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Employment of Aircraft in the Wars Before 1914

If we use the term "aircraft" to include all types of craft, lighter-than-air or heavier-than-air craft, then we must say that, in the form of balloons, they were used for purpose of war as early as 1794 by the French revolutionary armies. In this form, also, they were used by the Russians in 1812 against the French; by the French at Antwerp in 1815; by the Austrians in 1849 during the siege of Venice. They were also used by the Italians in 1859; by the Americans during the Civil War; by the French in 1860; by the British during the Boer war of 1899-1902; and by the Japanese in 1904 during the Russo-Japanese war.

For more than a century balloons have been used for purposes of observation, signalling, making reconnaissances, transmission of messages, and as a means of escape from besieged places.[1] But, owing to the incapability of the balloon to be directed to fly to, or over, a definite point as desired and the slowness of its movement, it has never been regarded as an essential factor in warfare. Hence, when we speak of aerial warfare, it generally means the employment of the power-driven aircraft invented at the beginning of this century.[2]

Aeroplanes were first used in the Turco-Italian war of 1911 and the Balkan wars of 1912-1913. In the Turco-Italian war of 1911, it was said that the Italians employed dirigible aircraft, from which they dropped explosives upon the Turkish forces, and that there was dropped over the town of Sanzour some 14 miles west of the city of Tripoli, a bomb, which fell into the street, killing four persons and wounding ten others, all of them non-combatants.[3]

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1. *C. L. M. Brown*: The Conquest of the Air (1927), p. 34-35; *James Wilford Garner*: International Law and the World (1920) vol. 1, p. 458-459. This type of balloon is sometimes called non-dirigible or free balloon.

2. For an account of the invention and successful flight of, and with, a power-driven flying-machine by the Wright Brothers in 1903, see *Arthur Sweetser*: The American Air Service, p. 6-8; and, *Brown, op. cit.*, p. 98-102.

3. This act by the Italians roused much discussion among the jurists at that time. They asked whether such bombardment from the air was not against the Declaration of the Hague Conferences of 1899 and 1907 as well as the Provisions (articles 25 and 27) of the Hague Regulations of 1907. The fact was that Turkey only had signed both of these, but not Italy. It was, therefore, thought that Italy was free to use aircraft for the purpose

Although aeroplanes were used before 1914, for very much the same purposes as balloons were used, they had already shown great possibility as an instrumentality of war, as remarked by Spaight, on the eve of the World War:

"The fighting aircraft has, beyond all question, arrived and come to stay. The extraordinary development of the power-propelled aeroplane, and, to a smaller degree, of the dirigible airship, within the last few years, has removed the question of aerial war from the subordinate place which it occupied when only wind-propelled, non-dirigible balloons were used as auxiliaries of armies, (as they have been off and on since 1794) and has given it a prominence and importance which demanded for it *special consideration and independent treatment* as a domain of war law."[4]

Law Regulating Aerial Warfare Before 1914.

(1) The Madrid Conference of 1911 and the Proposed Code

In 1911 at the Madrid Session of the Institute of International Law, M. Fauchille presented for the adoption of the Institute a draft code consisting of 28 articles on aerial law in time of peace and 30 articles on aerial law in time of war. The fact that Fauchille devoted more articles to aerial law in time of war shows that as a pioneer jurist in this field he had early visualized the importance of the subject. A few of these articles concerning aerial warfare are reproduced here to gain a more concrete idea of the nature of the proposed code and the trend of thought of the time:

"Art. 1.—Belligerent States have the right to carry war-like acts in any and every part of the atmosphere above their several territories, above the open sea, and above the sea bounding their coasts.

They are forbidden to carry out hostile acts, capable of causing the fall of projectiles or of causing damage generally, above the territories of neutral States, at whatever height, and also in the neighborhood of these States within a radius determined by the force of the cannon of their aircraft.

A belligerent's military aircraft, and also his public non-military aircraft, may not circulate above a neutral State except with the latter's authority . . . The circulation of aircraft in war-time is subject to the same restriction as during peace.

"Art. 6.—The bombardment by aircraft of towns, villages, habitations or buildings which are *not defended* is forbidden.

The rules established by the Hague Conventions of 18th October, 1907, relative to Sieges and Bombardments by Land or Naval Forces, are applicable to aerial war.

"Art. 19.—The principles of the Hague Convention of 18th October,

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of aerial bombardment. 6 Am. Jour. of Int. Law, p. 485 ff. Both the Hague Declaration and the Hague Regulations are discussed under topic II, in the following pages.

4. *J. M. Spaight*: Aircraft in War, p. 1. Spaight's book was published just before the War broke out; it deals quite adequately with the views and practice on the subject of aerial warfare, down to 1914.

1907, relating to Neutral Rights and Duties in Maritime War, are generally applicable to aerial war."[5]

This code, however, was not adopted by the Institute. It was objected to by some of the delegates on the ground that it was too comprehensive and out of proportion to the existing state of aerial navigation.[6] So, instead of this code, the Institute adopted a rather vague and impracticable principle, which reads:

"Aerial war is permitted, but only on the condition that it does not present for the persons or property of the peaceable population greater dangers than land or sea warfare."[7]

It appears that there were diverse opinions at the Madrid Conference. For instance, Holland and Maluquer proposed to forbid the employment of aircraft for any purpose of war. Professor Holland was so strong against aerial war that he expressed regret that scientific invention had made aerial navigation possible. There was another group, including Westlake and Alberic Rolin, who would allow the use of aircraft for reconnaissance but not for purposes of attack. A third group, by far the greatest of all, who believe that the employment of aircraft for either scouting or fighting was legitimate, provided that the peaceful population was not exposed to danger. Among these we find Fauchille, Kaufmann, Meili, R. Edouard Rolin. It is evident that the resolution passed by the Institute was based on the view of this group.

The impracticability of allowing aerial war on the condition that it should not present greater danger to the peaceful population than land or sea warfare, was pointed out by von Bar during the Madrid session. He stated that, if aircraft were employed for launching of bombs and projectiles, they were likely to cause more damage to non-combatant and private property, *because they could not be directed with precision against legitimate objects of attack.* It is clear that aerial war would include launching of projectiles

5. Fauchille's proposed code is appended to Spaight's work cited above; it may also be found in 24 Annuaire (1911); Revue de la locomotion aerienne, July-August, 1911.

6. It is interesting to note that this was precisely one of the grounds on which the Committee on Jurisprudence and Law Reform of the American Bar Association objected to the proposal of Judge Simeon E. Baldwin for the regulation of air navigation in the United States. The Committee points out in the report saying: " . . . The navigation of the air has not become so general as to permit uniform legislation so as to fix with legal certainty the rules for its government . . . Commerce by air has not yet attained sufficient growth on which to justify its regulation by Congress, . . ." See 36 Am. Bar. Ass'n. Rep. 380 ff. For a further presentation of Baldwin's proposed legislation, and the text, see his article in 9 Mich. Law Rev. (1910), p. 20.

7. This is Art. 4. See 24 Annuaire (1911).

and bombs, in other words, aerial bombardment. Since they cannot be as precise as the artillery or naval guns in picking up their targets, to allow such operation would inevitably result in exposing non-combatants to greater danger than land or sea warfare. This unsatisfactory nature of the Madrid solution was mentioned by Garner, giving as instance what happened during the Turco-Italian war:

" . . . As is well known, the first war in which aircraft were employed was that between Italy and Turkey in 1911-1912. Aeroplanes and dirigibles were used by the Italians not only for purposes of observation, exploration, signalling and distribution of proclamations, but also for the dropping of bombs upon Arab villages and camps. The Turkish government protested, not against the employment of aircraft as instruments of combat, but against the launching of bombs and projectiles upon undefended places, upon non-combatant populations and upon hospitals and sanitary establishments, all of which acts they properly denounced as violations of the laws of war."[8]

(2) The Hague Conferences and the Regulation of Aerial Warfare

(a) The Hague Declaration

By far the most important of international conferences that have dealt with the question of aerial warfare before the War, the two Hague Peace Conferences of 1899 and 1907 must be given the first place, for they were participated in by delegates representing the various governments of the world. During the First Conference in 1899, the Russian Government proposed to the Conference "to prohibit the throwing of projectiles or explosives of any kind from balloons or by any similar means." Although there was difficulty for the Powers to agree to a general reduction of armaments, they seemed to be favorably disposed toward the balloon prohibition. In fact, they did not pay much attention to this proposal. In 1899 aircraft had not been regarded as an effective weapon of war, like guns or torpedoes, for instance. The Conference in plenary session accepted it without debate,[9] and an agreement was reached, which took the form of a signed declaration as follows:

"The Contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons or by other new methods of a similar nature.

The present declaration is only binding on the Contracting Powers of war between two or more of them.

It shall cease binding from the time when, in a war between the

8. Recent Developments in International Law, p. 172. See *Coquet*, 20 Rev. Gen., p. 534-537; also 6 Am. J. I. L., *loc. cit., supra* note 3.

9. *James Brown Scott:* Proceedings, Conference of 1899, Sixth Plenary Meeting, p. 79.

Contracting Powers, one of the belligerents is joined by a non-contracting power."[10]

As the Declaration was to be in force only for a period of five years it expired in 1904, so the Russian Government included a proposal for its renewal in the program for the Second Conference. The renewal was agreed to for a period of five years, but the vote was far from unanimous.[11] This change of attitude among the Powers toward the question of the employment of aircraft for purposes of war at the Second Conference was to be expected. First, the Second Conference, unlike the First, was not called primarily to consider the limitation of armaments or to prohibit the employment of new weapons. Second, aircraft was by 1907 no longer regarded as "too imperfect to be of any practical use in warfare."[12] The difference in object between the two is shown by Sir Thomas Barclay in a comparison of the Hague Conferences:

"That of 1899 was essentially a Peace Conference, called for the express purpose of arresting the growth of armaments and war budgets. From the second one all discussion on this subject was deliberately excluded, though a resolution was unanimously adopted in favor of its future consideration, ..."[13]

As for the second reason which accounted for the change of attitude of the Powers, Hazeltine observes:

" . . . Now, to understand the attitude of the Powers on this whole matter, it must be carefully borne in mind that the science of aerostatics had made a very considerable advance between the time of the sitting of the first Hague Conference in 1899 and the time of the sitting of the second in 1907. The result was that the attitude of some of the Powers in 1907 was very different from the attitude in 1899 . . . ."[14]

To what extent progress has been made in aviation by 1907 is told by M. W. Royse as follows:

"The capacity of the weapon which fell within the scope of this proposal had undergone a vast change. The dirigible, with its compara-

10. *Scott*: The Hague Peace Conferences, vol. 1, p. 651. The statement made by the Dutch delegate supporting the Russian proposal, as recorded in the minutes of the meeting, is important as it recalled earlier international conventions of a similar nature. The concluding passage says: "At the Conference of Brussels in 1874, it was decided in Art. 12, which is almost like Art. II of the Russian advance program, that the laws of war do not grant belligerents an unlimited power in choosing means of injuring the enemy . . . Now, the progress of science . . . has been such that things hitherto beyond belief are realized today. We can foresee the use of projectiles or other things filled with deleterious gases, soporific, which, dropped from balloons in the midst of troops, would at once put them out of commission." *Ibid.*, p. 659-660.

11. 29 States for (Germany and Roumania on condition of unanimity); 6 against (Argentine, Spain, France, Montenegro, Persia, Russia); 10 States did not vote. See *Ibid.*, p. 652; *Oppenheim*: Int. Law, Vol. 2, p. 173.

12. *Lawrence*: Principles of International Law, p. 527.

13. International and Practice, p. 6.

14. *Harold D. Hazeltine*: The Law of the Air, p. 117-118.

tively large carrying capacity, wide cruising radius, and with its ability to hover indefinitely over a spot while practically immune from ground fire by its altitude capacity, was a weapon which obviously was not to be readily discarded. The airplane, although still of uncertain military value, was undergoing a rapid development in the year preceding the 1907 conference. Each month saw increases in speed, altitude and range. By October, 1907, although Germany was still concentrating on the dirigible, France was rapidly developing its heavier-than-air facilities."[15]

This is very significant in connection with the general question of disarmament, to which aircraft is not excepted. The moment aircraft proves to be capable of being used as one of the effective weapons of war, its unconditional elimination becomes impossible. The smaller States, it is true, were more ready to agree to the prohibition of any weapons capable of doing great damage, and which they could not use to advantage. But not so with the great Powers, as in this case, who saw the unlimited possibilities in this new weapon, and who generally gained their point in an international conference of this kind.[16] We saw this truth demon-

15. Aerial Bombardment (1928), p. 56.

16. The proposal to interdict the use in naval warfare of the submarine torpedo at the First Hague Conference, was opposed by the smaller States, because they believed they could use this weapon to their advantage, "as a cheaper defense against possible aggression from a strong and unscrupulous belligerent." *Lawrence, op. cit.*, p. 516. Another instance is the refusal of the United States to sign the Declaration of Paris (1856) abolishing privateering. At that time the United States had only a comparatively small navy. The abolition of privateering would tend to augment "the aggressive capacity of great naval powers while the defensive ability of others would be reduced" (*President Pierce,* Annual Message, Dec. 2, 1856, in Richardson's Messages, vol. 5, p. 412). The attitude of Great Britain toward the question of irregular troops at the Brussels Conference of 1874 is yet another instance in point. England's objection was based on the ground that certain of the proposed clauses would greatly increase the advantages of the continental powers maintaining compulsory military service. See British Parliamentary Papers, 1875, Miscellaneous, No. 1 and 2. Also comment on this in *Hall's op. cit.* (Atlay ed.), p. 525-526.

The difficulties surrounding the problem of disarmament have been very much in evidence, not only in the international conferences of 1856, 1874, 1899, 1907, but also in the Peace Conference of 1919 and the Washington Conference of 1921-1922 (see *supra* note 17). Commenting on the Peace Conference and the problem of disarmament, Tasker Howard Bliss says: "The conference recognized the existence of this problem but made no direct attempt to solve it . . . ." *House-Seymour*: What Really Happened at Paris, p. 371. And the difficulty, as the above writer points out, lies in the fact that: ". . . no agency, however, terrible, has continued to be unlawful from the moment it is discovered to be practical and effective in determining the course of a battle or in bringing the war to an end. The use of gas has been legalized by war, as shown by the preparations for its further use made by all the great armed nations (chemical warfare is now a regular branch of any well-equipped army of the leading nations). In every nation in Europe it is expected that the *use of aeroplanes for the bombing of cities* in the next great war will be on a scale without precedent in the last one. And all due to the fact that a *war of nations* in arms is in reality one of life and death, in which each will and must do what it can to save itself and destroy its adversary."—*Ibid.*, p. 381. See also *Royse*, op. cit., p. 21. The difficulties of reaching an agreement by States for an effective

strated in the Conferences of Paris, 1856, of St. Petersburg, and Brussels, the two Hague Conferences and the Washington Conference of 1921-1922.[17]

To return to the proposal for the renewal of the Declaration of 1899, Sir Edward Fry proposed in the plenary session of the Conference of August 14, 1907, that instead of five years, the declaration should remain in force until the close of the Third Peace Conference (which was then intended to be held in 1915). The declaration was the same in form as that of 1899, excepting the insertion of the words "for a period extending to the close of the Third Peace Conference," before the words "the launching of projectiles, etc."[18]

The fact that the Declaration binds only between belligerents who are signatories to this Declaration, and that it shall cease to be binding when one of the belligerents is joined by a non-signatory, practically nullifies the effect of the stipulation. Thus, as visualized by Hazeltine, in a war between Germany and Great Britain the Declaration would not be binding, and balloons and other aircraft might be used for the discharge of projectiles and explosives (indeed, that was the case during the War). Or, if Austria-Hungary and Great Britain should go to war, and Austria-Hungary should then be joined by Germany (who was not a signatory Power) as an ally, or England should be joined by France (who was also not a signatory Power) as an ally, the Declaration would cease to be binding between Austria-Hungary and England, even though they were parties to the Declaration.[19]

(b) The Hague Regulations on Land Warfare

Besides the Hague Declaration prohibiting the discharge of projectiles and explosives from balloons or by other new methods of a similar nature, there are five articles in the Hague Reglement or Regulations respecting the Laws and Customs of War on Land, which have some bearing on the regulation of aerial warfare. These

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limitation of armament may be summed up in four words—"conflict of military interests," among States.

17. Thus, the Washington Conference on the Limitation of Armament has not achieved anything more substantial as regarding the international control of air navigation, than the following resolution: "The Committee is of the opinion that it is not at present practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military."—Conference on the Limitation of Armament (1922), p. 800.

18. *Scott, op. cit.*, p. 652-653.

19. *Hazeltine, op. cit.*, p. 121.

are Articles 25, 26, 27, 29 and 53. Articles 25, 29, and 53 should be considered in particular.

Article 25 of the Hague Regulations:

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

This, and the other articles, is generally regarded as having greater binding force than the Declaration, because it has no time limitation and it is therefore still binding upon the Powers which had ratified it, provided that all the belligerents are parties to it.[20] The phrase "by any means whatever" was inserted in the revised Convention of 1907, and was intended to cover all cases of bombardment by aircraft. On this point practically all the international jurists agree. The difficulty lies in determining just what location may properly be regarded as "not defended." Garner is of the opinion that:

"While the purpose of the article is clearly to prohibit the bombardment of *undefended* places by aircraft as by other means, it lays down no rule for determining when a place is 'defended' or 'undefended' as against bombardment from the air. In land and naval war a place is defended when it possesses ramparts or fortifications, or is occupied by troops or possesses artillery for defense. But can it be said that a place is 'defended' in the sense that it is liable to bombardment from the air, merely because it contains fortifications, troops and ordinary artillery of horizontal range? It would seem that a place can justly be regarded as 'defended' against aerial bombardment only when it is equipped with artillery especially constructed for the purpose of bringing down enemy aircraft. If it is supplied with such artillery, it would seem to be liable to bombardment from the air even though it is not fortified or otherwise 'defended' in the sense of land and naval warfare."[21]

20. But in so far as these Hague provisions are merely declaratory of the existing laws and customs of war, they are of course binding independently of the status of the conventions of which they are a part. The question of the binding force of the Hague Conventions is considered elsewhere. In connection with Article 25 and its revision in 1907, the views of some of the leading authorities may be noted here:—J. Westlake says: "The words 'by any means whatever' were inserted in 1907, and ensure the permanent application to this case of the prohibition to employ projectiles dropped from the sky, whatever may at the next (third) Hague Conference be the fate of the Declaration against them."—International Law, vol. II, p. 87. "This provision involved a decided advance in the view taken by International Law, for it was formerly asserted by many writers and military experts that, for certain reasons and purposes, undefended localities also might, in exceptional cases, be bombarded . . ."—*L. Oppenheim:* International Law, vol. II, p. 217. While Hazeltine comments: ". . . According to the Regulations now in force, therefore, the attack or bombardment of undefended places *by any means whatever* is forbidden. This essentially embodied the original Russian proposal, and was understood by the Conference to cover the case of attacking or bombarding undefended towns by means of projectiles and explosives hurled from balloons or other air-vehicles. This prohibition being contained in the Regulation is a prohibition of unlimited duration—unless, of course, changed by international agreement—and is a rule of International Law at the present time . . ."—*op. cit.*, p. 122.

21. *Garner, op. cit.*, p. 167-168.

It seems that Hazeltine agrees with Garner in regarding the equipment of a place with anti-aircraft guns as a criterion that it is *defended:*

". . . With the possession of the new powerful Krupp guns especially designed for the destruction of airships, however, any otherwise undefended place might properly be viewed 'defended' as far as the dropping of projectiles from balloons and other air-vehicles is concerned. In any future war we may indeed confidently expect many places, otherwise unprotected, to be shielded by powerful air-ship-destroying guns; and, if so defended, it is possible that any town may be viewed as legitimate prey for the aerial fleets of those States which are not parties to the Hague general Declaration against the launching of projectiles from balloons; for the opinion seems to be held by several leading States that what is not prohibited by usage or convention or promisory declaration is permitted."[22]

Spaight gives three exceptions to the rule laid down in Article 25, stating that:

"As war law now stands one may say that an undefended city, unoccupied by troops and not situated within the perimeter of defense of a neighborhood fort or forts, may be bombarded in land war only in three cases and in those cases only *if it is absolutely impossible to obtain the end in view by milder means;* the three cases being: (1) the destruction of military stores, factories, etc.; (2) to secure compliance with legitimate requisitions; and (3)—a very doubtful case—to inflict punishment, by way of reprisals, for infractions of laws of war on the part of the enemy."[23]

Spaight wrote this in 1911, but in the light of our experiences during the World War, he has been able to raise the question on more definite ground. His recent view on this topic deserves to be quoted at length:

"The old broad rule that a defended city may, and that an undefended city may not, be bombarded, is no longer of any practical value. It has never been a satisfactory rule; it is more unsatisfactory than ever when applied to air bombardment . . . It will be still more difficult in future to tell whether a place is defended or not, for defense against air attack will tend to take the form of aerial counter-action rather than of artillery defense, and a squadron or flight of defending aircraft, perhaps based on some fairly distant aerodrome, may suddenly appear above a town which is entirely *open* so far as ground defense is concerned, and denying the raiding aircraft force access to that town, which cannot then truly be said to be *undefended.* For this and other reasons the criterion of 'defense' as a test of the legitimacy of bombardment will have to be reconsidered, and liability to or immunity from attack made to depend upon some other consideration."[24]

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22. *Op. cit.,* p. 123.

23. War Rights on Land (1911), p. 170. Cf. *Holland*: Studies in International Law, p. 110.

24. He goes on to say that complete prohibition of air bombardment may be ruled out as an impossible ideal, and that unrestricted freedom of air bombardment may similarly be set aside as repugnant to sentiments of humanity. He suggests that one of the two principles or practices during the War, one, the doctrine of the Entente, and the other, that of Germany, may be chosen as alternatives—In the British Year Book of International Law, vol. 4. (1923-1924), p. 23. In this connection, Professor Pillet ob-

Article 29 of the Hague Regulations:

"An individual can only be considered a spy if, acting clandestinely or on false pretences, 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 intended either for their own army or that of the enemy. To this class belong likewise *individuals sent in balloons* to deliver dispatches, and generally to maintain communications between the various parts of an army or a territory."[25]

To be more sure as to how far those who carry dispatches by aircraft may not be regarded as spies, and, therefore, punishable by death, it is desirable to examine more closely as to what constitutes a spy according to this article. According to the analysis given by Spaight, a spy is one who:

(1) seeks to obtain military information for the belligerent employing him;

(2) does so clandestinely or under false pretences; and,

(3) does so in the zone of operations of the other belligerent.[26]

Oppenheim stresses the point that individuals who were charged with the delivery of dispatches for their own army, and did it openly, could not be treated as spies, the fact that they use aircraft would not make any difference.

"Thus, a soldier or civilian trying to carry dispatches from a force besieged in a fortress to other forces of the same belligerent, whether making use of a balloon, or air-vessel, or riding or walking at night, may not be treated as a spy.

"On the other hand, spying can well be carried out by dispatch-bearer, or by persons in a balloon or an air-vessel. The mere fact that a balloon or air-vessel is visible does not protect the persons using

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serves: "'undefended' is an unfortunate expression, for one cannot know whether a town is defended until the moment when one decides to attack it."—In La Revue Génerale de Droit International Public (1916), xxiii, p. 429.

25. The distinction between a spy and one who is entitled to be treated as prisoner of war is important. In regard to prisoners of war Art. 4 of the Hague Regulations says: "Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who capture them. They must be *humanely treated.* All their personal belongings, except arms, horses, and military papers, remain their property." The text of the Hague Conventions of 1907, consisting altogether of thirteen conventions and one declaration, may be found in *Barclay's*: International Law and Practice, p. 79 ff. The Regulations on Land Warfare in Convention IV, at p. 130 ff.

26. *Op. cit.*, p. 202. Spaight further amplifies this analysis, saying: ". . . To establish the quality of spy in the case of a soldier, there must be disguise; in the case of a civilian spy, disguise is not essential—the clandestine nature of the act is sufficient condemnation."—*Ibid.*, p. 203. See also, *Amos S. Hershey*: International Public Law, p. 398-399, especially the footnotes; *William E. Hall*: International Law, ch. VII.

it from being treated as spies; since spying can be carried out under false pretences quite as well as clandestinely."[27]

The importance of this provision in the Hague Regulations, which protects a *bona fide* dispatch-bearing aeronault or aviator from being treated as a spy, cannot be over emphasized. For in previous wars, especially during the Franco-German War of 1870, when balloons came to be used quite extensively, the mere fact of flying over the territory of the belligerent was sufficient to stamp the flyer with the character of a spy, and make him liable to extreme punishment. During the war of 1870, the Germans treated as spies all persons passing over the German lines in balloons. It was said that a certain Nobecourt had his balloon fired upon, and when subsequently captured, he was sentenced to death (which was later commuted to imprisonment).[28]

Article 53 of the Hague Regulations:

"An army of occupation can only take possession of cash, funds, and realizable securities, which are strictly State property, depôts of arms, means of transport, stores and supplies, and generally all moveable property of the State of a nature to be used for operations of war.

"All means employed on land, at sea, *in the air,* for sending messages, for carriage of persons or things, apart from cases governed by maritime law, may be taken possession of, even though belonging to private persons, but they must be restored, and the compensation to be paid for them shall be arranged for on the conclusion of peace."

What concerns us here in this article is the provision that in time of war an army of occupation can take possession of aircraft belonging to private persons (not to speak of those belonging to the State), as indicated in the second clause, and that such requisition must be paid for and restored later on. Commenting on the benefit which this Hague provision confers on the inhabitants of the occupied territory, Spaight reflects:

"It seems cruel to allow an occupant to make the enemy's nationals contribute to the upkeep of the army which is fighting against their own. The fact is that in this matter, as in many others, there must be a certain amount of compromise, of 'give and take', between the interests of occupying armies and those of populations. It was not until quite recent years that the latter's interests were considered at all. It is too soon, yet, to expect to see the traditions of years wiped out and for-

27. *Op. cit.,* p. 224. However, Holland says: ". . . Persons in balloons are not spies, even if engaged in observing the movements of the enemy." It is not clear whether Holland uses the word "person" here for both soldiers and civilians, but from a sentence just before this one, which says "To claim the benefit of the second clause of this article (Art. 29) soldiers must be in uniform," it may be construed that he means uniformed soldiers only. In that case it is sound, as air service has in recent years formed one of the branches of the army. See *Holland:* The Laws of War on Land (1908), No. 84.

28. *Hall, op. cit.,* p. 651-652.

gotten. Both requisitions and contributions are, in a way, a relic of the vested rights which an invader once possessed to the money, goods, and labor of the people he had temporarily conquered. They date from the time when war supported war. Today, their foundations are beginning to be undermined. The last Hague Conference making the requisitioning belligerent responsible for payment, has struck a blow at the right of requisitioning—the extreme right recognized by the jurists—which may change its whole nature, and complete a process which had already begun, of replacing requisitioning by the system of amicable purchase or at least by a right of pre-emption. . . . *As war law stands today,* contributions and requisitions remain as approved methods by which an invader can procure from the enemy's citizens such funds, goods, or services as his army need—subject, in the case of requisitions, to his paying therefor either at the time or consequently."[29]

A comparison of the rules which determine the rights and duties of belligerents in the wars of more recent years with those regulating the conduct of war a century ago, will show that there has been a steady tendency toward codification of such rules. "From a body of traditions and custom, the law of war has gradually developed, . . . during the last fifty years into a fairly definite system of rules, many of which are now embodied in international conventions and declarations, and in official manuals or ordinances issued by States for the guidance of their military and naval commanders."[30] Hence, when the delegates from practically every civilized country of the world met at The Hague in 1899,

29. *Op. cit.,* p. 383-384. From this Hague provision and the comments made by Spaight, it may be assumed that both aircraft belonging to, and in the service of, private persons may be requisitioned. It may be assumed, too, that neither the craft nor the service of such persons will be employed for hostile purposes, but principally to facilitate transportation and communication. This is most obviously seen in the text originally found in the corresponding article of the Hague Regulations of 1899 (which was revised in the second conference of 1907, and reads as above), and which instead of saying "all means (or appliances) employed on land, at sea, in the air etc.," categorically enumerates "railway plant, land telegraphs, telephones, steamers, and other ships, . . . even though belonging to Companies or private persons . . ." It should be noted that nothing about aircraft was mentioned as a legitimate object of requisition in the provision of 1899. Although services of private persons may be demanded and paid for, they cannot be compelled; nor may aviators, for instance, be compelled to participate in hostile acts against their own country; nor can the service be demanded without proper authorization. This is clearly set down in Art. 52. The other two Hague provisions, besides those that have been commented on above, are:

"Art. 26. The officer in command of an attacking force must, before commencing a bombardment, except in case of assault, do all in his power to warn the authorities.

"Art. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historical monuments, hospitals, and places where sick and wounded are collected, provided they are not being used at the time for military purposes.

"It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand."

30. *Garner*: International Law and the World War, vol. I, p. 2.

in their endeavor to codify war law, they found that there were already some similar projects in existence. First, there was the "Instructions for the Government of Armies of the United States in the Field," as drawn up by Dr. Francis Lieber, and promulgated by the United States Government in 1863.[31] Second, the Brussels Convention of 1874.[31a] Although this Convention was not ratified, owing to the opposition of the British Government, it embodies "the most authoritative opinion of tacticians, diplomatists, and jurists on the laws and customs obligatory for belligerent States and their armies."[32] Third, the private codification of the Institute of International Law.[32a] The first of these, the American war-code, is most important, as it served as a basis for the Brussels Convention of 1874.

On the other hand, the Hague Regulations have since 1899 become the basis on which the individual State army manuals were issued, as stipulated in Art. 1 of the Convention (IV). To cite a few of these issued by the Governments of the leading Powers, there is:

(1) The German *Kriegsbrauch im Landkriege,* prepared in 1902, in pursuance of the Hague Convention;

(2) The French Manual, *Les Lois de la Guerre Continentale* (4th ed. 1913);

(3) The Swiss, Russian, and Japanese regulations of 1904;

(4) The British manual (in 1904 Holland's *Laws and Cus-*

31. This is the General Orders, No. 100, issued by the War Department on April 24, 1863. It is in ten sections and comprises 157 articles. A text of this code may be found appended to *James Brown Scott*: Texts of the Peace Conferences at the Hague, 1899 and 1907. See also *G. G. Wilson*: International Law, appendix I.

31a. The Brussels convention or project, as it is called, was adopted by the Conference of Brussels, August 27, 1874. It was, however, never ratified. The project contains 56 articles. The last four articles concern the rule of neutrality. The full text of the code is in *Scott, op. cit.*, p. 382-389.

32. *De Martens*: La Paix et la Guerre, p. 120; *Spaight*: War Rights on Land, p. 6.

32a. This is the "Laws of War on Land," recommended for adoption by the Institute at its session in Oxford, September 9, 1880. It is divided into three parts and in 86 articles, very much more elaborated than the Brussels project. The subject matter covers general principles, the application of general principles, hostilities, occupied territory, prisoners of war, termination of captivity, troops interned in neutral territory, and penal sanction. Besides these three codes, mention should be made of other conventions, although they deal either with maritime warfare or are not directly applicable to active troops. These are: the Paris Conference of 1856, the Geneva Conferences of 1864, 1868, and 1906 and the St. Petersburg Conference of 1868. They nevertheless indicate the tendency toward codification of warfare rules. About these conferences see, respectively, *Moore*: Digest, vol 7, p. 573; *Garner*: Int. Law, p. 45, and *Bordwell*: Law of War, p. 86; and, *Lawrence*: Int. Law, p. 530.

toms of War on Land was issued by the British Government), in the 1908 new edition which embodies the provisions of the Hague Convention; and

(5) The American Rules, the *United States Rules of Land Warfare* of 1914, which incorporates texts of Hague and Geneva Conventions.[33]

In view of the above facts, it may be said that the Hague Regulations derive their authority not only by virtue of international agreements, but also from practices in existence for almost three quarters of a century, and that they in turn shape the rules of land warfare issued by the various nations. In any estimate of the binding force of the Hague Conventions, it should not be overlooked that these are more than conventional, whenever they are declaratory of some existing laws and customs of war.[34]

(To be continued)

33. According to the provision of Art. 1 of Convention (IV), "The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention." The articles in the Convention should not be confused with those of the Regulations annexed to the Convention itself. The former has nine articles, while the latter, fifty-six. It may be noted here that the Kriegsbrauch im Landkriege has been translated into English in 1915 by J. H. Morgan as The German War Book, and that the British Manual on Land Warfare now in use, was prepared in 1912 by Col. Edmunds and Professor Oppenheim.—See, *Hall, op cit.*, p. 469-470. Spaight estimates highly the American Manual for the army (see *supra* note 31) drawn up by Dr. Lieber, on the initiative of President Lincoln. This was the war code which regulated the Union forces during the American Civil War. "Its principles and its philosophy are sound, elevated, and humane," says Spaight. And, ". . . it reads like an admirable paraphrase of the existing Hague Regelment." And of the effect of this code on the troops fighting the South, he concludes, "the conduct of the Union forces almost wholly composed of civilians with no previous training or discipline, compares more than favorably with that of regular armies in European wars."—*Spaight*: War Rights on Land, p. 14. Technically the Secessionists were rebels. But, as a matter of fact, they were treated as belligerents, and both sides, throughout the war, respected the principles of International Law. See *Lawrence*: International Law, p. 303.

34. *Garner, op cit.*, p. 19-21.

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