International Law Studies—Volume 12

International Law Situations

## Situation II.

### AIR CRAFT IN WAR.

There is war between X and Y. All other States are neutral. Airships and balloons are in common use. State X has not signed the convention prohibiting the launching of projectiles from balloons.

(*a*) X brings a balloon to State Z and fills it with gas preparatory to a flight with view to destroying a part of the fleet of Y by dropping explosives from above. The authorities of Y protest that this is a violation of neutrality. What action should be taken?

(*b*) X so maneuvers a balloon that if it is shot at, the projectile will fall within the territory of State B. What may Y do?

(*c*) An air craft of State C flies over State X in direction of State Y and easily discerns the location of the naval and military forces of State X.

What action may State X take if the air craft land on its territory?

What may be done if it does not land?

(*d*) A fleet of Y is maintaining an effective blockade before port O of State X. An aeroplane apparently from a neighboring neutral State flies over the blockading line, enters port O, lands, returns to the neutral State and later on a flight in another direction falls within the three-mile limit of State Y. The aeroplane and occupants are picked up by a vessel of the blockading force.

How should the aeroplane and occupants be treated?

(*e*) Would the treatment be different if they were picked up from the high sea?

(*f*) Would the treatment be different if they were picked up within neutral waters?

### SOLUTION.

(*a*) The protest of belligerent State Y should be heeded by neutral State Z.

(*b*) Y may take any action which would not involve violation of neutral jurisdiction, as would be the case if the projectile should fall in the territory of State B.

(*c*) When the neutral air craft lands within belligerent territory it may be detained or other measures may be taken to prevent the disclosure of military movements.

While the neutral air craft is still in the air, the belligerent may take such measures as possible to prevent disclosure of his military movements.

(*d*) If the aeroplane is neutral it should be sent to a prize court for adjudication.

If the aeroplane is belligerent it may be treated as an enemy vessel taken under similar conditions.

(*e*) The treatment would be the same if picked up from the high sea.

(*f*) The belligerent would have no military rights over an aeroplane picked up in neutral waters.

## NOTES.

*Early recognition of military value of balloons.*—During the last quarter of the eighteenth century the military value of balloons was recognized and various experiments were made. Giroud de Vilette, about 1783, wrote that from the beginning of his experiments he was convinced that the balloon would be an economical and very useful instrument for observing the position, maneuvers, march, and disposition of the enemy's forces, and for signaling this information to his own troops.

A balloon was used for observation purposes at the battle of Fleurus June 26, 1794. Balloons at the siege of Venice in 1849 were not found satisfactory for the discharge of projectiles. Balloons were used to a considerable extent during the Franco-Prussian War, and von Moltke had confidence in the military usefulness of air craft.

The captive balloon used particularly for observation and signaling purposes offers few problems as to its treatment in time of war, because the identity of the party which it serves or may serve is ordinarily easily determined. Kites and other captive air craft are subject to the same limitations.

Free balloons offer a greater number of problems because it is frequently difficult to determine whether there

is any element of hostility in a balloon which may be passing over. During the Franco-Prussian War persons who had passed the German frontier in balloons were imprisoned and severely treated, and a threat was made that they would be regarded as spies. None were, however, executed, and a few years later it came to be generally recognized that balloonists under such conditions were liable to be made prisoners of war, but were not liable to more severe treatment.

*Hague conventions.*—The Hague convention, with respect to the Laws and Customs of War on Land of 1899, in article 29, relating to spies, said:

> An individual can only be considered a spy if, acting clandestinely or on false pretenses, he obtains or seeks to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.
>
> Thus soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly the following are not considered spies: Soldiers or civilians carrying out their mission openly charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory.

This article was reaffirmed in the convention upon the same subject at The Hague conference of 1907. A limited use of balloons is thus permitted.

The discharge of projectiles from balloons was prohibited for a term of five years from 1899 by a declaration agreed upon at the First Hague Peace Conference. The prohibition was extended to analogous methods of discharge. When this convention came up for renewal at the Second Hague Conference in 1907 it was found that the development of the service of aerial navigation had made such progress since 1899 that States which approved the declaration of 1899 were not prepared to renew their adherence. Certain States, however, favored it, and the declaration was again submitted for approval, though only about one-half the States represented at the conference signed at the time.

A restriction on the use of balloons for bombardment of open places was, however, introduced in the Laws and Customs of War on Land. Article 25 of this convention of 1899 provided:

> The attack or bombardment of towns, villages, habitations, or buildings which are not defended is forbidden.

Article 25 of the same convention of 1907 provided:

> The attack or bombardment *by any means whatever* of towns, villages, habitations, or buildings which are not defended is forbidden.

The introduction of the clause *by any means whatever* is significant, but it must be observed that the prohibition extends only to places that are undefended and does not apply to fortified or defended positions. Accordingly, so far as the conventional laws of war are concerned, there is no prohibition of the use of balloons or other air craft for purposes of observation, scouting, and the like at any point, though doubtless neutrals have the right to regulate the use of the air space above their territories, and to exclude air craft which would use that air space for hostile purposes. There is no conventional prohibition of the use of air craft for the bombardment or attack upon fortified or defended places. The proposition of Lord Reay, of the British delegation to the Second Hague Conference in 1907 to the effect that the prohibition of aerial warfare and the restriction of warfare to land and sea would be a step in the direction of limitation of armaments did not meet with enthusiastic response.

*Changed conditions since 1907.*—The discussion at The Hague conference in 1907 and elsewhere at about the same time showed that on the part of many states the willingness to put restrictions on the use of air craft in time of war was due to the belief that they could not be effectively controlled. Since 1907 the progress in methods of aerial navigation has been so great that the conditions are now entirely changed. Air craft ascend to heights that were thought impossible, make flights against contrary winds, cross channels and seas, and go over mountains with such ease as to disturb well matured

war plans, are launched from and light upon decks of war ships, and in fact have become an agency which must be seriously considered in time of war.

The opposition to the use of air craft which was common before 1907 often had as its basis the contention that the use of such means in war would be at too great a risk to those who were not directly concerned in the war. It was maintained that the noncombatant population and property would be unduly endangered by the discharge of projectiles from balloons. The dirigibility of air craft recently constructed has removed many of these objections.

In case of a battle on the high sea between two fleets many of the objections to the use of air craft for the discharge of projectiles and explosives would not hold to the same degree as in land warfare.

The amount of goods which may be carried in an air craft at present is not large, but the risk to the belligerent is not always determined by volume. The character of the goods may be the essential point. Information may easily be carried which may determine the issue of a campaign.

While there has developed a considerable opposition to the exercise by air craft of ordinary war rights of attack and defense by means of projectiles it has been generally recognized that the belligerent must be able to use such force as he possesses against air craft which serve as scouts or may otherwise afford information to the enemy which may be of vastly greater importance to the enemy than any amount of material goods. The nationality of such air craft may be of importance for the court, but for the commander of the forces the main object is to prevent the furnishing of information which may defeat or upset his plans.

*Position of France, 1907.*—M. Renault, of the French delegation to the Second Hague Conference, speaking of the discharge of projectiles from balloons or other air craift, said:

Peu importe la mode d'envoi des projectiles. Il est licite d'essayer de détruire un arsenal, ou une caserne, que le projectile

employé dans ce but provienne d'un canon or d'un ballon; il est illicite d'essayer de détruire un hôpital par un procédé comme par l'autre. C'est là l'idée essentielle à laquelle nous estimons que l'on doit s'arrêter. Le problème de la navigation aérienne fait de tels progrès qu'il est impossible de prévoir ce que l'avenir nous réserve à ce sujet. On ne peut donc légiférer en connaissance de cause. On ne peut s'interdire d'avance la faculté de profiter de nouvelles découvertes qui ne toucheraient en rien au caractère plus ou moins humanitaire de la guerre, et qui permettraient à un belligérant d'exercer une action efficace contre son adversaire tout en respectant les prescriptions du Règlement de La Haye. (Deuxième Conférence Internationale de la Paix, Tome III, p. 152.)

The rapid development of aerial navigation has shown the wisdom of M. Renault's position in 1907. The increasing range of flight of air craft that are under control of the navigators has changed the problem of aerial warfare. Aerial corps in some form are now common adjuncts of military forces. The predictions of a few years ago in regard to the use of the air by man are in many respects more than realized. How far the use of air craft in war may be restricted by conventional agreement remains undetermined. Precedent seems to show that states are inclined to use against their enemies such force and such agencies as are under their effective control so long as these are not from their nature repugnant to the sense of humanity. Attempts were made to prohibit the use of torpedoes, submarine boats, and in earlier days firearms. In the actual effect of a projectile there may be little difference when it is fired from a gun several miles distant so as to fall within a certain area or dropped from an air craft a few hundred feet above the area. In firing upon air craft the motion of the target may be in any direction in space, while in a naval vessel the motion of the target is in the main upon a plane.

These new conditions of possible warfare show that the rules for warfare on land and on sea may not be adequate for the regulation of conduct when the extended use of the air is involved in hostilities. The changed attitude toward aerial warfare was shown in the difference in opinions of delegates to The Hague conference in 1899 and in 1907.

As Dr. Alex. Meyer, of Germany, says, in 1899 men were willing to prohibit the discharge of projectiles from balloons for a limited period, because it was felt that the lack of control of the balloon made it a cause of unnecessary danger if its use should be unrestricted. With the development of means of control of balloons and the advance in construction of dirigible air craft many of the reasons for the restriction of their use in war have disappeared.

(Die Luftschiffahrt in kriegsrechtlicher Beleuchtung, p. 13.)

*Aerial navigation conferences.*—The aeronautical congress held at Nancy from September 18 to 24, in 1909, expressed the wish:

1. Que les États, renonçant aux mesures prohibitives, s'entendent pour réglementer la circulation aérienne dans un sens libéral protégeant leurs droits de défense par toutes les vérifications utiles, en assurant l'observation de leurs lois douanières par des mesures appropriées à la matière, comme il a été fait pour les véhicules automobiles.

Le Congrès reconnaît que la matriculation des aéronefs serait la meilleure et peut-être la seule manière d'assurer l'efficacité d'une réglementation libérale.

2. Qu'en vue d'éviter les accidents et collisions, la circulation des navires aériens soit l'objet d'une réglementation internationale établie en s'inspirant, autant que possible, du réglement international, depuis longtemps éprouvé, relatif aux abordages en mer, et en tenant compte des règles déjà pratiquées dans la navigation aérienne.

3. Que, en raison de l'importance des connaissances météorologiques pour la navigation aérienne, la météorologie prenne une place toujours plus considérable dans l'enseignement.

(Revue Juridique Internationale Aérienne, 1ere Année, p. 33.)

*Opinion of Dr. Hazeltine.*—Dr. Harold D. Hazeltine, of Cambridge University, in lectures delivered late in 1910 and recently printed, touched upon some of the phases of aerial jurisdiction in time of war. His views may be stated somewhat in extenso in his own words:

In considering the rules of international law in times of war it is important to have clear ideas as to the aerial space that can legally serve as the theater of war and the base of warlike operations. It is admitted by all that the aerial space above the

territory and territorial waters of belligerents and also the aerial space above the high seas will in the future be legally the proper space for belligerent activities. A more difficult question arises with reference to the aerial space above the territory and territorial waters of neutrals. If the theory that the air is completely free be adopted, one would necessarily be obliged to admit that the entire aerial space above neutrals should also fall within the field of warlike operations. So, too, if one adopted the view that the territorial State has only a limited zone of protection above its territory, or even if the territorial State had only a limited zone of sovereignty, the logical conclusion would be that all the upper strata of the air space above the neutral's territory should be a legitimate field for the operations of the belligerent powers. But, so far as I know, all the adherents of the freedom-of-the-air position do not take this last logical step in their argument. They admit that the aerial space above neutrals should not serve as a space for the carrying on of hostilities by the belligerents. This admission on the part of the adherents of the freedom doctrine is a most important one; and, strictly speaking, I can not see in principle why they should not also admit the same considerations to apply in times of peace as in times of war. But this, of course, they do not admit! On the doctrine of the territorial State's full right of sovereignty in the entire air space above its territory and territorial waters, it is quite clear that this entire neutral air space could never serve as a space for actual hostilities between belligerents. In my opinion this latter is the sound view.

But although hostilities can not actually be carried on in neutral aerial space, a further question arises as to whether this neutral air space should be in other ways open to the use of belligerents. An examination of the present rules of maritime international law will assist us to an answer. Our fundamental question will be whether present rules of maritime international law should be adopted for future aerial international law. Present maritime international law lays down certain very important provisions favoring belligerents. It is not considered a violation of neutrality if a belligerent sea war vessel simply passes through the territorial waters of neutrals. So, too, the entry into neutral ports is not viewed as a breach of neutrality in case the entry is made for the purpose of obtaining provisions or of carrying out necessary repairs. Should these same principles apply in aerial international law?

The fact that territorial waters are in a sense a part of the sea, viewed as an international highway, lies perhaps at the basis of the rule that belligerent war vessels should have the right of passage through neutral territorial waters. Probably a distinction could be drawn between neutral territorial waters and the

neutral air space above these territorial waters, for it would undoubtedly be easy for an air vessel to pass through this narrow stretch of neutral aerial space into the air space over the neutral territory itself. The coast line itself acts as a natural and impassable barrier to sea vessels, while the invisible aerial frontier offers no such actual check. But despite this difference as regards natural conditions belligerent air vessels might well be permitted to pass through this narrow neutral aerial zone just above the coastal waters themselves.

If you think for a moment of the aerial space above the neutral territory itself, you will see that the rule to be applied here should be very different. Probably future international law will completely prohibit any passage of belligerent air vessels through the air space above the neutral territory itself. Certainly the same reasons for the present rules that prohibit the passage of belligerent troops across the territory itself should apply equally to the passage of belligerent aerial craft through the air space above that territory.

Admitting, then, that belligerent aerial craft should probably, on principle, be allowed passage through neutral air space above the neutral territorial coastal belt of water, the further question arises as to whether belligerent air vessels should be permitted actually to enter neutral harbors for purposes of asylum. Should they be permitted thus to enter for purposes of revictualing and for carrying out necessary reparations? As the sea itself is a highway for all nations, these privileges accorded to belligerent sea war vessels in neutral ports certainly seem to be based upon sound sense. Although one can conceive of various differences in detail as between the entry of belligerent sea vessels and belligerent air vessels, nevertheless it would seem just to accord the same privileges to the one class of vessels as to the other. Undoubtedly difficulties would arise in carrying out this principle, and the matter will require the most serious attention of international lawyers. It will be necessary, for example, definitely to determine how long the air vessel should remain in the neutral port, and it will be necessary to insure the strict observance of impartiality on the part of the neutral State itself. (H. D. Hazeltine, The Law of the Air, pp. 136–140.)

*French opinion in 1910.*—The opening words of M. Millerand, the French minister of public works, on May 18, 1910, at the International Conference upon Aerial Navigation show the rapidity of change in subjects which engage international conferences. He said:

Messeurs, Huit mois ne se sont pas écoulés depuis que j'avais l'honneur, ici même, de clôturer les travaux de la première Conférence internationale sur la circulation des automobiles, et je

prends aujourd'hui la parole pour souhaiter la bienvenue, au nom du Gouvernement de la République, aux membres éminents de la première Conférence internationale de navigation aérienne. (37 Clunet. J. D. I. P., 987.)

The French Government presented to this conference a series of propositions as bases for discussion. These prescribed the method of determining the nationality and identity of the airship, for licensing aerial pilots, for general prohibition of the carriage of arms, explosives, photographic and radiotelegraphic apparatus; for general liability to local authorities; that military and police airships could cross the frontier only after permission, and that other public airships should be assimilated to private airships, though no airship should enjoy exterritoriality. The problems before this conference were not settled, and adjournment was taken to November, 1910, but at this time some powers were unwilling to participate, and adjournment sine die took place.

The propositions which had been presented to the Institute of International Law in April, 1910, were placed before this conference. That of M. Fauchille said:

ART. 7. La circulation aérienne est libre. Néanmoins les États sous-jacent gardent les droits nécessaires à leur conservation, c'est-a-dire à leur propre sécurité et a celle des personnes et des biens de leurs habitants.

He also proposed in regard to airships that they be divided into public and private, and that the public airships might be military or civil. Each should have a nationality and identity, which should be made known. Airships might be excluded from certain zones, as from that of regions of fortifications, which regions should be made known. Navigation of the air above unoccupied territory and above the open sea was to be free. In international navigation dangerous articles and prohibited goods were not to be carried on airships. Acts on board the airship were to be within the jurisdiction of the State to which the airship belonged, while acts taking effect outside the airship are under jurisdiction of the

State within which the airship may be when the act takes places. Public airships would, so far as possible, be exempt from local jurisdiction. (17 Revue Droit International Public, p. 163, Mars–Avril, 1910.)

M. von Bar also submitted a proposition to the institute which came before the conference. He considered airships under jurisdiction of their own State so long as they remained in the air, though liable to the territorial law for any act that might take effect outside the airship. When it is not clear whether the act is criminal or civil, the law of the State of the airship prevails. The propositions of MM. Fauchille and von Bar were in many other respects supplementary. Both show how the agreement upon principles of aerial jurisdiction is progressing.

The First International Juridical Conference for the Regulation of Aerial Navigation held at Verona, from May 31 to June 2, 1910, adopted resolutions looking to the approval of much of the work of the Paris International Conference on Aerial Navigation. It maintained that the method of establishing the nationality of airships should be clearly defined, inclining to the position that the nationality of the owner should determine the nationality of the airship, that the airship would be liable for damage caused by landing, and that landing places might be prescribed. The conference regarded the aerial space above the open sea and above unoccupied territory as free; the atmosphere above the territory and the marginal sea of a State as under the jurisdiction of the subjacent State. Within the aerial domain of the State and subject to the necessary police and like regulations the navigation of the air would be free. The aircraft with its persons and goods, save for police and like regulations, would be under jurisdiction of the State to which it belongs. (17 Ibid., p. 410.)

Subcommittees of the Comité Juridique International de l'Aviation in considering a " Code de l'Air " arrived at different conclusions in 1910. The French subcommittee agreed upon the following:

ARTICLE 1er. La circulation aérienne est libre. Néanmoins les États conservent les droits nécessaires à leur defense, c'est-à-dire à leur propre sécurité et à celle des personnes et des biens de leurs habitants.

ART. 2. L'espace demeure absolument libre au-dessus de la pleine mer et des territoires inhabités.

The German committee proposed two projects, 7 members approving the first and 14 approving the second.

PROJET No. 1.—L'espace au-dessus de la haute mer et des territoires n'appartenant à personne est libre. L'espace situé au-dessus du territoire d'un Etat, y compris les mers côtières, est à envisager comme une partie du territoire de cet État.

PROJET No. 2.—L'espace au-dessus de la haute mer et des territoires n'appartenant à personne est libre. L'espace situé au-dessus du territoire d'un État (y compris les mers côtières) est à envisager comme une partie du territoire de cet État. Aucun État, cependant, ne doit, en temps de paix, interdire le passage inoffensif aux aérostats etrangers. Les événements qui se passent sur un aérostat étranger dans l'espace au-dessus, du territoire d'un autre État et qui n'intéressent pas celui-ci sont jugés d après le droit de l'État auquel l'aérostat appartient. (Revue Juridique Internationale Aèrienne 1ere Année, pp. 75–76.)

The Comité Juridique International de l'Aviation at meetings in April and May, 1910, considered the French and German propositions and agreed upon the following:

ARTICLE PREMIER.—La circulation aérienne est libre. Les États n'ont sur l'espace situé au-dessus de leur territoire, y compris les mer côtières, que les droits nécessaires pour garantir la sécurité et l'exercice des droits privés. (Ibid., p. 144.)

If the dominion of the air is in the subjacent State, this rule would establish a servitude in the air, as is the case in the general servitude in marginal seas which allows innocent passage.

The secretary of the Verona congress in 1910, Prof. Arnaldo de Valles, in an article in the July-August number, 1910, of the Revue Juridique Internationale de la Locomotion Aérienne, said:

1. La théorie de la domanialité publique de l'espace aérien est la plus conforme au régime juridique et économique actuel, soit dans le droit national, soit dans le droit international.

2. Cette théorie donne une raison scientifique au droit de police l'État et à l'exclusion des aérostats militaires des autres nations;

conclusions auxquelles on arrive dans la théorie de liberté seulement par voie empirique.

3. Une théorie de la domanialité de l'espace aérien ne restreint pas la vraie liberté qui consiste dans le droit de circulation. (Ibid., p. 208.)

*National regulations.*—International aerial navigation has already become a subject of domestic administrative regulation. The French minister of the interior issued a circular to the local officials on March 12, 1909, prescribing a method of action in case of landing of foreign balloons within their respective territorial divisions:

12 Mars, 1909.

Monsieur le Préfet: La fréquence des atterrissages de ballons étrangers en France a amené le gouvernement à s'occuper de cette question. Il a été reconnu que ces ballons étaient soumis au payement des droits de douane et il a été décidé en conséquence qu'il y avait lieu en pareil cas, de prendre les mesures suivantes: chaque fois qu'un ballon étranger descendra sur le territoire français, les maires, commissaires de police ou commissaires spéciaux devront vous en informer et prévenir sans retard les agents du service des douanes, s'il en existe dans le lieu d'atterrissage, ou, à leur défaut, les agents des contributions indirectes, afin d'assurer la perception des droits de douane. Le ballon devra être retenu jusqu'au payement des droits. D'autre part, les aéronautes seront tenus de décliner leur nom, prénoms, qualité et domicile. Si ce sont des militaires, ils devront indiquer le grade qu'ils occupent dans l'armée ainsi que le corps ou les services auquel ils appartiennent. En outre, les maires et les commissaires de police devront s'assurer que l'ascension a été entreprise dans un but purement scientifique et que les aéronautes ne sont livrés à aucune investigation préjudiciable à la sécurité nationale. Vous aurez soin de me transmettre ces renseignements par la voie télégraphique en m'avisant de l'atterrissage du ballon. Je vous prie de porter à la connaissance de MM. les sous-préfets, maires et commissaires de police les présentes instructions dont vous voudrez bien m'accuser réception.

Le Président du Conseil, ministre de l'intérieur,

G. Clemenceau.

In 1909 also the opinion in Denmark seemed to be that a German balloon had no right to establish in Denmark a station from which to proceed to the North Pole, and it was maintained that a state had the right to forbid airships access to any part of its territory if it judged such access prejudicial to the national interests. (16

Revue Droit International Public, p. 673, Sept.–Oct., 1909.)

There is also an undisputed legal right to regulate the movement of persons approaching fortifications, whether they approach by land, water, or air.

The use of the wireless telegraph has also been subject to national and international regulation.

*Jurisdiction in subjacent State.*—The Berlin agreement of 1903 and the Berlin convention of 1906 in regard to wireless telegraphy assume for the more important States of the world that jurisdiction over the atmosphere resides in the subjacent States.

The Hague conventions have prohibited by international agreement the launching of projectiles from balloons, bombardment "by any means whatever" of towns, villages, habitations, or buildings which are not defended and unneutral use of the radiotelegraph.

A dispatch of December 20, 1910, announces that Italy proposes that for time of war, by agreement by joint note, the powers of the world prohibit all firing from and arming of aerial ships, limiting their use to scouting and observation purposes only. This restriction was not made in the Turko-Italian War of 1911–12.

It is evident from the regulations issued by State authority, from decisions of courts, from codes, and expressions of State officials that States assume that they have jurisdiction in the air space above their territory.

The ideas in regard to the limits of aerial jurisdiction set forth by those who are giving special attention to this subject are not, however, in accord. It is natural that one group should maintain the ancient doctrine that "the air is free." Another group maintains that the domain of the air is exclusively in the subjacent State. A third group, between these, maintains that a certain zone of atmosphere above a State is within its jurisdiction, and beyond this the air is free. The height of this zone of jurisdiction is, however, a subject of considerable difference of opinion.

The argument has been advanced that the aerial domain of a State should be limited to a certain distance

above its territory. It has been stated that the altitude which an airship might attain can be determined, but as the limits fixed in earlier estimates have been surpassed it seems unwise to attempt at present to establish such limits.

Some think the height of the zone can be determined in a manner analogous to that of determining maritime jurisdiction. Some see unsurmountable difficulties in the use of this analogy. Of those who favor a zone theory some propose that the zone be determined by the limit of vision; some that the limit of effective control by arms be the determining factor; some that an arbitrary limit be agreed upon by the States of the world; and others advance other propositions.

It is evident that the claim can not be well sustained that the aerial dominion should be regarded as analogous to maritime, and that what is allowed in the marginal sea be allowed in a marginal zone of air, and what may be done on the high sea may be done in the aerial space above this marginal zone. While in time of war a battle between fleets upon the high sea might not endanger any neutral, a contest between their aerial fleets in the high air might result most disastrously to the subjacent neutral. In any case, while the force of gravity remains and until further means for counteracting its operation are devised, a neutral State can not be expected to submit to the risks of such use of the air. A warship upon the high sea when disabled may sink to the bottom without peril to the nearest neutral. From a battle in space above a neutral the descent of the disabled airship, possibly with a load of explosives, would certainly be with peril to the neutral. The perils to innocent neutrals because of war upon the high sea may be exceptional and almost negligible. The perils to innocent neutrals in case of war in the high air above neutral territory would be certain and grave. Indeed, the perils to those who, by the modern laws and customs of war are not liable to undue risks even within enemy territory, would give good ground for a question as to whether aerial battles above belligerent territory even should not be restricted. If

belligerents on the sea may not fight so near the coast that their shot shall fall within neutral jurisdiction, it would seem that battles in the air above neutral jurisdiction would be similarly prohibited. This would apply to the air above land and above the marginal sea, as projectiles or disabled airships would, by the universal physical law, fall toward the center of the earth when unrestrained. As, according to the law of physics, the velocity would be accelerated in proportion to the distance from which a body falls, it would on a physical basis be no less dangerous to allow a free zone at a considerable height than in a lower altitude. While on the sea it might be generally maintained that the greater the horizontal distance from the adjacent State the less probability that the act would affect the adjacent State, it could not be claimed that the greater the vertical distance from a subjacent State the less the probability that the act would affect the subjacent State. This distinctly would not be true in case of anything falling from an airship. Similarly, in observations of fortifications, photography by telescopic lenses, etc., increase of altitude may within limits give a greater range. Submarine mines for the defense of a State may not be visible from the surface of the water but may be seen from an airship.

It would seem that physical safety, military necessity, the enforcement of police, revenue, and sanitary regulations justify the claim that a State has jurisdiction in aerial space above its territory. This position also seems to underlie established domestic law and regulations, the decisions of national courts, the conclusions of international conferences, and the provisions of international conventions.

It would seem wise, therefore, to start from the premise that air above the high seas and territory that is res nullius is free, while other air is within the jurisdiction of the subjacent State "and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights," and for

these exceptions to the exclusive right of aerial jurisdiction of the subjacent State, international conferences should by agreement immediately provide.

*Von Bar's proposition, 1911.*—M. von Bar, after consideration of various aspects of the use of air craft in the time of war, submitted to the members of the Institute of International Law in 1911 the following rules:

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

Art. 2. Toutefois.

(*a*) Les aérostats, ballons ou aéroplanes militaire ennemis, si l'on tire sur eux (par des canons placés à terre ou à bord d'un vaisseau)[2] peuvent se défendre.

(*b*) Les combats en l'air sont permis,—

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

(2) Dans les mers territoriales des belligérants dans une zone de blocus.[3]

(3) Dans les sphères aériennes enveloppant les territoires des belligérants.

Art. 3. Il est interdit de capturer en l'air des aérostats, etc., privés ennemis, sauf les cas où ils entrent volontairement dans la sphère aérienne du territoire de l'adversaire ou dans une zone de blocus ou dans le cas de contrebande prévu par l'art. 4.

Art. 4. De même il est interdit de saisir et de confisquer des aérostats neutres ou leurs cargaisons à titre de contrebande, sauf le cas où l'on apporte immédiatement des secours à une côte ou à un port bloqué ou à l'armée ou à la flotte ennemie au théâtre de la guerre.

Art. 5. Dans les cas exceptés par les art. 4 et 5 on appliquera les règles des prises maritimes.

---

[1] Peut-être on préférerait une formule conforme à celle de la convention de la Haye. Mais elle ne dirait pas tout ce qu'à mon avis il faut dire. (Cfr., art. 2.)

[2] Comme les combats en l'air, sauf les cas mentionnés dans l'art. b, sont en général interdits on ne pourra tirer sur eux que de cette manière.

[3] Comme, en général, dans les mers territoriales des belligérants les vaisseaux neutres ont le droit de libre passage ces mers ne doivent pas être rendues inaccessibles par les dangers de batailles aériennes. Autrement la navigation aérienne, même d'un pays neutre et voisin à un territoire d'un État belligérant pourrait être entravée en grande partie; par example si la France était partie belligérante et l'Angleterre neutre les aérostats anglais seraient, en passant la Manche exposés à des dangers empêchant presque toute la navigation aérienne. Voyez en comparaison, quant à sécurité de la navigation en mer comme en l'air, le projet de M. Fauchille art. 23. It faut prendre en consideration que des courants peuvent très facilement porter les aérostats dans une zone ainsi circonscrite.

ART. 6. Il est interdit aux aérostats privés ennemis de pénétrer dans la sphère aérienne de l'État adversaire.

ART. 7. Les belligérants *peuvent* interdire aux aérostats neutres de pénétrer dans la sphère aérienne de leur territoire.

ART. 8. Il est interdit de tirer sur des aérostats neutres sans avertissement préalable et de tirer sur eux si, par hasard, ils sont forcés d'atterrir.

*Project before the Institute of International Law.*—The project submitted to the Institute of International Law in 1911, provides:

ART. 22. Les aérostats militaires des belligérants qui pénétrent sur le territoire d'un État neutre ne doivent pas y demeurer plus de 24 heures, à moins que leus avaries ou l'état de l'atmosphere ne les empêchent de partir dans ce délai.

Si des aérostats des deux parties belligérantes se trouvent simultanément en un même point de ce territoire, il doit s'écouler au moins 24 heures entre le départ de l'aérostat d'un belligérant et le départ de l'aérostat de l'autre. L'ordre des départs est déterminé par l'ordre des arrivées, à moins que l'aérostat arrivé le premier ne soit dans le cas où la prolongation de la durée légale de séjour est admise.

Les aérostats belligérants ne doivent rien faire en territoire neutre qui puisse augmenter leur puissance militaire, et leur présence ne doit en aucune manière préjudicier a l'État neutre; les seuls actes qu'ils peuvent accomplir sont ceux que réclame l'humanité et qui leur sont indispensables pour atteindre le point le plus rapproché de leur pays ou d'un pays allié au leur pendant la guerre.

D'une manière générale, il convient d'appliquer a là guerre aérienne les principes posés par la convention de la Haye du 18 octobre 1907, concernant les droits et les devoirs des puissances neutres en cas de guerre maritime. (24 Annuaire de l'Institute de Droit International, p. 33.)

This project seems to disregard the fact that the character of aircraft is very different from that of craft that keep the sea, as the medium which supports them is also different. More stringent regulations will doubtless be necessary if neutrality is to be maintained and belligerents as to receive treatment to which they are entitled.

*Action of institute, 1911.*—The Institute of International Law since 1900 have given attention to various aspects of the regulation of the use of the air. The following vote was adopted at the session of the institute at Madrid in 1911:

*Sur le régime juridique des aérostats.*

1. Temps de paix.

1. Les aéronefs se distinguent en aéronefs publics et en aéronefs privés.

2. Tout aéronef doit avoir une nationalité, et une seule. Cette nationalité sera celle du pays où l'aéronef aura été inmatriculé. Chaque aéronef doit porter des marques spéciales de reconnaissance.

L'État auquel l'inmatriculation est demandée, détermine à quelles personnes et sous quelles conditions il peut l'accorder, la suspendre ou la retirer.

L'État qui immatricule l'aéronef d'un propriétaire étranger ne saurait toutefois prétendre à la protection de cet aéronef, sur le territoire de l'État dont relève ce propriétaire, contre l'application des lois par lesquelles cet État aurait interdit à ses nationaux de faire immatriculer leurs aéronefs à l'étranger.

3. La circulation aérienne internationale est libre, sauf le droit pour les États sous-jacents de prendre certaines mesures, à déterminer, en vue de leur propre sécurité et de celle des personnes et des biens de leurs habitants.

2. Temps de guerre.

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

*Opinion of Fauchille.*—Fauchille, who has given much attention to aerial domain, has recently set forth his ideas upon war in the air in his sixth edition of Bonfils, Droit International Public.

Fauchille says, in regard to the general relations of belligerents and neutrals as concerns the field of aerial warfare:

Quel peut être le théâtre de la guerre aérienne? La guerre, si elle doit nuire aux belligérants, ne peut porter atteinte aux intérêts des neutres. L'application de cette idée conduit à la règle suivante: les États belligérants ont le droit, en quelque partie que ce soit de l'atmosphère, de se livrer à des actes d'hostilité au-dessus de leur territoire continental et au-dessus de la pleine mer ou de la mer qui longe leurs côtes; il leur est, au contraire, interdit d'accomplir des actes hostiles, susceptibles d'entraîner la

chute de projectiles et d'une manière générale de causer des dommages, au-dessus du territoire continental des États neutres à quelque hauteur que ce soit, et à proximité des côtes de ces États dans un rayon déterminé par la force du canon de leurs aéronefs.

Les aéronefs militaires des belligérants, et aussi les aéronefs publics non militaires, ne peuvent, en temps de guerre comme en temps de paix, circuler au-dessus des États neutres qu'avec l'autorisation de ces États; quant aux aéronefs privés, ils n'ont besoin pour circuler d'aucune autorisation. Mais il est défendu aux uns et aux autres de séjourner au-dessus des pays neutres dans un certain rayon près des frontières de l'État ennemi, car il ne faut pas qu'ils puissent, en se tenant au-dessus de ces pays, faire des actes d'observation et d'exploration sur le territoire de l'adversaire. La circulation des aéronefs en temps de guerre est, en tout cas, soumise aux mêmes restrictions que pendant la paix; ils doivent notamment respecter les régions interdites, spécialement les ouvrages fortifiés (n° 531[6]), et s'abstenir de tous actes dommageables au pays sous-jacent. (Bonfils, Droit International Public, Fauchille's 6[e] ed., No. 1440[3].)

In general, the opinion of most writers is to extend so far as possible the principles embodied in the rules for war on land and sea to the conduct of war in which aerial domain is involved.

## *Opinions on use of aerial space.*

But they (the belligerents) clearly do not have the right of using the aerial space surrounding the territory of neutral States (including marginal waters) for military purposes. (A. S. Hershey American Journal of International Law, vol. 6, p. 386.)

Modern law of nations allows acts of war to take place only within the territory of the belligerents or on the high seas. If air forces are allowed to engage in future wars, they, too, will have to observe this principle. They will be limited to the air domain of the belligerents and to the free parts of the air space. (Air Sovereignty—Lycklama à Nijholt, p. 65.)

The great importance of the aforesaid rule lies in its complement, which forbids acts of hostility within neutral territory, Hence the air space of neutral States will be closed to hostilities. (Ibid., p. 65.)

So passage above the neutral land can not be allowed any more than it is permitted on the soil. (Ibid., p. 67.)

In accordance with my conception of the legal nature of the air space over the different parts of the earth's surface, the belligerents can only use the air space over their own territory and over their coast waters, in addition to the air space over the open

sea, and over territory without sovereignty, and can not, on the other hand, use the air space over the territory and the coast waters of neutral States. (Die Luftschiffahrt in Kriegsrechtlicher Beleuchtung, Alex. Meyer, p. 18.)

The air space over the territory and coast waters of neutral States is, in accordance with my conception, by its legal nature, to be considered as neutral territory in every respect. Therefore not only actions which are against the interests of neutral States are prohibited, as, for instance, a battle, but in general all actions not consistent with neutrality. (Ibid., p. 20.)

This author holds that the entrance of belligerent men-of-war into neutral waters is not consistent with the neutral character of the territory, and should be prohibited, except in certain special cases, for instance, to transports carrying wounded, therefore—

In the war law of the air this basic principle must be asserted, and, therefore, during a war military airships of the belligerents, on account of the warlike nature of the act, must be prohibited both from passing through neutral air space, and also, in general, from landing in any neutral territory. (Ibid., p. 24.)

*Russian regulations, 1904.*—During the Russo-Japanese War of 1904–5, Russia issued among the rules to be observed:

The following actions, prohibited to neutrals, are considered as violating neutrality: The transport of the enemy's troops, its telegrams or correspondence, the supplying it of transport boats or war vessels. Vessels of neutrals found to be breaking any of these rules may be, according to circumstances, captured and confiscated. (U. S. Foreign Relations, 1904, p. 728.)

*Japanese regulations, 1904.*—The Japanese regulations during the Russo-Japanese War of 1904–5 provided for the capture of such vessels as "engaged in scouting or carrying information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy," and also provided for the confiscation of vessels guilty of such service.

The memoranda submitted to the international naval conference in 1908 by the 10 naval powers participating showed:

Qu'une idée commune est admise, d'après laquelle le belligérant peut poursuivre un certain nombre d'actes constituant de la part

des navires de commerce neutres une assistance donnée à l'ennemi. Il y a là une violation de la neutralité que le belligérant est en droit d'empêcher. (International Naval Conference, Parliamentary Papers, Miscellaneous No. 5 (1909), p. 106.)

*Application of principles to blockade.*—Whether the doctrine of freedom of the air for all navigators or the doctrine of exclusive jurisdiction in the subjacent State prevail, the question of the right of an air craft to enter a blockaded port would be an important one. Must a naval blockading force also maintain an aerial fleet in order that the blockade be binding under the principle that a blockade "to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy," as provided in the Declaration of Paris in 1856? The United States has interpreted this clause to mean that "an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port; it follows that the question of effectiveness is not controlled by the number of the blockading force." (The *Olinde Rodrigues*, 174 U. S. Sup. Ct. Repts. (1899), p. 510.)

Apparently if a blockade of a place is maintained by seagoing vessels only, it will not be dangerous for air craft to pass the line or to enter overland by making a comparatively short detour. The actual cutting off of communication with a place by means of a maritime blockade is increasingly difficult, if not impossible. As the present rules in regard to blockade are such as have developed for the maintenance of blockade by sea, it is not reasonable to expect that these rules would in all cases apply to aerial navigation.

The service which air craft can at present render to a blockaded place would largely be that of a means of communication with the outside world. Transportation of goods and persons would not commonly be by this method until aerial craft are further developed.

*The case of the Atalanta.*—The attitude of the learned English judge, Sir William Scott, later Lord Stowell, on the carriage of dispatches and maintenance of a means of communication with those who would be most served has

justly formed a basis for much of the later reasoning upon regulation of communication in the time of war. In the case of the *Atalanta*, in 1808, the communication involved was between a mother country and colony. The principles might apply equally well to any area with which communication is prohibited. A somewhat extended quotation from Lord Stowell's opinion shows the course of reasoning which has been approved:

> That the simple carrying of dispatches between the colonies and the mother country of the enemy is a service highly injurious to the other belligerent is most obvious. In the present state of the world, in the hostilities of *European* powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance, also, and support, because the infliction of civil distress for the purpose of compelling a surrender forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered in the contemplation of law as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up in time of peace—by ships of war or by packets in the service of the State? If a war intervenes and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy State, and is justly to be considered in that character; nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a *Charles the XIIth*, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental that, in the contemplation of human

events it is a sort of evanescent quantity of which no account is taken; and the practice has been, *accordingly*, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character as an act of the most noxious and hostile nature.

This country, which—however much its practice may be misrepresented by foreign writers, and sometimes by our own—has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offense of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, *the dispatches*, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight dependent on it, and therefore the same precise penalty can not, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle. (6 C, Robinson's Admiralty Reports, p. 440.)

The aim of the blockade is to cut off communication with the blockaded place. If one belligerent, as Lord Stowell says—

prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose (maintain communication) under the privilege of ostensible neutral character does, in fact, place himself in the service of the enemy State, and is justly to be considered in that character.

An aircraft that enters a port blockaded by water would in effect lend itself to the maintenance of communication with the area outside and would practically be in the service of the enemy. Such acts have in recent years been regarded as in the nature of unneutral service.

*Jurisdiction in air space.*—This situation involves the consideration of a field of relations which has not yet been completely defined. It is therefore necessary to consider the broad question of aerial jurisdiction somewhat fully, giving due weight to conditions somewhat analogous on land and sea. The air is, however, neither land nor sea, and the attempt to extend the laws of one or the other to the air would be as unfortunate in results

as an attempt to extend the laws of the land to the sea. The air is less stable and less adapted to appropriation than the sea, as the sea is less adapted to appropriation than the land. There has accordingly grown up an idea that land might be subject to ownership in the strict sense, while the sea could not be owned, but might be under the jurisdiction of a State. Rights in air space would likewise be matters which would involve the principles of jurisdiction.

Private aircraft can be more easily used for military purposes than can private marine vessels. The transfer of aircraft from neutral to belligerent control is more easy and less possible to detect. Unneutral service by aircraft would be difficult to prevent.

Undoubtedly the laws of war on land and on sea should be adapted to the aerial space so far as possible, but as the laws for land do not cover all possible contingencies which may arise at sea, so the laws of land and sea would not cover all contingencies that might arise in connection with aerial space.

Referring to the marginal sea, Ortolan says:

> L'état a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de jurisdiction, conformément aux règles de la jurisdiction internationale. (Ortolan, Diplomatie de la mer, vol. 1, Liv. II, Ch. VIII, p. 158.)

The tendency to confuse the idea of territory in the sense of land with jurisdiction has been common. The feudal system bound the State so closely with land that it was natural that land should for a time receive main consideration. The conditions necessary for State existence were gradually distinguished, and the attributes of the State as a political entity were recognized. Among these attributes one of the most important is the right to exercise jurisdiction.

As a legal concept, jurisdiction may be considered the right to exercise State authority. Story says that it may be—

> laid down as a general proposition that all persons and property within the territorial jurisdiction of a sovereign are amenable

to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. (Santissima Trinidad, 7 Wheat., 354.)

It is fully recognized that all land and the marginal sea, to a distance of a marine league at least, is subject to territorial jurisdiction, and that the open sea is not within the jurisdiction of any State, though vessels sailing upon such seas are within the jurisdiction of the State whose flag they rightfully fly. As Story says, exceptions to this rule of exclusive jurisdiction are such—

as by common usage and public policy have been allowed in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights.

The extreme theories of the freedom of the air would result in the denial of rights which existing States already consider essential to their existence as sovereign political entities.

The enlarged use of aerial space has necessarily given rise to new problems. The range of possible attack in time of war is increased if free use of the air is permitted. Scouting and similar measures take on a more important character.

The superficial frontier of a State is more easily determined than a frontier extending through aerial space.

*Private rights in air space.*—The question of rights in the space above the land and above the water was considered until recent years a matter of comparatively little importance, and mainly interesting to those who were engaged in weaving abstract theories.

The rights of the owner of land in the atmosphere above the land are stated in the codes of various States and in decisions of courts. Some of these rights were recognized in ancient times when the principle of State authority was not so fully developed. Individuals building out into the sea or up into the air were secured in exclusive enjoyment of the space actually occupied. (Di-

gest 1, 8, 6.) At the present time the old maxim cujus est solum ejus est usque ad coelum is subordinated to the paramount public interests, as is shown in many domestic cases involving trespass, damages, nuisance, public well-being, etc.

The Japanese Civil Code provides:

207. The ownership of land, subject to restrictions imposed by law or regulations, extends above and below the surface. (Löwhelm, translation.)

Other codes have provisions to somewhat similar effect. (Code Civil Swiss, art. 667; Dutch, art. 626; Spanish, art. 350; Austrian, sec. 297; Hungarian, sec. 569; Italian, art. 440; Portuguese, art. 2288; German, arts. 905, 906.)

While the rights of private persons in the air have received considerable definition, aerial jurisdiction and the right of State as against State have only recently become of such important practical significance as to attract international attention.

Nearly all States have in their legislation assumed exclusive right to enact regulations for the use of aerial space. This has been particularly frequent in case of the use of the air for telegraphic purposes.

Rights to game within the aerial frontiers has been repeatedly affirmed.

It is evident from decisions and laws of many States that jurisdiction over the aerial space above the State is a well-recognized attribute of the State. There are many cases in English and American decisions. The European courts have also been called upon to act. These States have assumed the right to determine the use of the superficial air and to pass upon the claims of the owners of subjacent land. The courts have generally acknowledged that certain rights resided in the owner of the subjacent land. A judgment of the New York Court of Appeals in 1906, referring to the rights of the land owner, said:

Usque ad coelum is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff, as the owner of the soil, owned upward to an indefinite extent. He owned the space occupied by the wire

and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles, and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. (Butter *v.* Frontier Telephone Co., 186 N. Y. Rep., 486.)

As States have never hesitated to make laws, to adjudicate conflicting claims, and to enforce decisions in regard to the aerial space above their territory, it would manifestly be a cause for friction to assert that this jurisdiction does not exist.

The actual practice of States has shown that jurisdiction over ships navigating the air is assumed to reside in the subjacent State. France, on March 12, 1909, through an order of the minister of the interior, directed subordinate officials to enforce customs and other regulations in case of balloons landing in French territory. (Bulletin officiel du Ministère de l'intérieur, mars 1909, p. 127.) These regulations were put in operation by customs regulations. (Annales des douanes 1er mai 1909, p. 116; 1er décembre 1909, p. 295; janvier 1910, p. 17.)

*Attitude of the United States.*—The United States courts have declared that the National Government has jurisdiction over the atmosphere in matters which affect the general well-being and national interests.

In the case of the Pensacola Telegraph Co. *v.* The Western Union Telegraph Co., 1878, Mr. Chief Justice Waite, in delivering the opinion of the Supreme Court of the United States, said:

Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are

successively brought into use to meet the demands of increasing population and wealth. (Cited also in Western Union Telegraph Co. *v.* State of Texas, 105 U. S., 460.)

The power of Congress would similarly extend to aerial navigation.

Mr. Justice Holmes (1908) says of the development of the idea of demarcation between public and private rights in the atmosphere, water, etc.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance can not be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. (Hudson Water Co. *v.* McCarter, 209 U. S., 349.)

Mr. Justice Holmes also in 1907 said:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

Mr. Justice Holmes also affirms that a commonwealth of the United States—

> has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests, and its inhabitants shall breathe pure air. (Georgia *v.* Tennessee Copper Co., 206 U. S., 230.)

*Belligerent air craft in neutral territory.*—Situation II (*a*) gives rise to the question of the rights of air craft of belligerents when in neutral territory.

Belligerent State X, brings a balloon to neutral State Z, and fills it with gas preparatory to a flight with view to destroying a part of the fleet of its enemy, State Y, by dropping explosives from above.

If the balloon is permitted to take in the gas, will it be an act of the nature which is permitted to vessels engaged in maritime war when they are permitted to coal in neutral territory? The subject of rights of coaling in neutral ports was given full consideration in 1910, International Law Situations, Situation I, pages 9–44. Previous to the Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime War, there was a growing tendency to restrict the amount of coal that might be taken in a neutral port. By article 19 of that convention, the neutral State was left the option of limiting the supply to an amount necessary to reach "the nearest home port or some nearer named neutral destination" or the neutral might permit the vessels "to take fuel necessary to fill their bunkers." Those who maintain the doctrine of an unlimited supply of fuel regard fuel simply as one form of supplies which makes navigation possible. Those who would restrict the supply regard fuel as more in the nature of war supplies. The drift of opinion as shown by The Hague regulations is toward the allowing of freedom in taking on fuel in a neutral port when not oftener than once in three months.

Even with this extension of the right of coaling, the entrance of a balloon into neutral territory may be in marked contrast to the entrance of a vessel of war into

a neutral port. One belligerent may easily learn of the entrance of a vessel of his enemy to a neutral port. The course which the vessel will follow on departure, the time of sojourn, and other facts may be reasonably determined. A vessel in a neutral port must ordinarily put to sea before reaching a home or an enemy port. A belligerent would ordinarily, therefore, have an opportunity to meet and to engage the vessel of his opponent in an area where battle is lawful and without material risk to the neutral.

It is possible, however, that the territory of States might be so situated that a neutral State might be directly between the two belligerents; e. g., if war existed between Germany and Spain. In such a case would the bringing of a war balloon to the French frontier from Germany place France under any obligation to permit the balloon to enter and take the necessary gas to make it navigable? If German balloons were permitted to enter French territory, take gas, and from points of advantage attack Spanish forces and territory, would such permission by France be analogous to the entrance of German troops, or would it be the use of French territory as a base? Whether or not the right of absolute sovereignty in the air is in the subjacent State, certainly France would be under no obligation to receive a German war balloon into its territory when France is neutral except on ground of humanity or vis major. France could scarcely permit German war balloons to use French territory as a point from which to attack Spain, and if German forces should enter French territory internment would be the penalty.

If, however, a war balloon were brought into a French port on board a German cruiser or other German public vessel, would it not be entitled to the exemptions to which the boats, launches, etc., of such vessels are entitled, and would it receive such treatment so long as it is appurtenant to the vessel? Undoubtedly the vessel would be allowed to take coal, oil, or other fuel for navigation; the launches would have similar privileges. Would the tak-

ing of gas by an air craft appurtenant to the public ship be analogous?

When the air craft appertains to the land forces The Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, would prevail. Article 2 provides that:

> Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.

Article 2 of the same convention provides for internment of troops entering neutral territory.

When the air craft belongs to the naval forces and comes into port under its own power, it may probably be allowed to take on supplies analogous to the supply of fuel for war vessels without violation of any neutral obligation. The taking of coal is often with a view to bringing the war vessel within range of the enemy. The taking of gas by a balloon might be for a similar purpose. The neutral has full right to regulate the taking of coal, as has been shown in recent wars. The neutral would have a similar right to regulate the supply of gas.

In the use of neutral land for balloons for land warfare the neutral territory becomes practically a base, and the neutral power is in reality receiving the belligerent forces into its territory, which is, according to the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Article 2, prohibited, unless internment follows.

An air craft of a belligerent that is brought, on board a war vessel, into the territorial waters of a neutral may or may not be fitted for use in war. If at the time it is not fitted for use and the neutral State allows it to make the preparations necessary to adapt it for war the State will doubtless be liable to the suspicion that its territory has been used as a base for warlike preparations.

*Review of Situation II (a).*—In the situation as stated the balloon is brought to neutral State Z to be filled with gas with view to a flight in order to destroy a part of the fleet of Y. This would seem to be an act in the nature

of the use of the territory of State Z as a base for warlike operations and should be forbidden.

*Solution* (*a*).—The protest of belligerent State Y should be heeded by neutral State Z.

*Firing into neutral territory.*—In Situation II (*b*), the question is raised as to what could be done if the forces of one belligerent, State X, so maneuvers a balloon that if shot at by the forces of the other belligerent, State Y, the shot will fall in the jurisdiction of neutral State B.

Unquestionably Y has a right to fire at a war balloon of State X. At the same time State B may demand that its jurisdiction be not violated.

The Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 provides, in article 1, "The territory of neutral powers is inviolable." The firing of a shot which would land in neutral territory would be a violation of neutrality and the neutral might, without offense, proceed against the party committing such violation.

That the hostilities are in such neighborhood that the risk of firing into a neutral State is present does not in any way excuse the belligerent from guarding against such action.

*Solution* (*b*).—Y may take any action which would not involve a violation of neutral jurisdiction, as would be the case if the projectile should fall in the territory of State B.

*Jurisdiction over neutral air craft.*—It is evident from Situation II (*c*) that there may be a risk to a belligerent from the flight of a neutral air craft over belligerent territory. If the jurisdiction of the air space is not in the subjacent State, the belligerent's right to control the use of the air space in the time of war would be limited. It would seem that such a claim would lead to many unfortunate complications. On the other hand, if the belligerent has jurisdiction over the air space above the territory, the Government can prescribe regulations for its use. Whether the theory that the air is free or the

theory that the jurisdiction is in the subjacent State prevails, the belligerent must have the right to regulate the use of the air space by neutrals in order that his operations may not be thwarted intentionally or unintentionally by them.

As a general rule, a belligerent must have the right to exercise such control of neutral air craft as may be necessary and possible.

In Situation II (*c*) when a neutral air craft flies over the belligerent State in such manner as to observe the disposition of its forces and in such direction as to make it possible that it may disclose this disposition to the enemy, it would be competent for the belligerent State to take such action as it was able in order to prevent the disclosure.

*Opinion of Fauchille on area.*—The rights of a neutral within the area of belligerent jurisdiction would naturally not extend to action which would injure the belligerent or imperil the success of his military undertakings. Fauchille says:

> En temps de guerre, les neutres pourront-ils naviguer dans les airs dominant le territoire des belligérants? Si les aéronefs privés belligérants peuvent circuler dans l'atmosphère située au-dessus des États neutres, il en est autrement des neutres vis-à-vis des belligérants: ici l'espionnage peut être à craindre non seulement à l'égard des ouvrages fortifiés, mais aussi à l'égard des mouvements et des emplacements de troupes qui, eux, sont susceptibles d'être perçus avec profit jusqu'à 10.000 mètres. Dès lors, la navigation aérienne des neutres doit être prohibée dans toutes les fractions de l'atmosphère qui domine le territoire d'un pays belligérant, ainsi que dans un rayon de 11.000 mètres à compter de ses côtes, car on peut évaluer à 1.000 mètres la portion des eaux côtières dont l'usage peut être vraiment utile à la préparation de la défense.—Certains proposent de reconnaître seulement aux États belligérants la *faculté* de défendre au-dessus de leur territoire la circulation des aéronefs des neutres.
>
> La solution qui défend aux aéronefs neutres de naviguer au-dessus et même aux alentours du territoire des belligérants rend en principe sans intérêt la question de savoir si les blocus établis d'une manière effective par un belligérant sont obligatoires pour les aéronefs neutres comme pour les navires neutres. Cette question ne pourra se poser que dans le cas assez rare où le rayon

d'action d'un blocus, tel que l'a entendu la Déclaration de Londres du 26 février 1909, est supérieur à 11.000 mètres: en pareil cas, on ne voit aucune raison de distinguer entre la navigation aérienne et la navigation maritime. (Bonfils, Droit International Public Fauchille, 6e ed., Nos. 1440[9], 1440[10].)

*Solution* (*c*).—When the neutral air craft lands within belligerent territory it may be detained or other measures may be taken to prevent the disclosure of military movements.

While the neutral air craft is still in the air, the belligerent may take such measures as possible to prevent disclosure of his military movements.

*Résumé* (*d*).—From the nature of the assured and of the probable rights of a State in the aerial space above the earth's surface where a State is exercising effective authority, it can be inferred that the aeroplane passed through a prohibited zone in entering the blockaded port.

From the nature of the service which an aeroplane is adapted to render, it may be fairly inferred that the aeroplane served as a means of communication between the blockaded port and the outside world. It would also be reasonable to presume that the aeroplane is in the service of the enemy. In such a case the liability to penalty does not cease with the delivery of the information at the blockaded port. The appearance seems to indicate that the aeroplane, if neutral, has been guilty of serving as a means of communication with the blockaded port. If the aeroplane belongs to the belligerent, it would be liable to capture in any case.

There is a possibility that the aeroplane if neutral can prove its innocence, but this is a matter for the court and not for the naval officer to determine. If the aeroplane is engaged in unneutral service, the machine is liable to confiscation, and the crew is liable to treatment as prisoners of war. (24 Annuaire de l'Institut de Droit International, p. 34, Art. 28.)

The aeroplane falls within the limits of the territorial waters of the United States, and is therefore within the

area within which the United States forces may lawfully make captures.

The commander of the vessel of the blockading fleet should, therefore, in case (*d*) send the aeroplane, if neutral, and the crew to a prize court for adjudication. If the aeroplane is belligerent, it with crew might be treated as an enemy vessel taken under similar circumstances.

*Résumé* (*e*).—As the right of capture on the high seas in the time of war is practically the same as the right of capture within the territorial waters of the belligerent, the treatment of the aeroplane and its occupants should be the same as if captured within the territorial waters.

*Résumé* (*f*).—As there is no right of capture within neutral waters, the vessel of the blockading force might be under obligation to take such measures as he was able to rescue the occupants and the aeroplane from danger, but he would do this on the ground of humanity, and would have no military rights over persons or property.

*Solution* (*d*).—If the aeroplane is neutral, it should be sent to a prize court for adjudication.

If the aeroplane is belligerent, it may be treated as an enemy vessel taken under similar conditions.

*Solution* (*e*).—The treatment would be the same if picked up from the high sea.

*Solution* (*f*).—The belligerent would have no military rights over an aeroplane picked up in neutral waters.

SOLUTION.

(*a*) The protest of belligerent State Y should be heeded by neutral State Z.

(*b*) Y may take any action which would not involve violation of neutral jurisdiction as would be the case if the projectile should fall in the territory of State B.

(*c*) When the neutral air craft lands within belligerent territory, it may be detained or other measures may be taken to prevent the disclosure of military movements.

While the neutral air craft is still in the air, the belligerent may take such measures as possible to prevent disclosure of his military movements.

(*d*) If the aeroplane is neutral, it should be sent to a prize court for adjudication.

If the aeroplane is belligerent, it may be treated as an enemy vessel taken under similar conditions.

(*e*) The treatment would be the same if picked up from the high sea.

(*f*) The belligerent would have no military rights over an aeroplane picked up in neutral waters.