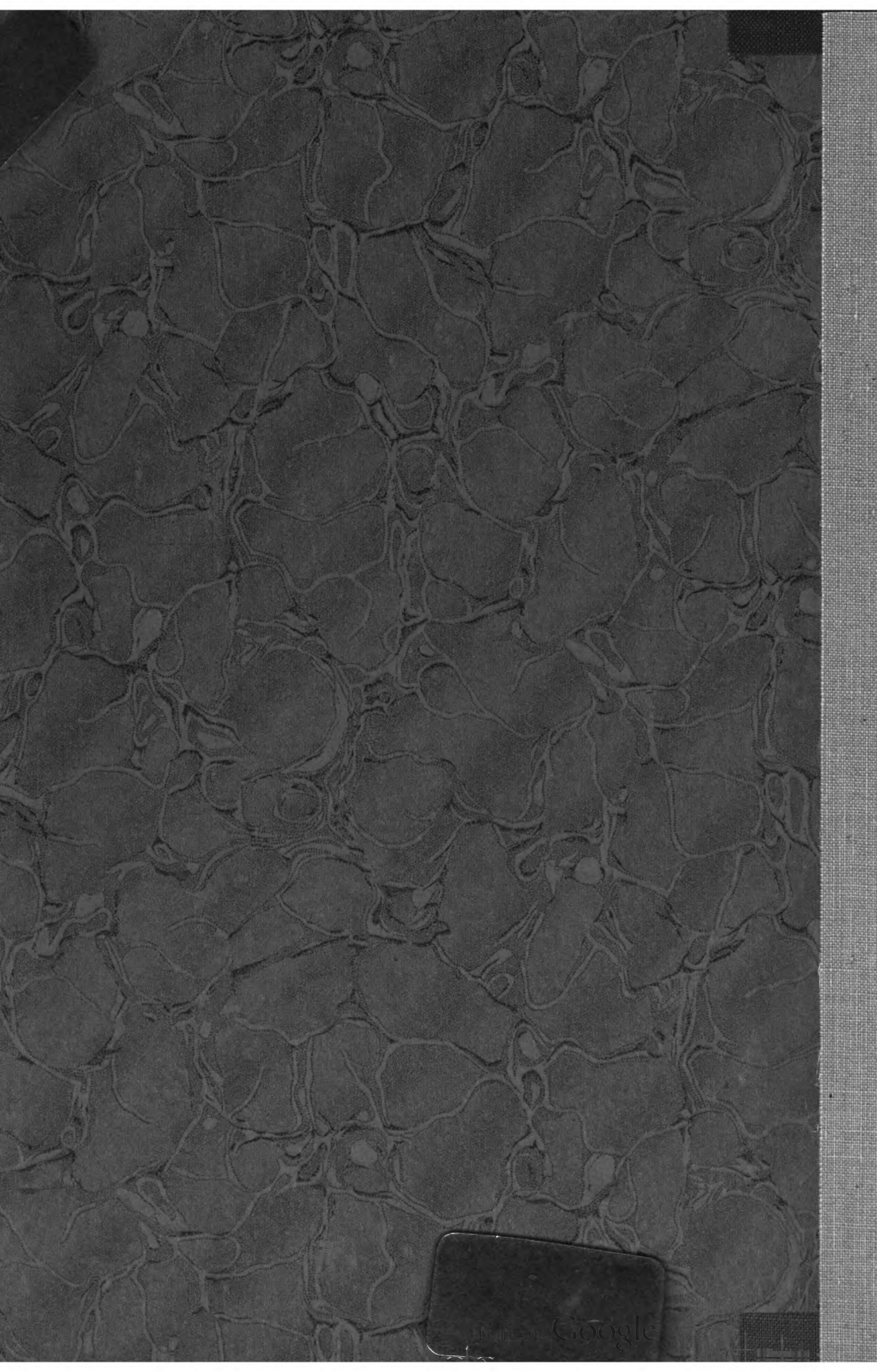
The Second Peace Conference (paragraph 2 of the ...

George Breckenridge Davis



The Second Peace Conference

(Paragraph 2 of Programme)

The Rules of War on Land

WORKING MEMORANDA

By Brigadier-General GEORGE B. DAVIS

(*Confidential for the United States Delegates*)

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INTRODUCTORY REMARKS.

The idea of codifying the laws of war in their entirety originated with the late Dr. Francis Lieber, professor of political science and international law at Columbia University, New York. He was also the author of the code approved by President Lincoln, after having been examined with great care by General Halleck, himself a high authority upon the laws and usages of war, which was formulated in 1863 as General Orders, No. 100, for the government of the armies of the United States in the field. This order, as was said by M. de Martens at The Hague, has remained the basis of all subsequent efforts in the direction of the humanization of war.

The annexe to The Hague convention, which embodies the Rules of War on Land is derived, in great part, from the codification of the Rules of War on Land which was prepared by the Institute of International Law, and which was recommended for adoption by that body at its annual session at Oxford on September 9, 1890.

As a tentative code had been prepared at the suggestion of the institute and had been made the subject of exhaustive discussion at several of its annual meetings in the city of Brussels, where its permanent bureau is located, the rules so prepared have become generally known as the "Brussels rules."

If the Brussels rules be read in connection with those framed by The Hague conference, the resemblances will be instantly apparent; as a considerable number of the Brussels articles were adopted, without substantial change, in the articles of The Hague convention which relate to the methods in which the operations of war on land are required to be conducted.

But there are some articles of The Hague convention which are entirely new and were not even suggested by the Brussels draft. To this class belong articles 14 and 16, relating to the bureau of information in respect to prisoners of war; article 15, which relates to the activities of relief associations for the amelioration of the condition of prisoners of war; article 17, in respect to the pay of commissioned officers who are in a status of captivity; article 18, in relation to religious privileges at camps of internment; article 19, respecting the wills of prisoners of war; article 50, in respect to the imposition of collective penalties; and articles 57 to 59, regulating the internment of prisoners of war by neutral states. The requirements of the articles above named represent a distinct and positive advance in the procedure of international law, and, if they have been found to work well in the several wars which have taken place since the convention was adopted, they should be allowed to continue in force.

THE RULES OF WAR ON LAND.

SECTION ——.

CHAPTER ——.

ARTICLE I.

ARTICLE I.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

In this article the rule in respect to the forces that may be employed in military operations on land seems to be correctly stated. The requirement of paragraph 2 in respect to the use of a "distinctive emblem recognizable at a distance" has been found to be somewhat difficult of execution owing to the greatly increased range of modern small arms. The rule came into considerable prominence during the Franco-Prussian war of 1870, growing out of the employment of certain newly organized levies by the French Government which was objected to by the Germans, the objection being carried to the point of resorting to retaliatory measures with a view to constrain the French Government to discontinue their employment.

If it is the purpose of the rule to require individual members of the combatant forces of a belligerent to wear a badge which can be recognized at a distance equal to that covered by the range of small arms, then the rule as it stands is practically impossible of execution. That range is now so great that the individual combatant can only be distinguished with great difficulty, even at mid ranges, so that a badge, however striking, would not enable the enemy to know at the extreme small-arm ranges whether individuals who were operating against him were or were not provided with proper distinctive badges. The rule is complied with, however, if a badge "recognizable at a distance" is worn; it may or may not enable the enemy to ascertain the composition of the forces operating in his front, but he is not in a position to demand more rigorous or exact compliance than is expressly stated in the article.

It will be observed that the article is silent in respect to the employment of individuals of uncivilized or partly civilized races, that being a matter which continues to be regulated by the general laws of war.

ARTICLE II.

ARTICLE II.

The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops, without having time to organize themselves in accordance with Article I, shall be regarded a belligerent, if they respect the laws and customs of war.

In the gradual formation of the rules of international law which regulate the composition of the military forces of a belligerent the civilized states of the world have arranged themselves into two groups or classes: (1) The great continental powers, like Germany, France, and Russia, whose armies are recruited by conscription, and who maintain large military establishments in time of peace. It is the desire of these powers to encounter in war the similar permanent establishments of the enemy. For that reason they have always opposed the use of militia and volunteers and of levées en masse. (2) The states which maintain small standing armies, and who desire in time of war to make use of all the defensive elements which their population contains. In this category fall England, the United States, the Scandinavian states, and the smaller European powers, who insist upon the right to employ militia and volunteers and in the event of invasion to use the whole adult male population in the form of a levée en masse in resisting the invasion of their territories.

It thus appears that this article embodies a compromise between the two classes of states of which mention has been made; it contains all that the small states can reasonably ask for, in that it enables them to quickly augment their permanent establishments. In its application to the great continental powers the compromise becomes apparent in the requirements respecting the command, discipline, and uniform of the forces that may be employed in war and in the manner in which their military operations shall be conducted. Although the language used in this article is very general, it is proper to note that it is not regarded by the Government of the Swiss Confederation as including a levée en masse, and for that reason that Government has thus far withheld its approval of the convention.

ARTICLE III.

ARTICLE III.

The armed forces of the belligerent parties may consist of combatants and noncombatants. In case of capture by the enemy both have a right to be treated as prisoners of war.

It is a well established rule both of international and municipal law that the citizens or subjects of two states which occupy the status of belligerents become legal enemies as a consequence of the existence of a state of war. That is, each citizen of one belligerent becomes the *legal* enemy of every citizen of the other and, for that reason, has no standing in its courts. But this status is *legal*, not

actual, and hostile operations can only be carried on in behalf of each belligerent by military forces composed of the classes named and described in Articles I and II.

In Article III the armed forces which it is permissible to use in war are still further classified into *combatants* and *noncombatants*. The former class includes the officers and enlisted men of the several branches of the line, who are included in the infantry, cavalry, and artillery arms of the service, together with such special troops of the staff, including engineers, signal corps men, etc., as are maintained in most, if not all, modern armies. In the class of noncombatants fall chaplains, medical officers, and officers of the intendance or supply departments, together with a very considerable class of civilian employees who habitually accompany armies in the field and contribute to its efficiency or minister to its necessities by rendering service as teamsters, packers, wagon masters, telegraph and cable operators, employees on railway trains and steamers, electricians, mechanics, and the like. It is the purpose of Article III to give to individuals of all these classes who fall into the hands of the enemy the privileges and immunities which are accorded to prisoners of war in the several articles of Chapter II. Article III seems to be satisfactory in its present shape and does not, in my opinion, stand in need of change. It is proper to remark that in Article I of the Geneva Convention of 1906 similar terms of inclusion are used with respect to the noncombatant employees who accompany all armies in the field in the declaration that "officers, soldiers, *and other persons attached to armies* who are sick or wounded shall be respected and cared for, etc."

CHAPTER II.—*Prisoners of War.*

ARTICLE IV.

CHAPTER II.—*On Prisoners of War.*

ARTICLE IV.

Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers remain their property.

The several articles of this chapter make ample provision for the treatment of those individuals of the enemy who occupy the status of prisoners of war, but it is nowhere attempted to define that status, or to indicate the method or manner in which an individual of the enemy passes from the status of a combatant or noncombatant in the forces of the enemy to that of a prisoner of war. In the practice of prize courts it is sometimes necessary for the court to review the incidents attending the capture of a neutral vessel which is conveying contraband to the enemy or has attempted to enter or leave a blockaded port. But no such necessity exists in connection with the capture of indi-

vidual combatants in a war on land. For that reason the article is properly silent as to these incidents, leaving the validity of the capture to be determined by the laws of war.

It is the purpose of the first paragraph of Article IV to prohibit private ransom, a practice which has become practically obsolete. Paragraph 2 provides, in very general terms, for the treatment of prisoners of war, and paragraph 3 exempts all their private property and belongings from capture or seizure, with the exception of the articles which are expressly excepted or excluded from the operation of the article; that is, horses and arms and military or official, as distinguished from private and personal, papers.

The article is conceived in a properly humane spirit and recognizes the fundamental rule that—

> The right to kill or injure an individual of the enemy ceases to exist the moment he lays down his arms, or surrenders, or asks for quarter. After such surrender the opposing belligerent has no power over his life unless new rights are given by some attempts at resistance. (Halleck, Chap. XX, sec. 6.)

The Geneva Convention of 1906 authorizes the commanding generals of the opposing forces, in the operation of agreements to that end, to confer special privileges and immunities upon prisoners of war who are sick or wounded; but that convention expressly provides, however, that all sick or wounded belonging to an army in the field who fall into the hands of the enemy shall occupy the status of prisoners of war. The requirements of Article IV, above stated, are largely declaratory in character and as such do not seem to stand in need of amendment.

Article V.

ARTICLE V.

Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety.

It is well established that a prisoner of war is not a criminal, and that such measures of detention as may be adopted by his captor are resorted to for the sole purpose of preventing his escape. It is equally well established that it is the duty of a prisoner of war to escape, if he can, and rejoin the forces from which he has been separated as a result of his capture. The word "interned," as used in Article V, obviously relates to such reasonable duress as may be imposed on a prisoner with a view to prevent his escape. The clause which recognizes the right to impose an obligation upon prisoners of war not to go beyond certain fixed limits or bounds relates to the power to impose a "parole," a term which is well understood in those rules of war which regulate the pacific intercourse of belligerents, in the operation of which a prisoner is exempted from surveillance on giving his promise not to pass beyond

the limits and bounds named in his parole. The pledge known to the laws of war as a "parole" is an undertaking given to his captor by a prisoner of war, and is usually, though not always, reduced to writing. A parole may be given at any time by a commissioned officer, but can only be given by enlisted men under exceptional circumstances, a parole in their behalf being given upon a proper occasion by their immediate commanding officers.

The belligerent government may also, in its discretion, forbid persons in its military service to give their paroles.

Good faith and humanity ought to preside over the execution of those commands which are designed to mitigate the evils of war, without defeating its legitimate purposes. (Vattel, liv. III, ch. 8, sec. 151; Wheaton, part 4, ch. 2, sec. 3; Halleck, ch. 18, sec. 11.)

It may be remarked that the language used in Article V does not operate either to extend or to restrict the existing practice in the matter of giving and receiving paroles, which will be regulated in the future as in the past by the general requirements of the laws of war.

ARTICLE VI.

ARTICLE VI.

The State may utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

Prisoners may be authorized to work for the Public Service, for private persons, or on their own account.

Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

When the work is for other branches of the Public Service or for private persons, the conditions shall be settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

This article is new, or, to speak with a little greater accuracy, it recognizes the revival of an old practice, which has generally been regarded as obsolescent, if not obsolete. There is some authority for the view that prisoners of war were employed in the construction of certain nonmilitary public works of France in the seventeenth century. I can find no authenticated instance, however, in more recent times in which it has been attempted to employ them on public works of the captor's state. Doctor Lieber regards the practice as legitimate, his Instructions for the Government of Armies in the Field containing the requirement, in respect to the employment of prisoners, that—

> Prisoners of war may be required to work for the benefit of the captor's government, according to their rank and condition. (Par. 76, G. O., 100, A. G. O., 1863.)

But it was never attempted, either by the Federal or Confederate military authorities, to require prisoners in their commands to perform any other labor than was necessary in the preparation of their food, the care of the sick, and the police and sanitation of the camps or prisons in which they were confined.

The regulations prepared by Gen. Winfield Scott, which were in force in the United States Army from 1825 to 1835, and which embodied the practice of the United States Government in the matter of prisoners of war, provided that—

709. Prisoners taken from the enemy, from the moment that they yield themselves, and as long as they obey the necessary orders given them, are under the safeguard of the national faith and honour. They will be treated at all times with every indulgence not inconsistent with their safe-keeping, and with good order among them. Officers in whose power they are, will bear in mind, and recall to the mind of the soldier, that courage is honoured by generosity; and it is expected that the American army will always be slow to retaliate, on the unarmed, acts of rigour or cruelty committed by the enemy—in the charitable hope of recalling the latter to a sense of justice and humanity by a magnanimous forbearance.

714. Prisoners of war in depot, if numerous, will be organized into battalions, and placed under a proper number of non-commissioned officers, selected from their own body, who will be charged with the interior police of the battalions and companies; subject, of course, to the orders of the commander of the depot. (Art. 59, Gen. Regulations for the Army, 1825.)

I have also been unable to find that compulsory labor was required of prisoners of war by the German Government during the Franco-Prussian war, or by the Russian or Japanese governments during the recent operations in Manchuria.

General Halleck assigns the true reason for the rule which authorizes a belligerent to require labor to be performed by prisoners of war in a statement in Chapter XVIII of his International Law, in which it is said that—

In all cases where the circumstances prevent an exchange of prisoners of war, or render it impossible for them to receive the means of support from their own state, it is the duty of the captor to furnish them with subsistence; for humanity would forbid his allowing them to suffer or starve. But if their own government should refuse to make arrangements for their support, exchange, or release, and if the captor should give them sufficient liberty to enable them to earn their own support, his responsibility ceases, and whatever sufferings may result, are justly chargeable upon their own government. Under ordinary circumstances, prisoners of war are not required to labor beyond the usual police duty of camp and garrison; but where their own state refuses, or willfully neglects to provide for their release or support, it is not unreasonable in the captor to require them to pay with their labor for the subsistence which he furnishes them. But this can be done only in extreme cases, and even then they should be treated kindly and with mildness, and no degrading or very onerous labor should be imposed on them. All harshness and unnecessary severity would be contrary to the modern laws of war. (Halleck, Int. Law, ch. 18, sec. 15.)

It is a well-established fact that wherever prisoners are collected in large numbers small industries are set up amongst them, and efforts are put forth to manufacture articles and trinkets of one kind

or another to sell to visitors and to the public in general. This work is voluntary, however, and is undertaken in part to pass the time and in part to obtain the means to alleviate the hardships of confinement, as to purchase tobacco, underclothing, and other necessary articles which are not supplied to prisoners of war by the government which holds them in captivity.

As the rule as stated in the article is derived from the statements of text writers, who assert the abstract right of a belligerent to require prisoners of war to render such services as will reimburse him, wholly or in part, for the cost of their support, rather than from well-authenticated instances in which such work has actually been required, there are some provisions of the article which are not entirely clear. The clause in the first paragraph, "The state may utilize," etc., and the similar clause beginning in the next paragraph, "Prisoners may be authorized to work," etc., indicate a permissive authority to employ their services, but the use of the word "tasks" in line 3 savors strongly of duress. The power to compel implies the power to punish, when an order or direction requiring prisoners to perform specific tasks not connected with their comfort and maintenance, as to prepare food, or to perform the necessary police work with a view to the proper sanitation of prison camps, has been given and is not obeyed.

It may truthfully be said that the article is not clearly drawn and, if rigorously applied, is likely to furnish occasion for considerable variation in interpretation. If it be conceded, however, that prisoners of war may be required to render nonvoluntary service to their captors, and we have the high authority of General Halleck in support of the view that such a right exists, no objection is seen to the method of obtaining and compensating such services which is prescribed in the article, and for that reason no amendment is suggested.

Article VII.

ARTICLE VII.

The Government into whose hands prisoners of war have fallen is bound to maintain them.

Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them.

It is a well-recognized rule of international law that it is the duty of a belligerent to support the members of its military establishment at all times and under all conditions of service, and this obligation is not changed or diminished by the fact that some of the members of its combatant forces are, for the time, in a status of captivity. General Halleck says as to this:

Vattel places the duty of a state to support its subjects, while prisonere in the hands of an enemy, upon the same grounds as its duty to provide for their ransom and release. Indeed, a neglect, or refusal,

to do so, would seem to be even more criminal than a neglect, or refusal, to provide for their exchange; for the exigencies of the war may make it the temporary policy of the state, to decline an exchange, but nothing can excuse it in leaving its subjects to suffer in an enemy's country, without any fault of their own, when the state has the means of relieving them from the misfortune in which they are involved, by acting in its service and by supporting its cause. It follows, therefore, that although a state may properly, under certain circumstances, refuse to exchange its prisoners, it cannot, without a violation of moral duty, neglect to make the proper and necessary arrangement for their support while they are thus retained, by a captor who is willing to exchange them. (Halleck, Int. Law, Ch. XVIII, sec. 14; Vattel, liv. 3, ch. 8, sec. 154.)

The existing rule of international law in respect to the support of prisoners is embodied in the article above cited, and no reason is seen for its modification. The article charges the captor's government with the immediate duty of supporting such prisoners as fall into its hands during the pendency of military operations. Whether the ultimate cost shall fall upon the belligerent by whom the prisoners are held in captivity or upon the belligerent to whose army the prisoners pertain, or shall be equitably apportioned between them, is a matter to be provided for in a treaty of peace.

ARTICLE VIII.

ARTICLE VIII.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping are again taken prisoners, are not liable to any punishment for the previous flight.

It has been seen that the restraint imposed upon a prisoner constitutes mere detention and has no penal or punitive character. There are certain offenses, however, which a prisoner may commit for which there is a conceded liability to punishment. Insubordination is one of them, and ordinary criminal offenses, whether felonies or misdemeanors, fall into the same category.

It is the duty of a prisoner to escape, if he can, but it is equally the duty of his captor to prevent it. The rule respecting the treatment of prisoners who have unsuccessfully attempted to escape and have been recaptured has always been that the rigor of their confinement may be increased, and that the captor may regulate the severity of his measures of detention in proportion to the prisoner's ingenuity or activity in attempting to escape. The second paragraph of Article VIII authorizes the imposition of "disciplinary punishment" upon prisoners who have escaped, but have been recaptured. In the military service of the United States a "disciplinary punishment" is one imposed for a minor neglect or violation of duty, and consists in a rebuke or

reprimand, or in a deprivation of privileges, or the requiring of extra fatigue, and the like, and includes a class of punishments which are imposed in the course of military administration, usually by company commanders, but which are less serious in kind or amount than would be imposed by a court-martial or other tribunal having a jurisdiction prescribed by law. The term "peines disciplinaires," as used in the original French text, seems to have much the same meaning that is assigned to it in our own military service and may safely be given the same interpretation.

That this interpretation is in harmony with the views of the conference is indicated by the discussion which was had in connection with the adoption of the article. After some debate it was considered, as in the rules of the Brussels conference of 1874, that—

Concerning Article 8 a long discussion took place in the Committee on the subject of the escape of prisoners of war. Finally it was admitted, as in the Brussels Convention of 1874, that an attempt at escape could not remain entirely unpunished, but that the degree of punishment should be limited, so as to forestall the temptation to regard such an attempted escape as something similar to desertion before the enemy, and therefore punishable by death. In consequence, the restrictive words "disciplinary punishment" were adopted, it being understood that this restriction had no application to cases where the escape or the attempt to escape was accompanied by special circumstances, constituting, for example, a plot, a rebellion, or a riot. In such cases the prisoners would be punishable under the first paragraph of the Article, declaring them to be subject to the laws and regulations in force in the army of the State into whose hands they have fallen.

The proposal of the Brussels Conference contained the provision that it was permissible, after a summons to halt, to use arms against an escaping prisoner of war. This provision was stricken out of the present Articles. The Committee did not deny the right to fire on an escaping prisoner of war, if military regulations so provided, but it did not seem necessary or proper to provide such formal extreme measures in the body of these Articles. (Holl's The Peace Conference at The Hague, pp. 146, 147.)

ARTICLE IX.

ARTICLE IX.

Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.

This is a humane statement of the rule governing disclosures that may properly be required of prisoners of war when interrogated in respect to their names and military designations at or soon after their capture. The curtailment of privileges which may be imposed for a failure to conform to the requirements of this article is a matter which involves inconvenience and discomfort to an officer who declines to disclose his name and rank, but goes no further, as it imposes no disgrace or humiliation and authorizes no punishment of a penal character to be imposed upon a prisoner of war.

ARTICLE X.

ARTICLE X.

Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personal honour, scrupulously to fulfill, both as regards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases, their own Government shall not require of nor accept from them any service incompatible with the parole given.

This article authorizes the release of prisoners upon parole and enjoins obedience to the engagements of their respective paroles; it also forbids their own government to require any duty of paroled prisoners which is inconsistent with the terms of any paroles which they may have given to the enemy at the time of their enlargement. The article embodies the rules of international law on the subject to which it relates as they now exist, and for that reason no revision is suggested.

ARTICLE XI.

ARTICLE XI.

A prisoner of war can not be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.

This article embodies a well-known rule of international law. That is, a belligerent can not compel a commissioned officer to give a parole, either for himself or for the enlisted men under his command; on the other hand, the belligerent who has prisoners of war in custody is not obliged to accede to their requests or demands to be allowed to give their paroles for the purpose of obtaining an enlargement of their limits of confinement or with a view to allow them to return to their own country under the usual pledge not to take part in military operations against the government that has accepted their pledges. The acceptance of pledges from prisoners of war is entirely a matter of discretion with the government in whose hands they are.

ARTICLE XII.

ARTICLE XII.

Any prisoner of war, who is liberated on parole and recaptured, bearing arms against the Government to whom he had pledged his honor, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and can be brought before the Courts.

In this article the existing rule of international law in respect to the penalty for breach of parole is correctly stated. The article applies to the extreme case—that in which a prisoner of war who has been set at liberty in the operation of a parole is captured with arms in his hands before he has been regularly exchanged or is shown to have rendered active military service inconsistent with his parole. In such a case the penalty of death may be inflicted, upon conviction by a military tribunal having jurisdiction of the offense.

ARTICLE XIII.

ARTICLE XIII.

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

This article applies to certain persons who accompany armies in the field and who, in our service, are generally known as "camp followers." The article particularly applies to such camp followers as are in no way connected with the military establishment and form no part of the military forces of the state whose armies they accompany. Article I of The Hague rules is broadly drawn, and by reasonable intendment may be held to include within its operation a considerable number of noncombatants who, as teamsters, wagon and forage masters, packers, guides, interpreters, mechanics, electricians, etc., habitually accompany and form a part of an army in the field. The persons belonging to the classes last named, though not subject to the articles of war or to military discipline in the strict sense of the term, are fully subject to military control and, if employed with an army of the United States in time of war, may be tried by court-martial. It is presumed that the same classes accompany foreign armies in active service and are similarly amenable to military control. It will be noted, however, that the persons named in the article, not being civil employees, are not entitled to the status of prisoners of war in conformity to the express terms of Article III, but are accorded that status as a matter of right if the belligerent into whose hands they fall sees fit to detain them, as he is empowered to do in the article. I can see no reason for the revision of this article unless the requirements of Article I of the Geneva Convention of 1906 be incorporated in it as an amendment. That article provides:

Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

ARTICLE XIV.

ARTICLE XIV.

A Bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States and, when necessary, in the neutral countries on whose territory belligerents have been received. This Bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned

This is a new article, and I understand that no particular difficulties were entertained in its enforcement during the recent operations in Manchuria.

In the Geneva Convention of July 6, 1906, the following articles appear in relation to the treatment of the sick and wounded in war on land:

As soon as possible each belligerent shall forward to the authorities of their country or army the marks

with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital, and deaths.

It is also the duty of the Information Bureau to receive and collect all objects of personal use, valuables, letters, &c., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.

or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country.

ARTICLE XV.

ARTICLE XV.

Relief Societies for prisoners of war, which are regularly constituted in accordance with the law of the country, with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and Administrative Regulations, for the effective accomplishment of their humane task. Delegates of these Societies may be admitted to the places of internment for the distribution of relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all their Regulations for order and police.

The corresponding article of the Geneva Convention of 1906 contains the following requirements in respect to the organization and activity of volunteer aid societies:

ART. 10. The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Each state shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

ART. 11. A recognized society of a neutral state can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

ART. 12. Persons described in articles 9, 10, and 11 will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power.

When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

ART. 13. While they remain in his power, the enemy will secure to the personnel mentioned in article 9 the same pay and allowances to which persons of the same grade in his own army are entitled.

It would thus appear that the Geneva Convention of 1906 makes ample provision for the establishment and administration of volunteer societies for the relief of the sick and wounded in time of war; it also makes provision for the harmonious cooperation of such associations with the medical and hospital departments of the army to which they are attached in the prosecution of their humanitarian endeavors. It would, therefore, seem proper, in determining upon the revision of this article, if any is to be attempted, to so frame the amended article as to make it correspond as closely as possible with the clauses hereinbefore cited from the Geneva Convention of July 6, 1906—this with a view to secure uniformity of administration in the operations of volunteer aid societies which are permitted to carry on their work in the theater of active military operations.

These associations are numerous and influential; they are abundantly supplied with funds and are familiar with the peculiar needs of the sick and wounded and with the closely related wants of prisoners of war. As the work among unwounded prisoners is in many of its details parallel to that relating to the convalescent sick and wounded, it is highly probable that the volunteer Red Cross societies, which now exist in many states of the world, will be willing to charge themselves with the duty of furnishing such relief and assistance to prisoners of war as may be deemed necessary in particular cases.

ARTICLE XVI.

ARTICLE XVI.

The Information Bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war or dispatched by them, shall be free of all postal duties both in the countries of origin and destination, as well as in those they pass through.

Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by the Government railways.

What has been said under the head of articles 14 and 15 applies with equal force to Article XVI.

ARTICLE XVII.

ARTICLE XVII.

Officers taken prisoners may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their Government.

This article is entirely new, there being no international usage on this subject prior to its adoption as a part of The Hague convention. It has been the practice of belligerents to permit officers and enlisted men who were held by them as prisoners of war to receive money and articles of food and clothing from relatives and friends at home. The article under discussion goes a step farther and authorizes a belligerent to allow officers who are held as prisoners of war to receive the full pay allowed them by the laws of their own

country, the belligerent government being reimbursed for these expenditures, from time to time, by the government in whose service the payees are.

This requirement is permissive and not mandatory in character, and is calculated to afford material relief to an officer who occupies the highly inconvenient status of a prisoner of war. The article applies a sufficient remedy to the cases to which it relates and for that reason does not seem to stand in need of revision.

ARTICLE XVIII.

ARTICLE XVIII.

Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities.

It has always been recognized that prisoners of war should be accorded the privilege of attending divine service whenever a convenient opportunity presented itself for holding such services at their places of internment, and this privilege has been accorded in countries where there is an established church, and the prison services are not in conformity with its rubrics. Article XVIII gives to the old usage a conventional sanction, which is entirely proper, and vests in the captor the right to frame such police regulations in respect to such services as may be deemed necessary by that government in whose hands the prisoners are.

ARTICLE XIX.

ARTICLE XIX.

The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the National Army.

The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

As the Constitution of the United States gives to a treaty negotiated in conformity to its requirements the operative force of a statute, the effect of the first clause of this article is to give to the wills of prisoners of war the same standing, in respect to execution or administration of estates, which they now enjoy under the laws of the United States. But all matters in respect to the disposition of the estates of decedents by will or otherwise are, under our Constitution, regulated by the several States.

Congress of course has power to make statutory regulations in respect to the execution and probate of the wills of persons residing on reservations over which the jurisdiction of Congress is exclusive, but no such statutory regulations have ever been framed by the National Legislature. In accordance, however, with the doctrine laid down by the Supreme Court in the case of Chicago Railway Co. *v.* McGlinn (114 U. S., 542), the local laws, not exclusively criminal in character, which are operative in a State in which a Government reservation is situated, are regarded as applicable to cases arising on such reservations until other statutory regulations have been adopted

by Congress, but, as has been said, no legislation in respect to the disposition of the estates of decedents has ever been attempted by that body.

It would thus appear that the first clause of the article gives a somewhat indefinite legal status to the wills of prisoners of war which are executed in a theater of military operations lying outside the territory of the United States. It also supplements and sanctions the requirements of the several Articles of War (125, 126, and 127), which regulate the disposition of the effects of deceased officers and soldiers which are present with them at the places of their decease. These articles provide that:

ART. 125. In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.

ART. 126. In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.

ART. 127. Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.

So far as the clause goes, it would seem to serve a useful purpose and should be allowed to stand.

In the English service, from which our own disciplinary and administrative regulations are largely drawn, provision was made for the nuncupative wills of soldiers who have died on foreign service. Such wills, when they had been reduced to writing, were required to be registered in the marshal's court by a provision of the English Articles of War of 1639.

There is an article of *James the Second*, which provides for the preservation of the *overplus* of the estate of deceased officers and soldiers, after the quarters and other necessary expenses shall have been paid, and for the keeping of such overplus to the use of those to whom it shall belong, if they claim it within the space of three months from the death of the party: but it does not specify what is to become of it after that period; so that probably it was distributed after the manner observed in the case last mentioned. (Samuels, p. 657.)

Samuels, the English leading commentator on military law, says, in discussing the English code, from which the articles above cited were derived:

Courts-martial formerly exercised a very large jurisdiction over the personal property of deceased officers and soldiers, granting the administration of such property, according to the distribution ordered by martial law, or of the country

where the deceased died; and entertained petitions, and various adverse proceedings touching the assets and estates of deceased persons serving in the army, and rendered them liable or chargeable with the debts or engagements of the deceased.

Blackstone, among the privileges of soldiers, mentions, that in actual military service they may make *noncupative* wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses which the law requires in other cases; and he adds, our laws does not extend this privilege so far as the civil law, which carried it to an extreme that borders on the ridiculous. For if a soldier, in the article of death, wrote anything in bloody letter on his shield, or in the dust of the field with his sword, it was a very good military testament.

In addition to the provision of the common law, and in imitation of the ordinances of former times, his Majesty, in the Section before us, has constructed Articles of War with the like purpose, that are well calculated to prevent the dilapidation of the present and tangible estate of those who may die away from their homes, in the prosecution of the King's service, and to keep it inviolate and indistributable, until those, having right or interest, shall present themselves to claim it; a more just, if not a more specious distribution, than is favoured in the ordinances of anterior seasons.

ARTICLE 1st. This Article provides that 'when any *commissioned* officer shall happen to die, or be killed in the King's service; the major of the regiment, or the officer doing the major's duty in his absence, shall immediately secure all his effects or equipage then in camp or quarters; and shall before the next regimental court-martial make an inventory thereof, and forthwith transmit the same to the secretary at war, to the end that, after the payment of such officer's regimental debts, and quarters, and interment, the overplus, if any be, may be paid to his legal representative.'

This provision places the effects and equipage of deceased officers under the charge of a known and superior officer in every regiment, and who is thereby rendered responsible for the safe custody of them, and of doing all the other acts, specified in the Article. Though the Article only prescribes that the major or some other officer, officiating as such, shall, make an inventory of the effects of the deceased before the next regimental court martial, it implies that he may convert them into money, in so much as to answer the debts and demands, particularized in the Article, and in order to execute the ulterior end of the same; i. e., the payment of the overplus, if there be any, after such debts and demands are satisfied, to the legal representative of the deceased.

It would be at the private responsibility of the major, if he further intermeddled with the estate of the deceased, than he is of necessity authorized by the Article, in the particulars ordained.

Cases might and do sometimes occur, where it would be and is desirable that this officer should have a larger power, for collecting the goods and estate of the deceased; as it often happens, on foreign service, when there is no near friend of the deceased on the spot, that the outstanding debts, due to the deceased, cannot be gathered in, at the instant, for the benefit of those interested in them, for the want of some local and present power to perform this just and necessary act; and that they afterwards become desperate, or are from other circumstances not realizable. But it would not be fit, or practicable, perhaps, to arm the major with such an authority, without making him accountable for the debts of the deceased; which would involve him in the conduct of litigious proceedings, and in duties which might be at variance with his public functions and his private interests, and sometimes implicate him in suspicions hurtful

to his feelings. For these reasons, perhaps, his duty is narrowed to the execution of the few indispensable acts specified in this Article.

ARTICLE 2d.—This makes a similar provision, in the event of the death of a noncommissioned officer or private soldier, ordaining, in that case, that 'the then commanding officer of the troop or company, shall, in the presence of two other commissioned officers, take an account of whatever effects he dies possessed of, besides his regimental clothing, arms and accoutrements, and of his credits, and shall take care that the same be applied in the first instance to the liquidation of his regimental debts; the remainder to be placed in the hands of the regimental paymaster, to be paid over to the representative of the deceased, if claimed within the regulated period; or if not seasonably claimed, the same to be remitted to the regimental agent, a report thereof being made to the secretary at war.'

The lively interest discoverable in this Article, for securing the effects and credits of soldiers to their relatives and representatives, marks the humane and peculiar attention of his Majesty to this very meritorious class of men.

There is a provision, at the foot of this Article for the disposal of the effects and credits of deserters; directing, that they shall be applied in like manner, with the aforementioned effects and credits, to the liquidation of their regimental debts; and the remainder, if any, to be brought to the credit of the public. (Samuels, pp. 657–660.)

According to the existing practice in England under the army act:

An officer or soldier on actual military service has power to make, as to his personal estate, a nuncupative will, that is to say, a will without writing, declared before a sufficient number of witnesses (*c*). Probate of the will and letters of administration of any common soldier, who is slain or dies in the service of Her Majesty are exempt from stamp duty (*d*). Special provision has been made for collecting and realising the effects of a deceased officer or soldier, and paying certain military debts thereout (*e*). (Mil. Laws, English p. 287; 29 Chas. II, chap. 3; 7 William IV and 1 Vic., chap. 26, sec. II; 55 Geo. III, ch. 184; Regl. Debts Acts 1893; 56 & 57 Vic., ch. 5; Regulation of forces act, 1881, sec. 51.)

So much of the second clause of Article XIX as relates to death certificates is an exceedingly useful one, and a regularly executed certificate of the death or burial of a prisoner of war would, in the operation of this clause of the treaty, be received in the courts of the United States or in those of the several States as evidence of the death of a prisoner in any action which might arise in respect to his death or burial. The provision governing the place and method of interment and the funeral honors to be shown in the event of the death of a prisoner are entirely proper and should be allowed to stand.

ARTICLE XX.

ARTICLE XX.

After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible.

It will be remembered that the matter of releasing prisoners of war on parole is provided for, to some extent, in Articles X, XI, and XII of the original Hague convention.

The normal method of releasing prisoners, however, is by exchanges in the operation of formal agreements called "cartels." As

the convention is silent on that subject, I must conclude that it was the intention of its framers to leave the regulation of exchanges to the operation of the ordinary rules of international law. This is entirely proper.

Article XX seems to require that the repatriation of prisoners of war shall be conducted with all possible expedition after peace has been concluded. I can see no reason either for revising this article or for extending its scope in such a way as to interfere with the freedom of belligerents to enter into agreements in respect to the exchange of prisoners.

This portion of the convention is also silent in respect to the internment of officers and men composing organized bodies of the enemy who have been forced by the vicissitudes of battle to take refuge in neutral territory, or by the necessities of military operations. As it was not made the subject of conventional regulation, it is not believed to be expedient to suggest the preparation of rules governing the treatment of belligerents who thus seek an asylum in neutral territory with a view to avoid becoming prisoners of war, leaving to the state which has accorded them asylum the discretion to determine the particular method in which its neutral duty shall be performed.

CHAPTER III.—*On the Sick and Wounded.*

ARTICLE XXI.

CHAPTER III.—*On the Sick and Wounded.*

ARTICLE XXI.

The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22nd August, 1864, subject to any modifications which may be introduced into it.

This article is declaratory in character and indicates that the obligation of belligerents, in respect to the sick and wounded who have fallen into their hands, is regulated by the terms of the Geneva Convention of August 22, 1864. This article seems to require no other revisory action than to insert a reference to the convention recently entered into at Geneva for the amelioration of the condition of the sick and wounded in time of war.

Section II.—ON HOSTILITIES.

CHAPTER I.—*On means of injuring the Enemy, Sieges, and Bombardments.*

ARTICLE XXII.

Section II.—ON HOSTILITIES.

CHAPTER I.—*On means of injuring the Enemy, Sieges, and Bombardments.*

It is a fundamental principle of the laws of war that, when a state resorts to force with a view to remedy an international wrong, it is not permitted to use any greater force than

ARTICLE XXII.

The right of belligerents to adopt means of injuring the enemy is not unlimited.

is necessary to apply a remedy to the wrong which it has suffered at the hands of the opposing belligerent. This principle is well set forth in the statement of "General Principles" which precedes the Brussels rules for the regulation of war on land, in which it is said that—

The only legitimate end that a state may have in war is to weaken the military strength of the enemy.

The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain from all needless severity, as well as from all perfidious, unjust, or tyrannical acts. (Davis on Inter. Law, p. 570.)

Elsewhere, in speaking of the means of injuring the enemy, it is said:

Certain precautions are made necessary by the rule that a belligerent must abstain from useless severity. (Ibid., p. 574.)

The article, which is declaratory in character and is quite clear in meaning, does not seem to stand in need of revision.

ARTICLE XXIII.

ARTICLE XXIII.

Besides the prohibitions provided by special conventions, it is especially prohibited—

(a.) To employ poison or poisoned arms;

(b.) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c.) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;

(d.) To declare that no quarter will be given;

(e.) To employ arms, projectiles, or material of a nature to cause superfluous injury;

(f.) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva Convention;

(g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

This article contains a statement of a number of forbidden practices as to which there is a general concensus of opinion among civilized nations. The special conventions to which the article refers are: (1) The Declaration of Paris in 1856, which is restricted in its application to the operation of maritime warfare; and (2) the Declaration of St. Petersburg of 1868, governing the use of explosive projectiles of less weight than 400 grams (14 ounces avoirdupois).

The prohibitions embodied in Article XXIII of The Hague convention are as follows:

(*a*) To employ poison or poisoned arms;

(*b*) To kill or wound treacherously individuals belonging to the hostile nation or army:

(*c*) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;

(*d*) To declare that no quarter will be given;

It will be noted that the prohibition only extends to the *declaration* that no quarter will be given. If a belligerent refuses quarter, in fact, it is not believed that the opposing belligerent is deprived of his right, under the general laws of war, to

bring about a discontinuance of the unlawful practice by a resort to measures of retaliation. To give such an interpretation to the clause would deprive a belligerent of the right to resort to the most potent agency which is placed at his disposal by the laws of war, with a view to compel the enemy to conform to their requirements in the conduct of his military operations.

(*e*) To employ arms, projectiles, or material of a nature to cause superflous injury;

This is an illustration of the operation of the rule already stated, that a belligerent in resorting to a particular act or practice, or in the employment of a particular instrument, may inflict only such injury as will accomplish a purpose authorized by the laws of war. In further illustration the case of small-arm projectiles may be cited. As it is the purpose of small-arm projectiles to place an individual enemy hors de combat—that is, to take him out of the combatant ranks—a belligerent may, therefore, use a bullet which will stop and disable an individual of the enemy's forces; when he has a bullet which will accomplish this he has reached the limit of his authority. He may not use a projectile which will inflict a wound of unnecessary severity—an explosive bullet, for instance. In the same way he may use any cutting or thrusting weapon—a saber, bayonet, or lance, for example, but he may not use poison for the purpose of inflicting an unnecessarily painful wound.

(*f*) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva convention;

(*g*) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

ARTICLE XXIV.

ARTICLE XXIV.

Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable.

Ruses of war, not involving perfidy or bad faith, have always been recognized as legitimate military undertakings. The last clause of this article, however, seems liable to abuse or misunderstanding in execution, as it conveys authority, in very general terms, to obtain information about the enemy and the country. This information must of necessity be obtained from natives or residents of the occupied territory, whose first allegiance is to their own government, and a subsequent article provides that—

Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited. (Art. XLIV, H. C.)

It would thus appear that while the grant of authority in Article XXIV is quite sweeping and is likely, if construed alone, especially

by an officer charged with the conduct of operations against the enemy, to be made the subject of extensive interpretation, it is to some extent, at least, restricted in its operation by the requirements of Article XLIV, in connection with which it should be read when the question of its application is presented to a military commander who is competent to give execution to its requirements.

The rule of war in respect to the treatment of the noncombatant subjects of the enemy who are resident in the theater of active military operations is well stated in Doctor Lieber's Rules for the Government of the Armies of the United States in the Field, which provides that—

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy and every enemy of importance to the hostile government or of peculiar danger to the captor; it allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life, from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith, either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery or pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

93. All armies in the field stand in need of guides, and impress them if they can not obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death. (G. O. 100, W. D., A. G. O., Apr. 24, 1863.)

As an illustration of the execution which has been given to the article under discussion by our own Government, it may be said that, in a number of cases arising in the Philippine Islands, in which it was brought to the attention of the Department that force had been used by officers of the Army, with a view to extract information from natives during the operations which were undertaken between 1899 and 1902, with a view to the suppression of an existing insurrection, the acts of violence were formally disavowed by the Department, and the officers engaged in them were ordered to be brought before courts-martial for trial under charges alleging a violation of the rules of war. The practice of the Department in that regard was based upon the view that the employment of force or duress toward the noncombatant inhabitants of the occupied territory was prima facie unlawful, and that the use of force or duress with a view to extort information, unless amply and abundantly justified by the overruling demands of military necessity, would subject the officer to trial and punishment.

It is clear that the practice of the Government of the United States, as above stated, lies fairly within both the letter and the spirit of the articles of the convention of 1899, which are applicable to the case. With so much in the way of explanation, it is not believed that the revision or amendment of the article is expedient at this time.

ARTICLE XXV.

ARTICLE XXV.

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

This article embodies what is believed to be the well-established rule of international law in respect to the treatment of open or undefended towns by a belligerent. It seems hardly necessary to say, however, that if any defense is attempted or if a town is occupied or held by the armed forces of the enemy, it ceases to be undefended and, for that reason, may be attacked or fired upon. The inhabitants of such a place, so soon as a garrison is established or military defense is attempted, become charged with the knowledge that the town is defended and, as such, liable to attack, and, if they desire to secure an immunity from acts of war, should remove their families and belongings from the zone of active military operations.

The corresponding paragraph of the Brussels rules contained the requirement that "only fortified places can be besieged." But this provision was stricken out on the motion of Gen. Gross von Schwarzkopf, of the Geneva delegation, who represented that the recent development of temporary fortifications had been such as to make it necessary to resort to regular siege operations with a view to their reduction. The general instanced the case of Plevna in the Russo-

Turkish war of 1877, and his views were confirmed by the notable defenses of Vicksburg, Richmond, Petersburg, Port Hudson, and Charleston during the American civil war, and by the less important operations that were undertaken with a view to the reduction of the defensive works erected by the Boers at Ladysmith, Kimberley, and Mafeking d'Africa.

ARTICLE XXVI.

ARTICLE XXVI.

The Commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.

This article has application to a place for the protection of which works of defense have been undertaken by the belligerents. It may be a regularly fortified place, like Strasburg or Metz, or its defense may be provided for by the erection of batteries or the construction of intrenchments, or by the conversion of buildings into defensive structures, or even by the establishment or maintenance of a garrison. In either case, by a resort to such defensive measures, the place is taken out of the class of "undefended towns" and brought within the operation of Article XXVI in respect to the matter of bombardment. In one case for which the article provides, that of an open assault which partakes to some extent of the nature of a surprise, preliminary warning or notice need not be given, as the mere fact that a defense is contemplated and that measures to that end are taken by the belligerent constitutes notice to the noncombatant inhabitants that an open assault may be attempted at any time, and they should govern themselves accordingly.

ARTICLE XXVII.

ARTICLE XXVII.

In sieges and bombardments all necessary steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

In this article the attempt is made to secure a special immunity to edifices devoted to religion, art, science, or charity from the artillery and mortar fire which are incident to siege operations, in so far as it is possible for the besieger to do so in the prosecution of his works with a view to the reduction of the place. The immunity conferred by the article is by no means absolute, but requires a considerable measure of forbearance on the part of the besieger and corresponding cooperation on the part of the besieged in the location of his defensive works, and in the marking and designating of buildings by flags or other devices in such a way as to enable the besieger to remove them as far as possible from his lines of fire. No revision is suggested.

ARTICLE XXVIII.

ARTICLE XXVIII.

The pillage of a town or place, even when taken by assault, is prohibited.

The existing rules of war in respect to pillage are relatively recent. So late, indeed, as the peninsular war captured places were given over to the troops for pillage for several days before any efficient steps were taken with a view to their restraint or punishment. General Halleck, a text writer of standard authority on the subject, says as to the practice of pillage:

> It would be difficult to find in the history of the most barbarous ages, scenes of drunkenness, lust, rapine, plunder, cruelty, murder, and ferocity equal to those which followed the captures of Ciudad Rodrigo, Badajos, and San Sebastian. The only excuse offered for these horrible atrocities was: 'The soldiers were not to be controlled!' (II Halleck (Baker's Ed.), chap. 20, sec. 22.)

Napier, the English historian of the peninsular war, says, in plain terms, that—

> Excuse will not suffice; for a young colonel of energetic spirit did constrain his men at Ciudad Rodrigo, to keep their ranks for a long time after the disorder commenced; but as no previous general measures had been taken, and no organised efforts made by higher authorities, the men were finally carried away in the increasing tumult. It is said that no soldier can be restrained after storming a town, and a British soldier least of all, because he is brutish and insensible of honour! Shame on such calumnies! * * * Undoubtedly, if soldiers hear and read that it is impossible to restrain their violence, they will not be restrained. But let the plunder of a town, after an assault, be expressly made criminal by the articles of war, with a due punishment attached; let it be constantly impressed upon the troops that such conduct is as much opposed to military honour and discipline as it is to morality; * * * let instantaneous punishment—death if necessary—be inflicted for such offenses. With such regulations, the storming of towns would not produce more military disorders than the gaining of battles in the field. (Napier, Peninsular War, Book XXII, Chap. II; II Halleck (Baker's Ed.), Chap. XX, Sec. XXII, and authorities cited.)

The rule embodied in the article, while highly mandatory, is so clearly stated as not to admit of misunderstanding, and stands in no need of revision.

ARTICLE XXIX.

CHAPTER II.—*On Spies.*

ARTICLE XXIX.

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.

In this article the attempt is made to define the offense of being a spy. The definition is substantially correct and in accordance with established practice. It is also attempted to except certain cases from the operation of the clause which describes the offense as a violation of the laws of war. The exceptions are proper and are well taken. That in respect

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 despatches destined either for their own army or for that of the enemy. To this class belong likewise the individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

to aeronauts employed in the transmission of dispatches by means of balloons dates from the Franco-German war of 1870, when military authorities in Paris, during the investment of that place by the Germans, successfully established communication with the French Government and with the outside world by means of balloons. The commander of the German investing forces was at first disposed to hold that persons employed in the balloon service were spies, but this was shortly desisted from, and the employment of balloons as a means of communication between a besieged place and its government, or between separate detachments of an army, is now regarded as a legitimate military undertaking. The use of balloons as instruments for injuring the enemy is discussed elsewhere.

ARTICLE XXX.

ARTICLE XXX.

A spy taken in the act can not be punished without previous trial.

For more than a century it has been the practice to subject persons charged with acts of espionage to trial before some form of military tribunal, a familiar case being that of the military commission which was convened at West Point for the trial of Major Andre. In a majority of cases when a conviction has been reached the punishment imposed has been death, usually by hanging. The trial of spies falling into the hands of the forces of the United States is regulated by section 2 of the Act of April 10, 1806, which provides that—

> In time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial. (Sec. 2, Act of Apr. 10, 1806, 2 Stat. L., 259.)

It seems to have been the view of the framers of the penal statute above cited that a citizen of the United States who acted as a spy for the enemy in time of war was guilty of treason and, as such, was liable to trial for any act which had been declared to constitute treason by Congress within the limitations which are imposed upon that body in the clause of the Constitution in which a definition of treason is embodied. As such a trial was found to be impracticable in time of war, especially when committed on territory in the military occupation of the United States or at places in the United States when,

by reason of insurrection or rebellion, the criminal courts of the United States were not in the exercise of their functions, the Act of 1806 was amended in 1862 so as to provide that—

All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death. (Act of February 13, 1862, 12 Stat. L., 340.)

ARTICLE XXXI.

ARTICLE XXXI.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

A successful spy is a dangerous antagonist to encounter in time of war, and the commanding general of an army in the field may be pardoned, when such a person falls into his hands, in resorting to such measures as will be calculated to prevent him from pursuing his occupation.

In the article under discussion a sufficient power in that regard is vested in the commander of an occupying army by the requirement that a spy who has rejoined the army by which he is employed and who is subsequently captured under circumstances indicating that he is not engaged in acts of espionage shall be treated as a prisoner of war; as a prisoner of war he is liable to the application of such measures of detention as are calculated to prevent his employment as a spy.

CHAPTER III.—*Flags of Truce.*

ARTICLE XXXII.

CHAPTER III.—*On Flags of Truce.*

ARTICLE XXXII.

An individual is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag bearer, and the interpreter who may accompany him.

Here, as in Article XXIX, a definition is attempted by an enumeration of the personnel which usually accompanies a flag of truce. The definition is accompanied by a statement of the immunities to which the members of the party are entitled who are sent out in the direction of the enemy for the purpose of establishing communication by flag of truce. No changes in or additions to this article are suggested.

ARTICLE XXXIII.

ARTICLE XXXIII.

The Chief to whom a flag of truce is sent is not obliged to receive it in all circumstances.

He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the envoy temporarily.

In this article the well-established rules of international law in respect to the obligation on the part of the enemy to receive a flag of truce are clearly and correctly stated, as is the right of the commander to whom the flag is sent to take such precautions as will be calculated to prevent any person who accompanies it from obtaining information while in his lines. He may detain the flag at his outposts and demand that the message shall be reduced to writing. He may blindfold the members of the party, or may resort to any other measures during their sojourn within his lines which, in his opinion, are necessary to prevent them from obtaining information.

When this is done, however, the bearer of the flag is absolved from any obligation not to report to his commander whatever the enemy permits him to see of his army or its movements during his sojourn in that enemy's lines. The power of the general who receives the flag in the matter of preventing the members of the party who accompany it from obtaining information is in no way limited or restricted, and if he desires to effectually prevent the bearer of the flag from obtaining information the measures to which he resorts to accomplish that end must be sufficient to actually prevent information from being obtained of what is going on in the immediate theater of his military activity.

It is a fundamental rule of war that the bearer of a flag of truce, when the business which brought him to the enemy's line has been concluded, should be permitted to return to his own lines, and that his return should not be prevented or delayed by the commander whose hospitality he enjoys. For that reason it was deemed necessary to vest in the commander who receives a flag of truce authority to detain the party in case an abuse of privilege is alleged to have been committed until such investigation has been had as will suffice to determine the proper course to pursue under the circumstances.

ARTICLE XXXIV.

ARTICLE XXXIV.

The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.

The requirements of this article are quite within the rule of international law as it stood at the date of its adoption, and it is the concensus of opinion among text writers of authority that if an officer makes use of a flag for the sole purpose of obtaining information as to the movements or operations of the enemy, he is subject to pun-

ishment as a spy. There can be no more serious violation of good faith in war than to use a flag of truce for the purpose of obtaining information in respect to the movements or purposes of the enemy. Such attempts are strongly resented by the belligerent whose interests are adversely affected by them, and it not infrequently happens that where a violation of the privilege of a flag of truce is charged a feeling of violent personal hostility is aroused in the enemy's army, due, in great part, to the breach of faith that is involved in using the flag for such a purpose. For that reason the article wisely requires a higher degree of proof to justify a conviction than would be deemed necessary where an ordinary violation of the laws of war is concerned. I can see no occasion for the amendment of this article.

ARTICLE XXXV.

CHAPTER IV.—*On Capitulations.*

ARTICLE XXXV.

Capitulations agreed on between the Contracting Parties must be in accordance with the rules of military honour.

When once settled, they must be scrupulously observed by both the parties.

This article gives expression not only to the rule of international law on the subject, but to the military importance which attaches to all intercourse of belligerents in time of war. It will be observed that the rule covers both the subject-matter of such undertakings and the execution which may be given to them by the parties of their operation. Without the utmost good faith on both sides in the execution of cartels, capitulations, and undertakings of like character, the hardships of war are likely to be materially increased in their application to classes of persons like prisoners of war, the sick and wounded, and the like, who are without power to help themselves, or to successfully assert the rights which are accorded to them by the laws of war and in the stipulations in furtherance thereof which are entered into from time to time by the belligerent powers or by the persons who represent them in the theater of military operations. For that reason it seems unnecessary to suggest any change in the text of this article.

ARTICLE XXXVI.

CHAPTER V.—*On Armistices.*

ARTICLE XXXVI.

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

This article seems to give accurate expression to the existing rule of international law on the subject of armistices, and should stand unchanged.

ARTICLES XXXVII, XXXVIII, XXXIX, XL.

ARTICLE XXXVII.

An armistice may be general or local. The first suspends all military operations of the belligerent States; the second, only those between certain fractions of the belligerent armies and in a fixed radius.

ARTICLE XXXVIII.

An armistice must be notified officially, and in good time, to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or at a fixed date.

ARTICLE XXXIX.

It is for the Contracting Parties to settle, in the terms of the armistice, what communications may be held, on the theatre of war, with the population and with each other.

ARTICLE XL.

Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.

The arrangement of truces into two classes which is outlined in article 37 represents the long-established international usage in that regard. A *general truce* or *armistice* is one which covers an entire theater of military operations and is usually entered into by the belligerent governments themselves, as was the case with the United States and Spain in the protocol of August 12, 1898 (30 Stat. L., 1742), or by a commanding general in the field with the power of sanction or subsequent ratification of his government.

On account of the important interests which are affected, general truces are invariably reduced to writing, and the instrument itself measures the rights of the belligerents who are parties to its operation and shows what may be done as well as what must be refrained from during its continuance. The truce itself provides for its termination, either upon the happening of a particular event, or upon the performance of or the failure to perform a certain condition. If notice is required to be given where the truce is terminable at the will of either party, the form and period of such notice are also provided for.

An ordinary truce is an undertaking which is entered into between belligerent commanders of separate detachments of armies in the field for some transient or casual purpose, as to bury the dead, to recover the wounded, etc., etc. These undertakings are less formal than general truces, but are governed by similar rules in respect to their operation, execution, and termination.

ARTICLE XLI.

ARTICLE XLI.

A violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained.

Article XLI is new to the extent that it prescribes an indefinite but none the less practicable form of procedure in a case in which the terms of an armistice or general truce have been violated by individuals; as, for example, where acts of hostility have been committed by individuals or inferior commanders, or where rights of war have been exercised in opposition to the terms of the truce.

Section III.—MILITARY AUTHORITY OVER HOSTILE TERRITORY.

ARTICLE XLII.

Section III.—ON MILITARY AUTHORITY OVER HOSTILE TERRITORY.

ARTICLE XLII.

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation applies only to the territory where such authority is established, and in a position to assert itself.

In the somewhat divergent views which are held as to what constitutes "occupied territory," the powers are susceptible of arrangement into two classes: The great continental powers which maintain large establishments in time of peace desire to regard territory as occupied so soon as it has been passed over by the advancing lines of an invading army, the purpose being to favor aggressive operations and to enable as large a force as possible to be employed in operating against the armies of the opposing belligerent. England, the United States, and the smaller European powers, on the other hand, hold the view that an occupation, like a blockade, to be binding must be effective—that is, that the territory in possession of a belligerent must be held by a military force which is sufficiently strong at all points to make the occupation effective, their idea being that the obedience of the inhabitants of one belligerent is constrained and that unless a military force is everywhere present to enforce obedience the allegiance of the population to their own government may continue, and they may commit acts of hostility so long as their operations are carried on in conformity to the requirements of Article II. The definition which is embodied in Article XLII conforms to the view last above stated, and is to that extent a concession to the claim of the smaller powers.

ARTICLE XLIII.

ARTICLE XLIII.

The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

It is assumed in this article that a military occupation of the kind described in Article XLII has been established and is being maintained by the occupying belligerent. Such being the case, as the commanding general of the invading forces is the only authority who is able to maintain order and protect life and property, it follows that from the date of effective occupation he becomes responsible for the maintenance of order, for the execution of the laws, and for the enforcement of the requirements of the convention, or of the general laws of war in respect to the government and administration of the occupied district.

Article XLIV.

ARTICLE XLIV.

Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited.

The view which now prevails in respect to the relation which exists between the inhabitants of occupied territory and the commanding general of the occupying forces is that their allegiance to their own government remains unchanged; no new tie of allegiance is created, nor is their temporary allegiance transferred from their own state to that of the enemy as a consequence of military occupation. The commander of the invading army is the supreme authority in the territory occupied by the forces under his command, and in him are vested, for the time being, all legislative, executive, and judicial authority.

As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the respective territory and its inhabitants. And all steps he takes in the exercise of this right must be recognized by the legitimate Government after occupation has ceased. This administration is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is, on the one hand, totally independent of the Constitution and the laws of the respective territory, since occupation is an aim of warfare, and since the maintenance and safety of his forces and the purpose of war stand in the foreground of his interest and must be promoted under all circumstances and conditions. But, although regarding the safety of his army and the purpose of war the occupant is vested with an almost absolute power, he is, on the other hand, not the Sovereign of the territory, and he, therefore, has no right to make such changes of the laws and of the administration as are not temporarily necessitated by his interest in the maintenance and safety of his army and in the realisation of the purpose of war. (II Oppenheim, p. 173–174.)

But the control which the commanding general exercises over the inhabitants of occupied territory is not based upon any theory of allegiance, their relation to him being out of constrained obedience to his commands. As the allegiance of the population has not been changed, the occupying commander can not compel the individuals composing it to commit acts of treason; that is, to take part in acts of hostility against their own government. The rule as stated correctly expresses the law and should stand.

Article XLV.

ARTICLE XLV.

Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited.

For the reasons stated in the discussion of Articles XLIII and XLIV, the propriety of the prohibition which is embodied in Article XLV is apparent, and the article should continue in force.

ARTICLE XLVI.

ARTICLE XLVI.

Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.

Private property can not be confiscated.

In this article certain objects of protection are named which belligerents for more than a century have conceded are entitled to as complete an immunity from the operations of war as it is possible to afford them. Private property may be taken by way of contribution or requisition, in order to compel the enemy to bear his share of the burdens and hardships of war, but it can not be confiscated—that is, it can not be seized by way of punishment for a breach of allegiance, for no tie of allegiance exists between the inhabitants of the occupied territory and the invading enemy. It is not understood that in the operation of a penalty which may be imposed by a military commission or other tribunal with jurisdiction to try cases in occupied territory, the private property of an individual may not be taken. It is rather a taking without compensation—a taking which is not in conformity to the laws of war which is here made the subject of the express prohibition.

ARTICLE XLVII.

ARTICLE XLVII.

Pillage is formally prohibited.

In this article the reasonable rule of international law on the subject of pillage is made the subject of conventional prohibition. No change or amendment is suggested.

ARTICLE XLVIII.

ARTICLE XLVIII.

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do it, as far as possible, in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

The rule governing the fiscal administration of occupied territory is correctly stated in this article. The occupying authority may continue to impose the burdens already authorized and, if justified by military necessity, may increase them, but to the authority or power to impose and collect taxes, which he is conceded to possess, there is here added a corresponding obligation that out of the revenue so obtained he must meet the expenditures to which those revenues were applied prior to the occupation; the measure of the obligation assumed by the belligerent is indicated in the express statement of the objects to which the revenue raised by the belligerent shall be applied—that is, "to defray the expenses of the adminis-

tration of the occupied territory on the same scale as that by which the legitimate Government was bound."

If a particular class of expenditure becomes impracticable or impossible, due to the fact of occupation, as an expenditure for the support of schools or churches, etc., the revenue applicable to that class of expenditure may be applied by the commanding general to other public uses.

ARTICLE XLIX.

ARTICLE XLIX.

If, besides the taxes mentioned in the preceding Article the occupant levies other money taxes in the occupied territory, this can only be for military necessities or the administration of such territory.

It rarely happens in war that the revenues derived from occupied territory are exactly applicable to the objects of expenditure to which they were appropriated in time of peace. Some objects of expenditure cease to exist, due to the fact that war exists. If the courts of the state or its schools can not be maintained for considerable periods of time, due to the vicissitudes of military operations, the sums ordinarily provided for their maintenance can not be expended. New objects of expenditure are developed as a consequence of the occupation of the territory, and these, in accordance with the terms of the article, must be justified by military necessity, or must be necessary in order to meet the increased cost of administration.

ARTICLE L.

ARTICLE L.

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it can not be regarded as collectively responsible.

The right of a belligerent to levy what are known as "collective penalties" has long been conceded. Where offenses against the laws of war are committed by residents of a particular locality under such circumstances as to render the detection of the individual offenders difficult or impossible, the town, district, or other organized community in which the offenses are being committed may be held collectively responsible for their commission, in this way making the community responsible for the misdeeds of its individual members. To justify a resort to this procedure, however, the local authorities must be in a position to act, by way of prevention, and the unlawful acts alleged to have been committed must be within the power of such authority to control, by an exercise of reasonable diligence, in respect to the measures of prevention resorted to with a view to the prevention or repression of the conduct complained of.

The rule as stated in the article is in accordance with the views of text writers of standard authority and does not seem to stand in need of revision.

ARTICLE LI.

ARTICLE LI.

No tax shall be collected except under a written order and on the responsibility of a Commander-in-Chief.

This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.

For every payment a receipt shall be given to the taxpayer.

Although the entire legislative, executive, and judicial power in occupied territory is vested in the commanding general of the occupying forces, there must be an express exercise of legislative power on the part of that officer if a new tax is to be imposed or an addition made to an old one. In such an exercise of legislative power the commanding general, unless a different practice is directed by military necessity, is required to follow the methods of raising revenue which prevailed in the territory prior to its military occupation.

This exercise of legislative authority is also restricted to the commanding general of the occupying forces and can not be exercised by subordinate commanders. As an exercise of legislative power is in question, the article very properly requires the act of the commanding general to be reduced to writing—this with a view to complete the public record of legislative acts and to assimilate the legislation of the commanding general to the existing revenue system. He is further required to conform to the rules and systems of assessment which are in force in the occupied territory. The reason for this has already been explained. The giving of receipts is required in order to secure the equitable and orderly exercise of the power to raise revenue and to mitigate future exactions which may be imposed upon a particular payee or property holder.

ARTICLE LII.

ARTICLE LII.

Neither requisition in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

In this article the distinction established by international law between contributions and requisitions is properly preserved. *Contributions* are levies made by the commanding general of the occupying forces upon the entire territory which he holds in secure military occupation. *Requisitions* are levies usually, but not always in kind, for the support of the invading army, which are provided for in regulations or general orders, and are levied and collected by subordinate commanders. Subsistence, forage, and other stores needed for the use or support of an army may be obtained, wholly or in part, from the occupied territory in the operation of requisitions, and an army which subsists itself in this manner is said to "live on the country." The services of men, teams, and animals may be obtained in the same manner.

As requisitions are levied locally, though in conformity to general instructions or regulations, the burden imposed falls in great part upon the inhabitants of towns, villages, and communes, and the restrictive clauses of the article set forth the conditions under which supplies and services may be obtained by means of requisitions. The levies must be in proportion to the resources of the individual or the locality, and must not require the residents of occupied territory who are compelled to render them to take part in military operations against their own country.

The requirement as to receipts serves two purposes. If the owner of the property which has been taken by way of requisition is subsequently reimbursed, either by the invader or by his own government, the receipt measures the extent and amount of his demand for reimbursement. Whether he is so reimbursed or not, the receipt may be produced and shown to the commanding officer of a requisitioning party with a view to reduce the amount of future demands for either supplies or services.

ARTICLE LIII.

ARTICLE LIII.

An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property of the state which may be used for military operations.

Railway plant, land telegraphs, telephones, steamers and other ships, apart from cases governed by maritime law, as well as depôts of arms and, generally, all kinds of war material, even though belonging to Companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.

In this article the effort has been made to classify certain kinds of property from the point of view of their liability to capture or appropriation. In the first paragraph of the article the several classes of state property which are liable to capture are stated and described. In the second paragraph certain classes of private property are mentioned which may be taken or used, but must be restored at the peace, and, in proper cases, with indemnities for their use. As to the second paragraph, it may be said that the article applies a conventional rule to a case as to which there was no general unanimity, either of practice or opinion, at the date of its adoption. The article is one which should be judged by its operation, and sufficient experience has not yet been obtained to show whether it should or should not be made the subject of revision or amendment.

At the first conference Mr. de Bille, of Denmark, proposed to add to the second paragraph of this article a provision protecting the landing connections of submarine cables within the maritime territorial limits of the signatory states. The Government of Denmark had made a similar proposition in the Conference at Brussels in 1874.

The Danish delegate declared that he would have preferred to extend the protection of this Article to all submarine cables in their full extent, but for practical reasons he confined his proposition upon this occasion to the protection of the landing connections within the limit of one league from the shore, hoping that the immense importance of the subject of protecting all submarine cables would cause it to be referred to a future conference. Lord Pauncefote, on behalf of Great Britain, declared that his Government could not consider this subject as falling properly within the jurisdiction of a Committee having charge of the rules of war on land; and the Danish delegate, under these circumstances, withdrew his proposition. (Holl's, p. 159.)

It is difficult to escape the conclusion that the Conference acted with great wisdom in determining not to attempt to regulate the use or prohibit the cutting of deep-sea cables in time of war. In the present condition of cable communication, and having regard to the fact that when a cable is cut by a belligerent the act is dictated by the highest considerations of military necessity, I think the rejection of Mr. de Bille's proposition was eminently proper, and the regulation and interruption of ocean submarine cables was left to the application of the rules of international law.

The exercise of discretion on the part of a public officer in time of peace represents a judgment reached by that officer, upon certain considerations of fact. It involves an exercise of judicial reasoning and a careful weighing of a number of considerations of fact which enter into and are made the basis of the discretionary judgment. Every step taken by a commanding general in the conduct of military operations and in the measures to which he finds himself compelled to resort in dealing with the personal and property rights of residents of occupied territory must be justified by military necessity and is the result of an exercise of a high legal discretion in that regard which is vested in such commanding general by the laws and usages of war. Where the law vests an exercise of discretion in a public officer, the courts will, as a rule, sustain the act of discretionary judgment and will refrain from inquiring into the incidents of its exercise. The same rule regulates the courts in passing upon the acts and measures of a commanding general in occupied territory in time of war. As the reasons which actuated him in a particular act of discretion are, as a rule, exempt from judicial review, it is highly proper that they should not be made the subject of treaty regulation. By an exercise of the treaty-making power the acts of a commanding general may be taken out of the field of discretionary judgment altogether, and his conduct in a particular regard may be controlled by a conventional rule; but it is to the highest degree inexpedient to attempt to regulate an exercise of discretion in time of war, and in the territory of an enemy, by a requirement of conventional law.

ARTICLE LIV.

ARTICLE LIV.

The plant of railways coming from neutral States, whether the property of those States or of Companies or of private persons, shall be sent back to them as soon as possible.

This article supplies a just and equitable rule to govern the commanding general of an occupying force in dealing with rolling stock and railway matériel belonging to lines which extend beyond the boundaries of the occupied territory, presumably, and in a majority of cases, into neutral states. The rule is a safe one; it need give no occasion for difficulty in execution, and should stand without revision.

ARTICLE LV.

ARTICLE LV.

The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

It is the evident purpose of this article to define the ownership of certain property and works belonging to the public, but not designed for or appropriated to military uses or purposes at the outbreak of the war. Certainly the cost of administration should constitute a charge against the revenue derived from such properties. In the meaning which has been assigned to the term "usufruct" in both the common and civil law, the usufructuary is entitled to the enjoyment of the revenue so long as he preserves the substance or capital of which he appropriates and uses the usufruct. In its application to the commanding general of occupied territory this means that, so long as he maintains the properties thus unimpaired, he may apply the usufructuary revenue to the necessary expenses of the military occupation.

ARTICLE LVI.

ARTICLE LVI.

The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.

All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

It is the purpose of this article to give a definite status to certain public property belonging to political organizations corresponding to municipal corporations, but forming no part of the fixed or movable property of the belligerent state. In all dealings with such property the commanding general of the occupying forces is required to distinguish it from state property, properly so called, and to regard it as private property which, save for the express exceptions which are made in the body of the article, is subject to requisition and to such other burdens as may be imposed for the benefit of the occupying forces. Such

property is also entitled to the protection and immunity which is accorded to the property of individuals and corporations by the convention of 1899.

With a view to remove any doubt as to the immunity which is accorded in the treaty to historical monuments, works of art, etc., the second paragraph contains an express prohibition in respect to their seizure, injury, or destruction, and requires such acts of spoliation to be made the subject of a resort to disciplinary measures on the part of the commanding general of the occupying forces.

Section IV.—INTERNMENT OF BELLIGERENTS AND THE CARE OF WOUNDED IN NEUTRAL COUNTRIES.

In order to bring the several requirements of this section into effective operation, organized commands or individual members of a belligerent army must have sought and obtained asylum in neutral territory. By the granting of such asylum the neutral obligations of the state which has afforded it are called into activity. Those obligations, as now understood at international law, require such neutral state to disarm the forces to whom asylum has been granted, to intern them, and to support them at the cost of the belligerent government in whose service they are until hostilities have terminated or a peace has been concluded.

Article LVII.

Section IV.—ON THE INTERNMENT OF BELLIGERENTS AND THE CARE OF THE WOUNDED IN NEUTRAL COUNTRIES.

ARTICLE LVII.

A neutral State which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

In this article the specific duty of internment is enjoined, and the character and method of its performance are provided for. The neutral state is also authorized to accord certain privileges to commissioned officers in the operation of appropriate paroles, subject, however, to the limitation that no paroled officer shall leave the territory of the neutral state without authorization. The power competent to grant such authorization is not stated, but as the obligation of the neutral state is to intern officers or enlisted men to whom it has granted asylum until the end of the war it is understood that the neutral state, save with the consent of the proper belligerent, is without authority to permit a paroled officer to return to his home.

ARTICLE LVIII.

ARTICLE LVIII.

Failing a special Convention, the neutral State shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace, the expenses caused by the internment shall be made good.

An asylum may be and usually is demanded and accorded under circumstances of great emergency; the neutral may suddenly find itself with a considerable number of troops on its hands, with no previous understanding with their own government as to reimbursement of the cost of their support. To such a case the article under examination applies a remedy, and prescribes the kind and amount of support and relief which shall be afforded to the interned troops; it also makes adequate provision for the final reimbursement of expenses incurred in their behalf at the conclusion of peace between the belligerent states.

ARTICLE LIX.

ARTICLE LIX.

A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such a case the neutral State is bound to adopt such measures of safety and control as may be necessary for the purpose.

Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral State, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

This article should be read in connection with paragraph 1, article 2, of the Geneva Convention of 1906, which provides that:

Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in relation to the wounded or sick as they may deem proper. They shall especially have authority to agree:

1. To mutually return the sick and wounded left on the field of battle after an engagement.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

3. *To send the sick and wounded of the enemy to a neutral state, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.*

With a view to make clear the rights and duties of a neutral state in both conventions, it would seem to be advisable that if any revision of this article is undertaken the effort should be made to distinguish it in its operation from the clause of the Geneva convention above cited. Article 59 makes sufficient provision for the mere transit through neutral territory of sick and wounded belonging to the

enemy; article 2 of the Geneva convention permits a neutral to receive the sick and wounded of a belligerent on condition that they shall be interned during the continuance of the war. In other words, two cases are provided for: (1) Convoys of sick and wounded which are passing through neutral territory, for which provision is made in article 59 of The Hague convention, and (2) collections of sick and wounded who are sent to neutral territory, with its consent and in the operation of agreements to that end which have been entered into by the commanders of the belligerent forces in the field. Cases of the first class call for the performance of neutral duties during the transit merely; cases of the second class impose certain duties upon the neutral state which only terminate with the execution of a treaty of peace or with the conclusion of an armistice entered into by the belligerents with a view to the termination of hostilities.

ARTICLE LX.

ARTICLE LX.

The Geneva Convention applies to sick and wounded interned in neutral territory.

This article should be read in connection with paragraph 3, article 2, of the Geneva Convention of 1906, which provides that belligerents "shall have power to agree:"

To send the sick and wounded of the enemy to a neutral state, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.

With a view to make clear the rights and duties of neutral states under both conventions, it would seem to be advisable that if any revision of this article is undertaken an effort should be made to distinguish it in its operation from the corresponding clause of the Geneva convention. Article 59 makes specific provision for the mere passage of convoys of sick and wounded through neutral territories. Article 2 of the Geneva convention permits a neutral to receive the sick and wounded of a belligerent army on condition that they shall be interned during the continuance of the war. In other words, two cases are provided for: (1) Convoys of sick and wounded which are passing through neutral territory, for which provision is made in article 59 of The Hague convention; (2) collections of sick and wounded which are sent to neutral territory for internment in the operation of agreements to that end which have been entered into by the commanders of the belligerent forces in the field. Cases of the first class call for the performance of neutral duties during the transit merely; cases of the second class impose certain duties upon the neutral state which only terminate with the execution of a treaty of peace or with the conclusion of an armistice entered into by the belligerents with a view to the termination of hostilities.

LAUNCHING OF PROJECTILES FROM BALLOONS.

The first of the three declarations which were embodied in The Hague Convention of July 29, 1899, contains the requirement that—

> The contracting powers agree, for a period of five years, to forbid the throwing of projectiles and explosives from balloons or by other new methods of a similar nature. (Dec. I, Hague Conf., Davis's Int. Law, p. 564.)

Balloons were first used for purposes of reconnoissance at the battle of Fleurus in 1794. They were occasionally employed by the Russians in 1812, and somewhat more extensively by the United States during the period of the civil war. They were more frequently and usefully employed, however, by the French during the investment of Paris by the Germans in 1870 and 1871, when 64 balloons were sent up, in one of which M. Gambetta escaped from the city and was thus enabled to organize resistance to the further advance of the German armies in the unoccupied provinces of France, their chief use being as a means of communication, rather than as an agency for obtaining information as to the location or movements of the German armies.

This use was strongly opposed by the German military authorities, who gave the French Government to understand that they would regard persons engaged in the management of balloons as spies. Indeed, two correspondents of the Figaro and Gaulois, two important French newspapers, were directed to be executed, on the ground that the information gained by them would be used to the disadvantage of Prussia. Execution was stayed by the crown prince, however, who subsequently ordered that they should be "set free as soon as they could do no harm."

Since the Franco-Prussian war balloons have come into general use as a means of communication between fortified places or detached armies and for reconnoissance purposes; they were so employed by the Japanese at the battle of Liaoyang and by the British forces during the Boer war. It has also been attempted to use them, but without marked success, for the purpose of obtaining photographic maps of territory in the possession of the enemy.

The use of balloons for the purposes above stated is now regarded as entirely legitimate, and is expressly authorized by Article XXIX of The Hague convention, although the immunity which is accorded by that article is restricted to the "individuals sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory."

As the prohibition embodied in the declaration above cited was restricted to a period of five years, it ceased to be obligatory upon the signatory powers on July 29, 1904; but I have been unable to find that it has ever been seriously proposed by any modern government

to adopt balloons as platforms from which shells or projectiles could be directed against the enemy. The reasons in support of the view that they are entirely unlikely to come into general use as agencies of destruction are well stated in Holls's Hague Conference, in which it is stated that—

> The action taken was for humanitarian reasons alone, and was founded upon the opinion that balloons, as they now exist, form so uncertain a means of injury, that they cannot be used with accuracy. The persons or objects injured by throwing explosives may be entirely disconnected from the conflict, and such that their injury or destruction would be of no practical advantage to the party making use of the machines. The limitation of the prohibition to five years' duration preserves liberty of action under such changed circumstances as may be produced by the progress of invention. (Holls's Peace Conf., p. 95.)

EMPLOYMENT OF PROJECTILES HAVING FOR THEIR SOLE PURPOSE TO DIFFUSE ASPHYXIATING OR DELETERIOUS GASES.

The second declaration which was reached by the conference and embodied in its convention provides that—

> The contracting powers agree to forbid the employment of projectiles which have for their sole purpose the diffusion of asphyxiating or deleterious gases. (Dec. II, Hague Conf., Davis's Int. Law, p. 564.)

The chemical composition of modern powders, including those used for artillery and small arms, is such that when fired or exploded certain gases are formed which are disagreeable and to some extent annoying to those who are compelled to inhale them; this for the reason that the gases set free by explosion are acrid in character and have a tendency to irritate the eyes, nose, throat, and lungs of those in whose presence or vicinity they are exploded. While these gases are slightly "deleterious," they are not "asphyxiating," and they result from the combustion of all powders, especially the smokeless types that are habitually used in modern armies. Clearly these powders, though not pleasant to inhale, are not included within the scope of the prohibition.

When it is attempted to go a step further and undertake to describe the powders and other components the use of which is prohibited in the declaration, we are met at the threshold of the inquiry by the fact that there are no such explosives. None have ever been invented or experimented with, and no government, so far as I can learn, has caused investigations to be prosecuted along such lines of inquiry.

Explosives for use in small arms as well as in the artillery service may be roughly classified into "propelling charges," on which the propulsion of the projectile depends, and "bursting charges," which are relied upon in the explosion of shells and mines; the exploding charges used in torpedoes belong to this class.

The best modern practice contemplates the use of smokeless powder in firing or propelling charges. As to bursting charges, it is impor-

tant that the powder used should be a somewhat more powerful explosive agent, as it is desirable to obtain considerable velocity for the exploded fragments when the shell bursts in the air in the vicinity of troops of the enemy, and that it should have greater rending power if used against battle ships or if the projectiles are used as mining shells. For these reasons picric acid is very freely used as a component of bursting powders and the products of explosion are to some extent deleterious. That is, if it were possible to explode a Lyddite shell which contained picric acid in a small, close room, the gases liberated would be sufficiently poisonous to endanger life. But no such result attends the explosion of that compound in the air, where the gases are instantly dispersed. Field batteries are usually furnished with a few shells which are intended to be used in the ascertainment of ranges, and for that reason have a bursting charge which will give out a large volume of smoke on explosion, but these powders are in no sense deleterious.

As all picrate compounds are easily exploded, they are to an appreciable extent uncertain and dangerous to use as bursting charges, and for that reason the United States Navy uses a less high explosive as a bursting charge for its shells.

The reasons that actuated Captain Mahan, a delegate to the first conference, in voting against this declaration are given in the following statement and are inserted in the report of the committee charged with the preparation of the declaration:

1. That no shell emitting such gases is as yet in practical use or has undergone adequate experiment; consequently, a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character, or whether injury in excess of that necessary to attain the end of warfare, of immediately disabling the enemy, would be inflicted.

2. That the reproach of cruelty and perfidy addressed against these supposed shells was equally uttered formerly against firearms and torpedoes, although each are now employed without scruple. Until we know the effects of such asphyxiating shells, there was no saying whether they would be more or less merciful than missles now permitted.

3. That it was illogical and not demonstrably humane, to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred men into the sea to be choked by water, with scarcely the remotest chance of escape. If, and when, a shell emitting asphyxiating gases has been successfully produced, then, and not before, will men be able to vote intelligently on the subject. (Holls's Peace Conf., p. 119.)

It would thus appear that, at the date of the adoption of the declaration above cited, there was no compound in use, or even in existence, which generated in its explosion the deleterious or asphyxiating gases which are made the subject of the conventional prohibition. It is therefore suggested that if any revision is proposed

it would be desirable to favor the repeal or omission of the requirement. If the declaration gives rise to no discussion, it is not believed to be of sufficient importance to charge the delegation with the duty of suggesting that its omission or revision is desired.

EMPLOYMENT OF JACKETED OR INCISED BULLETS.

The third declaration which was admitted to the convention contains the requirement that—

> The contracting powers agree to forbid the employment of bullets which expand or flatten easily in the human body, such as bullets the jackets of which do not entirely cover the core or are provided with incisions. (Davis's Int. Law, p. 564, Dec. III, Hague Conf.)

It has been seen, in the discussion of the declaration respecting balloons and deleterious or asphyxiating gases, that the conference erred in undertaking to legislate in respect to the use of agencies of destruction which were not in existence, and which had never been seriously proposed for adoption with a view to their use in war. The declaration under examination is subject to criticism on the same ground.

If the prohibition be analyzed, it will at once appear that it relates to a particular mechanical construction of small-arm projectiles, rather than to their effects as instruments of war. That is to say, there may be a great number of ways in which a bullet may be constructed which will not come within the scope of the prohibition, but which, if used in war, is calculated to inflict an unnecessarily cruel and painful wound. In other words, the declaration prohibits the use of bullets "the jackets of which do not entirely cover the core or are provided with incisions," but is inoperative as to bullets not subject to these specific objections, but which are so constructed as to add unnecessarily to the severity of the wound inflicted.

It appears from the discussion of the committee that the construction of what was erroneously known as the "Dum-Dum" bullet was made, in most part at least, the basis of prohibition. Sir John Ardagh, one of the English delegates, endeavored to show that the Dum-Dum bullet, as actually jacketed and manufactured, was not open to the objection stated in the resolution. It seems that Professor Bruns had carried on a series of experiments at Tübingen, extending through several months of the year 1898, with a view to ascertain the effects of certain small-arm projectiles on the human tissues. He had used a jacketed bullet, the soft core of which extended beyond the jacket to the extent of a full diameter. The wounds caused by this bullet were exceedingly severe, in point of fact frightful. The construction of the Dum-Dum bullet was then described by Sir John

Ardagh, who, after explaining that the completely jacketed bullet employed in the Lee-Metford rifle did not give enough shock on impact with the human body to stop the enemy or so disable him as to put him out of the fight, went on to say that—

It has been proven that in one of our small wars in India a man perforated five times by these bullets was still capable of walking to the English hospital at a considerable distance for the purpose of having his wounds dressed. After the battle of Omdurman, quite recently, it was shown that the greater number of the Dervishes who were wounded, but who had still saved themselves by flight, had been hit by small English bullets, at the same time when the Remington and Martini bullets of the Egyptian army were sufficient to put the soldier *hors de combat*. It was necessary to find a more efficacious means of warfare, and, with this object in view, the projectile known under the name of the Dum Dum bullet was manufactured in India, at the arsenal of that name near Calcutta. In the Dum Dum bullet, the jacket ends by leaving a small piece of the core uncovered. The effect of this modification is to produce a certain extension or convexity of the point, and to give a force more pronounced than that of the bullet which is completely jacketed, at the same time, however, less effective than that of the Enfield, Snider, or Martini bullets, all of which have greater calibre. The wounds made by this Dum Dum bullet suffice ordinarily to give a stopping shock and to place a soldier *hors de combat*, but their effect is by no means calculated to cause useless suffering. (Holls's Peace Conf., p. 99–100.)

Captain Crozier supported the position of Sir John Ardagh, and deprecated the attempt to cover the principle of prohibition of bullets producing unnecessarily cruel wounds, by specification of details of construction of the bullets, and he proposd the following formula as an amendment:

The use of bullets inflicting wounds of useless cruelty, such as explosive bullets, and in general every kind of bullets which exceeds the limit necessary for placing a man *hors de combat* should be forbidden. (Holls's Peace Conf., p. 103.)

The committee, however, adhered to the original proposition without even voting upon the amendment proposed by Captain Crozier, the vote standing 20 to 2, the latter being Great Britain and the United States of America; there was one abstention (Portugal); China, Mexico, and Luxemburg were not represented on the committee.

Subsequently the subject was taken up with a view to secure a text which would meet the unanimous approval of the delegates. At an informal meeting held at the Hotel Des Indes on July 8, at which Lord Pauncefote, Sir Henry Howard, Sir John Ardagh, Colonel á Court, Jonkheer Van Karnebeek, Captain Crozier, and others were present, the case was fully presented by Captain Crozier, whose remarks, which are set forth in full on pages 106 to 112 of Holls's Peace Conference, etc., may be read with great profit, as they are as true and applicable now as they were when the subject was

undergoing discussion in committee and at the subsequent plenary sessions of the conference. In spite of the cogent and powerful reasoning of Captain Crozier, however, the unmodified proposition was embodied in the convention, but was not accepted by England and the United States.

To sum up on this point, the proposition of the Russian delegates provided that—

> The use of bullets which expand or flatten easily in the human body, such as jacketed bullets of which the jacket does not entirely cover the core, or has incisions in it, should be forbidden. (Holls's Peace Conf., p. 98.)

The proposition submitted by Captain Crozier contained the requirement that—

> The use of bullets inflicting wounds of useless cruelty, such as explosive bullets, and in general every kind of bullets which exceeds the limit necessary for placing a man *hors de combat* should be forbidden. (Holls's Peace Conf., p. 103.)

It is proper to note at this point that the preamble of the declaration of St. Petersburg of December, 1868, embodies the following statement of reasons which led to the adoption of the declaration by the signatory powers:

> Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity. (Davis's Int. Law, p. 538.)

The objections to the Russian proposition are very clearly and accurately stated by Captain Crozier, who says:

> To the article as it stood he had three objections: first, it prohibited the use of all expanding bullets, without reference to the fact that it might be desirable in the future to adopt a musket of still smaller caliber in conjunction with a bullet which would expand regularly to a somewhat larger size. Second, that by this interdiction it might force people to the employment of a missile of a more cruel character not forbidden by the article; and thirdly, that it condemned the Dum Dum bullet without evidence against it. (Holls's Peace Conf., pp. 112–113.)

Elsewhere Captain Crozier said, in speaking of the efforts that might be put forth by states desiring to develop types of small arms having smaller calibers than those now in use:

> In devising means to increase the shock they will naturally examine the prohibitions which have been imposed, and they will find that with the exception of the two classes, viz.: explosive bullets and bullets which expand or flatten, the field is entirely clear; they will see that they can avoid the for-

bidden detail of construction by making a bullet with a large part of the covering so thin as to be ineffective, and that they can avoid altogether the proscribed classes by making a bullet such that the point would turn easily to one side upon entering the body, so as to cause it to turn end over end, revolving about its shorter axis;—it is well known how easily a rifle projectile can be made to act in this way. Or by making one of such original form as, without changing it, would inflict a torn wound. It is useless to give further examples. A technical officer could spend an indefinite time in suggesting designs of bullets, desperately cruel in their effects, which, forbidden by the amendment which I now propose, would be permitted under the article as it comes from the Committee. In fact, they would be even more than permitted, for one might be driven, in the effort to avoid the specified class, to the adoption of another less humane. If the shocking power of the bullet is to be increased at all, and we may be sure that if found necessary it will be done in one way or another, what more humane method can be imagined than to have it simply increase its size in a regular manner? But this is forbidden, and consequently there is great danger of some more cruel method coming into use, when there will not be a Conference ready to forbid it. There is always danger in attempting to cover a principle by the specification of details, for the latter can generally be avoided and the principle be thus violated. (Holls's Peace Conf., pp. 109–110.)

It is greatly to be regretted that a proposition drawn upon the lines laid down by Captain Crozier in his amendment was not adopted by the conference, with the addition, if need be, of such general terms of discretion as would prohibit the use in war of any small-caliber projectile which is calculated to inflict wounds of needless or unnecessary severity. Should a proposition to amend this declaration be submitted, a text following the lines of Captain Crozier's amendment might well be favored by the delegation.

TYPES OF FIELD ARTILLERY AND SMALL ARMS.

Two matters were submitted to and discussed by the first conference, but no agreement was reached as to their insertion in the body of the convention.

Field guns.—It was proposed by the Russian delegation that the Powers should agree that—

No field material should be adopted of a model superior to the best material now in use in any country—those countries having material inferior to the best now in use retaining the privilege of adopting such best material. This proposition was rejected by a unanimous vote, with the exception of two abstentions, namely: Russia and Bulgaria. (Holls's Peace Conf., p. 95.)

Small arms.—In the matter of small arms the Russian proposition was "that no Powers should change their existing type of small arms." On this point Holls says:

This proposition differed essentially from the one regarding field guns, which permitted all Powers to adopt the most perfect material now in existence; the reason for the difference was explained by the Russian representative, to be, that, whereas there was a great difference in the excellence of field artillery

material now in use in the different countries, that they all adopted substantially the same musket, and being on an equal footing, the present would be a good time to cease making changes. The object of the proposition was stated to be purely economical. It was explained that the prohibition to adopt a new type of musket was not intended to prevent the improvement of existing types; but this immdiately called forth a discussion as to what constituted a type, and what improvements might be made without falling under the prohibition of not changing it. Efforts were made to cover this point by specifying details, such as initial velocity, weight of the projectiles, etc.; also by a proposition to limit the time for which the prohibition should hold, but no agreement could be secured.

Captain Crozier, on behalf of the United States of America, stated early in the discussion the attitude of America, namely: that it did not consider limitations in regard to the use of military inventions to be conducive to the peace of the world, and for that reason propositions for such a limitation would not generally be supported by the American representatives.

A separate vote was taken on the question whether the Powers should agree not to make use of automatic muskets. In the words of Captain Crozier, "As this may be taken as a fair example of the class of improvements which, although they may have reached such a stage as to be fairly before the world, have not yet been adopted by any nation, an analysis of the vote taken upon it may be interesting as showing the attitude of the different Powers in regard to such questions." The States voting in favor of the prohibition were, Belgium, Denmark, Spain, Netherlands, Persia, Russia, Siam, Switzerland, and Bulgaria, (9). Those voting against it were, Germany, United States of America, Austria-Hungary, Great Britain, Italy, Sweden and Norway, (6). Those abstaining were, France, Japan, Portugal, Roumania, Servia, and Turkey, (6). From this statement it may be seen that none of the Great Powers, except Russia, was willing to accept restrictions in regard to military improvements, when the question of increase of efficiency was involved, and that only one great Power, France, abstained from expressing an opinion upon the subject.

In the full Committee, after the failure of another effort to secure the adoption of the proposition, it was agreed that the subject should be relegated to the future consideration of the different Governments. (Holls's Peace Conf., p. 96–97.)

The conclusion of the conference in this respect is embodied in Resolution No. III, which provides that—

The Conference gives expression to the desire that the questions relating to marine artillery and small-arms, such as have been investigated by it, be studied by governments with a view to reach an understanding in respect to new types and calibers. (Res. No. III, Hague Conference.)

NEW AGENCIES OF DESTRUCTION.

The question was also raised as to whether there should be any agreement in regard to the use of new means of destruction, which might possibly have a tendency to come into vogue—such as those depending upon electricity and chemistry. The Russian representative declared that his Government was in favor of prohibiting the use of all such instrumentalities, because of the fact that the means of destruction at present employed were quite sufficient; but after a short discussion this question was also put aside for future consideration on the part of the different Powers. (Holls's Peace Conf., p. 97–98.)

The trend of inventive activity now runs in the direction of increasing the efficiency of existing types of instruments of war rather than in the discovery of new agencies. In the absence of indications looking to the utilization of agencies and instrumentalities hitherto unknown, it may well be doubted whether the time and attention of the conference can be profitably employed in a discussion, largely academic in character, as to the possibility of employing agencies hitherto untried which are susceptible of use in the operations of war.

The rules of war that are embodied in the convention of 1899 have already been discussed, and in concluding the discussion of this part of the programme the question arises, What subjects were in mind in the preparation of the paragraphs respecting additions to the rules governing "the rights of neutrals on land", which is embodied in the programme of April 3 and 12, 1906. In the absence of a suggestion as to what is intended to be made the subject of conventional regulation, I can only recall a single subject which has not already been discussed, and that relates to the newly invented system of wireless telegraph.

THE WIRELESS TELEGRAPH.

The wireless telegraph as a means of obtaining and communicating information was first applied in actual warfare during the recent operations in Manchuria and its adjacent territorial waters. Its present applications are numerous and important, and its possibilities, though not fully developed, are known to be great and indicate a constantly increasing field of application to the naval and military operations of the future. But when all this has been said, the fact remains that when reduced to its lowest terms the wireless telegraph is simply a means of communication, and is in all respects similar to other means of public communication which are in operation in both neutral and belligerent states at the outbreak of war or which come into existence during its continuance.

Among other unneutral services which may be undertaken by a neutral state or by neutral subjects the maritime conveyance of the enemy's dispatches has always been regarded as constituting a most serious violation of neutral obligation, and when a ship is captured on the high seas while conveying dispatches of an enemy to a hostile destination the ship is invariably condemned. So, too, where an individual is captured by a belligerent in occupied territory while conveying dispatches to the enemy a serious violation of the laws of war has been committed, involving in a majority of cases an act of espionage, and the offender is correspondingly punished. In both cases, however, there is a specific violation of neutrality or an offense against the laws of war, and the bearer of the hostile dispatch is

made to suffer the penalty. Hall, a writer of high authority, says in respect of the neutral conveyance of enemy's dispatches:

With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connexion with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops he trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. (Hall's Int. Law, p. 673–674.)

Where, however, mail or telegraphic communications exist in a neutral state, which the public at large has the right to use and which form a connecting link in a system of telegraphic or mail communication extending perhaps beyond the territory of the neutral, the belligerent can not complain if an occasional communication between detachments of the enemy or between the enemy and his government passes through the mails or over the wires. On this point Hall says:

If a neutral, who has been in the habit in the way of his ordinary business of carrying post-bags to or from a belligerent port, receives sealed despatches with other letters in the usual bags, or if he even receives a separate bundle of despatches without special remuneration, he cannot be said to make a bargain with the belligerent, or to enter his service personally, for belligerent purposes. He cannot even be said to have done an act of trade of which he knows that the effect will be injurious to the other belligerent; despatches may be noxious, but they may also be innoxious; and the mere handing over of despatches to him in the ordinary course of business affords him no means of judging of their quality. A neutral accepting despatches in this manner cannot therefore be subjected to a penalty. (Ibid., p. 674.)

Despatches not being necessarily noxious, a neutral carrier is not necessarily exposed to a penalty for having made a specific bargain to carry them. He

renders himself liable to it only when there is reasonable ground for belief that he is aware of their connexion with purposes of the war. As the bearer of letters cannot be assumed to be acquainted with their contents, the broad external fact of their destination is taken as the test of their character, and consequently as the main ground for fixing him with or exonerating him from responsibility. Two classes of despatches are in this manner distinctly marked. Those which are sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral state. The despatches are themselves exempt from seizure, on the ground that their transmission is as important in the interests of the neutral as of the belligerent country; and to carry them is therefore an innocent act. (*The Caroline*, VI Rob., 461; *The Madison*, II Edwards, 226; Ortolan, Dip. de la Mer, II, 240; Calvo, sec. 603, Comp. Letter of Marque of the Confederate States, ap. Ortolan, ib. Append. XXI.) Those on the other hand which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral state, may be presumed to have reference to the war; and the neutral is bound to act on the presumption. If therefore they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession or of the quality of the person to whom they are addressed. Letters not addressed to persons falling within either of the above categories are *prima fâcie* innocent; if they contain noxious matter they can only affect the vessel when other facts in the case show the knowledge of the owner or master. Thus, where official despatches of importance were sent from Batavia to New York, and were there given by a private person, enclosed in an ordinary envelope, to the master of an American ship, for transmission to another private person in France, the ship was released, on the oath of the captain that he was ignorant of the contents of the letters entrusted to him. (Ibid, p. 675–676.)

Vessels not being subject to a penalty for carrying despatches in the way of ordinary business, packets of a regular mail line are exempted as of course; and merchant vessels are protected in like manner when, by municipal regulations of the country from the ports of which they have sailed, they are obliged to take on board all government despatches or letters sent from the post-offices.

The great increase which has taken place of late years in the number of steamers plying regularly with mails has given importance to the question whether it is possible to invest them with further privileges. At present, although secure from condemnation, they are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post-bags may be seized on account of despatches believed to be within them. But the secrecy and regularity of postal communication is now so necessary to the intercourse of nations, and the interests affected by every detention of a mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt now be shown in a naval war to mail vessels and their contents; and it may be assumed that the latter would only be seized under very exceptional circumstances. France in 1870 directed its officers that 'when a vessel subjected to visit is a packet-boat engaged in postal service, and with a government agent on board belonging to the state of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and despatches on board;' and it is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. (Ibid, p. 678–679.)

In concluding his discussion on the subject this writer says:

At the same time it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary manner through its post-offices. To give immunity from seizure as of right to neutral mail-bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it; and it is not difficult to imagine occasions when the absence of such power might be a matter of grave importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral government on board that no despatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing.

No usage has hitherto formed itself on the subject. During the American Civil War it was at first ordered by the government of the United States that duly authenticated mail-bags should either be forwarded unopened to the foreign department at Washington, or should be handed after seizure to a naval or consular authority of the country to which they belonged, to be opened by him, on the understanding that documents to which the belligerent government had a right should be delivered to it. On the suggestion of the English government, which expressed its belief 'that the government of the United States was prepared to concede that all mail-bags, clearly certified to be such, should be exempt from seizure or visitation,' these orders were modified; and naval officers were directed, in the case of the capture of vessels carrying mails, to forward the latter unopened to their destination. (Ibid, p. 679–680.)

It has been seen that the rigor with which it is attempted to break up contraband trade on the high seas in time of war does not extend to such a trade when carried on by land. A similar distinction exists between the conveyance of the enemy's dispatches, and the severe penalties which are imposed upon a vessel engaged in such a conveyance are not applied, outside of the theater of war, to the transmission of such dispatches by any methods which now exist for the transmission of communications by land.

As belligerents are not permitted to enter upon neutral territory, and as the distinction between neutral and hostile dispatches does not obtain on land, it has never been attempted to interfere with the transmission by mail of the enemy's messages through neutral territory. During the Franco-Prussian war, for example, the dispatches of the French Government to and from its naval commanders in the Mediterranean passed by Italian mail routes and by neutral mail steamers to their respective destinations, and the Italian Government was not regarded as having rendered unneutral services by permitting the transmission of such dispatches through its mails.

The same can be said of the transmission of enemy's dispatches through neutral territory by lines of telegraphic or cable communication. Cable lines in the theater of actual naval or military occupation come under the control of the belligerent commanders, and

may be cut or interrupted, or may be subjected to such censorship the military or naval commanders in the theater of hostilities see fit to impose upon grounds of military necessity; with this execption, it is believed that the same principle would apply to a line of wireless telegraph that is conceded to apply to lines of mail, telegraphic, or cable communication which have been established in neutral territory. If it forms part of a continuous line of communication, the mere fact that a portion of it passed through neutral territory would impose no greater obligation upon the neutral government than would a mail route or a line of ordinary telegraphic communication. Professor Holland, of Oxford University, in a recent paper contributed to the British Academy, says, in speaking of the obligation of a neutral state to prevent a belligerent from establishing a wireless telegraph status in its territory or territorial waters:

A neutral state is, no doubt, on principle, similarly bound to prevent the use of its territory for the reception and transmission of messages by wireless telegraphy, in furtherance of belligerent interests; and China seems to have accordingly destroyed, though tardily, the electrical installment placed by the Russians in the neighborhood of Chefoo, for the maintenance of communications between the beleaguered fortress of Port Arthur and the outer world. (Neutral Duties in a Maritime War, by Thomas Erskine Holland, Proceedings of the British Academy, II, 3, VII Moore's Dig. Int. Law, 941.)

Professor Moore, the author of the International Law Digest, in commenting upon the foregoing utterance, says:

Perhaps the learned author of the above passage did not intend to convey the idea that it would be the duty of a neutral state to prevent a private company engaged in transmitting wireless messages from receiving and transmitting any such message in furtherance of belligerent interests. The point in the particular case to which he refers was the establishment of a station in neutral territory by one of the belligerents, an act which the neutral undoubtedly may be required to use due diligence to prevent. With regard to the transmission of telegraphic messages by private companies regularly engaged in such business, there would appear to be no difference between the use of wireless telegraphy and the use of land lines or submarine cables. (VII Moore's Dig. Int. Law, p. 941.)

If a wireless apparatus is set up within the lines of a belligerent, or in that high portion of the high seas which constitutes the actual theater of naval operations, it is within the power of the enemy to neutralize its operation by destroying the apparatus or by attempting to interfere with the atmospheric transmission of electric vibrations. The case is, in some respects, the same as that of using a balloon as a means of conveying dispatches. The enemy may use balloons, air ships, or other aerial contrivances to interrupt such conveyance, or the balloons may be fired upon; but the method of conveyance is legitimate, and is none the less so because of the difficulty which the enemy encounters in his attempts to prevent or interrupt it. Neutral subjects who attempt to install wireless apparatus in the theater of

military or naval operations may be prevented from doing so by the belligerent whose interests are likely to be prejudiced by its installation. But the neutral subject who makes such an attempt can not be said to involve his government in the act of which he is guilty. It is only when a neutral state allows its territory or waters to be used for such a purpose that it becomes liable to be called to account, in its corporate capacity, for the rendition of unneutral services.

HOSTILITIES PRIOR TO DECLARATION OF WAR.

It is assumed that this question has been inscribed upon the programme as a consequence of the action of Japan in beginning hostilities against Russia in 1904 without prior declaration of war. The facts in the case are as follows: Diplomatic relations with Russia were severed by the Imperial Government of Japan on February 6, 1904, in a note to that end which was delivered at the foreign office in St. Petersburg and which contained the statement that—

> The Imperial Government reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests. The merest tyro in diplomacy knows what this meant. It was a distinct warning that hostilities might be expected at any moment, and the first blow was not struck till about sixty hours after it had been given. (Lawrence, War and Neutrality in the Far East, p. 31–32.)

Late at night on February 8 the fleet of war vessels composing the Russian Pacific squadron was attacked by Japanese torpedo boats in the outer roadstead of Port Arthur. On the same day a force of troops was landed from the Japanese squadron at Chemulpo, Korea, and the Russian gunboat *Koreetz* assumed the offensive against Admiral Uriu's squadron, which covered the landing of the Japanese forces at the neutral port of Chemulpo. On February 9 the Russian cruisers *Variag* and *Koreetz* were attacked and destroyed by Admiral Uriu's fleet in an engagement which took place off the Polynesian Islands in the vicinity of Chemulpo. On February 10 a formal declaration of war was issued by Japan.

The modern practice which regards the commission of an overt act of hostility as marking the outbreak of war between sovereign states is well stated by General Halleck, who says, writing in 1861:

> It was customary, in former times, to precede hostilities by a public declaration, communicated to the enemy. This was always done by the ancient Greeks and Romans. The latter first sent the chief of the *fecialcs*, called the *paterpatratus*, to demand satisfaction of the offending nation; and if, within the space of thirty-three days, no satisfactory answer was returned, the herald called the gods to witness the injustice, and came away, saying that the Romans would consider upon the measures to be adopted. The matter was then referred to the senate, and, when the war was resolved on, the herald was sent back to the frontier to make declaration in due form. Invasions, without such

public notice, were looked upon as unlawful, and no nation was regarded as an enemy of the Roman people until war was thus publicly declared against it. By such scrupulous delicacy, says Vattel, in the conduct of her wars, Rome laid a most solid foundation for her subsequent greatness. During the Middle Ages, and even as late as 1635, a declaration of war to the enemy, previous to beginning hostilities, was generally made, and indeed was required by the laws of honour and chivalry.

But in modern times the practice of a formal declaration to the enemy has fallen into entire disuse, the belligerents limiting themselves to a public declaration within their own territories and to their own people. The latest example of a public declaration to the enemy was that of France against Spain, at Brussels, in 1735, by heralds-at-arms, according to the forms observed during the Middle Ages. For a long time, however, writers on public law were divided in opinion with respect to the propriety of the modern practice of commencing war without any formal declaration to the enemy. Grotius, Puffendorf, Valin, Emerigon and Vattel think that such declaration should be made, while Bynkershoek, Heineccius and more recent writers maintain that, although such declaration may very properly be made, yet it cannot be required as a matter of right. There is nothing in international jurisprudence, as now practised to render such formal declaration obligatory, and the present usage entirely dispenses with it. All, however, agree that there should be some manifesto, or publication, made within the territory of the State which declares the war, announcing the existence of hostilities; and such manifesto, or publication, usually sets forth the motives for commencing the war. Some such formal act, proceeding from the competent authority, seems necessary in order to announce to the people at home, and to apprise neutral nations of, the war, for their instruction and direction in respect to their intercourse with the enemy. (I Halleck (Baker's Ed.), pp. 522–524.)

A very recent authority, Prof. J. Bassett Moore, in his International Law Digest, finds the modern rule to be that—

It is universally admitted that a formal declaration is not necessary to constitute a state of war. From this principle, however, an unnecessary and perhaps unwarranted inference is often drawn, namely, that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. Such a theory would seem to be altogether inadmissible. Although a contest by force between nations may, no matter how it may have been begun, constitute a state of war, it by no means follows that nations, in precipitating such a condition of things, are not bound by any principles of honor or good faith. If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated. In other words, to admit that a state of war exists is by no means to justify the mode by which it was brought about or begun. Nor is the practice of fraud and deceit permitted by a state of war supposed to be admissible in time of peace.

VII Moore's Dig. Int. Law, p. 171.
Walker, Pub. Int. Law, Part III, Ch. I, sec. 37.
Manning, Law of Nations (Amos's Ed.), Ch. III, p. 161.
Woolsey, Int. Law, sec. 120–121.
Wildman (Ed. 1850), Vol. II, pp. 5–8.
Dana's Wheaton, Part IV, sec. 298.

II Twiss, The Law of Nations, sec. 35, p. 65.
I Guelle, Precis des Lois de Guerre, 36.
Halleck, Int. Law, Ch. XXII, sec. 3.
III Phillimore, 85–105.
Hall, 374–382.
Lawrence, sec. 161.
II Ortolan, 11–24.
The Prize Cases, 67 U. S. (2 Black.), 635.
The *Pedro* (175 U. S., 354).
Baker *v.* Gordon (23 Ind., 204).
The *Teutonia* (4 Privy Council, 171; Snow's Cases, 250).

It is proper to say that the view above stated has been reached by the Supreme Court of the United States, and by the Privy Council of England, in cases involving the legality of hostilities without declaration. The view of the Supreme Court will be found in the Prize Cases, which were decided in 1862. The substance of the decision appears in a note to Dana's Wheaton, in which it is said:

In the Prize Causes (Black. II, 635), the construction of this clause of the constitution was fully considered. It was held that war was a certain state or condition of things, and might be brought about by the act of one party. Whenever war was to be initiated by an act of the national will, that will could be constitutionally expressed only by an Act of Congress; but, if war was instituted by a foreign power, and precipitated upon the country, "the President is not only authorized, but bound, to resist force by force. He does not initiate the war, but is bound to accept the challenge, without waiting for any especial legislative authority. And, whether the hostile party be a foreign invader or States organized in rebellion, it is none the less a war, although the declaration of it be unilateral." In conformity with this principle, it was held that the prize courts could take jurisdiction *jure belli* of captures made by the President's orders, and adjudicate upon them in accordance with the laws of war, although, at the time of the captures, war had not been either declared or recognized as existing, by any Act of Congress. The court considered that the state of things then existing, by the act of the rebels, amounted to a war, and that it authorized the President to meet the war of the rebels by the exercise of the war-powers of blocade and capture of enemy's property, without an antecedent Act of Congress.

The minority of the court held that, although the President could, in case of insurrection or invasion, by virtue of the Acts of Congress of 1795 and 1807, use the army, navy and militia, to repel the invasion or suppress the insurrection, yet such a state of things did not, in either case, amount to a war, in the legal sense, so as to authorize the use of the powers of war, without an Act of Congress either declaring or recognizing its existence. They seemed to consider that, until the passage of such an act, the course of the government must be a kind of coercion of individuals, by municipal law, on a large scale. They arrived, however, at the same practical result with the majority, because they regraded the Act of Congress of 13th July, 1861, before which few captures were made, as sufficient for the purpose, although it did not in direct terms profess to declare or recognize a war. (Dana's Wheaton, p. 710, note 246.)

A similar view will be found in the decision of the Privy Council in the case of the *Teutonia* (4 Privy Council, 171; Snow's Cases, 250).

Having regard to the great preponderance of authority in support of the view that a status of belligerency is created by an overt act of war, and that a formal declaration of war is no longer regarded as necessary, it would seem that the existing practice of the powers in that respect should not be changed, and that a proposition to require a formal declaration of war to be issued, as a condition precedent to a resort to hostilities, should not be regarded with favor.

NEUTRAL OBLIGATIONS ON LAND.

It may be said at the outset that the neutral obligations with which a state becomes charged at the outbreak of war are equally applicable on land and sea. Some of them are exclusively or chiefly applicable on the high seas or in neutral territorial waters; others are operative on land, but the standards of neutral obligation are the same in either case.

The violations of neutrality of which belligerents have had occasion to complain in the past have chiefly related to certain acts of neutral states in giving asylum to ships or fleets, and in permitting hostile expeditions to emerge from neutral ports; they have also related to certain acts of neutral subjects in the conveyance of contraband of war, or in engaging in trade with blockaded ports. In all these cases, as the acts referred to took place either on the high seas or in the territorial waters of a belligerent or neutral state, and as the corresponding exercises of neutral rights or performance of neutral duties have taken place, as a rule, on the sea rather than on the land, they are usually regarded as maritime undertakings and have been discussed by text writers as incidents of maritime warfare.

It is as unlawful, however, for neutral states to violate their neutral obligations or to permit those obligations to be violated on the land as it is on the sea, and the rules of international law apply with equal force to such violations upon whatever element, or under whatever circumstances they may be committed.

There are some instances, however, in which neutral rights are asserted or neutral duties violated habitually, if not exclusively, on land. The rule forbidding the enlistment of troops, for example, applies almost exclusively to acts committed on land, the operation of the prohibition being to forbid neutral territory to be used as a recruiting ground by either belligerent. The rules governing the granting of asylum to troops fleeing from the enemy, and the prohibition as to the setting out of expeditions in neutral territory are equally applicable to land and to maritime undertakings.

In the matter of contraband trade, the law of nations vests in a belligerent the right to search neutral vessels on the high seas, or in his territorial waters, or those of the enemy, and a similar right to search is accorded him with a view to prevent trade with blockaded

ports, and the rights of search and capture are invariably exercised at sea.

While contraband trade may be carried forward on land, as well as on the sea, and a belligerent may suffer equal or greater injury from the prosecution of contraband trade on land, the law of nations contains no specific provisions declaring land trade in contraband to be unlawful, and it confers no right upon the belligerent to prevent it. He may stop and search vessels on the high seas, but he is not permitted to exercise that right in neutral waters, much less is he permitted to exercise it in neutral territory. If the land commerce between belligerent and neutral territory is to be prohibited at all, the prohibition must be imposed by the neutral in whose territory the trade originates, or from which it passes into the territory of the belligerent. A belligerent who suffers in consequence of the existence of such trade must rely upon the neutral state to prevent it. But I have been unable to learn that it has ever been attempted to restrict or interrupt land commerce with a belligerent save in the case already mentioned, in which the belligerent territory adjoining the international boundary is in the secure possession of an occupying enemy. During the Franco-Prussian war, the rail-borne commerce between France and Italy and France and Spain, together with the commerce which was carried through the seaports on the Mediterranean littoral, was not interrupted nor was the claim advanced that it was subject to interruption. But trade between the French territory which adjoined Belgium and Switzerland, which was in German occupation, was subjected to such restrictions as the German military commanders saw fit to impose. It is conceded that maritime commerce, in articles not contraband of war, may continue to be carried on with the nonblockaded ports of the enemy. In that view of the case, it is difficult to see why land commerce should be interrupted or prohibited, in the absence of a rule of international law vesting in a belligerent jurisdiction or control of that form of commercial activity.

If the territory of the neutral state adjoins that of the belligerent, commerce between the neutral and belligerent states in time of war may be subjected to such restrictions as the belligerent may deem necessary. If the theater of war lies in the vicinity of the boundary line, the belligerent, in military occupation of the territory adjoining the boundary, may exercise such control over trade coming into the theater of war as he may deem necessary to prevent the enemy from profiting by contraband trade.

The proposition may therefore be accepted that the control that is vested in the belligerent to prevent neutrals from engaging in trade with the enemy must be exercised on the high seas and can not be exercised on land, save in territory that is in his secure military occupation.

THE REDUCTION OF ARMAMENTS.

In his letter of June 7, 1906, to the Imperial Russian ambassador, the Secretary of State makes use of the following language:

This Government is not unmindful of the fact that the people of the United States dwell in comparative security, partly by reason of their isolation and partly because they have never become involved in the numerous questions to which many centuries of close neighborhood have given rise in Europe. They are, therefore, free from the apprehensions of attack which are to so great an extent the cause of great armaments, and it would ill become them to be insistent or forward in a matter so much more vital to the nations of Europe than to them. Nevertheless, it sometimes happens that the very absence of a special interest in a subject enables a nation to make suggestions and urge considerations which a more deeply interested nation might hesitate to present. The Government of the United States, therefore, feels it to be its duty to reserve for itself the liberty to propose to the Second Peace Conference, as one of the subjects of consideration, the reduction or limitation of armaments, in the hope that, if nothing further can be accomplished, some slight advance may be made toward the realization of the lofty conception which actuated the Emperor of Russia in calling the First Conference. (Corres. Con. A Second Peace Conf., p. 30.)

To which, on November 12, 1906, the following reply was submitted in a memorandum from the Russian ambassador:

If the United States Government, in making the reservations mentioned in the note of the Secretary of State, had in view solely to reserve the right to raise at the Second Peace Conference the two questions referred to in that note, the Imperial Government have no objections whatever to offer, as they do not consider it possible to prevent the representatives of any power invited to the conference from submitting any proposal which their governments may consider expedient, and as they hold that it will depend on the conference itself to determine whether such proposal comes within the range of the established programme, and whether, therefore, it should be examined or not. (Ibid, p. 33.)

It has been the constant and steadfast policy of the United States, since the adoption of the Federal Constitution, to maintain its permanent military establishment at a minimum in point of numerical strength, but at a maximum in point of efficiency. The Regular establishment at the organization of the Government under the Constitution consisted of 700 men. At the outbreak of the civil war, three-quarters of a century later, the Army had reached a numerical strength of 10,000 men, and the Act of July 29, 1861, which authorized a small increase in the permanent establishment for the period of that war contained the requirement that—

The increase of the military establishment created or authorized by this act is declared to be for service during the existing insurrection and rebellion; and within one year after the constitutional authority of the Government of the United States shall be re-established and organized resistance to such authority shall no longer exist, the military establishment may be reduced to a number not exceeding twenty-five thousand men, unless otherwise ordered by Congress. (Sec. 6, Act of July 29, 1861, 12 Stat. L., 281.)

By the Act of July 28, 1866 (14 Stat. L., 223), the enlisted strength of the Army was increased to about 50,000 men, and continued at that strength until March 3, 1869, when the number of infantry regiments was reduced to 25 (15 Stat. L., 318.) By the Act of July 15, 1870, the strength of the establishment was reduced to 30,000 men, which was at one time to be exceeded. By the Act of June 1, 1874 (18 Stat. L., 73), the strength of the Army was still further reduced to 25,000 men, where it remained until the outbreak of the war with Spain. The Act of April 26, 1898 (30 Stat. L., 364), which authorized the raising of a volunteer force, and a considerable increase in the strength of batteries and companies in the Regular Army, contained the requirement that—

At the end of any war in which the United States may become involved the Army shall be reduced to a peace basis by the transfer in the same arm of the service or absorption by promotion or honorable discharge under such regulations as the Secretary of War may establish of supernumerary commissioned officers and the honorable discharge or transfer of supernumerary enlisted men; and nothing contained in this Act shall be construed as authorizing a permanent increase of the commissioned or enlisted force of the Regular Army beyond that now provided by the law in force prior to the passage of this Act. (Sec 7, Act of Apr. 26, 1898, 30 Stat. L., 365.)

It was also provided, as to the volunteer establishment raised for the prosecution of the war with Spain, or for any other war in which the United States might become engaged, that—

The Volunteer Army shall be maintained only during the existence of war, or while war is imminent, and shall be raised and organized, as in this Act provided, only after Congress has or shall have authorized the President to raise such a force or to call into the actual service of the United States the militia of the several States: *Provided*, That all enlistments for the Volunteer Army shall be for a term of two years, unless sooner terminated, and that all officers and men composing said army shall be discharged from the service of the United States when the purposes for which they were called into service shall have been accomplished, or on the conclusion of hostilities. (Sec. 4, Act of Apr. 22, 1898, 30 Stat. L., 361.)

A small increase in the strength of the Army, due to the existence of an armed insurrection against the authority of the United States in the Philippine Islands, was authorized by the Act of March 2, 1899, subject to the condition that the force so raised—

Shall continue in force until July first, nineteen hundred and one; and on and after that date all the general, staff, and line officers appointed to the Army under this Act shall be discharged and the numbers restored in each grade to those existing at the passage of this Act, and the enlisted force of the line of the Army shall be reduced to the number as provided for by a law prior to April first, eighteen hundred and ninety-eight, exclusive of such additions as have been, or may be, made under this Act to the artillery, and except the cadets provided for by this Act who may be appointed prior to July first, nineteen hundred and one: (Sec. 15, Act of Mar. 2, 1899, 30 Stat. L., 979.)

The permanent organization Act of February 2, 1901, contained the following limitation in respect to the strength of the Regular Army:

> The total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time one hundred thousand. (Sec. 36, Act of Feb. 2, 1901, 31 Stat. L., 757.)

It is proper to say that, in giving execution to the foregoing enactment, the maximum limit authorized in the statute was never reached, and the number fixed upon by the President to meet the existing emergency in the Philippine Islands has since been made the subject of Executive diminution, so that the regular establishment now consists of about 70,000 men.

The increase in the strength of the coast and field artillery was sanctioned by Congress at its last session, largely, if not solely, with a view to provide a reasonable force of caretakers for the preservation of the costly artillery material which has recently been installed in the seacoast defenses of the United States, and to enable a more efficient tactical organization to be applied to the very moderate force of field and mountain artillery which is maintained as a part of the permanent establishment.

To sum up this point, it may be said that the Regular Army and the organized militia, the latter being a force belonging to and habitually maintained by the States, aggregate considerably less than 200,000 men, an organization not more than adequate to the performance of the duties with which the Federal and State governments are charged in their respective constitutions, in connection with the execution of the laws, the maintenance of public order, and the suppression of insurrections against their authority.

In this view of the case, I think the conclusion must be reached that the United States, in so far as its military establishment is concerned, is not a menace to international public order, and that its standing army is not sufficient in point of strength to give occasion for uneasiness to neighboring powers or to the world at large.

The same can truthfully be said of the naval defenses of the United States. The strength and composition of its naval establishment is determined by a number of considerations having to do with the extent of its coasts, the defense of its insular possessions, and the protection of its commercial and maritime interests from unwarranted aggression. In other words, the extent and importance of the interests, with the defense of which the Government of the United States is charged, determine the size and character of its naval establishment. When its fleet has reached such a point in numbers and composition as to make it reasonably certain that its defensive needs have been fully met, its further expansion will be desisted from.

The traditions and tendencies of the Government and people of the United States are essentially pacific, its continental development has long since been reached, and it abides in peace with the neighbors whose territories are coterminous with its own. Its naval and military establishments are relatively small and are restricted to its defensive needs. The personnel of the Army and Navy are obtained by a system of volunteer enlistments and, in time of peace, it makes no demands upon its citizens for compulsory service, and it resorts to conscription only in the emergency of public war. The peaceful disposition of its inhabitants and its traditional relations of amity with the states of the civilized world would seem to warrant the belief that a suggestion looking to some mitigation of the existing burden of military expenditure might with great propriety originate with a power whose relations with the great states of the world have been those of constant and unswerving friendliness. For these reasons it is thought that such a suggestion coming from the delegation of the United States would bring the matter to the attenion of the conference in such a way as to minimize the embarrassment to which such a suggestion, by whomsoever offered, would inevitably give rise.