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ENEMY VESSELS AND THEIR PERSONNEL.

What treatment should enemy vessels and their personnel receive?

CONCLUSIONS.

(a) Public vessels.—Public vessels of the enemy may be captured or destroyed, except the following when innocently employed:
   1. Cartel ships designated for and engaged in exchange of prisoners.
   2. Vessels engaged in scientific work.
   3. Properly designated hospital ships.
   4. Vessels exempt by treaty or special proclamation.

(b) Days of grace for private vessels of the enemy.—A reasonable period of grace, to be determined by each belligerent, shall be allowed for vessels of the other belligerent bound for or within the opponent's ports at the outbreak of war.

(c) Private vessels.—Private vessels of the enemy may be captured, except the following when innocently employed:
   1. Cartel ships designated for and engaged in exchange of prisoners.
   2. Vessels engaged in religious, philanthropic, and scientific work.
   3. Properly designated hospital ships.
   4. Small coast fishing vessels.
   5. Small boats employed in local trade, e. g., transporting agricultural products.
   6. Vessels exempt by treaty or special proclamation.

(d) Personnel of public vessels of the enemy.—
   1. The personnel of public vessels which are liable to capture are liable to be made prisoners of war.
   2. The personnel of enemy public vessels which are exempt from capture share in the exemption so long as innocently employed.

Art. V. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

Art. VI. The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.

Art. VII. The names of the persons retaining their liberty under the conditions laid down in Article V, paragraph 2, and in Article VI, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

Art. VIII. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

(f) Passengers on private vessels of the enemy.—Innocent passengers on a private vessel of the enemy are to be accorded the utmost freedom consistent with the necessities of war.

NOTES.

Definitions.—Certain definitions of terms precede the French instructions of 1912, which, though not clearly distinguished in some writers, can be with propriety and advantage differentiated:

Dans tout le cours des présentes instructions, les expressions capture, saisie, confiscation, séquestre ont été employées avec le sens et dans le but qui vont être indiqués.

1. Opérations effectuées par le bâtiment de guerre.—La capture est l'acte purement militaire par lequel le commandant du navire de guerre substitue son autorité à celle du capitaine du navire de commerce, dispose du navire, de son équipage et de sa cargaison comme il est dit aux présentes instructions, sous réserve du jugement ultérieur du Conseil des prises quant au sort définitif du navire et de sa cargaison.

La saisie, lorsqu'elle s'applique aux marchandises seules, est l'acte par lequel le navire de guerre, avec ou sans l'assentiment du capitaine du navirearrêté, s'empara et dispose de ces marchandises comme il est dit aux présentes instructions, sous réserve du jugement ultérieur du Conseil des prises.

La saisie, lorsqu'elle s'applique au navire, diffère de la capture en ce que le sort ultérieur du navire n'est pas en cause quant à l'éventualité de sa confiscation. Il y a saisie, lorsque le navire doit être mis sous séquestre pendant la durée des hostilités; il y a
saisie, lorsque le navire doit être contraint de venir débarquer sa marchandise illicite dans un port national ou allié, sous réserve du jugement ultérieur du Conseil des prises quant au sort de cette marchandise.

La saisie est toujours accompagnée des opérations d'inventaire et d'apposition des scellés.

Le mot prise est une expression générale s'appliquant au navire capturé ou à la marchandise saisie. (See Appendix.)

Classification of vessels in time of war.—In a broad way vessels in time of war may be classified as belligerent vessels and as neutral vessels.

In general the neutral or enemy character of the vessel is determined by the flag the vessel is entitled to fly.

Belligerent vessels may be public vessels or may be private vessels.

Similarly, neutral vessels may be public or private.

The treatment of vessels will be determined by the rights of the class to which they belong.

Enemy public vessels.—The public vessels of the enemy are liable to capture or destruction unless exempt by special convention or under the general principles of international law.

The following public vessels of the enemy are exempt from capture or destruction when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in scientific work.
3. Properly designated hospital ships.
4. Vessels exempt by special convention or agreement.

The provision that such vessels shall be innocently employed may relate to any fact connected with their employment. Some States have by treaty or other agreement and sometimes by special proclamation exempted mail vessels or some particular class of vessels.

The rules in regard to the general right of capture of public vessels of the enemy are so generally recognized as to need little discussion.

Enemy private vessels.—Under the present rules private vessels of the enemy are subject to capture unless exempt by special convention or under the general principles of international law.
The following private vessels of the enemy are exempt from capture when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in religious, philanthropic, and scientific missions.
3. Properly designated hospital ships.
4. Small coast fishing vessels.
5. Small boats employed in local trade.
6. Vessels exempt by treaty or special proclamation.

As in the case of public vessels, the provision relating to innocent employment is strictly construed.

In the case of private vessels the question of determination of right to fly the flag may involve visit and search, but it may be said that the principles as set forth in article 57 of the declaration of London of 1909 and in the general report upon that article are usually accepted:

**ARTICLE 57.**

Subject to the provisions respecting the transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

The case in which a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in no wise affected by, this rule.

The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she has the right to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as compared with other movable property, and especially with merchandise. From more than one point of view ships have a kind of individuality, especially they have a nationality, a national character. This nationality is manifest in the right to fly the flag; it places the ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and to the laws of that State, and, should the occasion arise, to requisition. This is the surest test of whether a vessel is really a part of the merchant marine of a country, and therefore the best test for determining whether she is neutral or enemy. It is, moreover, expedient to rely exclusively upon this test, and to discard whatever is connected with the personal status of the owner.

The text mentions the flag which the vessel has the right to fly; that means, naturally, the flag which, whether she is actually
flying it or not, the vessel has the right to display according to the laws which govern the port of the flag.

Article 57 safeguards the provisions respecting transfer of flag, as to which it is sufficient to refer to articles 55 and 56; it might be that a vessel would really have the right to fly a neutral flag, from the point of view of the law of the country to which she claims to belong, but may be regarded as an enemy by a belligerent, because the transfer in virtue of which she has hoisted the neutral flag is annulled by article 55 or by article 56.

Lastly, the question was raised whether a vessel loses her neutral character when she is engaged in a trade which the enemy, prior to the war, reserved for his national vessels. An agreement could not be reached, as has been explained above, in connection with the chapter on Unneutral service, and the question remains wholly open, as the second paragraph of article 57 is careful to state.

Consideration of exemptions.—It should be borne in mind that many of the propositions in regard to the exemption from capture of enemy private property at sea would include exemption of innocent enemy ships.

That this exemption does extend to vessels is evident in the treaty of 1871 between the United States and Italy, which, after stating the general principle of exemption of private property except contraband of war, says in Article XII, "it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

Ships engaged in exchange of prisoners under cartel agreements are by contract exempt while fulfilling their mission.

Vessels engaged in religious, philanthropic, and scientific missions are exempt under article 4 of The Hague convention relative to certain restrictions on the exercise of the right of capture in maritime war. The proposition which led to the formulation of this regulation was proposed by Italy and was also coupled with the recommendation that the state to which the vessel belongs should notify the opposing belligerent of the fact in order that a safe conduct might issue and that measures might be taken that it should be respected. This qualification of the regulation was not adopted.
The exemption of hospital ships was an extension of the principles of the Geneva convention of 1864 through its elaboration for maritime warfare in 1906. The regulations for the treatment of such ships are very well established.

Small coast fishing vessels were granted exemption in early days. An agreement between the King of England and the King of France in 1403 was followed by other similar agreements exempting coast fishing vessels and fishermen, "provided they should comport themselves well and properly." Practice and opinion favored such exemption because the occupation of the fishermen had little or no bearing upon the war.

From the early days of the United States this exemption of coast fishermen has been advocated, and the provision for exemption was embodied in some treaties. The treaty between the United States and Prussia of 1785 contained a clause relating to this matter, which was repeated in subsequent treaties between the same states:

Art. 23. * * * All women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons; nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.

With few exceptions, exemption of coast fishermen with their vessels has been the rule, so that the Supreme Court of the United States said, after reviewing precedents, opinions, and practice in 1900 in the case of the Paquete Habana:

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the
mutual convenience of belligerent states, that coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. (U. S. Supreme Court Reports, vol. 175, p. 677.)

The exemption of small boats employed in local trade is not supported by such an array of precedents and opinions, but the arguments for this exemption are upon practically the same grounds.

The proposition of Rear Admiral Haus, of Austria, at the Second Hague conference shows the intent of the exemption:

A l'égard des bateaux de pêche côtière, sont, exemptés de capture les bateaux et barques affectés dans les eaux territoriales de quelques pays au service de l'économie rurale ou à celui du petit trafic local.

Ce n'est que dans les cas où des raisons militaires l'exigent, que lesdits bateaux et barques pourront être réquisitionnés contre indemnité conformément aux dispositions en vigueur pour la guerre sur terre.

Cette proposition ne vise que les bateaux et barques de petites dimensions et destinés au transport de produits agricoles ou de personnes le long de côtes accoires, ou entre la côte et des îles situées au-devant, ou dans les archipels, ou enfin dans les canaux des côtes plates.

Sans porter, d'une part, un préjudice quelque jeu sensible au commerce ou aux resources de l'État ennemi, et sans rapporter, d'autre part, au capturé un bénéfice pouvant pour lui entrer en ligne de compte, la capture de ces embarcations ne ferait, en réalité, que compromettre l'existence de marins, d'insulaires ou d'habitants du littoral se trouvant tout dans une situation de fortune des plus précaires, réduits qu'ils sont au maigre produit de leur métier.

Il semble donc s'imposer, dans l'intérêt de l'humanité, d'interdire la capture des bateaux et barques en question, excepté les cas d'exigences militaires. Mais même dans cette dernière hypothèse la capture ne devrait être admise que contre indemnité.
Abstraction faité de ces sentiments humanitaires, la capture desdites embarcations se présente comme une incon-séquence évi-
dente, si l'on considère cette mesure au point de vue des prin-
cipes régissant la guerre sur terre.
Car, si la côte se trouve être occupée par des troupes de terre, les bateaux et barques, dont il s'agit comme étant de la pro-
priété privée, échappent nécessairement à toute prise et pourrai-
ent, tout au plus, être mis en réquisition.
Aussi ne saurait-on guère trouver un motif raisonnable qui pût être invoqué pour autoriser des forces navales, ayant occupé des eaux territoriales, à procéder, sans en avoir le moindre profit, à la capture, voir même à la destruction de ces mêmes embarcations.
(Deuxième Conférence de la Paix, Tome III, p. 910.)

The official report upon the interpretation of The Hague convention, which provided for the exemption from capture of "small boats employed in local trade," said:

Conformément à la proposition de l'Autriche-Hongrie, le texte étend dans les mêmes conditions l'immunité à la petite navigation locale, c'est-à-dire aux bateaux et barques de petite dimension transportant des produits agricoles et se livrant à un modeste trafic local, par exemple entre la côte et des îles ou îlots voisins.
(Deuxième Conférence de La Haye, Tome I, p. 271.)

It is evident from the purpose of the regulation and from the official interpretation that it was the intent to restrict the exemption within narrow limits.

Days of grace.—The subject of delay to be accorded to merchant ships of one belligerent within ports of the other belligerent at the outbreak of war was considered by the Naval War College in 1906 and in 1910. The reg-
ulations proposed in 1906 were—

1. Each state entering upon a war shall announce a date before which enemy vessels bound for or within its ports at the out-
break of war shall under ordinary conditions be allowed to enter, to discharge cargo, to load cargo, and to depart, without liability to capture while sailing directly to a permitted destination. If one belligerent state allows a shorter period than the other, the other state may, as a matter of right, reduce its period to corre-
spond therewith.

2. Each belligerent state may make such regulations in regard to sojourn, conduct, cargo, destination, and movements after de-
parture of the innocent enemy vessels as may be deemed necessary to protect its military interests.
3. A private vessel suitable for warlike use belonging to one belligerent and bound for or within the port of the other belligerent at the outbreak of war is liable to be detained unless the government of the vessel's flag makes a satisfactory agreement that it shall not be put to any warlike use, in which case it may be accorded the same treatment as innocent enemy vessels. (International Law Topics, 1906, p. 46.)

The American delegation at the Second Hague Conference in 1907 maintained that the practice of exempting from capture enemy ships in an opponent's ports at the outbreak of hostilities had acquired the force of a general obligation. The British delegation regarded the exemption as a matter of favor which might or might not be granted. The only agreement that could be reached was that embodied in the convention relative to the status of enemy merchant ships at the outbreak of hostilities. This convention provides that "it is desirable" that merchant ships of one of the belligerents in an enemy port at the outbreak of hostilities "be allowed to depart freely, either immediately or after a sufficient term of grace," with provision for safe conduct along prescribed route. The convention, while granting some exemptions, does not seem to be as liberal as modern practice. The report of the American delegation in setting forth their reasons for not signing the convention shows this. (Senate Doc. 444, 60th Cong., 1st sess., 1908.)

The discussion in the International Law Situations for 1910 shows that Great Britain was unfavorable to the more liberal treatment of enemy vessels in port at outbreak of hostilities. The course of the development of the rule for the days of grace is shown in the International Law Situations for 1910, pages 66 to 78. The rule that was finally evolved at the Second Hague Conference in 1907 was as follows:

When a merchant ship of one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it be allowed to depart freely, either immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport to its port of destination or to such other port as shall be named for it.
The same applies in the case of a ship which left its last port before the commencement of the war and enters an enemy port in ignorance of the hostilities.

Mail vessels.—By certain treaties between states, mail steamers are made exempt from interference by the enemy. Sometimes such vessels are exempt under proclamation. The growing use of mail as the means of innocent communication, and the use of other means, such as the telegraph, for warlike purposes, has tended to incline opinion toward the exemption of mail vessels when they are employed strictly for that service, but this has not become a part of international law. Great Britain and the United States in 1848, and Great Britain and France in 1860, made conventions by which mail vessels were to continue their service during war until notification that it was to be discontinued, and in such case the vessel was to be permitted to return without interference.

The convention of 1907, relative to certain restrictions on the exercise of the right of capture in maritime war, article 2, says of the inviolability of mails that—

The ship, however, may not be searched except in case of necessity, and then only with as much consideration and expedition as possible.

Under exceptional conditions during the Chino-Japanese war the prize law of Japan in 1894 exempted "boats belonging to lighthouses," and in 1904, "lighthouse vessels and tenders" were exempted.

In early days it was not unusual for one belligerent to hold in its ports vessels of the other belligerent until he knew what treatment his own vessels were to receive in the harbors of his opponent.

In general, exemptions would not be granted to vessels which are involved in the hostilities or to vessels "whose construction indicates that they are intended to be converted into ships of war."

Rules of the Institute of International Law, 1913.—In section 2 of the Manual of the Institute of International Law in 1913 there is the following provision:
Persons on enemy vessels.—The treatment of persons found on board enemy vessels has not always been uniform. It has varied under different flags and at different times under the same flag. Some complications have arisen because vessels are of different classes and some difficulties because vessels may pass from one class to another by the action of those who are in control of their movements. The conduct or other relations of the persons on board an enemy vessel may also affect their treatment.

Early French regulations.—An order of the days of Napoleon provides for prisoners taken in war on the sea:

Art. 35. Tout capitaine de navire armé en guerre qui aura fait des prisonniers à la mer, sera tenu de les garder jusqu’au lieu de sa première relâche dans un port de France, sous peine de payer, pour chaque prisonnier qu’il aura relâché, cent francs d’amende au profit de la caisse des invalides de la marine, laquelle sera retenue sur ses parts de prises ou salaires, et prononcée par le conseil des prises.

Art. 36. Lorsque le nombre des prisonniers de guerre excédera celui du tiers de l’équipage, il est permis au capitaine preneur d’embarquer le surplus de ce tiers; et dans le cas où il manquerait de vivres, un plus grand nombre, sur les navires des Puissances neutres qu’il rencontrera à la mer, en prenant, au bas d’une liste des prisonniers ainsi débarqués, une soumission signée du capitaine du bâtiment pris, et des autres principaux prisonniers, portant qu’ils s’engagent à faire échanger et renvoyer un pareil nombre de prisonniers français de même grade; laquelle liste originale sera remise, à la première relâche dans les ports de France, à l’administrateur de la marine; et, dans les ports étrangers, au commissaire des relations commerciales de la République française.

Art. 37. Il est permis aux capitaines qui relâcheront dans les ports des Puissances neutres, d’y débarquer les prisonniers de
guerre qu'ils auront faits, pourvu qu'ils en aient justifié la nécessité aux agents de la République, dont ils seront obligés de rapporter une permission par écrit, lesquels remettront lesdits prisonniers au commissaire de la nation ennemie, et en tireront un reçu avec obligation de faire tenir compte de l'échange desdits prisonniers par un pareil nombre de prisonniers française de même grade.

Art. 38. Dans l'un et l'autre cas, les capitaines preneurs seront obligés, sans pouvoir s'en dispenser sous quelque prétexte que ce puisse être, de garder à leur bord le capitaine avec un des principaux officiers de l'équipage du bâtiment pris, pour les ramener dans les ports de France, où ils seront retenus pour servir d'otages, jusqu'à ce que l'échange promis ait été effectué. (Boucher, Institution au droit maritime (1803), p. 574.)

French regulations, 1912.—The French regulations of December 19, 1912, briefly state:

146. Si le navire capturé est un bâtiment de guerre, vous transborderez le capitaine, la majeure partie des officiers, une portion de l'équipage, et vous conduirez ces prisonniers dans un port français ou allié, ou occupé par les forces armées françaises ou alliées.

Passengers and others.—The treatment of those who may be with the military forces, whether on land or on sea, has received consideration in international conferences and has been the subject of domestic regulations. The regulations in regard to their treatment in time of land warfare are well defined. The regulation of The Hague convention respecting the laws and customs of war on land of 1907 accords with generally accepted practice:

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain are entitled to be treated as prisoners of war, provided they are furnished with a certificate from the military authorities of the army which they were accompanying.

The rules proposed at the meeting of the Institute of International Law in 1913, to be considered at the Oxford meeting in 1913, were similar in principle to those of The Hague conference of 1907. The wording is slightly different, however, as the control of the sea
can not be of exactly the same character as the control over the land area. The proposed article 66 was:

Les individus qui suivent une force navale sans en faire partie, tels que les fournisseurs, correspondants de journaux, etc., et qui tombent au pouvoir de l'ennemi, et que celui-ci juge utile de détenir, ne peuvent être détenus qu'au longtemps que les nécessités militaires l'exigent. Ils ont droit au traitement des prisonniers de guerre.

This article was the subject of a considerable interchange of views. The brief statement of this interchange is given in the report:

L'article du projet assimilait, en les traitant tous comme des prisonniers de guerre, si le belligérant a jugé utile de les détenir, les correspondants et reporters de journaux attachés à une escadre et embarqués sur cette force navale et ceux se trouvant à bord d'un navire public ou privé; et, pour les premiers, à la différence du Règlement de La Haye sur les lois de la guerre sur terre, il n'exigeait pas qu'ils fussent munis d'une légitimation de l'autorité militaire de la force qu'ils accompagnent. Cet article a été l'objet d'un certain nombre d'observations de la part des membres de la Commission, et celle-ci lui a fait subir sur divers points des modifications.

M. Hagerup a d'abord demandé qu'on rétablît dans l'article la nécessité de la légitimation exigée par le Règlement de La Haye. Mais M. Edouard Rolin Jaequemyns a fait remarquer, et la Commission s'est rangée à son avis, que cette exigence serait ici superflue: car, tandis que dans la guerre sur terre les correspondants de journaux pourraient être considérés comme espions à défaut d'une légitimation de l'autorité militaire compétente, ils sont dans la guerre maritime libres en principe comme tous les autres passagers trouvés sur le navire.

Le projet, en reconnaissant au belligérant le droit de detenir "s'il le jugait utile" les correspondants de journaux, lui donnait un pouvoir qui a semblé exagéré à la Commission. Celle-ci a déclaré, sur l'observation de M. Hagerup, qu'il ne pourrait les détenir "qu'au longtemps que les nécessités militaires l'exigeraient." Leur situation a été nettement précisée après un échange de vues entre MM. Hagerup, Kaufmann, Edouard Rolin Jaequemyns et Strisower: les correspondants de journaux doivent, en règle générale, être laissés libres; ils ne peuvent être faits prisonniers de guerre; mais le belligérant peut, si les nécessités militaires l'exigent, les retenir et, s'il les retient, ils auront droit au traitement des prisonniers de guerre.

Un pareil traitement ne devra, toutefois, d'après la Commission, être attribué aux correspondants de journaux que s'ils sont em-
barqués sur une force navale. S'ils sont à bord d'un navire public ou privé, ils seront laissés libres comme les autres passagers du navire : on ne saurait les traiter plus sévèrement que les membres de l'équipage du bâtiment sur lequel ils se trouvent. La Commission a donc décidé de supprimer le second alinéa de l'article. M. Kaufmann aurait voulu qu'on appliquât le traitement reconnu aux journalistes à bord d'une force navale à tous ceux se trouvant sur un navire quelconque "dans le rayon d'action d'une escadre." Mais on a fait remarquer que le rayon d'action bâtiments dans la zone des opérations militaires avait été réglé par l'article 67 du projet (article 53 de la Commission).

La Commission a pensé qu'il était inutile de prévoir les reporters à côté des correspondants de journaux: ce dernier terme est assez large pour englober les uns et les autres. Mais elle a jugé nécessaire d'assimiler spécialement aux correspondants de journaux certains individus qui, en dehors d'eux, peuvent aussi se trouver sur un navire, comme des fournisseurs : l'élévation qu'elle a donnée à cet égard n'a pas un caractère limitatif.

M. Holland a proposé, et la Commission a décidé, de supprimer de la disposition du projet le mot "armée", qui semblait se référer plutôt à la guerre sur terre, et les expressions "attachés à une escadre," dont le sens ne laissait pas d'être un peu obscur.

Correspondants, reporters, etc., may be regarded as belonging in some degree to the forces of the enemy, and therefore liable to detention as prisoners of war.

Passengers who are paying for transit are in a somewhat different relation. There is not an exact parallel in land warfare to passengers on a vessel flying an enemy flag. Passengers may have no choice of means of transport in time of war. Their carriage may have no relation to the war. The tendency in land warfare has been to give to noncombatants the largest possible degree of freedom. The rule proposed by the Institute was:

Art. 67. Les passagers qui, sans faire partie de l'équipage, se trouvent à bord d'un navire ennemi ne peuvent être retenus comme prisonniers de guerre par l'ennemi, à moins qu'ils ne se soient rendus coupables d'un acte hostile.

Les passagers militaires et les passagers civils déjà enrôlés peuvent être capturés comme prisonniers de guerre, même si le navire n'est pas susceptible de confiscation.

The article proposed in 1912 was as follows:

Art. 81. Les passagers qui, sans faire partie de l'équipage, se trouvent à bord d'un navire ennemi ne peuvent être retenus par
l'ennemi, à moins qu'ils ne soient rendus coupables d'un acte hostile : en pareil cas, ils peuvent être faits prisonniers de guerre. Les passagers militaires et les passagers civils déjà enrôlés peuvent être capturés comme prisonniers de guerre, même si le navire n'est pas susceptible de confiscation.

The reasons for the changes are thus stated in the report of the committee and illustrate the ideas of several representatives:

La redaction de l'alinea 1er de l'article 81 ete legerement modifiee dans sa forme pour donner satisfaction à une observation de M. Dupuis. Le projet, jugeant qu'il y avait là une question de legislation interieure, n'avait pas cru devoir se precupquer des pénalités auxquelles, en dehors du traitement de prisonniers de guerre, un belligerant pourrait soumettre les passagers qui se seraient rendus coupables d'un acte hostile. Or, tel qu'il etait libelle, l'article 81 permettait de croire que le traitement de prisonniers de guerre serait l'unique sanction infligee à ces passagers. Pour bien indiquer la possibility de pénalités, sans toutefois la mentionner expressément dans l'article comme l'auraient desire certains membres, notamment M. Dupuis, on a decide, sur la proposition de M. Hagerup, de supprimer la derniere phrase de l'alinea 1er et d'ajouter dans la premiere les mots: "comme prisonniers de guerre" après les mots: "ne peuvent être detenus."

L'alinea 2 de l'article 81, aux termes duquel "les passagers militaires et les passagers civils déjà enrôlés peuvent être capturés comme prisonniers de guerre, même si le navire n'est pas susceptible de confiscation", a été adopté sans modification. En autorisant la capture des passagers civils "déjà enrôlés", cette disposition n'a entendi viser que les individus incorpores dans la force armée des belligerants, c'est-à-dire non pas ceux qui à raison de leur age sont d'apres les lois de leur pays susceptibles d'être enrôlés mais seulement ceux qui se trouvent en fait entrés dans les cadres de l'armée. M. Kaufmann a declare au sein de la Commission: "Les mots 'passagers civils déjà enrôlés' ne comprennent pas tous les hommes qui, autant que ce a dépend de leur age, peuvent être enrôlés suivant les lois de leur pays, mais uniquement ceux qui, conformément aux lois de leur pays, ont été, actuellement enrôlés par un acte administratif (ordre d'appel special ou general) sans être par ce seul acte déjà devenus ou redevenus des personnes militaires." Au sujet de cet article 81, alinea 2, M. Paul Fauchille avait cru devoir appeler l'attention de la Commission sur l'article 144 des Instructions du 19 décembre 1912 pour les officiers de la marine française, que donne la solution suivante: "Les hommes de 18 à 50 ans, nationaux de l'État ennemi, et qui ne sont ni des passagers militaires, ni des passagers civils déjà enrôlés, ni des membres du personnel religieux, médical et hospitalier, ne
seront pas faits prisonniers de guerre, à la condition qu'ils s'engagent, sous la foi d'une promesse formelle écrite, à ne prendre pendant la durée des hostilités aucun service ayant rapport avec les opérations de la guerre." L'opinion de la Commission a été qu'on ne devait pas insérer dans le Règlement une pareille disposition. Celle-ci lui a paru excessive. Non seulement, en effet, elle regarde comme faisant partie de l'armée tous les hommes soumis par leur âge, d'après les lois de leur pays, au service militaire, c'est-à-dire, suivant la règle généralement admise, tous les hommes de 20 à 45 ans, mais elle assujettit encore aux lois de la guerre des individus que leur âge y soustrait : c'est dans des cas tout à fait exceptionnels que les hommes de 18 à 20 ans et ceux de 45 à 50 ans peuvent fournir une réserve aux forces armées; on ne saurait les traiter comme s'ils devaient la constituer normalement.

Propositions in 1913.—The Institute of International Law received from its committee both in 1912 and in 1913 a draft of a manual for war on the sea. The draft of 1913 was accompanied by a detailed report. The articles proposed in 1913 were.

SEC. V. DES DROITS ET DEVOIRS DU BELLIGÉRANTS VIS-À-VIS DES PERSONNES DE L'ENNEMI.

ART. 59. A. Personnel des navires—Bâtiments de guerre.—En cas de capture par l'ennemi d'un bâtiment de guerre, les combattants et les non combattants faisant partie de la force armée des belligérants ont droit au traitement des prisonniers de guerre.

ART. 60. Navires publics au privés.—Lorsqu'un navire ennemi public ou privé est capturé par un belligérant, les hommes de son équipage, nationaux d'un État neutre, ne sont pas faits prisonniers de guerre.

Il en est de même du capitaine et des officiers, également nationaux d'un État neutre, s'ils promettent formellement par écrit de ne pas servir sur un navire ennemi pendant la durée de la guerre.

Le capitaine, les officiers et les membres de l'équipage, nationaux de l'État ennemi, ne sont pas faits prisonniers de guerre, à condition qu'ils s'engagent, sous la foi d'une promesse formelle écrite, à ne prendre, pendant la durée des hostilités, aucun service ayant rapport avec les opérations de la guerre.

ART. 61. Les noms des individus laissés libres dans les conditions visées à l'article 60, alinéas 2 et 3, sont notifié par le belligérant capteur à l'autre belligérant. Il est interdit à ce dernier d'employer sciemment lesdits individus.

ART. 62. Toute personne faisant partie de l'équipage d'un navire public au privé ennemi est, sauf preuve contraire, présumé de nationalité ennemie.
Art. 63. Ne peuvent être retenus comme tels les membres du personnel d’un navire ennemi qui, à raison de son caractère particulier, est lui-même exempt de saisie.

Art. 64. Personnel des navires publics ou privés qui ont pris part aux hostilités.—Lorsqu’un navire public ou un navire privé a, directement ou indirectement, pris part aux hostilités, l’ennemi peut retenir comme prisonniers de guerre tous les membres du personnel du navire qui peuvent être considérés comme ayant pris part au fait de guerre reproché au navire.

Art. 65. Personnel des navires publics ou privés personnellement coupable d’actes hostiles.—Les membres du personnel d’un navire public ou d’un navire privé qui se rendent personnellement coupables d’un acte hostile envers l’ennemi peuvent être retenus par lui comme prisonniers de guerre.

The intent of these articles may be seen from the somewhat extended comment given in the report of the committee upon the several articles. There was a disposition to conform to the wording of the Hague conventions. In commenting on article 60 in regard to the paroling of the officers and crews of enemy vessels which were not ships of war, the report says:

Cet article dispose que le capitaine, les officiers et les membres de l’équipage, nationaux de l’État ennemi, ne doivent pas être faits prisonniers de guerre, s’ils s’engagent à ne prendre, pendant la durée des hostilités, aucun service ayant rapport avec les opérations de la guerre. M. Dupuis en a réclamé la suppression, car il stipule en réalité l’obligation de la libération conditionnelle, or cela est contraire à ce qui, à très juste titre, est admis pour la guerre terrestre par l’article 10 du Règlement de La Haye du 18 octobre 1907 : l’État capteur doit être libre de juger s’il convient ou non de mettre en liberté les individus capturés comme ceux-ci doivent être libres d’accepter ou de refuser la liberté sur parole. M. Holland a fait, d’autre part, remarquer que “si l’on peut avoir confiance dans la parole des officiers, il n’en est probablement pas de même dans la parole des hommes de l’équipage”. Mais la Commission a estimé, par quatre voix contre trois, qu’il y avait là, suivant l’expression de M. Strisower, une disposition “humanitaire” qu’il y avait lieu de maintenir : ce serait un recul que d’admettre à cet égard une solution différente de celle consacrée par l’article 6 de la Convention n° XI de La Haye.

Personnel of private vessels of the enemy.—Formerly the personnel of private vessels of the enemy was subject to such treatment as the opposing belligerent might
determine. A common rule before 1907 was to hold as prisoners of war those who by training or relation to the state might be immediately available for service of the enemy. In early days the crews of belligerent private vessels had often been treated with great severity, but with the growing tendency to limit hostilities to the armed forces on land and on sea there had been a drift of opinion toward liberality in the treatment of crews of captured private vessels.

In the call for the Second Hague Conference this subject was not mentioned, but it was introduced by the British delegation. Amendments were offered by other delegations. Discussion showed a remarkable unanimity of opinion in favor of very liberal treatment of the personnel of enemy private vessels. The tendency seemed to be to recognize the noncombatant persons at sea as nearly on the same footing as noncombatant persons on land. This marked a decided change from earlier practice, and one with far-reaching effects. The introductory part of the report of the committee upon these rules may well be considered:

Dans la pratique internationale actuelle, les hommes, les officiers et le capitaine composant l'équipage d'un navire de commerce ennemi capturé sont traités comme des prisonniers de guerre. Le droit de prise est, en quelque sorte, appliqué à l'équipage comme au navire lui-même, souvent même sans ce préoccuper de distinguer les sujets neutres des sujets ennemis.

Pour justifier cette manière d'agir, on invoque généralement l'intérêt du belligérant capteur à affaiblir les forces de son adversaire, en le privant d'effectifs plus ou moins destinés à servir sur les navires de guerre.

Quelqu'établie qu'elle soit, cette pratique a donné lieu, à plusieurs reprises, à des difficultés. On la critiquée, en faisant remarquer ce qu'il y avait de rigoureux à traiter comme prisonniers de guerre des particuliers qui ne participent pas aux hostilités, dont la plupart sont le pauvres gens, dont le dur métier est l'unique gagne-pain, et qui méritent autant de sollicitude que les particuliers étrangers aux armées et se trouvant sur le territoire ennemi.

Cette matière ne figurait pas au programme russe de la Conférence. La Quatrième Commission s'en est trouvée saisie par une proposition britannique (1) visant seulement les marins neu-
tres, puis par une proposition belge (2) étendant même aux marins ennemis le bénéfice de la liberté.

La question, n'ayant soulevé aucune discussion devant la Commission, et la Délégation britannique ayant déclaré accepter le principe de l'amendement belge, fut renvoyé au comité d'examen.

Votre Comité a été unanime à admettre, en principe, l'adoucissement du sort des équipage dans navires ennemis inoffensifs capturés ne participant pas à la guerre, à condition de ne pas porter atteinte par là à l'intérêt légitime du belligérant capturé de ne pas voir ces équipages aller grossir les effectifs de son adversaire.

C'est dans cet esprit qu'ont été préparées les dispositions ci-après: elles posent, en principe, que les équipages des navires ennemis capturés ne sont pas faits prisonniers de guerre, mais qu'il y a lieu de subordonner, en certains cas, cette liberté à certaines conditions, en vue d'assurer au belligérant capturé le respect de ses droits dans la mesure compatible avec l'humanité. (Deuxième Conférence de la Paix, Tome III, p. 1027.)

Exemption of persons from capture.—In land warfare the exemption of persons from capture is necessarily wide. In warfare on the sea the exemption has been less extended.

The general principle is that the subjects of enemy states are enemies and the subjects of other states friends. Both these principles may be conditioned by other relations and by the conduct of the parties. On the ground of conduct persons may be combatants or noncombatants, and the tendency is to determine their treatment according as they fall in one or the other of these categories, combatants being liable to the full consequences of the war and noncombatants being, so far as possible, exempt from such consequences.

The Hague convention of 1907, respecting the laws and customs of war on land, outlines with considerable fullness the rules for the treatment of persons in time of land warfare. No such complete statement of principles has been agreed upon for treatment of persons in warfare on the sea.

The personnel of duly authorized hospital ships is exempt from capture and treatment as prisoners of war. These ships may be public hospital ships of the enemy,
private hospital ships of the enemy, or may belong to neutrals.

The personnel of ships of war is in general liable to capture and to treatment accorded to prisoners of war. Exemption under The Hague convention of 1907 for the adaptation to maritime war of the principles of the Geneva convention provides, in article 10:

The religious, medical, and hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary and can afterwards leave, when the commander in chief considers it possible.

The belligerents must guarantee to the said staff when it has fallen into their hands the same allowances and pay as are given to the staff of corresponding rank in their own navy.

The treatment of the personnel of private vessels of the enemy is under The Hague convention of 1907 relative to certain restrictions with regard to the exercise of the right of capture in maritime war. These provisions are:

Art. 5. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral state, if they promise formally, in writing, not to serve in an enemy ship while the war lasts.

Art. 6. The captain, officers, and members of the crew who are nationals of the enemy state are not made prisoners of war, on condition that they undertake, on the faith of a formal written promise, not to engage, while hostilities last, in any service connected with the operations of the war.

Art. 7. The names of the persons left at liberty under the conditions laid down in article 5, paragraph 2, and in article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

Art. 8. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

Under this same convention it would be held that the personnel of innocently employed small coast fishing vessels, small boats engaged exclusively in the local trade,
vessels charged with religious, scientific, or philanthropic missions would be exempt from capture and treatment as prisoners of war.

Neutral persons who actually engage in the hostilities lose their exemption as neutrals and are liable to the same treatment as belligerents under similar conditions.

Prisoners of war.—The right to capture a vessel implies a right to restrain those on board the vessel to such an extent as may make the capture effective. The degree of restraint will depend upon the character of the vessel and the relation of the persons on board to the vessel. The crew of a captured war ship would naturally be liable to restrain as prisoners of war, while a shipwrecked sailor which the warship had rescued from a foreign private vessel might be released at the earliest moment compatible with military necessity.

The early practice would make prisoners of war of the officers and crew of an enemy vessel liable to capture. The argument was that the detention as prisoners of war reduced the power of the enemy and hastened the end of the war. This practice was sanctioned by the rules of many states. A limitation was later imposed which gave neutral members of the crew exemption under certain conditions which would not affect the issue of the war. It was held, however, that as on land the men who might be capable of military service might be detained in an area occupied by military forces, so crews of captured vessels might be detained.

From this idea developed the later doctrine that was generally adopted early in the twentieth century that those who by training or otherwise were immediately available for enemy naval service might be detained as prisoners of war. As a sailor had had special training in order to become a sailor he would be of special value to the enemy and the detention of a number of these specially prepared men would weaken the enemy’s resources. This argument had in the eighteenth century sometimes been applied to the crews of fishing vessels, but had gradually become obsolete.
In the Franco-Prussian War of 1870, captains and crews of captured vessels were detained as prisoners of war.

In the Spanish-American War in 1898 the passengers of captured private vessels were released, the crews and officers were given very liberal treatment when detained, though both were usually soon released unless needed as witnesses.

During the Russo-Japanese War in 1904-5 Russia generally followed the early policy of holding as prisoners of war the officers and crew of captured Japanese vessels.

Japan seems to have granted liberty to those of the officers and crew not needed as witnesses, unless they had been previously enrolled in the naval service.

Résumé.—Without going into detailed discussion of the reasons for exemption it is evident that certain classes of vessels are granted exemption from capture when they are innocently employed. The general grounds of humanity and expediency are behind these exemptions. There are also exemptions granted in treaties and conventions for special reasons as well as for general reasons. These exemptions may be applicable to all states or only to a small number of states, according to the treaty provisions. The convention in regard to treatment of fishing vessels is generally accepted, while the treaties as to mail vessels are limited to a comparatively small number of states.

The treatment of public vessels of the enemy may by general assent be more drastic than the treatment of private vessels. A ship of war may be destroyed, while a merchant ship should in general be taken to port.

The principles governing the treatment of vessels in a broad way apply to the treatment of the persons on board. The persons on board a public vessel of an enemy are supposedly in the service of the enemy vessel, and are liable to be treated accordingly, as the vessel and its personnel can not always be disassociated.

The personnel of private vessels of an enemy may usually be considered on the principles which are based on its relation to the war. These persons may be of any
nationality, and as engaged service of a private person may have no relation to the war. Similarly passengers on a vessel flying the flag of the enemy may not be and ordinarily are not involved in the war. These persons who are only remotely or not at all connected with the hostilities should not be unduly inconvenienced by the war.

At The Hague in 1907 these principles were recognized and conventions embodying some of these principles were drawn up by the conference. Some states have by decision and practice defined the rights of vessels and personnel. The treatment of certain vessels and their personnel is so well fixed that there is no need for explanation under a consideration of general rules, as in the case of cartel and hospital ships.

Considering all sources and regulations certain conclusions seem to be fairly established.

CONCLUSIONS.

(a) Public vessels.—Public vessels of the enemy may be captured or destroyed except the following when innocently employed:
   1. Cartel ships designated for and engaged in exchange of prisoners.
   2. Vessels engaged in scientific work.
   3. Properly designated hospital ships.
   4. Vessels exempt by treaty or special proclamation.

(b) Days of grace for private vessels of the enemy.—A reasonable period of grace, to be determined by each belligerent, shall be allowed for vessels of the other belligerent bound for or within the opponent’s ports at the outbreak of war.

(c) Private vessels.—Private vessels of the enemy may be captured, except the following, when innocently employed:
   1. Cartel ships designated for and engaged in exchange of prisoners.
   2. Vessels engaged in religious, philanthropic, and scientific work.
   3. Properly designated hospital ships.
   4. Small coast fishing vessels.
5. Small boats employed in local trade, e. g., transporting agricultural products.

6. Vessels exempt by treaty or special proclamation.

(d) Personnel of public vessels of the enemy.—1. The personnel of public vessels which are liable to capture are liable to be made prisoners of war.

2. The personnel of enemy public vessels which are exempt from capture share in the exemption so long as innocently employed.


Art. V. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral state, if they promise formally in writing not to serve on an enemy ship while the war lasts.

Art. VI. The captain, officers, and members of the crew when nationals of the enemy state are not made prisoners of war on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.

Art. VII. The names of the persons retaining their liberty under the conditions laid down in Article V, paragraph 2, and in Article VI, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

Art. VIII. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

(f) Passengers on private vessels of the enemy.—Innocent passengers on a private vessel of the enemy are to be accorded the utmost freedom consistent with the necessities of war.