COMMISSION OF JURISTS TO CONSIDER AND REPORT UPON THE
REVISION OF THE RULES OF WARFARE—GENERAL REPORT

The Conference on the Limitation of Armament at Washington adopted at its sixth Plenary Session on the 4th February, 1922, a resolution for the appointment of a Commission representing the United States of America, the British Empire, France, Italy and Japan to consider the following questions:—

(a) Do existing rules of international law adequately cover new methods of attack or defence 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?

The Commission was to report its conclusions to each of the Powers represented in its membership.

The Resolution also provided that those Powers should 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 civilised Powers.

By a second resolution adopted at the same session it was agreed to exclude from the jurisdiction of the Commission the rules or declarations relating to submarines and to the use of noxious gases and chemicals already adopted by the Powers in the said Conference.

21 The St. Petersburg International Telegraph Convention of 1875, to which the United States never became a party, forms the basis of much subsequent negotiation on telegraph communication. A preliminary conference on wireless telegraph was held in 1903, and an international convention was drawn up in 1906. The Radiotelegraph Convention of 1912, ratified by the United States, elaborated earlier conventions. While this convention was negotiated between “The United States of America and the Possessions of the United States of America,” the ratification by the United States included the possessions, “Alaska, Hawaii, and other Possessions in Polynesia, the Philippine Islands, Porto Rico, and the American Possessions in the Antilles, the Panama Canal Zone.”

The World War emphasized the need for further regulations, as by Article 21 of the Convention of 1912 naval and military installations were not covered. Many national regulations were published during the hostilities, and various degrees of control over radio were exercised by neutrals and belligerents.

The Conference on the Limitation of Armament by resolution voted in 1922 for the appointment of a commission of jurists who should consider new agencies of warfare, and radio was named as one of these. In earlier conferences, the terms “wireless telegraphy,” “radio telegraphy,” and others had been used, but the term “radio” was adopted by the commission as the comprehensive term for radio telegraphy, telephony, and goniometry.
With the unanimous concurrence of the Powers mentioned in the first of the above resolutions an invitation to participate in the work of the Commission was extended to and accepted by the Netherlands Government. It was also agreed that the programme of the Commission should be limited to the preparation of rules relating to aerial warfare, and to rules relating to the use of radio in time of war.

The United States Government proposed that the Commission should meet on the 11th December, 1922, at The Hague, and the representatives of the six Powers mentioned above assembled on that date in the Palace of Peace. At the second meeting of the Commission the Honourable John Bassett Moore, First Delegate of the United States, was elected President of the Commission.

The Commission has prepared a set of rules for the control of radio in time of war, which are contained in Part I of this Report, and a set of rules for aerial warfare, which are contained in Part II of this Report.

The Commission desires to add that it believes that if these sets of rules are approved and brought into force, it will be found expedient to make provision for their re-examination after a relatively brief term of years to see whether any revision is necessary.

PART I. RULES FOR THE CONTROL OF RADIO IN TIME OF WAR

The regulation of the use of radio in time of war is not a new question. Several international conventions already contain provisions on the subject, but the ever increasing development of this means of communication has rendered it necessary that the whole matter should be reconsidered, with the object of completing and co-ordinating existing texts. This is the more important in view of the fact that several of the existing international conventions have not been ratified by all the Powers.

The articles of the existing conventions which deal directly or indirectly with radio-telegraphy in time of war are as follows:

The Land War Neutrality Convention (No. V of 1907) prohibits in article 3 the erecting of radio stations by belligerents on neutral territory and also the use by belligerents of any radio station established on neutral territory before the war for purely military purposes and not previously opened for the service of public messages. Article 5 obliges the neutral Power not to allow any such proceeding by a belligerent.

Under article 8 a neutral Power is not bound to forbid or restrict the employment on behalf of belligerents of radio stations belonging to it or to companies or private individuals.
Under article 9 the neutral Power must apply to the belligerents impartially the measures taken by it under article 8 and must enforce them on private owners of radio stations.

Article 8 of the Convention for the Adaptation of the Geneva Convention to Maritime Warfare (No. X of 1907) provides that the presence of a radio installation on board a hospital ship does not of itself justify the withdrawal of the protection to which a hospital ship is entitled so long as she does not commit acts harmful to the enemy.

Under the Convention concerning Neutral Rights and Duties in Maritime Warfare (No. XIII of 1907) belligerents are forbidden, as part of the general prohibition of the use of neutral ports and waters as a base of naval operations, to erect radio stations therein, and under article 25 a neutral Power is bound to exercise such supervision as the means at its disposal permit to prevent any violation of this provision.

The unratified Declaration of London of 1909, which was signed by the Powers represented in the Naval Conference as embodying rules which corresponded in substance with the generally recognised principles of international law, specified in articles 45 and 46 certain acts in which the use of radio-telegraphy might play an important part as acts of unneutral service. Under article 45 a neutral vessel was to be liable to condemnation if she was on a voyage specially undertaken with a view to the transmission of intelligence in the interest of the enemy. Under article 46 a neutral vessel was to be condemned and receive the same treatment as would be applicable to an enemy merchant vessel if she took a direct part in hostilities or was at the time exclusively devoted to the transmission of intelligence in the interest of the enemy. It should be borne in mind that by article 16 of the Rules for Aerial Warfare an aircraft is deemed to be engaged in hostilities if in the interests of the enemy she transmits intelligence in the course of her flight.

The following provisions have a bearing on the question of the control of radio in time of war, though the conventions relate principally to radio in time of peace. These provisions are articles 8, 9 and 17 of the International Radio-Telegraphic Convention of London of 1912. Of these provisions article 8 stipulates that the working of radio-telegraph stations shall be organised as far as possible in such a manner as not to disturb the service of other radio stations. Article 9 deals with the priority and prompt treatment of calls of distress. Article 17 renders applicable to radio-telegraphy certain provisions of the International Telegraphic Convention of St. Petersburg of 1875. Among the provisions of the Convention of 1875 made
applicable to radio-telegraphy is article 7, under which the High Contracting Parties reserve to themselves the right to stop the transmission of any private telegram which appears to be dangerous to the security of the State or contrary to the laws of the country, to public order or to decency. Under article 8, each Government reserves to itself the power to interrupt, either totally or partially, the system of the international telegraphs for an indefinite period if it thinks necessary, provided that it immediately advises each of the other contracting Governments.

Regard has also been given to the terms of the Convention for the safety of life at sea, London, 1914.

With regard to the radio-telegraphy conventions applicable in time of peace, it should be remembered that these have not been revised since 1912, and that it is not unlikely that a conference may before long be summoned for the purpose of effecting such revision.

The work of the Commission in framing the following rules for the control of radio in time of war has been facilitated by the preparation and submission to the Commission on behalf of the American Delegation of a draft code of rules. This draft has been used as the basis of its work by the Commission.

The first article which has been adopted cannot be appreciated without reference to Article 8 of the Radio-Telegraphic Convention of 1912. This latter article enunciates the broad principle that the operation of radio stations must be organised as far as possible in such a manner as not to disturb the service of other stations of the kind. The object of article 1 is to demonstrate that this principle is equally to prevail in time of war. Needless to say, it is not to apply as between radio stations of opposing belligerents. In the same way as in time of peace the general principle cannot be applied absolutely, so also in time of war it can only be observed "as far as possible."

**Article 1**

In time of war the working of radio stations shall continue to be organised, as far as possible, in such manner as not to disturb the services of other radio stations. This provision does not apply as between the radio stations of opposing belligerents.

Article 17 of the Radio-Telegraphic Convention of 1912 enables States to regulate or prohibit the use of radio stations within their jurisdiction by rendering applicable to radio-telegraphy certain provisions of the International Telegraphic Convention of 1875. In particular it is articles 7 and 8 of that Convention which enable such measures of control or prohibition to be taken. The object of article 2 is to make it clear that such rights subsist equally in time of war.
Belligerent and neutral Powers may regulate or prohibit the operation of radio stations within their jurisdiction.

The next article is really only an adaptation of articles 3 and 5 of the Land Warfare Neutrality Convention (No. V of 1907). Article 3 (b) of that Convention only prohibits the use of any radiotelegraphic installations established by belligerents before the war on the territory of a neutral Power for purely military purposes. The object of article 3 as now adopted is to prohibit any erection or operation by a belligerent Power or its agents of radio stations within neutral territory.

The wording shows that the responsibility of the neutral State is affected as well as that of the belligerent State in the case in question. The words "personnes à son service" in the French text are employed in the same sense as the word "agents" in the English text.

It should be understood that neutral Governments are bound to use the means at their disposal to prevent the acts which the article is designed to stop. This implies that they will be responsible in any serious case of negligence.

The erection or operation by a belligerent Power or its agents of radio stations within neutral jurisdiction constitutes a violation of neutrality on the part of such belligerent as well as on the part of the neutral Power which permits the erection or operation of such stations.

Article 4 covers the same ground, so far as concerns radio, as that provided for in articles 8 and 9 of Convention V of 1907 mentioned above; but while article 8 stipulates that a neutral Power is not bound to forbid or restrict the use of wireless installations by a belligerent, and article 9 relates to the restrictive or preventive measures taken by a neutral Power for this purpose, measures which must be applied impartially to the belligerents, article 4 imposes on neutral Powers the duty of preventing the transmission by radio of any information destined for a belligerent concerning military forces or military operations.

This article is a compromise. On one side one Delegation pointed out that the 1907 system had stood the test during the war when neutral Governments had taken under article 9 of the 1907 Convention restrictive or preventive measures which were quite satisfactory. On the other side it was pointed out that those measures had been taken precisely for the purpose of complying with the obligation imposed by neutrality, and that it would be well to define this obligation so as to help and protect neutral Powers in preventing the
violation of their neutrality and thereby reducing the probability of their becoming involved in the war. Agreement was reached on the basis of a text indicating exactly the character of the messages prohibited, viz., messages concerning military forces and military operations. It is understood that the prohibition would not cover the repetition of news which has already become public.

It has been agreed that the article does not render necessary the institution of a censorship in every neutral country in every war. The character of the war and the situation of the neutral country may render such measures unnecessary. It goes without saying that neutral Governments are bound to use the means at their disposal to prevent the transmission of the information in question.

The second paragraph merely reproduces the first paragraph of article 9 of the Convention of 1907. The phrase “destined for a belligerent” covers all cases where the information is intended to reach the belligerent, and not merely messages which are addressed to the belligerent.

**ARTICLE 4**

A neutral Power is not called upon to restrict or prohibit the use of radio stations which are located within its jurisdiction, except so far as may be necessary to prevent the transmission of information destined for a belligerent concerning military forces or military operations and except as prescribed by article 5.

All restrictive or prohibitive measures taken by a neutral Power shall be applied impartially by it to the belligerents.

The legislation of a large number of Powers, for instance, that of the Powers represented in the Commission, already provides for the prohibition of the use of radio installations on board vessels within their jurisdiction. In harmony with articles 5 and 25 of the Convention concerning the Rights and Duties of Neutral Powers in Maritime Warfare (No. XIII of 1907), article 5 enacts the continuance of this régime in time of war and makes it obligatory for all mobile radio stations.

**ARTICLE 5**

Belligerent mobile radio stations are bound within the jurisdiction of a neutral State to abstain from all use of their radio apparatus. Neutral Governments are bound to employ the means at their disposal to prevent such use.

The transmission of military intelligence for the benefit of a belligerent constitutes an active participation in hostilities and therefore merchant vessels or private aircraft have no right to commit such an act. If they do so they must be content to lose the immunity which their non-combatant status should confer.

The vessel or aircraft concerned renders itself liable to be fired upon at the moment when the act is committed and is also liable to
capture. In case of capture the vessel or aircraft will, if the facts be established, be dealt with in the prize court on the same footing as an enemy merchant vessel or enemy private aircraft. Members of the crew and passengers, if implicated, are to be regarded as committing an act in violation of the laws of war. A neutral vessel or aircraft which has been fired upon without adequate justification will be entitled to address a demand for compensation to the competent authorities. Jurisdiction over such claims might with advantage be conferred upon the prize court.

The second paragraph of the article places neutral merchant vessels or neutral aircraft when on or over the high seas in a position which corresponds to that laid down by article 4 for radio stations in neutral territory. Such radio stations on land must not transmit information destined for a belligerent concerning military forces or military operations and the neutral Power must see to it that this rule is observed. Mobile radio stations when on or over the high seas are not subject to the control of the neutral Government to the same extent as radio stations on land, and consequently the rule laid down in this article does not impose any obligations on the neutral Government. The neutral mobile radio stations themselves will, however, be subject to the same measure of prohibition as the radio stations in neutral territory. They must not transmit information of the nature specified which is destined for the belligerent.

The distinction between the acts dealt with in the first and second paragraphs is that in the first and graver case it is assumed that the merchant vessel or aircraft will have been acting in connivance with the enemy. In flagrant cases, as for instance, where the vessel or aircraft is found transmitting intelligence as to the movement or strength of military forces to an enemy in order to enable the latter to shape his movements accordingly, such connivance would be presumed.

The phrase "destined for a belligerent" has the same meaning as in article 4. As in the case of article 4, it is understood that the prohibition would not cover the repetition of news which has already become public.

The collection by the belligerent of the necessary proofs to establish his case against an aircraft or a vessel may take time. The examination of the message logs of many other vessels or aircraft may be necessary before responsibility can be fixed upon the particular vessel or aircraft which transmitted the incriminating message. It is therefore not possible to limit the right of capture to the duration of the voyage or flight during which the message was sent. How long the liability to capture should subsist was a more
difficult point to determine. Agreement was ultimately reached on a basis of one year.

It is realised that the risk of capture during this period will be a great prejudice to neutrals, but on the other hand the injury done to the belligerent by the transmission by radio of improper messages may under modern conditions of warfare be irreparable, and therefore the sanctions attached to the rule must be serious. The neutral will, however, not be gravely inconvenienced by the measures necessary to protect himself against any violation of the rule.

In the case of all aircraft and of merchant vessels which are not carrying passengers, no great injury will result from the prohibition of radio messages other than those which are authorized by article 9, and in the case of merchant vessels carrying passengers, there can be no insuperable difficulty in the institution on board the merchant vessel, if it is thought necessary, of the same measures as the neutral State may institute on land to protect itself under article 3.

Paragraph 3 is limited to neutral vessels and aircraft because enemy vessels and aircraft are liable to capture at any time by reason of their enemy status.

It goes without saying that as capture is a belligerent right it cannot be exercised except in time of war, and therefore if the war terminates before the expiration of the time limit, the liability to capture is at an end.

The Netherlands Delegation has made a reserve on the subject of this article. It feels that the difficulties of obtaining satisfactory proofs against a neutral vessel or aircraft in the prize court will be so great in these cases that provision should be made for the international review of prize court decisions under this article. In its opinion the Permanent Court of International Justice would be the most appropriate tribunal for this purpose.

ARTICLE 6

1. The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.

2. A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The Prize Court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation.

3. Liability to capture of a neutral vessel or aircraft on account of the acts referred to in paragraphs (1) and (2) is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of.
Apart from the question of the acquisition by the enemy of information, the use of radio installations by merchant vessels or aircraft may very well be a source of great embarrassment to the commander of a belligerent force. Not merely may it be essential to him to keep secret the strength of his forces or the operations in which they are engaged, but it may be necessary to ensure that there should be no interference with his communications. Further provisions are, therefore, required to complete the protection afforded to belligerents by article 6.

For this purpose power is given to a belligerent commander to warn off neutral vessels and neutral aircraft and to oblige them to alter their course so that they will not approach the scene of the operations of the armed forces.

A second right given to a belligerent commander is to impose on neutral vessels and aircraft a period of silence in the use of their transmitting apparatus when in the immediate vicinity of the forces under his command. No matter what technical measures may be taken by neutral mobile stations in accordance with the provisions of article 1, their messages, if made at a short distance from the receiving apparatus of belligerent forces, might interfere with the working of such apparatus, and such interference might prevent the hearing of messages to or from the commanding officer or the other units under his command.

To avoid undue hardship to neutrals, the faculty conferred upon the belligerent commander is limited to the duration of the operations in which he is engaged at the time. The article presupposes the actual presence of naval or aerial forces engaged in operations, and that the measures will not be applicable to widely extended zones or to zones in which no military action is taking place.

It is also understood that the change of course provided for in the first paragraph of the article must not prevent a ship or an aircraft from continuing its voyage and from reaching its port of destination.

The article is confined in terms to neutral vessels and aircraft because the belligerent commanding officer requires no special provision to protect himself against the operations of enemy vessels and enemy aircraft.

It will be noted that the terms in which the article is drafted as well as those employed in articles 6 and 8 would cover neutral public vessels or aircraft. This does not imply any intention to encroach upon the rights of neutral States. It is assumed that no such neutral public vessels or aircraft would attempt to interfere in any such manner with the naval or aerial operations conducted by the forces of a State engaged in war.
In case a belligerent commanding officer considers that the success of the operation in which he is engaged may be prejudiced by the presence of vessels or aircraft equipped with radio installations in the immediate vicinity of his armed forces or by the use of such installations therein, he may order neutral vessels or neutral aircraft on or over the high seas:

1. To alter their course to such an extent as will be necessary to prevent their approaching the armed forces operating under his command; or

2. Not to make use of their radio transmitting apparatus while in the immediate vicinity of such forces.

A neutral vessel or neutral aircraft, which does not conform to such direction of which it has had notice, exposes itself to the risk of being fired upon. It will also be liable to capture, and may be condemned if the Prize Court considers that the circumstances justify condemnation.

Article 8 was intended to avoid, as far as possible, the eventuality of one of the belligerents being able to find on board a neutral mobile radio station any texts of radio messages transmitted from the radio stations of the belligerents and not destined for such neutral mobile station.

Such radio messages might possess military importance, and the neutral would thus involuntarily assist one of the belligerents by furnishing him with the means of becoming acquainted with such radio messages.

The seizure of the texts, entailing as it will the removal from the official log of the pages on which the operator enters the messages transmitted and received, together with an indication of the hour of such transmission and reception, has appeared to the Commission to be a sufficient penalty in view of the fact that such a proceeding would attract the attention of the administration to which the mobile station belongs, and would show that the responsible persons in the service of that station had not obeyed the provisions of the present article.

Provision is only made for the mere removal by the belligerent of the relevant pages.

The origin of the radio messages received is shown by the indications at the beginning of the message or in the call-sign. Military stations use the indications entered in the register of the International Bureau at Berne, or else secret indications which do not appear in that official register. No written record should therefore be preserved of radio-telegrams which are preceded either by the indications of a belligerent military station or by an unknown indication.

It is to be noted that the text of this article does not exclude the application of sanctions directed against unneutral service, if it is proved that the breach of the provisions in question was committed with an intention of rendering unneutral service.
Neutral mobile radio stations shall refrain from keeping any record of radio messages received from belligerent military radio stations, unless such messages are addressed to themselves. Violation of this rule will justify the removal by the belligerent of the records of such intercepted messages.

In the first paragraph of article 9 the Commission was anxious to indicate that belligerents who heard signals or messages of distress must, when deciding whether or no they would respond to such signals, take into account both their duties to humanity and their military duties.

The second paragraph is inspired solely by sentiments of humanity with a view to saving human life at sea. The text specifies clearly that every mobile station finding itself in danger or perceiving an immediate danger for other mobile stations will have the right, however it may be affected by other provisions of these rules, to transmit messages in order to ask for help or to signal the danger for navigation which it has perceived. By the words “messages which are indispensable to the safety of navigation,” should be understood only such messages as are immediately necessary for preventing the collision, stranding or loss of ships or aircraft.

**Article 9**

Belligerents are under obligation to comply with the provisions of international conventions in regard to distress signals and distress messages so far as their military operations permit.

Nothing in these rules shall be understood to relieve a belligerent from such obligation or to prohibit the transmission of distress signals, distress messages and messages which are indispensable to the safety of navigation.

Article 10 is inserted to prevent the employment of signals and messages of distress as ruses of war. It is justified by considerations of honour and humanity. Persons who violate the rule may be punished.

**Article 10**

The perversion of radio distress signals and distress messages prescribed by international conventions to other than their normal and legitimate purposes constitutes a violation of the laws of war and renders the perpetrator personally responsible under international law.

The purpose of article 11 is to show clearly that the question whether an act which involves a breach of these rules constitutes also an act of espionage cannot be answered except by reference to the rules of international law which determine what acts amount to espionage.
Acts not otherwise constituting espionage are not espionage by reason of their involving violation of these rules.

The purpose of article 12 is to define clearly the position of the radio operator so far as regards personal liability to punishment. The operator works in his cabin where he executes the orders of those above him. Consequently it is right that he should incur no personal responsibility merely because he has executed orders which he has received in the discharge of his duties as radio operator. Liability to punishment for acts which contravene rules such as articles 9 or 10 falls on those who have given the orders for such acts.

Radio operators incur no personal responsibility from the mere fact of carrying out the orders which they receive in the performance of their duties as operators.

It has not been thought necessary to insert in the rules an article defining the word “radio-station” or “station radio-télégraphique.” The phrase is used in both texts as covering radio-telegraphic stations, radio-telephonic stations, radio-goniometric stations and generally all stations which use Hertzian waves transmitted through air, water or earth.

The Japanese Delegation submitted to the Commission the following proposal:

The belligerent may take such measures as to render inoperative the coastal radio stations in enemy jurisdiction, irrespective of their owners.

After examining and discussing this proposal, the Commission came to the conclusion that it was not necessary to insert a special article referring to the subject. It was of opinion that the texts of other international conventions or the usages of war covered the question in all its practical aspects and gave the right to take the measures contemplated in the Japanese proposal.

The Land Warfare Regulations and the Naval Bombardment Convention, 1907 (No. IX of 1907), permit the bombardment of coastal radio stations by land or naval forces. Article 24 of the rules for aerial warfare enables similar measures to be taken by the air forces against radio stations used for military purposes. Furthermore article 53 of the Land Warfare Regulations authorises the seizure by a belligerent in occupation of enemy territory of coastal radio stations, even if such stations belong to private individuals.

An interesting proposal was submitted by the Italian Delegation for protecting the radio-telegraphic communications of combatant forces by the establishment around them of a kind of “zone of
silence.” The Commission agreed that this idea was already implied in the text of article 7, and that it was consequently not necessary to express it in a special article.

PART II. RULES OF AERIAL WARFARE

In the preparation of the code of rules of aerial warfare the Commission worked on the basis of a draft submitted by the American Delegation. A similar draft, covering in general the same ground, was submitted by the British Delegation. In the discussion of the various articles adopted by the Commission the provisions contained in each of these drafts were taken into consideration, as well as amendments and proposals submitted by other Delegations.

CHAPTER I. APPLICABILITY: CLASSIFICATION AND REMARKS

No attempt has been made to formulate a definition of the term “aircraft,” nor to enumerate the various categories of machines which are covered by the term. A statement of the broad principle that the rules adopted apply to all types of aircraft has been thought sufficient, and article 1 has been framed for this purpose.

ARTICLE 1

The rules of aerial warfare apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on the water.

For States which are parties to the Air Navigation Convention of 1919, aircraft are divided by article 30 into two classes, State aircraft and private aircraft, State aircraft being sub-divided into military aircraft and aircraft exclusively employed in State service, such as posts, customs or police. The article also provides, however, that State aircraft, other than military, customs and police aircraft, are to be treated as private aircraft, and subject as such to all the provisions of that Convention. For practical purposes, therefore, States which are parties to the Convention of 1919 divide aircraft in time of peace into three categories:

(a) Military aircraft.
(b) State aircraft employed for customs and police purposes.
(c) Private aircraft and such State aircraft as are employed for purposes other than those enumerated in (b).

The Convention of 1919 has not yet become by any means universal, but it would be so inconvenient for States, which are parties to it, to come under different rules in time of war, that account has been taken of the provisions of the Convention when framing the articles adopted by the Commission.
It has also been necessary to take into account the fact that Italy has entrusted the supervision of the customs service to the military forces, a fact which has prevented the adoption of exactly the same language as that employed in article 30 of the Convention of 1919. When read in conjunction, however, with article 5 below, it will be found that the classification adopted by the code of rules of aerial warfare corresponds very nearly with that prescribed in article 30 of the Convention mentioned above.

**Article 2**

The following shall be deemed to be public aircraft:

(a) Military aircraft.

(b) Non-military aircraft exclusively employed in the public service.

All other aircraft shall be deemed to be private aircraft.

A clear distinction must be made between aircraft which form part of the combatant forces in time of war and those which do not. Each class must be easily recognisable; this is essential if the immunities to which non-combatant aircraft are entitled are to be respected. Article 3 has been framed with this object.

**Article 3**

A military aircraft shall bear an external mark indicating its nationality and military character.

Public non-military aircraft are not in command of persons commissioned or enlisted in the fighting forces; consequently there must be evidence on board the aircraft of the service in which they are engaged. Such evidence is afforded by their papers. It will be seen by reference to article 51 below that aircraft of this class may be visited for the purpose of the verification of their papers.

**Article 4**

A public non-military aircraft employed for customs or police purposes shall carry papers evidencing the fact that it is exclusively employed in the public service. Such an aircraft shall bear an external mark indicating its nationality and its public non-military character.

Article 5 has been adopted for the purpose of regulating the position of State-owned aircraft employed in the postal service, or for commercial purposes. Such aircraft will be engaged in international traffic which should properly subject them to the same measures of control as those to which private aircraft are subject. They should also bear the same marks.
In terms the article applies to all public non-military aircraft other than those employed for customs or police purposes, following in this respect the language adopted in the last paragraph of article 30 of the Air Navigation Convention of 1919. It is in connection with aircraft employed in the postal service or for commercial purposes that it will find its chief application.

Objection has been expressed to this article by the Netherlands Delegation on the ground that its effect will be to subject State-owned aircraft to capture and to the jurisdiction of belligerent prize courts.

**Article 5**

Public non-military aircraft other than those employed for customs or police purposes shall in time of war bear the same external marks, and for the purposes of these rules shall be treated on the same footing, as private aircraft.

Private aircraft must in time of war bear marks to indicate their nationality and character and to enable the aircraft to be identified. It would be inconvenient that the marks to be borne in war time should differ from those borne in time of peace. For peace time the marks which a private aircraft is to bear are prescribed in the Air Navigation Convention of 1919. This Convention, however, is not universal in character and account must be taken of the position of States which are not parties to it. Nevertheless, all States, whether parties to the Convention or not, will before long have enacted legislation as to the marks which aircraft of that nationality are to bear. The Commission has therefore felt that it will be sufficient to lay down as the rule for time of war that aircraft must bear the marks which are prescribed by the legislation in force in their own country. Foreign Powers, whether belligerent or neutral, are not concerned with the enforcement of that legislation as such; that is a matter for the municipal courts of the country concerned. The object of the article is to afford to belligerent and neutral authorities a guide as to the marks which a private aircraft must bear.

**Article 6**

Aircraft not comprised in articles 3 and 4 and deemed to be private aircraft shall carry such papers and bear such external marks as are required by the rules in force in their own country. These marks must indicate their nationality and character.

Great abuses might prevail if the external marks affixed to an aircraft could be altered while the machine was in flight. It is also necessary that the marks should be clearly visible. The principles adopted in article 7 are in harmony with the provisions of the Air Navigation Convention of 1919.
Article 7

The external marks required by the above articles shall be so affixed that they cannot be altered in flight. They shall be as large as is practicable and shall be visible from above, from below, and from each side.

Each State chooses for itself the marks which its aircraft are to bear. The marks chosen for private aircraft in time of peace by States which are parties to the Air Navigation Convention of 1919 are set out in that Convention, and are generally known. It is equally important that the marks for public aircraft, whether military or non-military, should be equally well known, and also the marks chosen for private aircraft possessing the nationality of a State, which is not a party to the said Convention. Notification to all other Powers is, therefore, provided for of the marks prescribed by the rules in force in each State.

Necessity may arise for a change in the marks adopted by each State. When that happens the change must be notified. If the change is made in time of peace, there can be no difficulty in notifying it before it is brought into force.

In time of war changes must be notified as soon as possible and at latest when they are communicated by the State concerned to its own fighting forces. It will be important to a State, which changes the marks on its military aircraft in time of war, to notify the change as quickly as possible to its own forces, as otherwise the aircraft might run the risk of being shot down by their own side. For this reason no anxiety need be felt that there will be any attempt to evade compliance with the rule.

Regret has been expressed in some quarters that any change should be allowed in time of war of the marks adopted by a particular State. The practical reasons, however, in favour of allowing such modifications are overwhelming. The marks adopted by different countries for their military machines are in some cases not very dissimilar, and if war broke out between two countries whose military machines bore marks which were not readily distinguishable, it would be essential that a modification should be made.

Article 8

The external marks, prescribed by the rules in force in each State, shall be notified promptly to all other Powers.

Modifications adopted in time of peace of the rules prescribing external marks shall be notified to all other Powers before they are brought into force.

Modifications of such rules adopted at the outbreak of war or during hostilities shall be notified by each Power as soon as possible to all other Powers and at latest when they are communicated to its own fighting forces.

Article 9 is founded upon a proposal first submitted by the Japanese Delegation; an American proposal to the same effect was
submitted at a later stage. The subject of the article is one of some difficulty and one which has in times past been fruitful of discussions and disagreements in connection with warships, the Powers not having been able to agree whether the act of sovereignty involved in the commissioning of a warship might properly be exercised on the high seas (see the preamble to Convention VII of 1907).

The proposal received the support of a majority of the delegations only, the French Delegation being unable to accept it.

**Article 9**

A belligerent non-military aircraft, whether public or private, may be converted into a military aircraft, provided that the conversion is effected within the jurisdiction of the belligerent State to which the aircraft belongs and not on the high seas.

The proposal submitted by the Japanese Delegation would also have prevented the conversion of military aircraft into private aircraft except within the jurisdiction of the belligerent State concerned. The majority of the members of the Commission were of opinion that an article on this subject was not required. It does not seem likely that such conversion would be effected upon the high seas except for the purpose of enabling an aircraft, otherwise entitled to do so, to enter neutral territory. There would be many practical difficulties in the way of any such conversion: not only would identity marks have to be affixed which would depend on the registration in the home State, but a civilian crew would have to be obtained and various certificates would be required, all of which should be dated. If the marks and papers belonging to some other aircraft were used, the marks and papers would be false. A fraud would have been practised on the neutral State. Even if the proceedings were authorised by the belligerent State concerned, so that it would be valid under its own law, the marks would still be false marks so far as concerned the neutral State, and if it became aware of the fraud committed, it would be justified in disregarding the conversion.

Article 10 adopts for time of war a principle which has already been adopted for private aircraft in time of peace by article 8 of the Air Navigation Convention of 1919.

**Article 10**

No aircraft may possess more than one nationality.

**Chapter II. General Principles**

Article 11 embodies the general principle that outside the jurisdiction of any State, i.e., in the air space over the high seas, all aircraft have full freedom of passage. Provisions embodied in other
articles which restrict the liberty of individual aircraft are to be regarded as exceptions to this general principle.

**Article 11**

Outside the jurisdiction of any State, belligerent or neutral, all aircraft shall have full freedom of passage through the air and of alighting.

In time of peace many States are subject to treaty obligations requiring them to allow aircraft of other States to circulate in the air space above their territory. In time of war a State must possess greater freedom of action. Article 12 therefore recognises the liberty of each State to enact such rules on this subject as it may deem necessary.

**Article 12**

In time of war any State, whether belligerent or neutral, may forbid or regulate the entrance, movement or sojourn of aircraft within its jurisdiction.

**Knowledge of the Existence of the War**

Among the provisions contained in the original American draft was an article to the following effect:

The liability of an aircraft for violation of the laws of war is contingent upon her actual or constructive knowledge of the existence of the war.

The discussions upon this article led the American Delegation to withdraw the proposal.

Knowledge of the existence of a state of war was frequently in the past an important element in deciding cases instituted in prize courts for the condemnation of a ship or goods. Sailing ships were often at sea in old days for months without touching at any port, and under such conditions it was easy for a vessel to be unaware of the outbreak of war. The question diminished in importance when steamships tended to replace sailing ships, and diminished still more in importance when wireless telegraphy was invented and fitted to sea-going ships.

With aircraft the case is different; the velocity of their flight and the small supplies of fuel which they can carry will render it unusual for a flight to exceed twelve hours in length. Cases are therefore not likely to arise in which there can be any doubt of the actual knowledge of the existence of a state of war, or in which constructive knowledge has to be relied on. Furthermore, all aircraft of important size are likely to be fitted with a wireless installation.

The Declaration of London, framed in 1909, contained provisions on this subject (see articles 43 and 45), and it was then found necessary to deal with the matter in greater detail than is attempted in the above American proposal. Until experience shows that it is necessary to frame a rule on this subject for aircraft, it seems more
prudent to leave the matter to rest on the basis of the general rules of international law.

So far as concerns neutral Powers, the Convention on the Opening of Hostilities (No. III of 1907) lays down that the existence of a state of war must be notified to neutral Powers, and that they are subject to no obligations arising therefrom until the receipt of such notification. They cannot, however, rely on the absence of any such notification, if it can be established that they were actually aware of the existence of the state of war. This provision seems adequate and satisfactory.

**Chapter III. Belligerents**

The use of privateers in naval warfare was abolished by the Declaration of Paris, 1856. Belligerent rights at sea can now only be exercised by units under the direct authority, immediate control and responsibility of the State. This same principle should apply to aerial warfare. Belligerent rights should therefore only be exercised by military aircraft.

**Article 13**

Military aircraft are alone entitled to exercise belligerent rights.

Operations of war involve the responsibility of the State. Units of the fighting forces must, therefore, be under the direct control of persons responsible to the State. For the same reason the crew must be exclusively military in order that they may be subject to military discipline.

**Article 14**

A military aircraft shall be under the command of a person duly commissioned or enlisted in the military service of the State; the crew must be exclusively military.

Combatant members of the armed land forces must, if they are not in uniform, wear at least a distinctive emblem. So long as the officers or crew of a military aircraft are on board the aircraft there is no risk of any doubt as to their combatant status, but if they are forced to land they may become separated from the machine. In that event it is necessary for their own protection that their combatant status should be easily recognised.

**Article 15**

Members of the crew of a military aircraft shall wear a fixed distinctive emblem of such character as to be recognisable at a distance in case they become separated from their aircraft.

The next article indicates the aircraft which may engage in hostilities, and forbids private aircraft from being armed when they are outside the jurisdiction of their own country.
The immunities which a belligerent is bound to respect in a non-combatant impose upon the non-combatant a corresponding obligation not to take part in hostilities. This principle applies equally to aerial warfare. If a distinction is to be drawn between military and other aircraft, the distinction must be observed on both sides, and non-military aircraft must not attempt to engage in hostilities in any form.

To give full effect to this principle, a non-military aircraft must be debarred from transmitting, during flight, military intelligence for the benefit of a belligerent. This rule will be seen to be natural and logical if the peculiar characteristics of aircraft are borne in mind. It is as scouts and observers that one of their principal uses is found in time of war. If non-military aircraft were to be allowed to act in this capacity, injury of very serious consequence might be done to the opposing belligerent. If exposed to such risk, no belligerent could agree to respect the immunities which a non-combatant aircraft should enjoy, and the only way to ensure such respect is to recognise that the transmission of military intelligence for the benefit of a belligerent is a participation in hostilities, which would constitute a violation of the laws of war and would be dealt with accordingly.

The rule as framed has been restricted within the narrowest limits compatible with military safety. It is limited to transmission of intelligence during flight. When the flight has been completed, the individual concerned will be within the jurisdiction of some State, and there the control of the transmission of information will be subject to the regulations of that State. It will not be affected by the provisions of this article.

The mounting of arms in time of war may be construed as *prima facie* evidence of an intention to take part in hostilities. It is true that of recent years certain States found it necessary to arm merchant ships in self-protection, but the conditions of air warfare are so different that it has not been thought necessary to allow for such a proceeding on the part of aircraft. A gun would not be an adequate protection to an aircraft against illegal attack, as the first warning the aircraft might have of any such attack would be an act which might involve its destruction.

On the other hand, to permit private aircraft to be armed would facilitate acts of perfidy on the part of an opposing belligerent; an aircraft masquerading under false marks might suddenly open fire, and the risk of this would be sufficient to render it dangerous for an honest belligerent to respect the immunities of private aircraft to the extent which he would wish.

The interests of private aircraft are from every point of view better served by the adoption of a rule against the arming of private aircraft in time of war.
The article as framed does not extend to aircraft within the jurisdiction of their own State. Such an extension would be an unreasonable interference with the domestic jurisdiction of the State concerned.

The rule against aircraft being armed is limited to private aircraft. Public non-military aircraft engaged in customs or police work may find it necessary to carry arms because the fulfillment of their functions renders it essential for them to be able to apply coercion in case of need. In their case, the carriage of arms would raise no presumption of an intention to take part in hostilities, but they are subject just as much as private aircraft to the provisions of the first two paragraphs of the article.

**Article 16**

No aircraft other than a belligerent military aircraft shall engage in hostilities in any form.

The term "hostilities" includes the transmission during flight of military intelligence for the immediate use of a belligerent.

No private aircraft, when outside the jurisdiction of its own country, shall be armed in time of war.

The provisions of the Geneva Convention have been applied to maritime warfare by the Convention signed at The Hague in 1907 (Convention X of 1907). It will probably be found desirable to extend them in due course to warfare in the air and to negotiate a special convention for this purpose. Pending the conclusion of any such convention, a rule has been adopted stating broadly that these conventions apply to aerial warfare. Flying ambulances should enjoy the privileges and immunities conferred by the Geneva Convention upon mobile medical units or sanitary formations. The work of such flying ambulances must, of course, be carried out subject to similar conditions of belligerent control as those laid down in the Conventions of 1906 and 1907, and they must devote themselves to the task of succouring all wounded impartially in accordance with the principles embodied in these Conventions. When the new special convention referred to above is concluded, the opportunity will no doubt be taken to extend to flying ambulances the exemption from dues already conferred by treaty upon hospital ships which enter a foreign port.

**Article 17**

The principles laid down in the Geneva Convention, 1906, and the Convention for the adaptation of the said Convention to Maritime War (No. X of 1907) shall apply to aerial warfare and to flying ambulances, as well as to the control over flying ambulances exercised by a belligerent commanding officer.

In order to enjoy the protection and privileges allowed to mobile medical units by the Geneva Convention, 1906, flying ambulances must bear the distinctive emblem of the Red Cross in addition to the usual distinguishing marks.
Article 18 is intended to clear up a doubt which arose during the recent war. The use of tracer bullets against aircraft was a general practice in all the contending armies. In the absence of a hard surface on which the bullet will strike, an airman cannot tell whether or not his aim is correct. These bullets were used for the purpose of enabling the airman to correct his aim, as the trail of vapour which they leave behind indicates to him the exact line of fire. In one case, however, combatant airmen were arrested and put on trial on the ground that the use of these bullets constituted a breach of the existing rules of war laid down by treaty.

The use of incendiary bullets is also necessary as a means of attack against lighter-than-air craft, as it is by setting fire to the gas contained by these aircraft that they can most easily be destroyed.

In the form in which the proposal was first brought forward its provisions were limited to a stipulation that the use of tracer bullets against aircraft generally was not prohibited.

Various criticisms were, however, made about the proposed text, chiefly founded on the impracticability for an airman while in flight to change the ammunition which he is using in the machine gun in his aircraft. He cannot employ different bullets in accordance with the target at which he is aiming, one sort of ammunition for other aircraft and another sort for land forces by whom he may be attacked.

The Commission, therefore, came to the conclusion that the most satisfactory solution of the problem would be to state specifically that the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

**Article 18**

The use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

This provision applies equally to States which are parties to the Declaration of St. Petersburg, 1868, and to those which are not.

In order that there may be no doubt that the use of false external marks is not a legitimate ruse it has been specifically prohibited. By later provisions in the rules, the use of false external marks is made a ground for capture and condemnation of a neutral aircraft.

What are here referred to are false marks of nationality or character, the marks which are dealt with in Chapter I of these rules. The article would not apply to mere squadron badges or other emblems which are only of interest to one particular belligerent force.
ARTICLE 19

The use of false external marks is forbidden.

Another mode of injuring the enemy, which it has seemed desirable to prohibit, is that of firing at airmen escaping from a disabled aircraft.

ARTICLE 20

When an aircraft has been disabled, the occupants, when endeavouring to escape by means of a parachute, must not be attacked in the course of their descent.

Incidents took place in the recent war which showed the desirability of having a distinct rule on the question whether the dropping of leaflets for propaganda purposes was a legitimate means of warfare.

Attempts were made by one belligerent to impose heavy penalties on airmen who were forced to descend within his lines after engaging in this work.

Article 21 has been framed to meet this case. It is not limited to dropping leaflets, as aircraft can disseminate propaganda by other means, such for instance, as emitting trails of smoke in the form of words in the sky.

What is legalised by the article is the use of aircraft for distributing propaganda. It does not follow that propaganda of all kinds is thereby validated. Incitements to murder or assassination will, for instance, still be considered illegitimate forms of propaganda.

ARTICLE 21

The use of aircraft for the purpose of disseminating propaganda shall not be treated as an illegitimate means of warfare.

Members of the crews of such aircraft must not be deprived of their rights as prisoners of war on the charge that they have committed such an act.

BOMBARDMENT

The subject of bombardment by aircraft is one of the most difficult to deal with in framing any code of rules for aerial warfare.

The experiences of the recent war have left in the mind of the world at large a lively horror of the havoc which can be wrought by the indiscriminate launching of bombs and projectiles on the non-combatant populations of towns and cities. The conscience of mankind revolts against this form of making war in places outside the actual theatre of military operations, and the feeling is universal that limitations must be imposed.

On the other hand, it is equally clear that the aircraft is a potent engine of war, and no State which realises the possibility that it may
itself be attacked, and the use to which its adversary may put his
air forces can take the risk of fettering its own liberty of action to an
extent which would restrict it from attacking its enemy where that
adversary may legitimately be attacked with effect. It is useless,
therefore, to enact prohibitions unless there is an equally clear un­
derstanding of what constitute legitimate objects of attack, and it is
precisely in this respect that agreement was difficult to reach.

Before passing to a consideration of the articles which have been
agreed, mention must be made of the Declaration prohibiting the
Discharge of Projectiles and Explosives from Balloons, signed at
The Hague in 1907. Three of the States represented on the Com­
mis­sion\textsuperscript{22} are parties to that Declaration; the other three are not.
Under the terms of this Declaration the Contracting Powers agree
to prohibit the discharge of projectiles and explosives from balloons.

or by other new methods of a similar nature. Its terms are, there­
fore, wide enough to cover bombardment by aircraft. On the other­
hand, the scope of the Declaration is very limited; in duration it is
to last only until the close of the Third Peace Conference, a con­
ference which was to have been summoned for 1914 or 1915, and its
application is confined to a war between contracting States without
the participation of a non-contracting State.

The existence of this Declaration can afford no solution of the
problems arising out of the question of bombardment from the air,
even for the States which are parties to it.

The number of parties is so small that, even if the Declaration
were renewed, no confidence could ever be felt that when a war broke
out it would apply. A general agreement, therefore, on the subject
of bombardment from the air is much to be desired. For the States
which are parties to it, however, the Declaration exists and it is well
that the legal situation should be clearly understood.

As between the parties it will continue in force and will operate in
the event of a war between them, unless by mutual agreement its
terms are modified, or an understanding reached that it shall be
regarded as replaced by some new conventional stipulation; but it
will in any case cease to operate at the moment when a Third Peace
Conference concludes its labours, or if any State which is not a party
to the Declaration intervenes in the war as a belligerent.

No difficulty was found in reaching an agreement that there are
certain purposes for which aerial bombardment is inadmissible.

Article 22 has been formulated with this object.

\textsuperscript{22} United States of America, Great Britain, and The Netherlands.
ARTICLE 22

Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

The Naval Bombardment Convention of 1907 (No. IX) allows bombardment for enforcing payment of requisitions for supplies necessary for the immediate use of the naval forces (article 3), but not for enforcing payment of money contributions (article 4).

For aerial warfare it has been decided to adopt the more stringent rule of the Land Warfare Regulations.

ARTICLE 23

Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

Agreement on the following article specifying the objects which may legitimately be bombarded from the air was not reached without prolonged discussion. Numerous proposals were put forward by the various delegations before unanimity was ultimately attained. The text of these proposals will be found in the minutes. In particular mention may be made of an Italian proposal of the 8th February, on which the text ultimately adopted was in great part founded. Regret was expressed by some delegations that a more far-reaching prohibition did not meet with unanimous acceptance.

The terms of the article are so clear that no explanation of the provisions is necessary, but it may be well to state that in the phrase in paragraph 2 “military establishments or depots” the word “depots” is intended to cover all collections of supplies for military use which have passed into the possession of the military authorities and are ready for delivery to the forces, “distinctively military supplies” in the succeeding phrase is intended to cover those which by their nature show that they are certainly manufactured for military purposes.

If the code of rules of aerial warfare should eventually be annexed to a convention, paragraph 5 of the article would find a more appropriate place in the convention.

It will be noticed that for aerial bombardment the test adopted in article 25 of the Land Warfare Regulations, that of the town, &c., being defended, is abandoned. The nature of the objective or the use to which it is being put now becomes the test.

ARTICLE 24

1. Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.
2. Such bombardment is legitimate only when directed exclusively at the following objectives; military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

4. In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

5. A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

Both in land warfare and in maritime warfare the principle has been adopted that certain special classes of buildings must be spared so far as possible in case of bombardment; for the former, by article 27 of the Land Warfare Regulations, for the latter by article 5 of the Naval Bombardment Convention of 1907 (No. IX). A similar provision, largely based on that in the Naval Bombardment Convention, has been adopted as article 25. By day, these privileged buildings must be marked in a way which will make them visible to aircraft; the marks agreed on being those laid down in the Geneva Convention and in the Naval Bombardment Convention; the use of such marks is made obligatory so as to correspond with the duty placed on the adversary of sparing such buildings. By night, however, the use of lights to make the special signs visible is optional, because experience has shown that such lights may serve as guides to night-flying aircraft and may thereby be of service to the enemy.

ARTICLE 25

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the red cross on a white ground, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white.
A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

A proposal was submitted by the Italian Delegation for the purpose of securing better protection from aerial bombardment for important historic monuments. During the recent war it was not found that the articles in the Land Warfare Regulations and the Naval Bombardment Convention were sufficient to prevent historic monuments from being bombarded. An unscrupulous opponent can always allege that they are being used for military purposes and ignore the written agreements accordingly. There is also the possibility that in the attack on some object which is a legitimate subject for bombardment, a historic monument in the immediate vicinity may be injured.

The Italian proposal comprised two new features, the creation of a zone round each historic monument within which the State was to be debarred from committing any act which constituted a use of the area for military purposes, and a system of inspection under neutral auspices to ensure that the undertaking was carried out, both as regards the monument itself and the zone. By this means any pretext for the bombardment would be removed, and the risk of unintentional injury would be minimised.

The proposal received the sympathetic consideration of all the Delegations and it was accordingly remitted to an expert committee for more detailed consideration. Article 26 has been prepared in the light of their report.

The Italian proposal comprised not only historic but also artistic monuments. It has seemed better to omit the word "artistic" for fear lest a divergence should appear to be created between the new article and article 25, the language of which is modelled on article 27 of the Land Warfare Regulations and article 5 of the Naval Bombardment Convention (No. IX of 1907). The words "historic monument" in this article are used in a broad sense. They cover all monuments which by reason of their great artistic value are historic to-day or will become historic in the future.

It should be clearly understood that adoption of the system is only permissive. If a State prefers to trust only to article 25 to secure protection of its monuments, there is no obligation upon it to notify them to other Powers in peace time and to establish the surrounding zones which are not to be used for military purposes.

The notification must be made through the diplomatic channel. It will then be open to any State receiving the notification, if it thinks it necessary to do so, to question within a reasonable time the propriety of regarding a particular place as an historic monument. If no
question is raised with regard to the monuments notified, other States will be regarded as having accepted the demand for the protection of such monuments from bombardment, and the immunity will then rest on the basis of agreement. For the same reason the notification once made must not be withdrawn after the outbreak of hostilities.

Considerable hesitation was expressed in accepting the provision that notification must be made in time of peace. It was urged that the system proposed was a new procedure, that particular monuments might be forgotten, and that more elasticity should be allowed. On the other hand, it was urged that the essence of the scheme was to get agreement as to the immunity of these monuments, and that unless notification in time of war was excluded, it was not likely that any would be notified in time of peace.

The effect of allowing a 500-metre zone to be drawn round each monument may well be that in certain special cases, as, for instance, Venice or Florence, which are particularly rich in ancient and historic monuments, a large portion of the city would be comprised within the protected zones. The zones round each monument will overlap and so create a continuous area. The subsequent provisions will, however, ensure that there is a complete absence of military use of any portion of the area so protected.

It was agreed that if the belligerents did not for military reasons place the signs indicated in the article, enemy aviators had no right by reason merely of their absence to bomb the zone in question, if it had been duly determined and notified.

In their report, the experts stated that they considered that the marks designed to indicate the zones of protection round monuments should differ in design from those prescribed by article 25 for the historic monuments themselves. The Commission took note of this recommendation.

The prohibition against the use of the zone surrounding the monument must be very strictly interpreted. There must be a complete cessation of the use of any place, including, for instance, factories and railway lines, with a military purpose in view.

The special committee of inspection provided for by the article will be constituted by the State which has taken advantage of the article. There would not seem to be any need to establish the committee until the outbreak of war. As these special arrangements will have to be made in order to secure full protection for its historic monuments, the State will be bound to afford to this committee the fullest opportunity for making the investigations they may think necessary.
ARTICLE 26

The following special rules are adopted for the purpose of enabling States to obtain more efficient protection for important historic monuments situated within their territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special régime for their inspection:

1. A State shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall in times of war enjoy immunity from bombardment.

2. The monuments round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.

3. The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 metres in width, measured from the circumference of the said area.

4. Marks clearly visible from aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

5. The marks on the monuments themselves will be those defined in article 25. The marks employed for indicating the surrounding zones will be fixed by each State adopting the provisions of this article, and will be notified to other Powers at the same time as the monuments and zones are notified.

6. Any abusive use of the marks indicating the zones referred to in paragraph 5 will be regarded as an act of perfidy.

7. A State adopting the provisions of this article must abstain from using the monument and the surrounding zone for military purposes, or for the benefit in any way whatever of its military organisation, or from committing within such monument or zone any act with a military purpose in view.

8. An inspection committee consisting of three neutral representatives accredited to the State adopting the provisions of this article, or their delegates, shall be appointed for the purpose of ensuring that no violation is committed of the provisions of paragraph 7. One of the members of the committee of inspection shall be the representative (or his delegate) of the State to which has been entrusted the interests of the opposing belligerent.

ESPIONAGE

The articles dealing with espionage follow closely the precedent of the Land Warfare Regulations.

Article 27 is a verbal adaptation of the first paragraph of article 29 of the Regulations, so phrased as to limit it to acts committed while in the air.

Consideration has been given to the question whether there was any need to add to the provision instances of actions which were not to be deemed acts of espionage, such as those which are given at the end of article 29 in the Regulations, and it was suggested that article 29 of the American draft might appropriately be introduced in this manner. It was decided that this was unnecessary.

23 Acts of the personnel of correctly marked enemy aircraft, public or private, done or performed while in the air, are not to be deemed espionage.
The article submitted by the American Delegation was intended to ensure that reconnaissance work openly done behind the enemy lines by aircraft should not be treated as spying. It is not thought likely that any belligerent would attempt to treat it as such.

**Article 27**

Any person on board a belligerent or neutral aircraft is to be deemed a spy only if acting clandestinely or on false pretences he obtains or seeks to obtain, while in the air, information within belligerent jurisdiction or in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

Acts of espionage by members of the crew of an aircraft or by persons who have been carried in an aircraft may well be committed after they have left the aircraft. They will in that case be subject to the Land Warfare Regulations.

**Article 28**

Acts of espionage committed after leaving the aircraft by members of the crew of an aircraft or by passengers transported by it are subject to the provisions of the Land Warfare Regulations.

Two rules have been adopted in land warfare with respect to espionage which should apply equally to aerial warfare. These are that a spy cannot be punished without previous trial, and that a member of an army who commits an act of espionage and succeeds in rejoining the army cannot, if he is subsequently captured, be made responsible for the previous act of espionage. He is entitled to be treated as a prisoner of war.

**Article 29**

Punishment of the acts of espionage referred to in articles 27 and 28 is subject to articles 30 and 31 of the Land Warfare Regulations.

**Chapter V. Military Authority over Enemy and Neutral Aircraft and Persons on Board**

The rapidity of its flight would enable an aircraft to embarrass the operations of land or sea forces, or even operations in the air, to an extent which might prove most inconvenient or even disastrous to a belligerent commander. To protect belligerents from improper intrusions of this kind, it is necessary to authorise belligerent commanders to warn off the intruders, and, if the warning is disregarded, to compel their retirement by opening fire.

It is easy to see that undue hardship might be occasioned to neutrals if advantage were taken of the faculty so conferred on belligerent commanding officers and attempts were made to exclude
for long or indefinite periods all neutrals from stipulated areas or to prevent communication between different countries through the air over the high seas. The present provision only authorises a commanding officer to warn off aircraft during the duration of the operations in which he is engaged at the time. The right of neutral aircraft to circulate in the airspace over the high seas is emphasised by the provisions of article 11, which provides that "outside the jurisdiction of any State, belligerent or neutral, all aircraft shall have full freedom of passage through the air and of alighting."

Article 30 is confined in terms to neutral aircraft, because enemy aircraft are in any event exposed to the risk of capture, and in the vicinity of military operations are subjected to more drastic treatment than that provided by this article.

It will be noticed that the terms of the article are general in character and would comprise even neutral public or military aircraft. It goes without saying that the article is not intended to imply any encroachment on the rights of neutral States. It is assumed that no neutral public or military aircraft would depart so widely from the practice of States as to attempt to interfere with or intrude upon the operations of a belligerent State.

**Article 30**

In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which he has had notice issued by the belligerent commanding officer, may be fired upon.

The power to requisition aircraft in occupied enemy territory is recognised in article 53 of the Land Warfare Regulations. The text of article 53 is not specific as to whether it includes neutral property, and though in practice it is regarded as doing so, it has been thought well to adopt a special rule in harmony with article 53. It is not unreasonable that neutral owners of property should receive payment for their property at once, as they are not concerned with the peace which will be ultimately concluded.

**Article 31**

In accordance with the principles of article 53 of the Land Warfare Regulations, neutral private aircraft found upon entry in the enemy's jurisdiction by a belligerent occupying force may be requisitioned, subject to the payment of full compensation.

Property of the enemy State, which may be used for operations of war, is always liable to confiscation if it falls into the hands of the
opposing belligerent. It is natural, therefore, that public aircraft of the enemy should be so treated.

Article 17 will create an exception in favour of flying ambulances as they will be protected by article 6 of the Geneva Convention, but this exception will be subject to the principle laid down in article 7 of the same Convention that the protection accorded to mobile medical units ceases if they are made use of to commit acts harmful to the enemy.

ARTICLE 32

Enemy public aircraft, other than those treated on the same footing as private aircraft, shall be subject to confiscation without prize proceedings.

Non-military aircraft of belligerent nationality, whether public or private, should not in general be exposed to the risk of instant destruction, but should be given the opportunity to land. If they are flying in the jurisdiction of their own State and enemy military aircraft approach, they should, for their own protection, make the nearest available landing. Failure to do so exposes them to the risk of being fired upon.

ARTICLE 33

Belligerent non-military aircraft, whether public or private, flying within the jurisdiction of their own State, are liable to be fired upon unless they make the nearest available landing on the approach of enemy military aircraft.

The preceding article has dealt with the case of belligerent non-military aircraft flying in the jurisdiction of their own State. Article 34 deals with the same category of aircraft in certain other circumstances. If such aircraft are in the immediate vicinity of the territory of the enemy State, or in the immediate vicinity of its military operations by land or sea, they run the risk of being fired upon. They are, of course, liable to capture by reason of their enemy status, but in an area where it is probable that military operations will be in progress, or in any place where they are actually in progress, non-combatant aircraft of belligerent nationality can only proceed at their own risk. By their mere presence they expose themselves to the risk of being fired upon.

ARTICLE 34

Belligerent non-military aircraft, whether public or private, are liable to be fired upon, if they fly (1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own State, or (3) in the immediate vicinity of the military operations of the enemy by land or sea.

The principle has already been recognised in article 30 that a belligerent commanding officer may warn off neutral aircraft from
the immediate vicinity of his military operations. If they fail to comply with such a warning, they run the risk of being fired upon. Article 35 deals with neutral aircraft which may be flying within the jurisdiction of a belligerent country at a moment when military aircraft of the opposing belligerent approach. If warned of the approach of such military aircraft, it is their duty to make a landing; otherwise they might hamper the movements of the combatants and expose themselves to the risk of being fired upon. They are not, however, exposed to the risk of capture and condemnation as are neutral aircraft failing to comply with directions issued by a belligerent commander under article 30.

**Article 35**

Neutral aircraft flying within the jurisdiction of a belligerent, and warned of the approach of military aircraft of the opposing belligerent, must make the nearest available landing. Failure to do so exposes them to the risk of being fired upon.

Article 36 regulates the position of members of the crew and of passengers of an enemy aircraft which falls into the hands of a belligerent.

If the aircraft is a military aircraft, the crew will consist of members of the military forces and will, of course, be made prisoners of war. Any passengers will share the same fate, because in time of war a belligerent State would not be using its military aircraft for carrying non-combatant individuals unless their journey was a matter of importance to the State. Combatant passengers would naturally be made prisoners of war.

In the case of public non-military aircraft, the same principle applies. It is true that the members of the crew may not be members of the military forces, but they constitute part of the State organisation. As to passengers, they would not be carried on such aircraft, except for Government purposes. There is, however, one important exception. A State-owned passenger-carrying aircraft line is not by any means an unlikely development and, if such should be instituted, there would be no reason to apply this principle to all the passengers on such aircraft. They should only be made prisoners of war if in the service of the enemy, or enemy nationals fit for military service.

As regards private aircraft, it must be remembered that the crew will consist of trained men, constituting a reserve upon which the belligerent can draw in case of need. If they are of enemy nationality, or in the service of the enemy, there is good reason to hold them as prisoners of war. If they are neutrals not in the service of the enemy, they are by their service on board an enemy aircraft releasing other men for military purposes. If they are to be
given their release, the belligerent should be entitled to protect himself in the future against such indirect assistance by exacting an undertaking from each individual against his serving in an enemy aircraft during the remainder of the war. Such an undertaking corresponds to that provided for in the second paragraph of article 5 of the Convention concerning restrictions on the right of capture in maritime war (No. XI of 1907). It was adopted there only for the officers of a merchant vessel, because the officers are the highly trained men. In the case of aircraft, it is reasonable to extend it to all the members of the crew.

What is said in the report on article 37 dealing with the crew and passengers of neutral private aircraft as to temporary delay in effecting the release in certain cases and as to members of the crew or passengers who have rendered special services to the belligerent being made prisoners of war, applies also in the case of the crew and passengers of an enemy aircraft.

**ARTICLE 36.**

When an enemy military aircraft falls into the hands of a belligerent, the members of the crew and the passengers, if any, may be made prisoners of war.

The same rule applies to the members of the crew and the passengers, if any, of an enemy public non-military aircraft, except that in the case of public non-military aircraft devoted exclusively to the transport of passengers, the passengers will be entitled to be released unless they are in the service of the enemy, or are enemy nationals fit for military service.

If an enemy private aircraft falls into the hands of a belligerent, members of the crew who are enemy nationals or who are neutral nationals in the service of the enemy, may be made prisoners of war. Neutral members of the crew, who are not in the service of the enemy, are entitled to be released if they sign a written undertaking not to serve in any enemy aircraft while hostilities last. Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

The names of individuals released after giving a written undertaking in accordance with the third paragraph of this article will be notified to the opposing belligerent, who must not knowingly employ them in violation of their undertaking.

When circumstances have arisen which have led to the detention of a neutral private aircraft by a belligerent, the question will arise of the treatment to be meted out to the crew and to the passengers, if any, of such aircraft. In general, the crew of an aircraft will be very expert individuals, whose services would be of great value to a
belligerent. If they are of enemy nationality or in the service of the enemy, or engaged in a violation of neutrality, there is good reason for detaining them as prisoners of war. If not, they should be released unconditionally.

Passengers who are in the service of the enemy or who are enemy nationals fit for military service may likewise be detained.

Immediate release of persons who cannot be made prisoners of war may not in all cases be feasible. The fact that military exigencies may necessitate a temporary delay in according release does not prejudice the right to such release in due course.

The peculiar characteristics of aircraft may enable members of the crew or passengers in a neutral aircraft in time of war to render services of special importance to a belligerent. Where such services have been rendered in the course of the flight in which such persons were captured, the individuals may be made prisoners of war, whatever their nationality.

The rules adopted on this subject are in conformity with the practice of the recent war, but they have not secured unanimous assent. The Netherlands Delegation has felt unable to accept them for two reasons, viz., firstly, that they constitute an extension of the accepted rules of international law, and, secondly, because of the absence of any provision to the effect that where the detention of the aircraft has taken place in circumstances which are subsequently made the subject of prize court proceedings, and the capture is held to be invalid, the crew and passengers of the aircraft should be released unconditionally.

ARTICLE 37

Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released unconditionally, if they are neutral nationals and not in the service of the enemy. If they are enemy nationals or in the service of the enemy, they may be made prisoners of war.

Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

The phrase "prisoner of war" in its narrower sense is applied to the combatant and non-combatant members of the armed forces of the belligerent (see article 3 of the Land Warfare Regulations). It is used in articles 36 and 37 in a broader sense and is applied to passengers or members of the crew of neutral and enemy aircraft who may not be members of the belligerent armed forces at all. To-
avoid any risk of doubt as to the treatment to which such persons are entitled article 38 lays down that their treatment shall not be less favourable than that to which members of the armed forces are entitled.

**Article 38**

Where under the provisions of articles 36 and 37 it is provided that members of the crew or passengers may be made prisoners of war, it is to be understood that, if they are not members of the armed forces, they shall be entitled to treatment not less favourable than that accorded to prisoners of war.

**Chapter VI. Belligerent Duties Towards Neutral States and Neutral Duties Towards Belligerent States**

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 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.

The customary rules of international law authorise 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.

**Article 41**

Aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessels.

The principle is well established in land warfare that combatant forces of a belligerent must not penetrate within neutral jurisdiction. If they do, they are beyond the reach of their enemy: they have entered what is to them an asylum, and consequently, if after their visit to neutral territory they were allowed to re-enter hostilities, they would be making use of neutral territory to the detriment of their adversary.

From this principle arises a duty, which is incumbent on all neutral States, to do what they can to prevent combatant forces from entering their jurisdiction, and to intern those which do. These principles are recognised and adopted for aerial warfare by article 42. The obligation to intern covers also aircraft which were within the neutral jurisdiction at the outbreak of hostilities.

Where aircraft and their personnel are in distress and seek shelter in neutral territory, knowing that their fate will be internment, or where the entry is due to the fact that the aircraft has lost its bearings or experienced engine trouble or run out of fuel, the neutral State is under no obligation to exclude them; it is, in fact, morally bound to admit them. This is due to the principle that those who are in distress must be succoured. The prohibition in the article is aimed at those who enter in violation of the rights of the neutral State.

The prohibition on entry into neutral jurisdiction leads naturally to the further obligation incumbent upon neutral States to enforce compliance with the rule. It is beyond the power of any neutral State to ensure that no belligerent military aircraft will ever violate its neutrality; its obligation is limited to the employment of the means at its disposal, conforming in this respect to the phraseology employed in the Convention dealing with the Rights and Duties of Neutral Powers in Maritime War (No. XIII of 1907).
The provision in the article is limited to military aircraft because it is only in respect of such craft that the prohibition on entry is absolute. Under article 12 the admission of private or public non-military aircraft is within the discretion of the neutral State. Where such aircraft penetrate within neutral jurisdiction in violation of the measures prescribed by the neutral Power, they will be subject to such penalties as the neutral Power may enact; these may or may not include internment. Recognition of this fact has enabled the Commission to omit a provision which figured as article 11 in the American draft:

A neutral Government may intern any aircraft of belligerent nationality not conforming to its regulations.

The obligation on the part of the neutral Power to intern covers not only the aircraft, but its equipment and contents. The obligation is not affected by the circumstance which led to the military aircraft coming within the jurisdiction. It applies whether the belligerent aircraft entered neutral jurisdiction, voluntarily or involuntarily, and whatever the cause. It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent.

The only exceptions to the obligation to intern an aircraft are those arising under articles 17 and 41. The first relates to flying ambulances. Under the second, an aircraft on board a warship is deemed to be part of her, and therefore will follow the fate of that warship if she enters neutral ports or waters. If she enters under circumstances which render her immune from internment, such aircraft will likewise escape internment.

The obligation to intern belligerent military aircraft entering neutral jurisdiction entails also the obligation to intern the personnel. These will in general be combatant members of the belligerent fighting forces, but experience has already shown that in time of war military aeroplanes are employed for transporting passengers. As it may safely be assumed that in time of war a passenger would not be carried on a belligerent military aircraft unless his journey was a matter of importance to the Government, it seems reasonable also to comprise such passengers in the category of persons to be interned.

**Article 42**

A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any.
Under article 15 of the Convention for the adaptation of the principles of the Geneva Convention to Maritime War (No. X of 1907), the shipwrecked, wounded or sick members of the crew of a belligerent warship, who are brought into a neutral port, must be interned. The same rule is applied by article 43 to the personnel of a disabled belligerent military aircraft, when the men are brought in on board a military aircraft. It goes without saying that such individuals could not be brought in and landed at a neutral port without the consent of the neutral authorities.

**Article 43**

The personnel of a disabled belligerent military aircraft rescued outside neutral waters and brought into the jurisdiction of a neutral State by a neutral military aircraft and there landed shall be interned.

The principle is well established in international law that in time of war a Government, which remains neutral, must not itself supply to a belligerent Government arms or war material. For aerial warfare effect is given to this principle by the following article:

**Article 44**

The supply in any manner, directly or indirectly, by a neutral Government to a belligerent Power of aircraft, parts of aircraft, or material, supplies or munitions required for aircraft is forbidden.

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.

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 hostili­
ties, or carrying or accompanied by the necessary elements of such
equipment. Consequently, its departure under circumstances which
would constitute the despatch of a hostile expedition, must be pre­
vented by the neutral Government.

It is easy to see that it is aircraft which have flown out of the
neutral jurisdiction, which are most likely to engage in hostilities in
some form before delivery to the belligerent purchaser in the bel­
ligerent State, and it is in these cases that the neutral Government
must take special precautions. All risk will be avoided if the air­
craft, despatched to the order of a belligerent Power, does not come
within the neighbourhood of the operations of the opposing bellig­
erent. The neutral State should therefore prescribe the route which
the aircraft is to follow. This alone, however, will not be sufficient.
The aircraft might ignore the instructions it receives. Guarantees
for compliance must therefore be exacted. It will be for the neutral
State to determine the guarantees which it thinks necessary, but they
must be effective guarantees, such, for instance, as insisting on the
aircraft carrying a representative of the Government to see that the
route indicated is followed.

To meet these requirements, the following article has been
adopted:

**Article 46**

A neutral Government is bound to use the means at its disposal:

1. To prevent the departure from its jurisdiction of an aircraft in a
   condition to make a hostile attack against a belligerent Power, or
carrying or accompanied by appliances or materials the mounting
   or utilisation of which would enable it to make a hostile attack, if
there is reason to believe that such aircraft is destined for use
   against a belligerent Power.
2. To prevent the departure of an aircraft the crew of which includes
   any member of the combatant forces of a belligerent Power.
3. To prevent work upon an aircraft designed to prepare it to depart in
   contravention of the purposes of this article.

On the departure by air of any aircraft despatched by persons or companies
in neutral jurisdiction to the order of a belligerent Power, the neutral Gov­
ernment must prescribe for such aircraft a route avoiding the neighbourhood
of the military operations of the opposing belligerent, and must exact what­
ever guarantees may be required to ensure that the aircraft follows the route
prescribed.

The height to which aircraft can ascend would enable them to be
used for observation purposes from a spot within neutral jurisdic­
tion, i.e., within the airspace above neutral territory or territorial
waters, if hostilities were in progress close to the frontier between
two States. Such proceedings might be extremely harmful to belligerent interests, and if the observations were made on behalf of one of the belligerents and for the purpose of supplying him with information, would amount to an improper use of neutral territory. To meet this contingency, the following provision has been adopted:

**ARTICLE 47**

A neutral State is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observation of the movements, operations or defences of one belligerent, with the intention of informing the other belligerent.

The prohibition of aerial observation within neutral territory on belligerent account must apply equally to the case of aircraft on board belligerent warships when in neutral waters. To avoid all misconception on this point, the following paragraph has been added:

This provision applies equally to a belligerent military aircraft on board a vessel of war.

The measures which a neutral Government may be obliged to take to compel respect for its rights may entail the use of force; fire may have to be opened on foreign aircraft, even military aircraft of another State. Following the analogy of article 10 of Convention V of 1907 (Rights and Duties of Neutral Powers in Land War) and article 26 of Convention XIII (Rights and Duties of Neutral Powers in Maritime War), it has been thought well to declare that the measures, even of force, taken by a neutral Power for this purpose cannot be regarded as acts of war. Still less could they be regarded as unfriendly acts, seeing that they are taken in specific exercise of rights conferred or recognised by treaty.

It may be well to add that the neutral Government will not be responsible for any injury or damage done to the aircraft or other object.

**ARTICLE 48**

The action of a neutral Power in using force or other means at its disposal in the exercise of its rights or duties under these rules cannot be regarded as a hostile act.

**CHAPTER VII. VISIT AND SEARCH, CAPTURE AND CONDEMNATION**

Both the American and British drafts when first submitted to the Commission provided for the use of aircraft in exercising against enemy commerce the belligerent rights which international law has sanctioned. This principle has not met with unanimous acceptance; the Netherlands Delegation has not felt able to accept it. The stand-
point adopted by this Delegation is that the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce. No justification exists for the extension of those rights to an aircraft, which is a new engine of war entirely different in character from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels. Consequently there is no reason to confer on a military aircraft the right to make captures as if it were a warship, and no reason to subject commerce to capture when carried in an aircraft. In developing international law the tendency should be in the direction of conferring greater, not less, immunity on private property.

For these reasons the Netherlands Delegation has not accepted the rules contained in Chapter VII and its participation in the discussion of individual rules has been subject to the general reserves made with regard to the whole chapter.

The majority of the delegations have not felt able to reject the principle that the aircraft should be allowed to exercise the belligerent right to visit and search, followed by capture where necessary for the repression of enemy commerce carried in an aircraft in cases where such action is permissible. This principle is embodied in article 49, of which the text is as follows:

**Article 49**

Private aircraft are liable to visit and search and to capture by belligerent military aircraft.

No article on the subject of the exercise by belligerent military aircraft of the right of visit and search of merchant vessels has secured the votes of a majority of the Delegations, and therefore no article on the subject is included in the code of rules. Nevertheless, all the Delegations are impressed with the necessity of surrounding with proper safeguards the use of aircraft against merchant vessels. Otherwise excesses analogous to those which took place during the recent war might be reproduced in future wars.

The reason why no agreed text has been adopted by the Commission is due to divergence of view as to what action an aircraft should be permitted to take against a merchant vessel.

The aircraft in use to-day are light and fragile things. Except in favourable circumstances they would not be able to alight on the water and send a man on board a merchant vessel at the spot where the merchant vessel is first encountered (visite sur place). To make the right of visit and search by an aircraft effective it would usually
be necessary to direct the merchant vessel to come to some convenient locality where the aircraft can alight and send men on board for the purpose. This would imply a right on the part of the belligerent military aircraft to compel the merchant vessel to deviate from her course before it was in possession of any proofs derived from an examination of the ship herself and her papers that there were circumstances of suspicion which justified such interference with neutral trade. If the deviation which the merchant vessel was obliged to make was prolonged, as might be the case if the aircraft was operating far from land, the losses and inconvenience imposed on neutral shipping would be very heavy.

Is or is not a warship entitled to oblige a merchant vessel to deviate from her course for the purpose of enabling the right of visit and search to be carried out? Would an aircraft be exercising its rights in conformity with the rules to which surface warships are subject if it obliged a merchant vessel to deviate from her course in this way? Even if a warship is entitled on occasion to oblige a merchant vessel to deviate from her course before visiting her, can a similar right be recognised for military aircraft without opening the door to very great abuses?

These are the questions upon which the views entertained by the Delegations differed appreciably, and indicate the reasons why it was not found possible to devise any text on which all parties could agree.

The French Delegation declared that aircraft must conform to the rules to which surface warships are subject. The French Delegation proposed the following text:

Aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject.

In view of the differences of opinion manifested in regard to the above questions, the Delegation regarded this formula as the only one which was likely to receive the support of a majority of the Commission.

The American Delegation considered that a merchant vessel should be boarded when she is encountered, but maintained that, even if a departure from this rule might in exceptional circumstances be permitted in visit and search by surface ships, a similar concession to aircraft, with their limited means of boarding, would readily have the effect of converting the exception into the rule. They stated that they were not advised of anything in the record of the Washington Conference showing an intention to authorise surface ships or submarines to divert merchant vessels, without boarding them, to a port for examination; but that, were the case otherwise, the Washington Conference had decided that the subject of aircraft, which presented difficulties of its own and which might involve
questions different from those pertaining even to submarines, should be dealt with separately; and that to permit aircraft, with their rapidity and range of flight, to control and direct by orders enforceable by bombing, and without visit and search, the movement of merchant vessels on the high seas would, in their opinion, give rise to an inadmissible situation.

The American Delegation, therefore, proposed the following text:

Aircraft are forbidden to visit and search surface or subsurface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject.

In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft cannot divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft cannot capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested.

The British Delegation maintained that the problem connected with visit and search of merchant vessels by aircraft was analogous to that of the exercise of such right by submarines, and that the most satisfactory solution of the problem would be to apply mutatis mutandis the wording of article 1 of the Treaty signed at Washington on the 6th February, 1922, for the protection of the lives of neutrals and non-combatants at sea in time of war.

This Delegation maintained that by using the language of that treaty, as proposed, the question of the right to oblige a merchant vessel to deviate to a reasonable extent would be solved because the wording adopted at Washington had been modified so as to admit this right. The British Delegates proposed the following text:

The use of aircraft against merchant vessels must be regulated by the following provisions, which, being in conformity with the rules adopted by civilised nations for the protection of the lives of neutrals and non-combatants at sea in time of war, are to be deemed an established part of international law:

A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.

Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

The Japanese view was based on the practical difficulty in the way of exercise of the right of visit and search by aircraft. Visit and search is a necessary preliminary to capture, and unless an aircraft
is physically capable of carrying it out, the recognition of the right of military aircraft to conduct operations against merchant vessels may lead to a recurrence of the excesses practised against enemy and neutral merchant vessels in the submarine campaign initiated during the recent war. Therefore, the Japanese Delegation preferred not to recognise the right at all. But, in the end, as the amended American text removed the greater part of their fear of possible abuse, they expressed readiness to accept it, and suggested at the same time that the text had better be completed by the addition of the last sentence of the British text.

The Italian Delegation accepted the British point of view; it maintained that diversion of merchant vessels by surface warships was recognised and that the wording of the Washington Treaty should be repeated. To prevent any abusive exercise of the right by aircraft, the Italian Delegation proposed to add the following sentences to the paragraphs of the Washington Treaty as set out in the British text:

After the first paragraph add—

Visit must in general be carried out where the merchant vessel is first encountered. Nevertheless, in cases where it may be impossible to alight and there is at the same time good ground for suspicion, the aircraft may order the merchant vessel to deviate to a suitable locality, reasonably accessible, where she may be visited. If no good cause for this action is shown, the belligerent State must pay compensation for the loss caused by the order to deviate.

After the third paragraph add—

If the merchant vessel is in the territorial waters of the enemy State and not on the high seas, she may be destroyed after previous notice has been given to the persons on board to put themselves in a place of safety and reasonable time has been given them for so doing.

The Italian Delegation also intimated that for the sake of arriving at an agreement, it would vote in favour of the French text given above. In accepting it, however, it declared: (1) that in the existing practice of maritime war the majority of European Powers admitted that, if visit on the spot where the merchant vessel was encountered was impossible, surface warships are entitled to oblige merchant vessels to deviate to a suitable spot where the visit can take place; (2) that, even if it is not desired to rest on the maritime practice indicated above, the Italian Delegation must maintain the right of belligerent aircraft to exercise the right of visit in accordance with the texts of the amendments proposed.

The Netherlands Delegation accepted the American proposal as the one which limited most narrowly the exercise of belligerent rights by aircraft.

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24 See Minute 105.
When put to the vote the American proposal was supported by the Japanese and Netherlands Delegations and opposed by the British, French and Italian. The French proposal was opposed by the American, British, Japanese and Netherlands Delegations. The British and Italian Delegations explained that they could only support it if it was amplified in the way indicated in the British and Italian amendments.

Although all the Delegations concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and non-combatants, the Commission, by reason of a divergence of views as to the method by which this result would best be attained, was unable to agree upon an article dealing with the exercise of belligerent rights by aircraft against merchant vessels. The code of rules proposed by the Commission therefore leaves the matter open for future regulation.

While aircraft are in flight in the air, the operation of visit and search cannot be effected so long as aircraft retain their present form. Article 49 therefore necessitates the recognition of a right on the part of belligerent military aircraft to order non-military aircraft to alight in order that the right of visit and search may be exercised. They must not only be ordered to alight, but they must be allowed to proceed to a suitable locality for the purpose. It would be a hardship to the neutral if he was obliged to make a long journey for this purpose and the locality must, therefore, not only be suitable, but must be reasonably accessible—that is, reasonably convenient of access. A more precise definition than this can scarcely be given; what is reasonably convenient of access is a question of fact to be determined in each case in the light of the special circumstances which may be present. If no place can be found which is reasonably convenient of access, the aircraft should be allowed to continue its flight.

As is the case with merchant vessels, a refusal to comply with such belligerent directions will expose the aircraft to the use of force for the purpose of insisting on compliance. Just as the belligerent right has received universal acceptance in maritime war, so is the principle admitted that the neutral vessel is under a duty to submit to it and if in consequence of her failure to do so she is damaged or sunk, she has no right to complain, seeing that she has failed to comply with an obligation imposed upon her by the law of nations. This principle does not, however, entitle a belligerent to apply force unnecessarily. His measures of coercion must be limited to what is reasonably required to secure the fulfilment of his object.

It is for this reason that a warship always fires a shot across the bow of a vessel before attempting to hit the vessel herself, and, even
when obliged to fire at the vessel herself, must still take all measures within her power to rescue the crew and passengers. Recognition of a similar right on the part of aircraft to apply force must be conditioned by the obligation on the part of the aircraft not to apply force to a greater extent than is necessary. It would be so easy for the aircraft to take measures which might at once entail the destruction of the aircraft and the loss of life of everybody therein that it is essential to recognise the principle that force must only be employed to the extent which is reasonably necessary.

**Article 50**

Belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible.

Refusal, after warning, to obey such orders to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon.

The next article deals with the position of a neutral public non-military aircraft. The future of commercial aviation may involve the establishment of State-owned lines of aircraft for commercial purposes. The principle has already been recognised that such aircraft must be treated upon the same footing as private aircraft. Their subjection to the exercise of the right of visit and search and capture must, therefore, be assured. Where public non-military aircraft are not used for commercial purposes, the general rule must apply according to which a belligerent warship can only visit the public vessels of a friendly Power so far as may be necessary for the purpose of ascertaining their character, i.e., by the verification of their papers.

**Article 51**

Neutral public non-military aircraft, other than those which are to be treated as private aircraft, are subject only to visit for the purpose of the verification of their papers.

Article 52 applies to aircraft in time of war the principle which already obtains in the case of merchant vessels, namely, that an enemy merchant vessel is liable to capture in all circumstances.

**Article 52**

Enemy private aircraft are liable to capture in all circumstances.

The next article deals with the grounds upon which a neutral private aircraft may be captured.

(a) The first is where it resists the legitimate exercise of belligerent rights. This is in harmony with article 63 of the Declaration of London. As first submitted to the Commission, the text included
the words "or flees." On due consideration, however, these words were omitted. The reasons for this omission cannot be stated better than is done in the report on article 63 of the Declaration of London, prepared by M. Renault:

If the vessel is stopped, and it is shown that it was only in order to escape the inconvenience of being searched that recourse was had to flight, and that beyond this she had done nothing contrary to neutrality, she will not be punished for her attempt at flight. If, on the other hand, it is established that the vessel has contraband on board, or that she has in some way or other failed to comply with her duty as a neutral, she will suffer the consequences of her infraction of neutrality, but in this case, as in the last, she will not undergo any punishment for her attempt at flight. Expression was given to the contrary view, namely, that a ship should be punished for an obvious attempt at flight as much as for forcible resistance. It was suggested that the prospect of having the escaping vessel condemned as good prize would influence the captain of the cruiser to do his best to spare her. But in the end this view did not prevail.

(b) The second ground for capture is that of the failure of a neutral aircraft to comply with directions given by a belligerent commanding officer enjoining the withdrawal of neutral aircraft from the immediate vicinity of his military operations. By the terms of article 30, a neutral aircraft disregarding such a prohibition is exposed to the risk of being fired upon. It might well be thought that such risk would involve a sufficient deterrent without rendering non-compliance a ground of capture. The reason why capture has been added is due to the peculiar circumstances of warfare in the air. The right to oblige aircraft to avoid the scene of military operations would only be made use of in cases where it was a matter of importance to the belligerent to ensure their absence, and consequently where effective measures must be taken to secure compliance. If a neutral private aircraft is to be fired upon for this purpose, it is desirable to render it as little likely as possible that it shall be fired upon in a way that will involve its destruction. If the airman knows that the aircraft, when forced to alight, may be made the subject of capture, he is less tempted to secure observance of the rule by firing in a way which will involve the destruction of the aircraft.

(c) The third ground for capture is where the aircraft is engaged in unneutral service. This phrase "unneutral service" formed the subject of careful consideration in the Naval Conference of London in 1908 and 1909, at the time when the Declaration of London was framed. The meaning attached to the term by the Commission in the preparation of the present text is that used in articles 45 and 46 of that Declaration, the intention being to render those articles applicable in the case of similar action on the part of aircraft. For instance, it will cover an act amounting to taking
a direct part in hostilities, such as that mentioned in the second paragraph of article 16. The Commission would also refer to that portion of the Report on the Declaration of London which deals with unneutral service (articles 45 and 46) as they are in entire concurrence with it.

(d) The fourth ground for capture is that a neutral private aircraft is armed in violation of article 16, which stipulates that outside its own jurisdiction a private aircraft must not be armed. The carriage of arms by a private aircraft under such circumstances gives rise to a well-founded suspicion of an intention to take part in hostilities in violation of the laws of war.

(e) The fifth ground for capture is that an aircraft has no marks or is bearing false marks in violation of article 19.

(f) The sixth ground for capture is the absence or irregularity of the papers of the aircraft. This rule is in accordance with that which prevails in maritime warfare. The papers which must be carried are indicated with greater precision in article 54.

(g) The seventh ground for capture is that of an aircraft being found manifestly out of the proper line of its flight as indicated by its papers and where no sufficient reason is found for its presence in that locality. The importance of this rule from the point of view of aerial warfare is due to the ease with which aircraft can be used for reconnaissance work, even though they may be masquerading as neutral aircraft engaged on innocent occupations. It may well be that in any particular case the aircraft will be able to establish the innocence of its presence. It may have been blown out of its course; it may have been compelled to make a deviation to secure supplies; it may even have intentionally deviated for the purpose of avoiding an area in which it considered that military operations were possible. It is therefore to the interests of both parties—the belligerent and the neutral—that ample opportunity for enquiry should be given to the belligerent before exercising his right of capture. It will only be where the results of such investigations show that there is good cause for suspicion that the aircraft was engaged in some improper operations that capture will be resorted to.

(h) The eighth ground for capture is where the neutral private aircraft carries, or itself constitutes, contraband of war. This sub-head is framed upon the basis that the term "contraband of war" will bear the same meaning as it has in maritime warfare.

(i) The ninth ground for capture is that the aircraft is engaged in a breach of blockade. "Blockade" is here used in the same sense in which it is employed in Chapter 1 of the Declaration of London, that is to say, an operation of war for the purpose of preventing by the use of warships ingress or egress of commerce to or from a defined portion of the enemy's coast. It has no reference to a blockade
enforced without the use of warships, nor does it cover military investments of particular localities on land. These operations, which may be termed "aerial blockade," were the subject of special examination by the experts attached to the various Delegations, who framed a special report on the subject for consideration by the Full Commission. The conditions contemplated in this sub-head are those of warships enforcing a blockade at sea with aircraft acting in co-operation with them. As the primary elements of the blockade will, therefore, be maritime, the recognised principles applicable to such blockade, as for instance, that it must be effective (Declaration of Paris, article 4), and that it must be duly notified and its precise limits fixed, will also apply. This is intended to be shown by the use of the words "breach of blockade duly established and effectively maintained" in the text of the sub-head.

It is too early yet to indicate with precision the extent to which the co-operation of aircraft in the maintenance of blockade at sea may be possible; experience alone can show. Nevertheless, it is necessary to indicate the sense in which the Commission has used the word "effective." As pointed out in the Declaration of London, the effectiveness of a blockade is a question of fact. The word "effective" is intended to ensure that it must be maintained by a force sufficient really to prevent access to the enemy coast-line. The prize court may, for instance, have to consider what proportion of surface vessels can escape the watchfulness of the blockading squadrons without endangering the effectiveness of the blockade; this is a question which the prize court alone can determine. In the same way, this question may have to be considered where aircraft are co-operating in the maintenance of a blockade.

The invention of the aircraft cannot impose upon a belligerent who desires to institute a blockade the obligation to employ aircraft in co-operation with his naval forces. If he does not do so, the effectiveness of the blockade would not be affected by failure to stop aircraft passing through. It is only where the belligerent endeavours to render his blockade effective in the air-space above the sea as well as on the surface itself that captures of aircraft will be made and that any question of the effectiveness of the blockade in the air could arise.

The facility with which an aircraft, desirous of entering the blockaded area, could evade the blockade by passing outside the geographical limits of the blockade has not escaped the attention of the Commission. This practical question may affect the extent to which belligerents will resort to blockade in future, but it does not affect the fact that where a blockade has been established and an aircraft attempts to pass through into the blockaded area within the limits of the blockade, it should be liable to capture.
The Netherlands Delegation proposed to suppress (i) on the grounds that air blockade could not be effectively maintained, basing its opinion on its interpretation of the experts' report on the subject.

The British, French, Italian and Japanese Delegations voted for its maintenance. The American Delegation voted for its maintenance ad referendum.

(k) The tenth ground for capture is that the private aircraft has been transferred from belligerent to neutral nationality with a view to escaping the disadvantages which enemy status confers upon aircraft. This sub-head has been inserted in order that so far as possible the rules applicable to maritime warfare should apply to warfare in the air.

The sub-head as adopted does not embody the detailed provisions of the Declaration of London (articles 55 and 56) because those articles constituted a compromise between two competing principles and have not stood the test of experience.

The sub-heads enumerated above comprise those which the Commission has considered sufficient to justify capture. Experience may show that other cases will arise in which capture may be necessary, as great development may yet occur in the science of aviation.

The article concludes with a proviso that the act which constitutes the ground of capture must have occurred in the course of the flight in which the neutral aircraft came into belligerent hands. This proviso would not, of course, apply to the case of transfer from belligerent to neutral nationality.

Account must also be taken of the special case provided for in article 6 of the rules for the control of radio in time of war under which merchant vessels or aircraft transmitting intelligence may in certain circumstances be liable to capture for a period of one year from the commission of the act complained of.

**Article 53**

A neutral private aircraft is liable to capture if it—

(a) Resists the legitimate exercise of belligerent rights.

(b) Violates a prohibition of which it has had notice issued by a belligerent commanding officer under article 90.

(c) Is engaged in unneutral service.

(d) Is armed in time of war when outside the jurisdiction of its own country.

(e) Has no external marks or uses false marks.

(f) Has no papers or insufficient or irregular papers.

(g) Is manifestly out of the line between the point of departure and the point of destination indicated in its papers and after such enquiries as the belligerent may deem necessary, no good cause is shown for the deviation. The aircraft, together with its crew and pas-
sengers, if any, may be detained by the belligerent, pending such enquiries.

(h) Carries, or itself constitutes, contraband of war.

(i) Is engaged in breach of a blockade duly established and effectively maintained.

(k) Has been transferred from belligerent to neutral nationality at a date and in circumstances indicating an intention of evading the consequences to which an enemy aircraft, as such, is exposed.

Provided that in each case (except (k)) the ground for capture shall be an act carried out in the flight in which the neutral aircraft came into belligerent hands, i.e., since it left its point of departure and before it reached its point of destination.

By custom and tradition practical uniformity has arisen as to the papers which a merchant vessel is expected to carry. There is no serious divergence between the legislation now in force in civilised countries. No practical inconvenience, therefore, arises in the application of the established rule of maritime war, that a vessel is liable to capture if it has no papers or if the papers are irregular. Similar uniformity would no doubt in time arise in connection with aircraft, particularly if the Air Navigation Convention of 1919 becomes universal. It has, however, been thought prudent to indicate in a special article the facts which the papers found on board an aircraft must indicate if its papers are to be held sufficient. Under article 6 the papers to be borne by an aircraft are those prescribed by the laws of its own State. The forms, names and number of such papers are therefore a matter to be determined by each State except so far as it may already be bound by treaty stipulations. Article 54 prescribes the points that must be established by such papers, that is to say, it ensures that the papers shall give the belligerent information on the points which it is important for him to know. They must show the nationality of the aircraft, the names and nationality of the crew and the passengers, the points of departure and destination of the flight, particulars of the cargo, and must include the necessary logs. The legislation in force in each State must be sufficient to satisfy this rule if it desires that its aircraft shall escape trouble in time of war. It is not thought that this article will involve any inconvenience, as legislation which would not prescribe at least as much as the above on the subject of aircraft is unlikely to be enacted by any State.

**ARTICLE 54**

The papers of a private aircraft will be regarded as insufficient or irregular if they do not establish the nationality of the aircraft and indicate the names and nationality of the crew and passengers, the points of departure and destination of the flight, together with particulars of the cargo and the conditions under which it is transported. The logs must also be included.
The practice has now become universal for belligerent States to institute a prize court in which proceedings will take place for adjudicating on all cases of capture of ships or goods effected in maritime war. It is in the interest of neutrals that this system has been developed. If aircraft are to be allowed to exercise the belligerent right of capture, it is only proper that the same protection should be accorded to neutrals as in the case of captures effected by warships. This view has readily obtained unanimous assent, and is embodied in article 55.

**ARTICLE 55**

Capture of an aircraft or of goods on board an aircraft shall be made the subject of prize proceedings, in order that any neutral claim may be duly heard and determined.

The provisions of articles 52 and 53 deal only with the grounds for capture. They do not prescribe the rule which is to be applied by the prize court. Reflection has led the Commission to the view that, save in certain exceptional cases where aircraft will have been captured for reasons peculiar to aerial warfare, the decisions of the prize courts in adjudicating on captures effected by aircraft, should proceed on the same principles as those which obtain in captures by warships. If the jurisdiction of the prize courts is to apply in aerial warfare as well as in maritime warfare, it is convenient that the rules applied should be the same in both cases. It would be impossible to frame an exact code, at the present stage, of the rules which prize courts apply, nor indeed would it be within the competence of this Commission to do so as far as concerns maritime warfare. It would certainly lead to divergence between rules applied in the case of aerial captures and those applied in the case of maritime captures. The simplest solution has therefore been found in the adoption of the principle that the prize court should apply the same rules in both cases.

The special cases which have to be provided for are those where an aircraft has no marks or has used false marks, or has been found armed in time of war outside the jurisdiction of its own country, and also in the case where a neutral aircraft has violated the rule that it must not infringe the directions of the belligerent commanding officer to keep away from the immediate vicinity of his military operations. In these cases it is agreed that the aircraft should be liable to condemnation.

**ARTICLE 56**

A private aircraft captured upon the ground that it has no external marks or is using false marks, or that it is armed in time of war outside the jurisdiction of its own country, is liable to condemnation.
A neutral private aircraft captured upon the ground that it has disregarded the direction of a belligerent commanding officer under article 30 is liable to condemnation, unless it can justify its presence within the prohibited zone.

In all other cases, the prize court in adjudicating upon any case of capture of an aircraft or its cargo, or of postal correspondence on board an aircraft, shall apply the same rules as would be applied to a merchant vessel or its cargo or to postal correspondence on board a merchant vessel.

The destruction of neutral merchant vessels first came into prominence as a belligerent practice at the time of the Russo-Japanese War. It was not without difficulty that an agreement was reached between the Powers as to the extent to which the practice should be recognised in maritime war. In the case of enemy vessels, the practice has always been recognised as legitimate, subject to the overriding principle that the persons on board must be placed in safety and the papers of the vessel must be secured. This principle has been adapted to aerial warfare by article 57, of which the text is as follows:

**Article 57**

Private aircraft which are found upon visit and search to be enemy aircraft may be destroyed if the belligerent commanding officer finds it necessary to do so, provided that all persons on board have first been placed in safety and all the papers of the aircraft have been preserved.

The articles dealing with the destruction of neutral aircraft are largely based upon the provisions of the Declaration of London, but the language used is of a more restrictive character, so as to reduce the possibilities of an abuse of the practice, as happened in the late war. Destruction is limited to cases where an aircraft is captured in circumstances which show that it would be liable to condemnation on the ground of unneutral service, or on the ground that it has no marks or bears false marks. Apart from these cases, destruction can only be justified by the existence of grave military emergencies which would not justify the officer in command in releasing the aircraft. In all cases, destruction must be justified by the circumstance that sending the aircraft in for adjudication would be impossible, or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged.

**Article 58**

Private aircraft which are found upon visit and search to be neutral aircraft liable to condemnation upon the ground of unneutral service, or upon the ground that they have no external marks or are bearing false marks, may be destroyed, if sending them in for adjudication would be impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged. Apart from the cases mentioned above, a neutral private aircraft must not be destroyed except in the gravest military emergency, which would not justify the officer in command in releasing it or sending it in for adjudication.
The safeguards designed to ensure full protection for neutral interests in the case of any such destruction are embodied in article 59. The persons on board must be placed in safety. The papers must be secured in order that they may be available in the forthcoming prize court proceedings. The captor must then bring the case before the prize court and must establish, firstly, the need for destruction, and, secondly, when that is established, the validity of the capture. Failure to establish the first point will expose him to the risk of paying compensation to all the parties interested in the aircraft and its cargo. Failure to establish the second will place him in the same position in which he would be if the aircraft had not been destroyed, and he had been ordered to make restitution of the aircraft or cargo improperly captured.

Article 59

Before a neutral private aircraft is destroyed, all persons on board must be placed in safety, and all the papers of the aircraft must be preserved.

A captor who has destroyed a neutral private aircraft must bring the capture before the prize court, and must first establish that he was justified in destroying it under article 58. If he fails to do this, parties interested in the aircraft or its cargo are entitled to compensation. If the capture is held to be invalid, though the act of destruction is held to have been justifiable, compensation must be paid to the parties interested in place of the restitution to which they would have been entitled.

The special case of the destruction of contraband on board an aircraft, apart from the destruction of the aircraft itself, is dealt with in article 60, which proceeds on lines similar to article 54 of the Declaration of London. After the contraband has been destroyed, the aircraft will be allowed to continue its flight. Similar provision is made for the protection of neutral interests as under the preceding articles.

The article as adopted is limited to absolute contraband, but three Delegations considered that the word "absolute" should be deleted, and that the article should extend to all forms of contraband, as in article 54 of the Declaration of London.

Article 60

Where a neutral private aircraft is captured on the ground that it is carrying contraband, the captor may demand the surrender of any absolute contraband on board, or may proceed to the destruction of such absolute contraband, if sending in the aircraft for adjudication is impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged. After entering in the log book of the aircraft the delivery or destruction of the goods, and securing, in original or copy, the relevant papers of the aircraft, the captor must allow the neutral aircraft to continue its flight.

The provisions of the second paragraph of Article 59 will apply where absolute contraband on board a neutral private aircraft is handed over or destroyed.
Chapter VIII. Definitions

In some countries, the word "military" is not generally employed in a sense which includes "naval." To remove any ambiguity on this point a special article has been adopted.

Article 61

The term "military" throughout these rules is to be read as referring to all branches of the forces, i.e., the land forces, the naval forces and the air forces.

Article 62 is intended to remove all risk of doubt as to whether aircraft personnel should, in matters not covered by these rules or by conventions as to the application of which there can be no doubt, be governed by the Land Warfare Regulations or by the unwritten rules governing maritime war. The rules to be applied are those contained in the Land Warfare Regulations. Regard must be had to the last paragraphs of the Convention to which the Land Warfare Regulations are attached, that cases not provided for are not intended, for want of a written prohibition, to be left to the arbitrary judgment of military commanders. In all such cases the population and belligerents are to remain under the protection of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience.

The French Delegation expressed the opinion that the terms of article 62 were hardly adequate to cover a subject so complex.

Article 62

Except so far as special rules are here laid down and except also so far as the provisions of Chapter VII of these Rules or international conventions indicate that maritime law and procedure are applicable, aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops in virtue of the custom and practice of international law and of the various declarations and conventions to which the States concerned are parties.

Jurisdiction

The British draft code contained an article (No. 9) stipulating that for the purpose of the proposed rules, territory over which a Power exercises a protectorate or a mandate, and also protected States, should be assimilated to the national territory of that Power. The Japanese Delegation drew attention to the necessity of providing also for the case of leased territories if any such article were adopted. Throughout the articles adopted the word "jurisdiction" is used. The Commission has considered the question whether it is necessary to add a definition of the word "jurisdiction," and has come to the conclusion that it would be better not to do so. The area within which each State is responsible is well understood; no difficulty of
this sort arises in practice; and no inconvenience has been caused
by the absence of any such definition from Convention No. XIII, of
1907, in which the word "jurisdiction" is used in a manner very
similar to that in which it is used in the present rules.

MARGINAL TERRITORIAL AIR BELT

An interesting proposal was made by the Italian Delegation that
along the coast of every State the national jurisdiction in the air-
space should for aerial purposes extend to 10 miles. The proposal
did not comprise any extension of territorial waters generally, a
matter which would have been outside the reference to the Commis-
sion under the terms of the Washington Resolution.

Detailed consideration of the proposal led the majority of the
dellegations to think that the suggestion is not practicable.

It seems inevitable that great confusion would follow from any
rule which laid down a different width for the territorial airspace
from that recognised for territorial waters, more particularly in the
case of neutral countries for whose benefit and protection the pro-
posal is put forward. As an example it is only necessary to take
article 42, which obliges a neutral State to endeavour to compel a
belligerent military aircraft entering its jurisdiction to alight. If
the aircraft entered the jurisdiction from over the high seas, it would
do so at 10 miles from the coast, and if in compliance with neutral
orders it forthwith alighted on the water, it would then be outside
the neutral jurisdiction, and the neutral State could not intern the
aircraft.

On principle it would seem that the jurisdiction in the airspace
should be appurtenant to the territorial jurisdiction enjoyed beneath
it, and that in the absence of a territorial jurisdiction beneath, there
is no sound basis for jurisdiction in the air.

Furthermore, it is felt that the obligation to enforce respect for
neutral rights throughout a 10-mile belt would impose an increased
burden on neutral Powers without adequate compensating advan-
tages. Even with this wider belt it would still be easy for airmen
fighting in the air to lose their bearings in the heat of the combat,
and to encroach inadvertently on neutral jurisdiction. Lastly, the
greater the distance from the coast, the more difficult it is for the
position of an aircraft to be determined with precision, and the more
frequent, therefore, will disputes become between belligerent and
neutral States as to violation by the former's aircraft of the latter's
jurisdiction.

With a view to meeting these criticisms, the Italian Delegation
recast the proposal in a different shape, and suggested that in time of
war a State, whether neutral or belligerent, should be authorized,
if it so desired, and if it notified other Powers accordingly at the
beginning of the war, to extend its jurisdiction over the marginal air-belt to a distance of 10 miles at any given places along its coast. In this form the proposal would have placed no burden upon neutrals, because they would not have made use of it unless they considered it to their advantage. The anomalies of the divergent widths of the marginal air-belt and the marginal belt of sea would have remained.

After due consideration of the proposal, the majority of the Delegations felt unable to accept the proposal even in its amended form.

The Italian Delegation made the following statement:

1. It does not think it desirable to resume in Plenary Commission the discussion of a question which has on several occasions been considered in all the necessary detail during the meetings of the Sub-Committee.

2. Nevertheless, although the majority of the Delegations have already put forward views opposed to its proposal, it continues to believe in the importance of that proposal and in the necessity for its adoption and insertion in an international convention.

3. From the point of view both of belligerent and of neutral States, there are reasons of the highest juridical and technical importance which make it indispensable to allow each State the power of including in its jurisdiction the atmospheric space to a distance of 10 miles from its coast.

4. The difficulties resulting from the difference between the width of the marginal air-belt and the width of national territorial waters would not seem to be so serious as to render the Italian proposal unacceptable in practice.

5. In any case, there is no juridical obstacle to the fixing of the same width of space for the marginal air-belt as for territorial waters, the Italian Delegation being of opinion that international law, as generally recognised, contains no rule prohibiting a State from extending its territorial waters to a distance of 10 sea-miles from its coasts.

6. In conclusion, it urges that a question of such paramount importance should be reopened and placed upon the agenda of a conference in the near future.

COMPENSATION AND DISPUTES

The Netherlands Delegation submitted the following proposal:

The belligerent Party who, intentionally, or through negligence, violates the provisions of the present rules is liable to pay compensation in case damage is caused as a result of such violation. Such Party will be responsible for all acts committed by members of his armed forces.

If any dispute should arise on the subject which is not otherwise settled, such dispute shall be submitted for settlement to the Permanent Court of Arbitration, in conformity with Convention I of 1907, or to the Permanent Court of International Justice, in respect of such States as have accepted as compulsory ipso facto its jurisdiction.

The Commission approving the principle of indemnity, decided to incorporate the proposal in its general report, so as to bring it to the attention of the Governments.

VIOLATION OF THE RULES

No provision is made in the articles adopted as to the penalties to which persons violating the rules are to be subject. Some of the
provisions in the drafts laid before the Commission stated that persons violating the article in question were to be punishable with death, or were to be treated as war criminals. No such stipulation figures in the Land Warfare Regulations and it has seemed better to omit it. Its absence will not in any way prejudice the imposition of punishment on persons who are guilty of breaches of the laws of aerial warfare.

United States of America:
  JOHN BASSETT MOORE.
  ALBERT HENRY WASHBURN.

British Empire:
  RENNELL RODD.
  CECIL J. B. HURST.

France:
  A. DE LAPRADELLE.
  BASDEVANT.

Italy:
  V. ROLANDI RICCI.

Japan:
  K. MATSUI.
  M. MATSUDA.

Netherlands:
  A. STRUYCKEN.
  VAN EYSINGA.

The Secretary-General:
  J. P. A. FRANÇOIS.

THE HAGUE, February 19, 1923.

CONVENTION BETWEEN NORWAY AND SWEDEN RELATING TO AIR NAVIGATION, SIGNED AT STOCKHOLM, MAY 26, 1923

His Majesty the King of Sweden and His Majesty the King of Norway, who have agreed to conclude a Convention relating to Air Navigation between Sweden and Norway, have for this purpose appointed as their plenipotentiaries:

His Majesty the King of Sweden:
  His Excellency Carl Fredrik Wilhelm Hederstierna, His Majesty's Minister for Foreign Affairs;

His Majesty the King of Norway:
  M. Johan Herman Wollebaek, His Majesty's Envoyé Extraordinary at Stockholm;

who, having duly received full powers, have agreed as follows:

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1923 League of Nations Treaty Series, Vol. XVIII, p. 173. While the "Rules of Aerial Warfare" drawn up by the Commission of Jurists in 1923 have not been ratified, conventions somewhat similar to that of May 26, 1923, between Norway and Sweden have been ratified by several states since the World War.