention of the powers agreeing to the appointment of a commission to consider and report upon the rules of international law respecting new agencies of warfare that the commission shall review or report upon the rules or declarations relating to submarines or to the use of noxious gases and chemicals already adopted by the powers in this conference.

This last resolution left as the main problem for the commission of jurists that of aerial warfare, even though the treaty relating to the use of submarines and noxious gases was not ratified by all the powers.

Status of rules as to aircraft in peace.—The rules for the use of aircraft in time of peace have gradually developed with the progress of aviation. The convention for the regulation of aerial navigation, signed at Paris October 13, 1919, stated generally accepted principles for the time of peace, and by article 38 provided: "In case of war the provisions of the present convention shall not affect the freedom of action of the contracting states, either as belligerents or as neutrals.” The first article
declared, however, that "the high contracting parties recognize that every power has complete and exclusive sovereignty in the air space above its territory." This being true in the time of peace would be unquestioned in the time of war.

World War practice.—During the World War states exercised the right to exclude aircraft altogether.

Switzerland made its position as a neutral clear in the ordinance of August 4, 1914:

17. As to aviation, attention will be given to what follows:
   (a) Balloons and aircraft not belonging to the Swiss Army can not rise and navigate in the aerial space situated above our territory unless the persons ascending in the apparatus are furnished with a special authorization, delivered in the territory occupied by the army, by the commander of the army; in the rest of the country, by the Federal military department.
   (b) The passage of all balloons and aircraft coming from abroad into our aerial space is forbidden. It will be opposed if necessary by all available means and these aircraft will be controlled whenever that appears advantageous.
   (c) In case of the landing of foreign balloons or aircraft, their passengers will be conducted to the nearest superior military commander who will act according to his instructions. The apparatus and the articles which it contains ought, in any case, to be seized by the military authorities or the police. The Federal military department or the commander of the army will decide what ought to be done with the personnel and matériel of a balloon or aircraft coming into our territory through force majeure, and when there appears to be no reprehensible intention or negligence. (1916 N. W. C. Int. Law Topics, p. 73.)

The proclamation of the United States relating to the neutrality of the Panama Canal Zone, November 13, 1914, stated:

Rule 15. Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction. (Ibid. p. 99.)

Aircraft on vessels of war.—It has been maintained that aircraft are analogous to the boats of a vessel of war, and may be used in transporting the personnel of the
vessel of war to and from shore in the same manner that the ship's boats are used. This might be true in some cases if conditions were favorable, and sometimes also it might be possible to use aircraft from the deck of a vessel to fly to the neighborhood of a merchant vessel at sea. At present, however, such is not the purpose for which space is given up to aircraft on board a vessel of war, and such is not the reason for the careful training of aircraft personnel. There would be no sound military argument for carrying aircraft on vessels of war merely to take the place if conditions were favorable of the ship's boats.

_Fuel and supplies._—It has long been admitted and is embodied in many conventions and proclamations that fuel and supplies may be afforded in a neutral port, but not more often than once in three months. XIII Hague Convention, rights and duties of neutral powers in maritime war, provided:

Art. 19. Belligerent ships of war can not 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.

Art. 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.

The United States in 1914 issued proclamations of neutrality containing the following provisions in regard to supplies and fuel:

No ship of war or privateer of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the sub-
sistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the government to which she belongs. (1916 N. W. C. Int. Law Topics, p. 86.)

Fighting strength.—It had been well understood that repairs involving increase of fighting strength were not to be made in neutral ports. Before the World War, regulations and proclamations had made this evident. In the Danish royal order of December 20, 1912, concerning the neutrality of Denmark in case of war between foreign powers, it was stated, in article 5, a:

All repair relating to the fighting capacity of the vessel is prohibited. The authorities concerned indicate which repairs to be accomplished and when completed the vessel leaves as soon as possible.

CONCLUSION

While the rules in regard to the treatment of aircraft and vessels bearing aircraft have not been fully agreed upon, it may be presumed that the general principles embodied in rules for the conduct of warfare will not be greatly modified. The application of accepted rules will necessarily be adapted to the changing methods and means of warfare. Neutrals will observe these rules when clearly set forth, and in absence of clear rules will probably apply for regulation of conduct of aircraft, parallel and analogous rules to those for the regulation of other means of transportation and observation. The use of a neutral port for the purpose of increasing the fighting strength of a vessel has been in general prohibited. The
transfer of aircraft in a neutral port from one vessel of war of X to another vessel of war of State X may be presumed to be to increase the fighting capacity of one of the vessels, and the same may be presumed in the transfer of aircraft fuel and parts.

SOLUTION

State Z may legally decline to permit within its jurisdiction the transfer of aircraft or of aircraft fuel or parts.