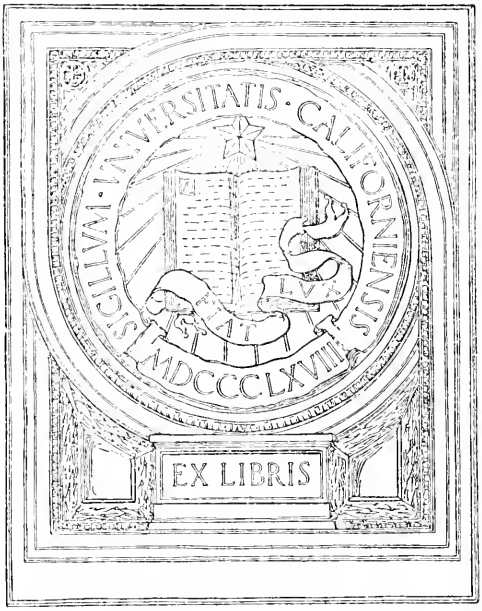

OUTLINES
OF
INTERNATIONAL LAW

BY

CHARLES H. STOCKTON

REAR-ADMIRAL U. S. N., RETIRED

PRESIDENT OF THE GEORGE WASHINGTON UNIVERSITY, DELEGATE PLENIPOTENTIARY TO THE LONDON NAVAL CONFERENCE
AUTHOR OF "THE LAWS AND USAGES OF WAR AT SEA" AND OF A MANUAL OF INTERNATIONAL LAW FOR THE USE OF NAVAL OFFICERS

CHARLES SCRIBNER'S SONS

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PREFACE

THE deplorable war which is being carried on at the time of this writing, extending, as it does, to three of the great continents of the world, has created many complex problems and delicate situations in connection with international law. It has been said by good authority that there have arisen more vexed questions in international law during the first six weeks of this war than during the entire period of the Napoleonic contests. From this fact alone arises the importance not only of increased knowledge of the tenets of this subject but also the necessity for treatises that are abreast the times. A number of books upon the subject have become out of date, especially in the body of their text, by changes that have occurred, partly as the results of the recent tribunals and conferences of The Hague and of the London Naval Conference of 1909. These results have taken the form of important conventions and declarations, amounting, in fact, to a partial codification of the laws and usages of war ashore and afloat.

In addition to the changes referred to there have occurred new situations, international in character, brought into existence by the various negotiations and treaties incident to the construction of the Suez and Panama Canals. There are also changes in aspects and conditions arising from the development of maritime and aerial warfare in recent wars. We can add, also, to this statement of recent developments in international law, the mention of the increase in the range and number of treaties providing for arbitration and other methods for the pacific settlement of international disputes. Although these

instrumentalities have not, unhappily, eliminated warfare, they have effected settlements in various international disputes of serious moment, such as the Venezuelan boundary question, the Dogger Bank episode, and the long-continued and at times irritating questions of the fisheries of the Bering Sea and North Atlantic Ocean.

In addition to the need of a new text-book for study, there are certainly other reasons for the addition, even of a multiplication, of elementary books treating upon international law in this country. The continuous and remarkable growth of the United States in area, population, travel, and trade has not only created and extended many interests and important relations with other nations of the world, but it has also caused a closer and complicated interdependence. With this great and growing international intercourse in view it seems hardly necessary to say more as to the importance of a knowledge of the law of nations in war time and in peace. Information upon these subjects is not only valuable to our representatives at home and abroad, but to all intelligent citizens, especially as the general government is becoming closer in its relations with and dependence upon its citizen voters.

In a work upon international law, which should be above all things authoritative in its nature, frequent reference to recognized authorities becomes indispensable. This is the case, as a distinguished writer says, "not only as pointing to the source of particular statements, but also as directing to the stores of further information which might otherwise escape the notice of the student who would desire to extend his research into wider fields."

For these reasons I have consulted many writers and freely quoted those whose statements and authority justify such quotations when they are pertinent to the subjects discussed. Of the writings of our own countrymen, I have drawn freely from the exhaustive digest of international law of Professor John Bassett Moore, from Dana's edition of Wheaton, and

from other works by American writers, to whom due credit has been given. Of recent English writers consulted I will mention Doctor Thomas J. Lawrence, Professor A. Pearce Higgins, and especially the works of Doctors Westlake and Oppenheim. The recent work in French by Professor Ernest Nys, of the University of Brussels, I have found both interesting and valuable.

In closing these prefatory remarks, it may be wise to call attention to the policy and position which the United States has assumed in regard to the tenets of international law. International law is a part of the law of our land as shown by the Constitution of the United States and also by the decisions of our jurists. In addition, Sir Henry Maine makes a wise and sound interpretation of our position when he says that:

"The statesmen and jurists of the United States do not regard international law as having become binding on their country through the intervention of any legislature. They do not believe it to be of the nature of immemorial usage, 'of which the memory of man runneth not to the contrary.' They look upon its rules as a main part of the conditions on which a state is originally received into the family of civilized nations. This view, though not quite explicitly set forth, does not really differ from that entertained by the founders of international law, and it is practically that submitted to and assumed to be a sufficiently solid basis for further inferences by governments and lawyers of the civilized sovereign communities of our day. If they put it in another way it would probably be that the state which disclaims the authority of international law places herself outside the circle of civilized nations."

In conclusion, I can only add the words of Daniel Webster when, as Secretary of State, he wrote to our representative to Mexico that:

"Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national

character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."

CHARLES H. STOCKTON.

WASHINGTON, D. C., October 1, 1914.

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OUTLINES OF INTERNATIONAL LAW

PART I

INTRODUCTORY

CHAPTER I

THE NATURE, SCOPE, AND OBSERVANCE OF INTERNATIONAL LAW

1. **The Nature of International Law.**—International law is that body of rules and obligations which prescribes the rights and duties of states and which governs generally the conduct of modern civilized states in their relations with each other and with individuals of other states.

These rules and obligations may justly be considered as based upon humanity and upon the moral convictions and wise experience of enlightened mankind. They are no longer confined in their operations to the Christian states of the world.

These rules and principles should also govern, in a broad and humane way, the conduct of all civilized states in their relations toward peoples who are less than civilized in their usages and behavior.

"International law," as Doctor Pearce Higgins happily observes, "is *not* a body of rules which lawyers have evolved out of their own inner consciousness: it is *not* a system carefully thought out by university professors, bookworms, or other theorists in the quiet and seclusion of their studies. It is a living body of practical rules and principles which have gradually come into being by the custom of nations and international

agreements. To the formation of these rules, statesmen, diplomatists, admirals, generals, judges, and publicists have all contributed. It is also of comparatively modern origin, for the existing state system of the world dates in effect from the end of the Middle Ages." [1]

It may be well to add that no doubt should exist as to the establishment of any rule of international law if it be invoked as authoritative. As Chief Justice Alverstone, of Great Britain, aptly said: "The mere opinions of jurists, however eminent or learned that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement or gradually have grown to be a part of international law by their frequent practical recognition in dealings between various nations." [2]

A very distinguished English legal writer, in answering the question, What is international law? says very pertinently: "International law is evolved in the practice of states under the dictates of advancing civilization. It is a living fact. Though there be, indeed, no specially appointed and recognizable international legislator, though there be no specially appointed and recognizable international court, though there be no specially appointed and recognizable international sanction, international law *is*, and moves, and has its being. International legislators are *all* legislators who deal with the questions of the relations of men as members of different states; international courts are *all* courts which take to cognizance the like problems; and international sanctions are *all* sanctions which enforce the decisions of these courts. And beyond and behind these courts is in the last resort the stern arbiter war; once the unchecked private vengeance, now the regulated self-help of nations. State lawyer, state judge, and state enforcement, these are so many unconscious international agents when they have to do with rules of conduct observed

[1] "The Binding Force of Int. Law," A. P. Higgins, p. 3.
[2] West Rand Central Gold Mining Co. *v.* King (L. R. 1905, 2 K. B. 391).

by men as members of different states, even when they declare doctrines the reverse of cosmopolitan.

"And whether it be by comity, whether it be of grace, or whether it be of fear, civilized peoples in fact do take into account the existence of systems of law other than their own."[1]

2. **The Term "International Law."**—The term international law was proposed about the year 1780 by Jeremy Bentham, an English writer, in a work upon the subject of "Morals and Legislation," as the proper expression to cover the same ground as the phrase "laws of nations" in English, the *Droit des Gens* or *Droit international* in French, and *Völkerrecht* in German. It will be used in this book in common with the expression "the law of nations" and as a synonymous term.

Both expressions, but especially that of international law, have been criticised by various English and other writers, generally upon the ground that, states being independent, a rule which is observed between states or nations is, in so far as it is international, not properly a law, while, in so far as it is properly law, it is not international, the term international law thus involving, it was said, a contradiction.

The principal critic of this term was Mr. John Austin, a learned English jurist, and the criticism was made especially in his work upon "the principles of jurisprudence and terminology." Without entering into the question of the Austinian theory of law and that of other writers upon the same subject, it can be said that the term has made its way into the language and terminology of the subject and superseded to a great extent the older term of the law of nations. In regard to the significance of the term, Walker says very truly and succinctly that "rather let us have peace and peacefulness without the blessings of neat terminology than precise language and therewith the spirit of lawlessness. It is well to have a formally faultless science of jurisprudence; it is better to have

[1] Walker's "Science of Int. Law," pp. 50, 51.

English-speaking peoples displaying ready obedience to the dictates of honor, justice, and proved utility enshrined in the rules known as the law of nations, or international law." [1]

3. International Law to Be Distinguished from Other Named Subjects.—International law, or international public law, should be distinguished from other international subjects which, though somewhat related, cover to a more or less degree different purposes. These are international private law, or the conflict of laws; international comity, or the comity of nations; international state policy, or diplomacy; and international ethics, or international morality. By defining these subjects in the following paragraphs, we will make the necessary differentiation of the subjects.

4. The Conflict of Laws, or International Private Law.—International private law, or, preferably, the conflict of laws, comprises the rules and principles used in deciding cases of private rights which arise from conflicting national systems of law. These rules and principles derive their force from the municipal law and sovereignty of the state which administers them and affects individuals only. Under these rules municipal courts decide upon the jurisdiction of the case and "by what national force it is just that it should be decided." [2] In the United States the various States of the Union are regarded as sovereign from the point of view of the conflict of laws.

In general, international private law relates to questions such as those of citizenship, minority, legitimacy, lunacy, the validity of foreign marriages, wills, and contracts, and to the limits of national jurisdiction in private cases. The prevailing principle is that the jural capacity of a person is determined by the law of his domicile.[3]

5. International Comity, or the Comity of Nations.—The comity of nations comprises those acts, usages, and rules of good-will, etiquette, and courteous treatment that are due from

[1] Walker, "History of Law of Nations," p. 19.
[2] Hall, 6th ed., p. 51.
[3] Woolsey, 6th ed., p. 105.

one nation to another and which are based upon mutual self-respect. These matters are generally observed without being concerns of rigid obligation unless made so by treaty or conventional agreement. The etiquette existing and observed between nations, although not international law, is a concomitant and almost, if not quite, as binding.

The use of formal and more or less defined courtesy between sovereign and other states causes the prevention of jealousies and disputes, while it is true, on the other hand, when the usages are once established, that to withhold such courtesies is a slight and causes friction. But, on the whole, as in a human society, it is probable that without these courtesies there would be a greater amount of existing unfriendliness.[1]

Included in this comity of nations are the courteous relations existing between men-of-war of different nations and the system of honors and salutes afloat and ashore. They are now a matter of international arrangement, though less exacting than formerly. It has been well said of them by Ortolan, a French writer, that they are of use as honors paid to the independence of nations, as a public, authorized recognition that the sovereignties of the world are entitled to mutual respect. They encourage the personnel of public vessels, from the commanding officer down to the seaman of the lowest rating, to feel that the national honor is in their hands and thus raise the sense of character of those who are its representatives abroad or upon the high seas.[2]

6. International State Policy, or Diplomacy.—Diplomacy, according to Bernard, "means, in its wider sense, the art or science, real or imaginary, of foreign politics—in its narrower acceptation it stands for the art, or imaginary art, of negotiating, or for negotiation itself considered as a business or employment." The word *diplomacy*, or its equivalent in French, is of no earlier date than the French ministry of Vergennes.

[1] Woolsey, 6th ed., pp. 118, 119.
[2] Ortolan, "Diplomatie de la mer," pp. 316, 332, 345.

It is well to quote, in treating of this subject, the following extracts from the preface of the scholarly "History of Diplomacy" by our countryman and diplomatist, Doctor D. J. Hill. He says:

"It is, perhaps, at present worth the effort to point out the fact that the fixed legal and conventional relations between modern states are as firmly grounded in public needs and fundamental principles as the constitutions of the different countries which compose the international system. It is true that force has been a determining element in the conflict of nations, as it is in the maintenance of civil order within the state; but it is not mere aimless or undirected force that has produced the present international system. On the contrary, it is due to the gradual perception of the conditions on which human governments can be permanently based. It is the result of reasoned policy and deliberately formed conventions in restraint of force—the triumph of statesmanship and diplomacy not shaped and determined by military action but controlling the movements of armies and navies whose coercive powers are put in action only by decisions reached after deliberation at the council-board." [1]

Bulmerincq in a cogent way makes a discrimination between international law and international policy when he says: "Law leaves no choice; policy keeps open various means to an end and permits a free choice in respect to these." [2]

7. **International Ethics.**—International ethics has been defined as the principles which should govern international relations from the higher point of view of morality, justice, and humanity.[3]

As a background, however, to the crystallized codes and usages of international law there should always be international ethics. Although Woolsey does not favor any distinc-

[1] Hill, "History of European Diplomacy," vol. I, Preface, p. ix.
[2] Marquardsen's "Handbuch," I, par. 3.
[3] Hershey's "Essentials of Int. Law," p. 2.

tion being drawn between international law and international ethics, nevertheless his words used in discussing the general question express to an extent the actual difference between these moral and jural spheres. He says: "The advantage of separating international law in its theoretical form from the positive existing code depends not on the possibility of constructing a perfect code according to a true theory but on the fact that right views of justice may serve as a touchstone of actual usages and regulations; for in all jural science it is most important to distinguish between the law as it is and as it should be." [1]

An elevated opinion of the connection between the two is given in a speech made by John Bright in the British House of Commons in his explanation of his resignation from the ministry after the bombardment of Alexandria in 1882. He said: "The House knows that for forty years at least I have endeavored to teach my countrymen an opinion and doctrine which I hold, namely, that the moral law is intended not only for individual life but for the life and practice of states in their dealing with one another. I think that in the present case there has been a manifest violation both of international law and of the moral law, and therefore it is impossible for me to give my support to it." [2]

8. International Law Compared with Municipal Law.—International law differs from national or municipal law, especially from that which is written law, in that it has primarily states instead of persons for its subjects, that it does not proceed from any superior lawmaking power, and that there is no sovereign authority whose function it is to enforce the law in the case of neglect or violation. Its existence is, however, accepted by all civilized states as a ruling force between them, and it is never abrogated nor suspended by them in time of peace or war.[3]

[1] Woolsey's "Int. Law," p. 3. [2] Trevelyan, "Life of Bright," p. 426.
[3] Stockton, "Manual of Int. Law for Naval Officers," p. 13.

International law, especially in Great Britain and the United States, is a matter of judicial recognition, sanction, and even interpretation. Mr. Justice Gray of the United States Supreme Court, in the case of the *Paquete Habana*, said: "International law is a part of our law and must be ascertained and admitted by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." [1]

In the convention of the second Hague conference for the establishment of an international prize-court, which convention has been ratified by the United States, it is provided that in the absence of treaty provisions this court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

9. **International Law as Part of Municipal Law.**—All civilized states that are or claim to be members of the family of nations recognize international law in one way or another as part of the law of the land. Before, however, it can become a part of municipal law the two laws or systems must have equally exalted standards. In the first place, it is expected that we find in the country concerned the necessary degree of civilization. It has been well said that it is impossible for states to take part in modern international society when they are unable to realize the ideas on which such society is based and that the area within which international law operates properly coincides with the area of civilization.

"As soon as a nation," says Woolsey, "has assumed the obligations of international law, they become a portion of the law of the land to govern the decisions of courts, the conduct of the rulers and that of the people. A nation is bound to protect this part of law by statute and penalty as much as that part which controls the jural relations or in other ways affects the actions of individuals." [2]

[1] *Paquete Habana*, "Scott's Cases," 19. [2] Woolsey, "Int. Law," p. 27.

As to England, Blackstone says: "International law is adopted in its full extent by the laws of England; and whenever any question arises which is properly subject to its jurisdiction it is held to be a part of the law of the land." This view was held continuously by the high judicial authorities of Great Britain until the exceptional opinion of Chief Justice Cockburn, delivered in the case of the ship *Franconia*, which opinion was supported by seven out of the thirteen judges sitting in the case. They declined to enforce the rule of Blackstone just recited and held that enacted municipal law was required to enforce the international law of the case which was as to criminal jurisdiction over a foreign vessel within the marginal waters of the English shore. This decision caused much unfavorable opinion and was practically nullified by the passage of an act of Parliament.

It has been supplanted also as an authority by a recent decision of Lord Chief Justice Alverstone in 1905 in which he said: "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country and that to which we have assented along with other nations in general may properly be called international law and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant." [1]

As to the United States, we may quote Chief Justice Marshall in the case of the *Nereide*, in which he declared international law to be "a part of the law of the land." Besides similar opinions, both from the Supreme Court of the United States in the cases of the *Scotia* and the *Paquete Habana* and of learned jurists, the Constitution of the United States in Section 8, Article I, invests in Congress the power "to define and punish offences against the laws of nations," and in Section 2, Article III,

[1] Case of West Rand Central Gold Mining Co. *v.* the King (L. R. 1905, 2 K. B. 391).

it is provided that "in all cases affecting ambassadors, other public ministers, and consuls . . . the Supreme Court shall have original jurisdiction."

10. **Codification of International Law.**—The various codes and collections of sea laws existing before the time of Grotius represent the first attempts of codification of a part of what has since become international law. International sea trade created laws and usages of this nature long before their necessity was recognized on shore. The high seas became common, as time advanced, to all countries which possessed shipping, and hence these codes as evolved became factors in the development of sea trade and intercourse and also as usages and customs that have been incorporated largely in our present maritime international and municipal law.

By far the most important and best preserved of these codes is "The Consolato del Mare," compiled in Barcelona, Spain, in the middle or latter part of the fourteenth century, in the dialect of the Roman tongue which was then and is to an extent still the language of the province of Catalonia, in which Barcelona is situated. This compilation is considered by the best writers upon the subject not as a legislative code but as a record of the customs and usages received as law by the various commercial communities of the Mediterranean. It was considered of great authoritative value upon certain subjects and is still of value as the exponent of many laws and traditions. It embraces rules governing not only civil contracts relating to trade and navigation in peace but expounded principles then recognized as bearing upon belligerent and neutral rights in time of war.

Earlier and other sea codes were the "Rhodian laws," dating back in part to the eighth century; "The Tabula Amalfitana," claimed to have originated in Amalfi, Italy, in the tenth century; the laws of Oléron, France, of the twelfth century; and the Leges Wisbuensis of Wisby, Gothland, for the northern seas, dated in the fourteenth century.

Modern movement toward the codification of international law is progressing by various general compilations, efforts of learned writers, and also by means of partial codifications, the results of individual efforts and those of various international conferences of recent times. Among the individual codifications are those of Lieber, Field, Levi, Fiore, Bluntschli, and others, while as a result of international conferences there are the declaration of Paris, 1856, the rules of the Geneva conventions, 1864–9, the declaration of St. Petersburg, 1868, the declaration of London, 1909, and the codes and conventions of the Brussels and Hague conferences.

It is true that most of these are fragmentary and partial and vary as to definiteness in statement, but it is wise that the progress should be in that manner awaiting the formation of a code of universal authority. The law uncodified by authority, like the common law of England, still remains in force.

11. **Observance of International Law.**—We will now deal with the matter of the observance of international law by the civilized countries of the world. In the first place, we may state that international law cannot be restricted to any political or geographical group of civilized countries. It is no longer even confined to Christian states, for the moment a nation attains and exhibits sufficient civilization, self-restraint, and independence it naturally enters into the body of states to whom, as a whole, international law applies.

The government of every country, civilized or not, is compelled to be alive to the existence of other states and to the questions arising from intercourse with them. "Even," as Lawrence says, "where a state adopts a self-sufficient theory of national life, and endeavors, as China did till quite recent times, to keep its people from all intercourse with foreigners, it does not escape from the necessity of dealing with them. It cannot act as if it were alone in the world, for the simple reason that it is not alone. The whole machinery of non-intercourse is created with a view to other states and absorbs

in its working no small care and attention of the government. If, then, external affairs have from the necessity of the case to be dealt with by states which have adopted a policy of the most rigorous isolation, it is clear that the vast majority of peoples who desire a greater or less amount of intercourse with their neighbors impose thereby upon their rulers the task of dealing to a very large extent with foreign nations."[1]

From this necessity alone a body of governing rules would arise and from this necessity would also follow their observance. The fact of occasional violations would be the rule of similar violations of civil and other laws.

Although international law does not proceed from any superior lawmaking power and there is no sovereign authority whose function it is to enforce its provisions, it is accepted by all civilized states and is not abrogated or suspended by them in time of peace or in time of war. A recognition of its obligations is, as we have previously stated, incorporated in the municipal laws of most states, and punishments for offences against its requirements is in our country vested in Congress.

As an interesting provision for its enforcement I will quote Article 66 of the declaration of London, which reads as follows: "The signatory powers undertake to insure the mutual observance of the rules contained in the present declaration in any war in which the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts and more particularly their prize-courts."

Various schemes and projects have been suggested for many centuries of a federation of the leading military and naval powers, and also of syndicates of states charged with enforcements of international law and of measures for prevention of wars, with provisions for the organization of international police or armed forces. This remedy would threaten the inde-

[1] Lawrence's "Principles," 3d ed., pp. 3, 4.

pendence and individuality of nations and as a remedy seems not only impracticable but liable to be worse in its workings than the disease which it endeavors to cure.

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2. The Propriety and Significance of the Term "International Law"—

   Holland's "Jurisprudence," 10th ed., 380, note. Wheaton's "International Law," par. 12. Hall, "International Law," 6th ed., 13–16.

3. International Public Law, International Private Law, or Conflict of Laws, the Comity of Nations, Diplomacy, International Ethics—

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4. International Law Compared with Municipal or National Law—

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6. Codification of International Law—

   Higgins's "Hague Peace Conferences," 8–17. Holland's "Studies," etc., 59–78. Oppenheim, vol. I, 2d ed., 35–44.

7. Observance of International Law—

   Higgins, "Binding Force of International Law." Hall's "International Law," 6th ed., 215. Moore's "Digest," vol. VI, par. 987. Oppenheim, vol. I, 2d ed., par. 156.

CHAPTER II

THE SOURCES OF INTERNATIONAL LAW. THE EARLY INTERCOURSE OF PEOPLES

12. The Original Motives and Causes of International Law.—International law, properly so called, as it exists in modern times, is the law regulating the intercourse of sovereign states. As a consequence, the science of modern international law did not exist in the times of antiquity and of the Middle Ages, before sovereign states were known or existed, with their independence and equality and consequent rights and duties. But in the early times mentioned there did exist intercourse between the peoples and nations as then existing, and from that intercourse grew certain rules, codes, and usages which served, in a way, the purposes of such intercourse and have since gone into the making of modern international law.

From this intercourse and from the motives and causes of this intercourse we can then find the fountainhead of international law. These motives can be said to be due to the needs and to the social and communal spirit of mankind, which existed from the beginning until the present time.

It is true that these rules and customs were sometimes religious in their nature and origin and sometimes a result of humane instincts for the mitigation of the horrors of early warfare, but most frequently they were the outgrowth of the human need for co-operation and social intercourse which had gradually extended from groups of human beings and families to communities, cities, and so-called nations. These combinations, by further extension in modern times, brought into exis-

tence the general association of civilized states known as the family of nations, with its laws and usages.

Phillimore says of this extension, that "to move and live and have its being in the great community of states is as much the normal condition of a single nation as to live in a social state is the normal condition of mankind."[1]

13. **The Sources of International Law.**—In addition to the causes just mentioned, from which originated early international usage and intercourse, there are other sources to which modern international law owes its formation and growth. The first source, then, of international law, in the opinion of the writer, is

(*a*) Customs and rules of peoples and nations in early days.

Concerning this, Professor Moore says: "Of the positive element of the new science the Roman civil law was the chief source, since it was the foundation of the jurisprudence of the countries of continental Europe, whose laws and practices were chiefly consulted."[2]

In previous paragraphs allusion has been made to the existence of rules and customs accompanying the mutual intercourse of peoples in war and peace in the earlier days. These will be referred to later, when dealing with the history of the international relations of antiquity, and though the rules of war especially were more cruel and drastic than now, still we will find certain elementary usages which are not unfamiliar to us even in the present century. The various sea codes and laws previously mentioned can be classed among the rules to which reference is made. As a second source can be named

(*b*) The treatises of the great publicists, such as Grotius, Gentilis, Bynkershoek, Vattel, and others of earlier times. The great work of Grotius, entitled "De Jure Belli ac Pacis," was published in 1625, in the early days of the Thirty Years' War, and its publication and reception marks a period in the history of civilization. Grotius has been called the father of inter-

[1] Phillimore, vol. I, par. 7.

[2] Moore's "Digest," vol. III, p. 2.

national law, and without doubt his works, with their deep and far-reaching effect, deserve to be mentioned among the primary sources of modern international law.

"With Grotius," says Woolsey, "a new era begins. His great work was practical, not scientific; it was to bring the practice of nations, especially in war, into conformity with justice. He held firmly to a system of natural justice between states without, however, very accurately defining it. To positive law, also, originated by states, he conceded an obligatory force, unless it contravened this justice of nature. In setting forth his views he adduces in rich abundance the opinions of the ancients and illustrations from Greek and Roman history. The nobleness of his mind and his claim to respect as the father of the science have given to his treatise, 'De Jure Belli ac Pacis,' an enduring influence."[1]

Another important source of international law is found in

(*c*) International treaties and agreements.

These treaties are the result of long negotiations, but more especially are derived from various international conferences officially assembled and whose product becomes universally adhered to and put in practice. It is not essential that all civilized states should be represented in such conferences or congresses, but it is necessary that they should adhere to the results either by act or in principles. The principles of such treaties as the treaty of Westphalia, the congress of Vienna, and the treaty of Paris in 1856, and some of the conventions of The Hague conferences, are examples of this nature. A fourth source is

(*d*) Treaties between states.

These may be between two or more states or between a considerable number of states, with the purpose of declaring existing laws or recommending the establishment of newly defined usages or principles. These treaties, without creating rules of international law, are early steps taken for their sanc-

[1] Woolsey, 6th ed., "Int. Law," pp. 29, 30.

tion and toward their general adoption. Among treaties of this nature can be mentioned the Treaty of Washington of 1871, with its three rules as to neutral states which have since been so much further extended in authority by their practical acceptance in the conventions of The Hague conferences. Next can be named the

(*e*) Decisions of arbitral and judicial tribunals.

Among these tribunals can be named courts of arbitration, mixed tribunals, international commissions of inquiry, and national prize-courts, especially those of last appeal. Particular decisions of this class can be found in those of the United States Supreme Court in prize cases, the decisions of Lord Stowell and other famous jurists in English prize cases, in that of the Geneva arbitration which settled the *Alabama* claims in 1872, the finding of the North Sea commission of inquiry of 1906 which settled the Dogger Bank affair, and the decisions of The Hague tribunals in such questions as those of the Newfoundland fisheries, etc.

The decisions of national prize-courts, although of value, as Dana shows, because they exhibit the judicial manner of settlement after full argument in open court, on both sides of the question, are after all unilateral and national. In speaking of these Chief Justice Marshall, in the case of the Thirty Hogsheads of Sugar *v.* Boyd, says: "The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."[1]

We come next to the sixth of the sources which consists of the

(*f*) Agreements and rules formulated by various official and unofficial international bodies of accepted standing.

These agreements and rules can remain simply as expression of what international law should be in the opinion of men learned in the law, or, if they are properly assembled, they can present protocols, declarations, or conventions which, adopted and

[1] Moore's "Digest," vol. I, p. 2.

signed by duly accredited delegates, can be made, after ratification, international agreements which by sufficient adherence may finally be accepted as international law.

These international bodies range in standing from the Geneva conference of 1868, the Brussels conference of 1874, the conventions of The Hague of 1899 and 1907, and the London naval conference of 1909 to such learned associations as the Institute of International Law.

Next come

(*g*) Unilateral acts, decrees, codes, and instructions issued by a state for the guidance of its representatives, which can be considered as among the sources of modern international law. The following are enumerated by Hershey as "famous examples": the French marine ordinance of 1681; the British admiralty manuals and the American naval war code of 1900 (withdrawn in 1904); the instructions for the government of the armies of the United States in the field, issued during our Civil War; the United States neutrality laws of 1794 and 1818; the British foreign enlistment acts of 1819 and 1870; and the various proclamations and declarations of neutrality issued at the outbreak of late important wars.[1]

(*h*) Opinions of statesmen and official legal counsel.

These are expressed and found in state papers and duly published official legal opinions, and are of importance as evidences of what, in the opinion of well-versed and responsible officials, is or should be considered as international law. Such state papers written upon controversial subjects of state policy from the pens of distinguished men are naturally of great ability and consequence.

(*i*) The writings of modern jurists and historians.

"Wheaton places among the principal sources of international law 'text-books of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by

[1] Hershey's "Essentials," pp. 22, 23.

general consent.' As to them, he forcibly observes: 'Without wishing to exaggerate the importance of these writers or to substitute in any case their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment.' They are witness of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." [1]

As to the importance of the history of international law as well as of general history in connection with its study and its development as a science, I can do no better than to quote what the elder Woolsey has said upon the subject. He says that:

"In every branch of knowledge the history of the branch is an important auxiliary to its scientific treatment. From the changes and improvements in the law of nations it is evident that the history of this science—both the history of opinion and practice—is deserving of especial attention. It is a leading chapter in the history of civilization. It furnishes valuable hints for the future. Notwithstanding its dark passages, it is calculated to animate the friends of justice and humanity. It explains the present state of the science and indicates the obstacles which have retarded its advance. . . . History tells of crimes against the law of nations, as well as of its construction and its observance, of old usages or principles given up and new ones adopted. There is no value in the mere historical facts, apart from reasons or pretexts for them, and from their bearings on the spread of justice and the sense of human brotherhood in the world." [2]

The value of the history of the development of international law and the consequent deduction of "the moral for the future

[1] Wheaton, 8th ed., par. 15, as quoted by Justice Gray in case of *Paquete Habana*.

[2] Woolsey, "Int. Law," 6th ed., pp. 31, 32.

out of the events of the past" has caused of late increased studies of the past. This has been aided by discoveries of early records and a resultant intelligent deciphering of these discoveries. The student of international law has now at his service excellent histories of international law and diplomacy in English, French, and German.

Among these general and special histories I may mention, in English, Ward's "Enquiry into the Foundation and History of the Law of Nations," published in 1795; "The Rise and Growth of the Law of Nations," by Hosack, first published in 1848; Henry Wheaton's "History of the Law of Nations from the Earliest Times to the Treaty of Washington of 1842," published both in English and French; Walker's "History of the Law of Nations," published in 1899; D. J. Hill's "History of Diplomacy in the International Development of Europe," the first volume of which was published in 1905; and Phillipson's "International Law and Custom in Ancient Greece and Rome," published in 1910.

In French there is to be found the monumental work of Laurent, in fourteen volumes, "L'Histoire des Droits des Gens," etc., the second edition of which was published from 1861 to 1868; Ortolan wrote upon the subject of the Roman law, the last edition (Culver) of which was published in 1896; the two valuable works of Nys are "Le Droit de la guerre et les précurseurs de Grotius," published in 1882, and "Les origines de Droit International," published in 1894.

In German there are to be found upon this subject the works of Müller-Jochmus of 1848, those of Cybichowski of 1907, and that of Strupp, published in 1911.

14. The Early History of the Intercourse of Nations.—It has been stated in the first portion of this chapter that the conditions of the peoples of antiquity and of the Middle Ages were such that modern international law as now established could not have existed. It was explained, however, that international intercourse did exist under certain rules and usages, and

that this intercourse was in time of peace as well as of war and, to a limited extent, was of a friendly nature. The relations and intercourse between communities and peoples were, however, largely dominated by force. War was then the habitual method of arranging disputes between communities and for obtaining desired advantages. Peace was conventional in more senses than one. It existed from special agreements and conventions. The foreigner was normally an enemy and, as a stranger, at least a subject of suspicion and avoidance, if not of open enmity and savage cruelty.

In most histories of the international relations of the peoples of the world in early times the accounts begin with the Greeks and Romans and their times, as showing the beginning of the rules of international law. But more recent investigation and archæological discoveries develop the fact that though, as intimated, war was the habitual intercourse between the larger groups of men and communities before the Greeks and Romans, it was not always the case. Sir Henry Maine says: "Man has never been so ferocious or so stupid as to submit to such an evil as war without some effort to prevent it. It is not always easy to read the tokens of his desire and endeavor to obviate war or to diminish its cruelties; it takes some time to interpret these signs; but when attention is directed to them they are quite unmistakable. The number of ancient institutions which bear the marks of a design to stand in the way of war, and to provide an alternative to it, is exceedingly great. There are numerous old forms of trial discoverable in a great number of countries and in a great number of races in which, among the ceremonial acts of the parties, you can see evidences of a mimic combat. The Roman *sacramentum* is the best and most familiar instance of this. What we call a judicial proceeding is obviously taking the place of a fight."[1]

"The history of the international relations of antiquity," says Hershey, "is by no means one of unrestrained conquest

[1] Maine, "Int. Law," pp. 11, 12.

and slaughter, as too often represented by the older historians. The ancient Egyptians, the Babylonians or Chaldeans, the East Indians, and the Chinese were in the main peaceful, agricultural, and industrial peoples, averse to bloodshed and conquest except when driven thereto by great warriors or conquerors. The Assyrians, the Hebrews, the Phœnicians and Carthaginians, and the Greeks and Romans appear, on the other hand, to have been more warlike and bloodthirsty."[1]

15. Code of Manu.—In India there existed the code or ordinances of Manu, probably compiled about 500 B. C., in which we find a humane set of instructions or recommendations for warfare that are creditable alike to the author and to the probable war practices of the times. In these ordinances it is required that " one should not, fighting in battles, slay enemies by concealed weapons nor with barbed or poisoned (weapons) nor with fire-kindled arrows. Nor should one (mounted) slay an enemy down on the ground, a suppliant one with loosened hair, one seated, one who says 'I am thy prisoner'; nor one asleep, one without armor, one naked, one without weapons, one not fighting, a looker-on, one engaged with another; nor one who has his arm broken, a distressed man, one badly hit, one afraid, one who has fled; remembering virtue (one should not slay them)."[2]

16. The Hebrews.—So far as the Hebrews were concerned, their action and the policy enjoined upon them by Moses, the Jewish lawgiver, was drastic and at times very cruel. Especially is this found to be the case in the chapters of the book of Deuteronomy toward the seven nations who were the original inhabitants of the promised land of the Hebrews.

In the initial verses of the seventh chapter of this book it reads that " When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many

[1] Hershey, "Essentials," pp. 28, 29.

[2] "Ordinances of Manu," Burnell and Hopkins, London, 1891 (quoted by Hershey, pp. 30, 31), lect. VII, nos. 90–93.

nations before thee, the Hittites, the Gergashites, and the Amorites and the Canaanites and the Perizzites, and the Hivites and Jebusites, seven nations greater and mightier than thou; and when the Lord thy God shall deliver them before thee; thou shalt smite them, and utterly destroy them; thou shalt make no covenant with them, nor shew mercy upon them; neither shalt thou make marriages with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son. For they will turn away thy son from following me, that they may serve other gods; so will the anger of the Lord be kindled against you, and destroy thee suddenly."

Although during war the Hebrews were, as has been quoted, savage in their instructions and practice, with the nations concerned, still with other peoples than the seven nations their conduct was directed to be less severe. In the twentieth chapter of the same book of Deuteronomy (tenth verse, etc.), it is enjoined that "When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then shall it be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee. And if it will make no peace with thee, but will make war with thee then thou shalt besiege it; and when the Lord thy God hath delivered it unto thine hands, thou shalt smite every male thereof with the edge of the sword; but the women and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee."

Savage as were the Hebrews in their wars, they were no worse than the surrounding nations while in times of peace they entered into friendly relations with others and protected the "strangers within their gates." Hiram of Tyre was an ally of David, and under Solomon Jewish merchant vessels visited and traded in safety with distant countries.

17. Other Intercourse of the Ancients.—The earliest treaty whose text has been transmitted to our times is said to be that between Rameses II (the Pharaoh who knew not Joseph) and the King of the Hittites, dated about 1272 B. C. In this treaty is recognized full reciprocity and equality between the two kings and provision is made for the mutual extradition of political refugees and humane treatment of immigrants.

As to foreign commerce, however, it may be said that its conduct in these times approached if it did not quite reach plunder and piracy. Besides being cruel and barbaric in their warfare, the Phœnicians were said by the Greek writers to be practised pirates, while Montesquieu, a French writer, says that "Carthage had a peculiar law of nations. She caused all strangers who traded in Sardinia and toward the pillars of Hercules to be drowned." [1]

Laurent, a Belgian writer, mentions, as a relieving feature of these times, that the Persians, ever barbarous in their warfare, had at their court a minister whose duty it was to care for and entertain foreign guests. He goes on to say that "it is a beautiful symbol of the mission which belongs to the department of foreign affairs. The diplomacy of the future, ceasing to be inspired with hate, will have no more important function than that of cultivating relations of friendship between nations." [2]

18. International Laws and Usages of the Greeks.—In times of peace the mutual relations of the Greek cities were characterized by exclusiveness. Throughout Greece the state of citizenship was a privilege that was jealously guarded against the foreigner. The Athenians were reputed to be the most hospitable of the Greeks, but even at Athens the domiciled aliens, while they enjoyed the protection of the local laws through the agency of their patron, were subjected to special taxation and were liable to compulsory service in the rank of hoplites or in the galleys.

[1] Montesquieu, "Esprit des Lois," book XXI, chap. II.
[2] Laurent, "Etudes sur l'humanité," p. 477.

Sparta, in her early days, refused on the one hand to permit strangers to reside within her limits, and on the other hand forbade her citizens to live abroad. Greek care for the stranger was at its best in the treaties agreed upon for the mutual administration of justice to the stranger.[1]

As to war practice it may be said that the herald and trophy were inviolate and that truces were fairly observed. Otherwise it was cruel and severe. No mercy was expected or given to the defenders of a city taken by assault. Prisoners were held as slaves or killed in cold blood. Captives were maimed or branded. The water-supply of a city under siege was poisoned by Solon and the inhabitants of a peaceful country town were massacred by directions of an Athenian. The rude outlines of the public laws of war observed by the Grecian states are given by Wheaton as follows:[2]

(1) The rights of sepulture were not to be denied to those slain in battle.

(2) After a victory no durable trophy was to be erected.

(3) When a city was taken, those who took refuge in the temples could not lawfully be put to death.

(4) Those guilty of sacrilege were denied the rights of sepulture.

(5) All the Greeks were allowed in time of war, as well as of peace, to consult the oracles, to resort to the public games and temples, and to sacrifice there without molestation.

These limitations of the extreme rights of war were enforced by the Amphyctional Council, which, as a religious institution, had jurisdiction over international violations of religious laws and customs.

19. International Intercourse and Laws of the Romans.—As to the Romans—in the first period of her history, when Rome was one of several petty states on the Italian peninsula, the practice of Rome in her external relations shows customs

[1] Walker, "History of the Law of Nations," pp. 40, 41.

[2] Wheaton, "History of the Law of Nations," Introd., p. 14.

and rules somewhat similar to those existing in the Greek countries. The guest tie existed in Rome as in other countries of the same era. "Not only did the Roman Senate," says Walker, "enter into treaties upon terms of equality with Tarentines and Samnites, not only were foreigners from time to time freely admitted to Latin or even to Roman civic rights, but the Roman magistrates directly provided for the enforcement at Rome of the legal rights of the alien visitor." All foreign sojourners in Rome were under a system of equity and law known as the *Jus Gentium,* which included what is now known as private international law, and also rules which are now recognized as coming within the scope of public international law.

An assault upon an ambassador or herald was punishable under the *Jus Gentium.* Envoys of Tarquin who were involved in a conspiracy, when their fellow conspirators were arrested, were themselves allowed to go free under the *Jus Gentium.* Although this law in its public meaning approaches our modern international law, yet, as Walker well says, it "was at root law universal; the foundation of the system was community of observance by men of whatsoever nationality, by men as law-abiding human beings, not by men as members of different bodies public." [1]

In regard to war the Romans had a system of rules known as the *Jus Fetiale,* which covered the declaration of war, the conclusion of peace, and the negotiation of treaties. Unlike some modern states that allow at times selfish interests to dominate, whether they are individual or national, the violation of formal conventions or treaties was considered by all right-thinking Romans as a breach of sacred obligations and a proper cause for divine resentment.

But notwithstanding this fidelity to obligations the Romans in their war operations were cruel and unscrupulous. Their operations of devastation spared neither vegetables in growth

[1] Walker, "History of the Law of Nations," vol. I, pp. 45, 46.

nor trees bearing fruit. As a result of victory over the enemy the Romans "confiscated all of his property, movable and immovable, public and private, doomed him and his posterity to perpetual slavery, and dragged his kings and generals at the chariot-wheels of the conqueror, thus depressing an enemy in his spirit and pride of mind, the only consolation he has left when his strength and power are annihilated." [1]

Walker, in discussing the law of war of the Roman, says: "The Romans of the Augustan age nevertheless ascribed to their ancestors a certain *Jus Belli*, or law of war, which at any rate set a bound to absolutely unlimited savagery. When the treacherous tutor of the sons of the leading men of Falerii led his charges into the camp of the Roman besiegers, Camillus declared, according to Livy, that whilst between the Falerians and Romans there did not exist the form of society established by human compact there did and ever would exist that implanted by nature. 'There are, he said, laws of war as well as of peace and we have learned not less justly than bravely.' And the traitor, stripped and with hands bound behind his back, was handed over to the boys to be driven back into Falerii by rods supplied by the Roman hero. It was this conduct which, according to the historian, induced the Falerians to make peace, they being conquered by justice and good faith." [2]

The international usage of the Roman Empire was generally the same as that of the republic, and the Roman was both a cruel soldier and a man of laws. *Jus Belli* and *Jus Fetiale* still existed in the frontier wars of the Romans, while *Jus Gentium* was continued both as the universal law and as "Roman equity, to be employed in the moulding by Grotius and his successors of the international law of to-day." [3]

20. **The Dark and Middle Ages.**—In the Dark Ages, between 476 A. D. and 800 A. D., but few attempts were made

[1] Wheaton, "History of the Law of Nations," p. 25.
[2] Walker, "History of the Law of Nations," vol. I, p. 49.
[3] Walker, "History of the Law of Nations," vol. I, p. 59.

to revive and introduce anything like the reign of law, order, and justice. "The Goths, Vandals, and Thuringians, like the Vikings of the north in later days, burned, pillaged, and slew without mercy. They ravaged fields, uprooted vines, cut down olive-trees and burned without distinction all buildings sacred or profane, leaving their track behind them in smouldering ruins. . . . They slew in attack alike priest and layman, man and woman, and put to death their prisoners in the most cruel fashion. . . . Even after the formal adoption of Christianity the war practice of the barbarian conquerors was more than brutal." [1]

The vestiges of civilization remained only on the eastern seaboard of the Mediterranean and in the West with the church, which at this juncture, historians declare, alone saved civilization in Europe. In the midst of wars priests like Gregory of Tours cried out continually against every form of cruelty, and happily not always in vain.

The Saracen invasion of Europe in 713 brought a new element into European civilization, but with a code of war and peace more advanced and more humane than anything existing on that continent in their times. With the coronation of Charlemagne by Pope Leo III in A. D. 800 the Dark Ages may be said to come to a close, and the name of the Roman Empire and Emperor was revived, and also much of the reality of imperial control. With it came, however, the age of feudalism, which was practically contemporaneous with the Middle Ages. Under the successors of Charlemagne it prevailed throughout the civilized world. It lasted until the fifteenth century and was both a system of land tenure and a system of government. Interfeudal intercourse was again controlled by brute force or somewhat regulated violence. Notwithstanding, however, the conflict and troubles in which the papacy was involved, the Roman Church never ceased to stand for peace in these times of feudalism and brutal force

[1] Walker, "History of the Law of Nations," vol. I, p. 65.

and in place of the existing violence offered the ideals of Christian fraternity. The unity of the Christian religion had its great influence with its common beliefs and forms of worship, while the Crusades (1096–1291) had their effect as shown in the paragraphs that follow.

" In the courts of the feudal lords," says Hill, " the judgment of God was sought by the trial of battle, where litigants, witnesses, and judges decided the case by physical combat. But in the ecclesiastical courts justice was determined by the code of canon law, which invoked the principles of reason and equity."

" If the popes inspired and organized the Crusades, thus appealing to the use of force, it was not because they loved war but because the holy places were in danger. . . . While the church was using its authority to ameliorate the abuses of private warfare in Europe it was thus elevating the power of the sword by the control of noble and refining principles in Asia. By its protection of the helpless and the innocent, which was made the ambition of the Christian knight, chivalry was at the same time ennobling the practice of arms and preparing the forces which were to overthrow feudalism as a social institution. The recognition of the rights of the humble, the association of the Crusades in a common cause, the formation of codes of honor, the emancipation of men from feudal obligations as a reward for their heroic deeds, the return to their places of origin of a new class of freemen were all to constitute a new leaven for the reorganization of society." [1]

Nevertheless, the warfare of the Crusades, especially as shown in their capture of Jerusalem by assault in 1099, exhibited at times, unfortunately, that brutality which then pervaded warfare elsewhere and which lasted in Europe until after the time of Grotius and the Thirty Years' War.

The revived study of the Roman law, the results of the Crusades as a whole, the influence of chivalry, the development

[1] Hill, "History of Diplomacy," vol. I, pp. 271, 272.

of commerce and its codes of laws, the incidental formation of leagues of cities, the Reformation, and, finally, the discovery of America all tended toward the advance of civilization, the improvement of the intercourse of peoples, and the development of the laws of nations.

Notwithstanding the continued savagery of war, or perhaps on that very account, attempts were being made from time to time for the establishment of peace by means of the "Truce of God" to restrict private warfare and by means of associations or peace leagues to establish the "Peace of God." More effective than either of these was the institution in France of the *Quarantaine le Roy,* which provided for an enforced lapse of forty days between the outbreak of a quarrel and the beginning of hostilities. Apparently the modern systems of peace societies and the proposed intervals before a declaration of war are only revivals from the ancient days and not especially the creation of modern enlightenment.

But the supplanting of feudal justice by the adoption of royal tribunals and decrees was having a wholesome effect toward peace. Writers of note began to challenge the attention of the educated by opposition to the supremacy of any world power and by condemnation of the inhumanity of existing warfare. The ideas of the territorial sovereignty of individual rulers and nations, the legal equality of states, and the question of the balance of power and the equilibrium of European forces began to be discussed and was established, in fact, by the leading municipalities of Italy. The forerunners of Grotius were having their audience and the times were almost ripe for Grotius himself.

21. The Predecessors of Grotius.—Among the predecessors of Grotius were a number of writers who discussed matters directly and indirectly that are now found comprised within modern international law. Among them were Legnano (1360); Christine of Pisa, a woman born in Venice in 1363; Machiavelli (1469–1527); Victoria, a Dominican monk (1480–

1549), whose works were published in 1557; Bodin (1530–96); Ayala (1548–84); Suarez (1548–1617); and Gentilis, born in 1552. The writers just mentioned were philosophers, theologians, and humanitarians, excepting the famous Machiavelli, an Italian statesman about whose position there has been much debate. His work, "The Prince," published after his death, treated of the policy of rulers and has been the cause of much disrepute to his name in later days. He condemned neutrality, for instance, in wars on the ground that it was more profitable to declare for one side or the other. Victoria, in 1557, disputed the claim of the papacy for world temporal power, while Francisco Suarez, as will be seen, advanced a complete philosophic theory of international law.

This writer, Suarez, gave in his work, published in 1612, an admirable statement of the conditions that rendered necessary the foundation and existence of international law among states and communities. Upon this matter he said: "The human race, however divided into various peoples and kingdoms, has always not only its unity as a species but also a certain moral and quasi-political unity, pointed out by the natural precept of mutual love and pity which extends to all, even to foreigners of any nation. Wherefore, although every perfect state, whether a republic or a kingdom, is in itself a perfect community composed of its own members, still each such state, viewed in relation to the human race, is in some measure a member of that universal unity. For those communities are never singly so self-sufficing but that they stand in need of some mutual-aid society and communion, sometimes for the improvement of their condition and their greater commodity, but sometimes also for their moral necessity and need, as appears by experience. For that reason they are in need of some law by which they may be directed and rightly ordered in that kind of communion and society. And, although this is to a great extent supplied by natural reason, yet it is not so supplied sufficiently and immediately for all purposes, and therefore it has been

possible for particular laws to be introduced by the practice of those same nations. For just as custom introduces law in a state or province, so it was possible for laws to be introduced in the whole human race by the habitual conduct of nations. And that all the more because the points which belong to this law are few and approach very nearly to natural law, and being easily deduced from it are useful and agreeable to nature, so that although this law cannot be plainly deduced as being altogether necessary in itself to laudable conduct, still it is very suitable to nature and such as all may accept for its own sake." [1]

The most famous of the predecessors of Grotius, however, was Albericus Gentilis, an Italian Protestant jurist, who left Italy some little time after his graduation at Perugia and found his way to England, and was while there appointed professor of civil law at Oxford in 1587. His first work dealt with the history of legation. In 1588 and 1589 he published in part his best-known work: "De Jure Belli." His third book, published in 1613, treated of the laws of neutrality, a subject little considered at this time while its treatment by him was not only far in advance of his time but also more advanced than any discussion made by Grotius himself upon the matter. Walker declares that "his resolutions are well-nigh, if not in every case, identical with the decisions of modern international law." [2] In its framework the principal work of Gentilis, "De Jure Belli," was followed as a model by Grotius himself.

22. Grotius, the founder of the Science of Modern International Law.—The great exponent of the principles of modern international law, and the first to arrest the attention of the whole civilized world upon the matter, was Hugo Grotius. His great work upon the subject, written in Latin, bore the title, "De Jure Belli ac Pacis," and was published in 1625.

[1] Quoted in Westlake's "Principles," etc., pp. 26, 27.
[2] Walker, "History of the Law of Nations," p. 274.

As an evidence of its far-reaching influence, it may be stated that at least forty-five Latin editions were issued prior to 1748 and that it had been translated into all of the leading modern languages by the close of the seventeenth century. It has been frequently mentioned as an historical incident that Gustavus Adolphus of Sweden carried a volume of Grotius as his constant camp companion during the Thirty Years' War, and that after the war the Elector Palatine established a chair of natural law at Heidelberg, selecting for its occupant Puffendorf, a well-known disciple of Grotius.

Hugo Grotius was born at Delft, Holland, in 1583, and, entering the University of Leyden at the age of twelve years, took his degree of doctor of laws three years afterward at Orleans, France. As a result of one of the politico-religious disputes of his country, he was involved in the fall of Oldenbarneveldt and received a sentence of perpetual imprisonment in 1619. Escaping in 1621 through the assistance of his devoted wife, he went to Paris, where he published his great work. In 1634 he was appointed Swedish minister to France. In 1645 he retired from this position, and died shortly afterward at Rostock, having suffered shipwreck on the Pomeranian coast. He is buried in the principal church of his native city.

Grotius was a profound as well as a versatile scholar, and brought to his writings not only great learning but a deep and passionate love of justice and humanity. He was excited, he states in his preface, to the preparation of his work by the uninformed and unhappy state of the public opinion current in his time on the subject of the law of nations, and by the wild lawlessness and barbarity in war practice which was the natural outcome of the popular darkness.

Walker declares that "it was the task of Grotius to show that there was a law at once of peace and war, that men were not, as members of different states, released from all control in their mutual dealings, that justice was not silent amidst the clash of arms; to prove, in brief, the existence of a definitely

ascertainable and active law of nations. In 'De Jure Belli ac Pacis' he stands forth as the prophet of justice to an age of lawlessness." [1]

The argument and principles advanced in this work are based upon the law of nature, which Grotius defines to be "the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational and social nature (of man) has in it a moral turpitude or a moral necessity, and, consequently, that such act is forbidden or commanded by God, the author of nature." From the law of nature he largely deduces the necessary authority for the law of nations, which in turn he defines as "that which regards the mutual relations of several peoples or rulers of peoples, whether it proceed from nature . . . or be understood by custom and tacit compact." [2]

Some of the principles and customs of Grotius are now obsolete. His work lacks a proper treatment of the laws of neutrality, but in the elaboration of the great primary principles of international law he goes far beyond his predecessors, while the doctrines of the independence and equality of states as developed by him are among the fundamental rights of states universally accepted at the present day. Modern international law, then, may be said to begin as a science with the work of Hugo Grotius.

It has been said that it was reserved for Grotius to combine the principles of his forerunners into a system which was so acceptable to the mind of Europe that thought was changed into action.[3] That this was the case in relation to the relations and status of states I have just said. It had also powerful effect upon the savagery and brutality of warfare.

Sir Henry Maine in one of his lectures upon international law mentions the following incident with which I will close this topic:

"At about the middle of his reign Louis XIV of France

[1] Walker, "History of the Law of Nations," pp. 284, 285.
[2] Whewell's translation of Grotius. [3] Lawrence's "Principles," p. 30.

adopted two measures by which he was thought to have carried the severity of war to the farthest point. He devastated the Palatinate, expressly directing his officers to carry fire and sword into every corner of the province, and he issued a notice to the Dutch, with whom he was at war, that, as soon as the melting of the ice opened the canals, he would grant no more quarter to his Dutch enemies. The devastation of the Palatinate has become a proverb of savageness with all historians, though fifty years earlier it might at most have been passed as a measure of severity, or might have even been defended; but the proclamation to the Dutch called forth a burst of execration from all Europe, and the threat to refuse quarter was not acted upon. The book of Grotius was making itself felt, and the successors of Grotius assure us that it was his authority which deterred the French king and the French generals from the threatened outbreak." [1]

TOPICS AND REFERENCES

1. The Original Motives and Causes of International Law—

   Grotius, Whewell's translation, pars. 7–8, 16, 18, and 22–23. Vattel, pars. 10–12. Lawrence, "International Problems," chap. III.

2. The Sources of International Law—

   Hall, 6th ed., 5–13. Maine, "International Law," lect. I. Snow, 2d ed., par. 3. Baker, "First Steps," etc., 19–23.

3. The Early Intercourse of Peoples—

   Breasted, "History of Egypt." Laurent, "Etudes sur l'histoire de l'humanité." Walker, "History of the Law of Nations," 1899, I, 20–64. "International Law and Diplomacy in Ancient China" ("The Lore of Cathay"), Martin.

4. The Code of Manu—

   "The Ordinances of Manu," translated by Burnell and Hopkins, London, 1891.

5. The Hebrews—

   The books of Deuteronomy, Exodus, Judges 1–7.

[1] Maine's "Int. Law," p. 23.

6. Other Intercourse of the Ancients—

   Montesquieu, "Esprit des lois," bk. XXI, chap. II. Laurent, "Etudes de l'humanité," 477, etc. Budge, "History of Egypt," 48, etc. Brugsch, "Egypt under the Pharaohs," 2d ed.

7. International Laws and Usages of the Greeks—

   Greenidge, "Greek Constitutional History." Phillipson, "International Law and Customs of the Greeks and Romans." Mahaffy, "Social Life of the Greeks."

8. International Laws and Intercourse of the Romans—

   Phillipson, "International Law and Customs of the Greeks and Romans." Ortolan, "History of Roman Law," Cutler's ed., 1896. Hill, "History of European Diplomacy," vol. I.

9. The Dark and Middle Ages—

   Walker, "History of the Law of Nations," vol. I. Bordwell, "Law of War." University of Pennsylvania translation. Reprints.

10. The Predecessors of Grotius—

    Westlake, "International Law," 1894, chaps. II and III. Wheaton, "History of the Law of Nations." Holland, "Studies in International Law," 1898.

11. Grotius—

    Hugo Grotius, "De Jure Belli ac Pacis," 1625, translated by Whewell, Cambridge, 1853. Westlake, "Principles of International Law," chap. III. Walker, "Science of International Law," chap. IV.

CHAPTER III

THE DEVELOPMENT OF MODERN INTERNATIONAL LAW

23. The Peace of Westphalia and the Thirty Years' War.—The peace of Westphalia in 1648 closed the Thirty Years' War, the worst of the wars of comparatively modern times. Notwithstanding the barbarity of previous wars, especially those in the Low Countries, which were in all probability those that influenced Grotius in his cry for humanity, and against the horrors that accompanied war, it must be conceded that for duration and extent, for devastation, for barbarity, for sacrifice of life, and for horrible accompaniments, there has been nothing to exceed the war of thirty years in Europe.

The close of the Dutch War in 1609, from exhaustion, was only too soon followed, in 1618, by this war, with its ferocity and famine. But notwithstanding its accompaniments, its results were of great moment.

"That war," says Walker, "was destined to do a mighty work. It was, in one view, a mere contest for territorial independence of German princes against the empire; in another, it was a revolt of the smaller states against Austro-Spanish supremacy, a war of the balance of power; in a third, it was a struggle of Catholicism and Protestantism, of the old faith against the new, a crusade of the Jesuit against the Calvinist and the Lutheran. But it had yet another and a grander aspect. It was, on giant lines, the war of liberty of thought against authority, of individualism against oppression, albeit men were content to fight for the freedom of the prince before the freedom of the people, for the religious local option of the ruler before universal toleration." [1]

[1] Walker, "Science of Int. Law," pp. 89, 90.

But at what a cost! Germany was reduced in population from sixteen millions to four millions. A state of famine was caused which drove men and women to cannibalism. "Twelve hours after the fall of Magdeburg 20,000 men, women, and children lay charred and blackened corpses amidst the ashes of the hapless city. . . . During the siege of Leipsic Tilly's soldiers exercised the wildest licentiousness and cruelty in the surrounding towns; men and women were stripped, scourged, cropped, yoked, and submitted to such freaks of unrestrained barbarity as sicken the heart by their bare recital." [1]

Besides the political results of the Thirty Years' War as formulated in the treaties of Münster and Osnaburg under the name of the peace of Westphalia, these treaties and this peace opened up the new school of jurists, the disciples of Grotius, in continental Europe. It marked also the period of the establishment of permanent legations, which tended toward pacific relations among the European states. In a larger sense it has been well said that the peace of Westphalia sang the deathknell of world empire as well as of world church, while international law as a modern science resting upon the territorial sovereignty of states commences its history with the conclusion of its treaties. The terms of this peace were constantly renewed and confirmed in all treaties of peace of the continental states of Europe until the outbreak of the French Revolution.

24. **The Successors of Grotius.**—The principal writers and jurists dealing with public international law who may be termed the successors of Grotius were Zouche (1590–1660), Puffendorf (1632–94), Thomasius (1655–1728), Cornelius Bynkershoek, who wrote his more famous books from 1702–37, and Vattel, whose career extended from 1714 to 1767.

The most celebrated writers among the immediate successors of Grotius were the two last mentioned, Bynkershoek and Vattel. The most famous and important work of Bynker-

[1] Walker, "Science of Int. Law," p. 247.

shoek was the "Questiones Juris Publici." Of this work Wheaton, no mean authority himself, says that:

"In this work Bynkershoek treats the important subject of belligerent and neutral relations with more completeness, precision, and fulness of practical illustration than any of his predecessors and, indeed, it may be said, of his successors among the public jurists. He is the first writer who has entered into a critical and systematic exposition of the law of nations on the subject of maritime commerce between neutral and belligerent nations; and the plan which he adopted was well calculated to do justice to the subject." [1]

Vattel was also one of the most distinguished writers among the successors of Grotius. He was a Swiss writer, a disciple of the profound German philosopher Wolff. Vattel treated especially upon the primary rights and duties of states and also laid stress upon the conventional and customary side of international law, which he largely illustrated from the history of his own times. His books are among the classics of international law. Other writers of a still later date, perhaps worth mentioning, were Moser, G. F. de Martens, the earliest of three writers of the same name upon international law and diplomacy, Hübner, a Dane, and Lampredi, an Italian, who wrote upon "Armed Neutrality" in 1788. It can be said, finally, that although the successors of Grotius show various tendencies in treating of international law, some reactionary, others more positive in their teachings, there will be found, on the whole, general progress and substantial agreement in their writings.

25. From the Peace of Westphalia until the Peace of Utrecht.—This period, extending from 1648 to 1713, was filled with a succession of wars arising from the ambition of Louis XIV. They were closed at times by the peace of Aix-la-Chapelle in 1668, of Nimeguen in 1678, and that of Ryswick in 1697. These treaties of peace marked, however, little more than truces; nevertheless, upon the whole, this period shows a

[1] Wheaton, "History of Law of Nations," p. 193.

progress in the development of the law of nations, notwithstanding the occasional violations in its practice.

Among the principles constantly discussed in the learned and laborious state papers of these times was that of intervention to maintain the balance of power in Europe. The principle itself was then generally acknowledged, but as a not unusual thing in state policy the question of its application became a subject for disputes. It came too close to being a question of interference by one state or group of states with the internal affairs of another state not to be one of danger to pacific relations. In one shape or another the question of the balance of power may be said to exist in Europe to the present day.

During the period under discussion the laws of maritime warfare became more generally known and followed. During the wars in the Low Countries, however, a Spanish archduke hanged twelve sick Dutch soldiers made prisoners in a stranded vessel on the plea that they were taken at sea, where there were no laws of arms to be observed.[1]

But matters had improved since then, and it can be said at this time of the period under discussion that the doctrine of the freedom of the sea had been largely conceded, notwithstanding the writings of Selden to the contrary, while fixed rules were formulated as to the right of visit and search, blockade and contraband.

Much was due in this subject to the survival of the early maritime codes already referred to. Of one of these, Wheaton says: "The testimony of Grotius and other public jurists of the seventeenth and the earlier part of the eighteenth century shows that the rules relating to maritime warfare adopted by the *consolato del mare* as early as the latter part of the fourteenth century were still recognized in practice by the principal European states, with certain exceptions contained in the ordinances of France and Spain, during the different mar-

[1] "Grotius," p. 398.

itime wars which took place between the peace of the Pyrenees in 1659 and the peace of Utrecht, 1713. These rules, then, may be considered as forming the general maritime law of Christendom, independent of these exceptions and of others introduced between particular nations by special treaties forming the conventional law between the contracting parties." [1]

26. From the Peace of Utrecht to the French Revolution.—This period, extending from 1713 to 1789, was marked by the rise of Prussia to a power of the first class, the war of independence on the part of British American colonies and the subsequent recognition of their independence by all nations, the entry of Russia into the family of nations, the first partition of Poland, and the beginning of the French Revolutionary and Napoleonic era.

The peace of Utrecht, among other matters, sanctioned once more "the legitimacy of the English Revolution of 1688 and guaranteed the Protestant succession to the British crown in the House of Hanover, as it had been settled by Act of Parliament. The cause of the Stuarts was thus finally abandoned by France and with it the principle of hereditary, indefeasible right on which it was grounded. The treaties of Utrecht were constantly renewed and confirmed from this time forth in every successive treaty of peace between the great continental and maritime powers until the peace of Lunéville, in 1800, and that of Amiens, in 1803, when they were, for the first time, omitted." [2]

The two maritime wars that were terminated by the treaties of Aix-la-Chapelle, 1748, and of Paris, 1763, caused many maritime questions to arise. Each belligerent adhered to its own views of the laws of nations in its conduct toward neutrals. France, by the ordinance of October 21, 1744, exempted from capture neutral vessels with enemy's goods, confiscating the goods of the enemy and restoring the vessel with the rest of

[1] Wheaton, "History of the Law of Nations," pp. 106, etc.
[2] Wheaton, "History of the Law of Nations," p. 87.

the cargo, contraband excepted. But two remarkable restrictions upon foreign commerce were revived to the effect that—

1. All goods the growth, produce, or manufacture of the enemy's country were made liable to capture and confiscation except in neutral vessels navigating directly from the enemy's port where the goods were laden to a port of their own country.

2. Neutral vessels were prohibited from carrying a cargo from one port to another of the enemy, whatever might be the origin of the goods or to whomever they might belong.

From these rules Denmark, Spain, and Sweden were exempt.

The English practice, as given by their commissioners in 1754, was "that the law of nations has established that the goods of an enemy on board the ship of a friend may be taken." "That the lawful goods of a friend on board of the ship of an enemy ought to be restored." [1]

Another rule laid down by England at this period was known as the Rule of the War of 1756, which forbade, in war time, neutrals to engage in the coasting trade of a belligerent, or in any other trade which was not permitted to them in time of peace. The desirability of this rule, whose correctness was supported by many English and some American jurists, will be discussed later.

In 1780 Russia proclaimed the maritime principles of the armed neutrality, which were:

(1) That all neutral vessels may freely navigate from port to port and on the coasts of nations at war.

(2) That goods belonging to the subjects of powers at war shall be free in neutral vessels except contraband of war.

(3) That contraband articles shall be restricted to munitions of war.

(4) That the denomination of a blockaded port is to be given only to one which has the enemy vessels stationed sufficiently near to cause an evident danger to the attempt to enter." [2]

[1] Wheaton, "History of the Law of Nations," pp. 210, etc.
[2] Wheaton, "History of the Law of Nations," pp. 297, 298.

These principles were approved by France, Austria, and the United States and were incorporated into the conventions of the league of armed neutrality of 1780.

27. From the Outbreak of the French Revolution to the Congress of Vienna.—The outbreak of the French Revolution followed closely the end of the American Revolution and the consequent attainment of the independence of the United States, toward which the French nation so largely contributed. The French Revolutionary government in rapid succession adopted declarations and laws against wars of conquest and intervention and enunciating the principles of the Golden Rule and others tending toward the highest ideals. These, however, in due time were set aside both in practice and principle.

Entering into an era of conquest, the Revolution was followed by the régime of Napoleon (1804–14) and the wars connected with his name and rule. To meet those wars of aggression and conquest, various European coalitions were formed, headed by Great Britain, which eventually ended in his downfall and the reduction, practically, of France to her original boundaries, while advantageously reducing the number of the German states by various combinations.

With respect to the effect of the French Revolutionary and Napoleonic wars upon international law, Wheaton says: "This long-protracted and violent struggle was too often marked in its course by the most flagrant violations of the positive laws of nations, almost always accompanied, however, by a formal recognition of its general maxims, the violations being excused or palliated on the ground of overruling necessity or the example of others justifying a resort to retaliation. This mighty convulsion, on which all the moral elements of European society seemed to be mingled in confusion, at last subsided, leaving behind it fewer traces of its destructive progress than might have been expected, so far as regards a general respect for the rules of justice acknowledged by civilized communities in their mutual intercourse." [1]

[1] Wheaton, "History of the Law of Nations," p. 422.

It is only necessary here to outline the systems and decrees of both contending belligerents. In 1793 England and Russia forbade all navigation with the ports of France, while in answer the French conventions of the republic directed the French fleet to capture all neutral merchant vessels carrying provisions or goods to the ports of the enemy. Napoleon continued this policy, declaring Great Britain to be in a state of blockade, and decreed that all vessels sailing to and from any British port should be confiscated. The action on both sides was repeated and incorporated in the various decrees known as the Berlin and Milan decrees of 1806 and 1807 and the various British orders in council.

The suffering neutral powers protested. The United States led in this protest and opposition in 1793, when Washington was President, and became the advocate of neutral rights with lasting effect upon the policy of nations in war time. The Baltic powers, headed by Russia, revived the armed neutrality of 1780 in the second league of armed neutrality of 1800, adding an article in regard to convoy, which continued a matter of dispute more or less latent until settled by Articles 61 and 62 of the declaration of London, in 1909. Most of the questions resulting from the Revolutionary and Napoleonic wars came up for settlement in the general congress of European powers, which met at Vienna in 1815, and which completed the arrangements for the pacification of Europe and the restoration of the Continent to its former status as far as it was then practicable.

28. From the Congress of Vienna to the Declaration of Paris.—The congress of Vienna had been preceded by the treaties of peace signed at Paris in 1814 and the convention of London of 1814 established between Great Britain and Holland. These treaties were, to a great extent, ratified by the congress of Vienna.

This congress marked an epoch in the political history of Europe and, to a much less extent, an era in the history of in-

ternational law. In political history it provided for the union of Norway and Sweden and Belgium and Holland; it neutralized Switzerland, rearranged Germany into a loose confederation of thirty-nine states, and ratified the restoration of the old dynasties provided for by the treaty of Paris, with the exception of Sweden and Norway.

So far as international law was concerned, the congress of Vienna established the grades and precedence of ambassadors, ministers, and other envoys; agreed upon the freedom of certain great international rivers like the Rhine and the Scheldt; established general principles for other coriparian states, which was extended in 1856 to the Danube; and placed itself on record against the continuance of the African slave trade.

After the congress of Vienna, Austria, Prussia, and Russia formed what became known as the Holy Alliance, the terms of the accompanying declaration and articles being of the most elevated character, announcing for its guidance the precepts of justice, Christian charity, and peace. France and England joined in this alliance, or rather in the concert of Europe which arose from it in 1818, issuing a declaration that the fundamental basis of the union was their intention never to depart from the "strictest observation of the principles of the rights of nations; principles which in their application to a state of permanent peace can alone effectually guarantee the independence of each government and the stability of the general association."

This declaration of the five cabinets was soon put to a test. A revolution broke out in Spain against the reactionary rule of Ferdinand VII; Portugal, Naples, and Piedmont soon followed. As a result the powers of the Holy Alliance assembled at Troppau December 8, 1820, announcing their determination to quell these dangerous revolutions. England refused to join in the movement, but later France led successfully an invasion in Spain against the new government, and by this action the revolutionary movements were soon put down. The protocol of Troppau of 1820 was not, however, signed by France or

England. The latter withdrew from the alliance and declined to join the congress of Verona which preceded and authorized the armed interference of France in Spain.

The Spanish colonies in America were, in the meantime, also in revolution, and it was feared that an extension of the actions of the Holy Alliance would be made to America. But Great Britain and the United States protested against the right of the allied powers to interfere by forcible means in the contest between Spain and her colonies in America. The British Government declared to France "that it would consider any foreign interference by force or menace in the dispute between them as a motive for recognizing the latter without delay." [1]

29. **The Enunciation of the Monroe Doctrine.**—On the part of the United States, President Monroe, in his annual message to Congress of December 2, 1823, declared as follows:

"The American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by European powers. . . . We should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them or controlling, in any other manner, their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. . . ." [2]

This is the statement formally asserting what is now known as the Monroe Doctrine. Whatever may be said as to its extent in growth since its enunciation by Monroe, its present neces-

[1] Wheaton, "History of the Law of Nations," p. 520.
[2] Richardson, "Messages and Papers of the Presidents," p. 218.

sity, or the advisability of its geographical restriction, it must be said that its assertion by President Monroe as a policy was both timely and effective. The recognition of the Latin-American states by the United States had taken place the previous year and was followed by Great Britain in 1825.

It can be seen that the Monroe Doctrine, accepted and approved by Great Britain as a proper policy in its original wording, is not and never has been international law. It is also neither municipal nor constitutional law, but is a declaration of the national policy of the United States which has been adhered to and followed in the main with respect to European powers. It has varied greatly in its definition and interpretation in the relations of the United States with the other powers of the continent who are generally known as the Latin-American states.

30. **The Declaration of Paris.**—The Crimean War between Russia on one side and France, England, Sardinia, and Turkey upon the other was unfortunate in so far as it gave a new lease of life to Turkey in Europe, but it also gave a step toward the unification of Italy. The congress of Paris, in establishing peace at the conclusion of hostilities, gave to the world the declaration of Paris, which in its enunciation of important principles in maritime warfare settled disputes of many years' standing.

At the outbreak of the Crimean War, both England and France, on March 28 and 29, 1854, declared upon the subject of maritime capture that they would "waive the right of seizing enemy's property on board a neutral vessel unless it be contraband of war; nor was it their intention to claim the confiscation of neutral property not being contraband of war" in enemy's ships. Furthermore they declared it was not their present intention to commission privateers. Otherwise they announced their intention to seize contraband, to prevent neutrals from bearing enemy's despatches, and to declare and maintain blockade. As, at this time, England claimed the

right of seizing the goods of an enemy in neutral merchantmen and France claimed the power to seize neutral goods on enemy's vessels, as allies engaged in a common war they would have caused neutrals to suffer badly had it not been for their mutual agreement and declarations.[1]

The principles involved in these declarations naturally came up as subjects for discussion in the congress of Paris in 1856, which established peace, and the result was the famous declaration of Paris, signed March 30, 1856. This declaration announced the following principles:

(1) Privateering is and remains abolished.

(2) The neutral flag covers enemy's goods with the exception of contraband of war.

(3) Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.

(4) Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy.[2]

The United States of America is the only maritime power that has not formally adhered to this declaration in its entirety. Secretary Marcy declined to accept this declaration on the part of the United States unless it was amended so as to include a provision by which the private property of the citizens or subjects of a belligerent power shall be exempt from seizure by public armed vessels of the enemy except it be contraband of war. The United States announced, however, during the Civil War and during the war with Spain, in 1898, that it would adhere in its conduct to the principles of the declaration. This declaration has been made more effective by the enumeration of contraband of war and the common agreement as to the conditions of blockade by the declaration of London, to which the United States is a party. The conditions as to the value of privateering at the present day and as

[1] Manning's "Commentaries," new ed., p. 249.

[2] Higgins, "The Hague Peace Conferences," etc., pp. 3, 4.

to our own naval strength have changed very much from the past, and the holding out against a formal adherence on our part is now of little consequence in view of our action in our last two wars. President Woolsey, in discussing this subject, wisely says, in conclusion, that "the true policy of the United States is to come under the operation of the four articles as soon as possible." [1]

31. From the Declaration of Paris to the Treaty of Washington, 1871.—The wars succeeding the Crimean War in Europe up to and including the Franco-German War developed no great matters or changes in international law. The Schleswig-Holstein War with its aftermath of the war between Austria and the North German Confederation gave to the coming empire of Germany the important naval port of Kiel. The unification of Italy and the consequent establishment of a new maritime power resulted from the latter and other wars and deprived the Vatican of temporal power. The Franco-German War, depriving France of her Rhine provinces, created imperial Germany, a strong and aggressive member of the family of nations, with naval ambitions and increasing sea power.

In America, however, from the Civil War of 1861–5 arose several questions in international law, especially with respect to the rights and duties of neutrals ashore and afloat.

Among these questions, which will only be mentioned now and discussed later, was that of the early recognition of the status of belligerency of the Confederate States, the official issue of Doctor Lieber's codification of the laws of land warfare as instructions to the armies of the United States in the field, the *Deerhound* rescue of Captain Semmes of the *Alabama*, the questions of continuous voyages with respect to the blockade and contraband of war, the affair of the *Trent*, the seizure of the *Florida* and the *Chesapeake* in neutral ports, and the serious controversies involved in the construction and equipment of the *Alabama* and other vessels of war for the Confederates,

[1] Woolsey's "Int. Law," 6th ed., p. 314, note.

which finally resulted in the treaty of Washington of 1871, its rules of neutrality, and the subsequent arbitration and award at Geneva.

In 1864 the first convention for the amelioration of the condition of soldiers wounded in armies in the field was formulated at Geneva; an additional conference for the same purpose met again in Geneva in 1868, and finally, in 1906, a new convention was framed in the same place and has been generally ratified.

32. From the Treaty of Washington of 1871 to the First Hague Conference.—The rules of the treaty of Washington of 1871 which were adopted by the signatory powers, the United States and Great Britain, and upon which was based the Geneva arbitration, read as follows:

A neutral government is bound—

First. "To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction to warlike use."

Secondly. "Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men."

Thirdly. "To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

Besides the question known as the *Alabama* claims, which was to be decided by the arbitration tribunal which met at Geneva, there were other unsettled questions between the two countries which were included in the treaty to be settled, some by a tribunal which met at Halifax, and another one, a question

of boundaries in the northwest, that was settled by the arbitration and decision of the Emperor of Germany.

The United States made, before the tribunal of Geneva, claims for losses indirectly incurred by the depredations of the *Alabama* and other Confederate cruisers, one of which was for the expenses involved in the prolongation of the war. Without action upon the questions of the so-called indirect damages, the tribunal held that "these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations and should, upon such principles, be wholly excluded from the consideration of the tribunal, in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon."

On the 14th of September, 1872, the award was made by the tribunal of Geneva of $15,500,000 in gold for the actual losses of vessels and goods sustained from the three Confederate vessels.

The practical adoption of the rules of this treaty, as given above, at a later date by the second Hague conference will be discussed under the proper heading.

Various international conferences, like that of London in 1871 on the Black Sea question, the Brussels conference of 1874, the West African conference on the Congo question in in 1884–5, and the international military commissions of St. Petersburg, have been convened and have formulated regulations, some of which have been incorporated into later conventions of The Hague. Many other conferences have been convened and dealt with a great variety of subjects, adopting administrative regulations covering matters of safety in navigation, postal communication, and, in general, of a social, economic, and sanitary nature.

The short Spanish-American War and that between China and Japan involved minor disputed questions of international

law which will be dealt with later, under the proper headings. But after the Spanish-American War of 1898, on the 11th of January, 1899, the Russian foreign minister took action which is destined to be far-reaching in its effect.

He proposed in the name of the Czar, as supplementary to a previous invitation, the meeting of a conference of all governments accredited to the court of St. Petersburg for the purpose of considering various subjects connected with the limitation of armaments, the mitigation of the evils of war, and the maintenance of peace. The Dutch Government having assented to the assemblage of the conference at The Hague, invitations were addressed by it to the states designated by Russia, and the first Hague conference was called into being.

33. **The First Hague Conference.**—The conference met on the 2d of May, 1899, under the presidency of M. de Staal, the first Russian plenipotentiary, and was attended by representatives of twenty-six powers. Difficulties had been raised as to the status of several powers invited. Italy declined to attend if the papal representative was admitted; Great Britain, as suzerain, objected to the representative of the Transvaal. The representative of Bulgaria was admitted as in subordination to Turkey. The powers represented did not include any of the American republics with the exception of the United States and Mexico, and the results of this conference fell far short of what was expected from its initiation and from the terms of the circular of the Russian court. The limitation of armaments and of war budgets was recognized in a resolution in which such restriction was affirmed as being extremely desirable. Anything beyond that was found to present so many difficulties from a practical point of view that it was abandoned. But something was accomplished: first and best of all, a convention arranging for the pacific settlement of international disputes was adopted; second, one for regulating and further humanizing the laws and customs of war on land; and third, one for the adaptation to maritime warfare of the principles of the

Geneva convention of 1864. Three declarations were adopted prohibiting the use of various projectiles and explosives that caused unnecessary suffering, and also a number of wishes (*vœux*) were drawn up that were to bear fruit, it was hoped, at some future day.

Soon after the conclusion of the conference a war broke out between the South African republics and Great Britain, and that was succeeded by the war between Russia and Japan. The improved code for land warfare was put in operation, and combatants were at last working upon a common basis.

Under the convention for the pacific settlement of international disputes, the Dogger Bank affair between Great Britain and Russia was settled, the machinery for the conclusion of the Russo-Japanese War was put into operation, and a court of arbitration established which tried several important cases.

34. The Second Hague Conference.—This conference was proposed by President Roosevelt through the secretary of state, Mr. John Hay, in 1904, Russia being at that time at war with Japan. The Czar, however, made known his wish to call the second conference at The Hague, and President Roosevelt at once yielded the precedence to the Czar, who issued the first call in 1906, and this time included all other countries in South America that were ready to adhere to the conventions of the previous Hague conference. After unavoidable delay the second convention of The Hague met on the 15th of June, 1907, with representatives from forty-five states. As a result there were thirteen conventions and one declaration adopted, and three wishes (*vœux*), and a number of recommendations entered upon the records. The conventions were:

1. A revised convention for the pacific settlement of international disputes.

2. A convention respecting the employment of force for the recovery of contract debts.

3. A convention relative to the opening of hostilities.

4. A revised convention regarding the laws and customs of land warfare.

5. A convention relating to the rights and duties of neutral powers and persons in case of war on land.

6. A convention regarding the status of enemy merchant ships at the outbreak of hostilities.

7. A convention in regard to the conversion of merchant ships into war-ships.

8. A convention as to the laying of submarine mines.

9. A convention regarding the bombardments by naval forces in time of war.

10. A convention for the adaptation to maritime war of the principles of the Geneva convention.

11. A convention relative to certain restrictions with regard to the exercise of the right of capture in naval war.

12. A convention relative to the creation of an international prize-court.

13. A convention concerning the rights and duties of neutral powers in naval war.

Besides these conventions there was a renewal of the declaration prohibiting the discharge of projectiles and explosives from balloons. In addition, the principle of compulsory arbitration was admitted, and the resolution of the first Hague conference in regard to the limitation of military expenditures was confirmed. The wishes adopted were in favor of the advisability of formulating a convention for a judicial arbitral court, and also one to safeguard the pacific relations, more especially those of a commercial and industrial nature between inhabitants of the belligerent states and neutral countries. The conference also expressed the wish that the powers should regulate by special treaties the position, as regards military charges, of foreigners within their territories, also that the preparation and codifications of regulations relative to the laws and customs of naval warfare, or in any case

applying as far as possible the principles of the laws and customs of war on land to such warfare, should be taken up by the next Hague conference, and also that the meeting of this conference should take place at a date fixed by common agreement.

So far as the revision of the convention for the pacific settlement of international disputes is concerned in the first eight articles, the only changes were to substitute the word "contracting" for "signatory" powers, and in Article 3 to add the words "and desirable" so that it now reads: "Independently of this recourse (to war) the contracting powers deem it expedient *and desirable* that one or more powers strangers to the dispute should on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the states at variance," etc.

The subject of international commissions of inquiry was dealt with in six articles in the convention of 1899, but that of 1907 contains twenty-eight articles upon the subject. This institution had proved its value in the North Sea commission of 1905. The only other important change was made in the addition to present Article 48—formerly Article 27—which provides that in case of dispute between two powers one of them may always address to the international bureau a note containing a declaration that it would be ready to submit the disputes to arbitration.

"The bureau must at once inform the other power of the declaration."

This convention was adopted by the United States and confirmed by the Senate on April 2, 1908, with the following declaration: "Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state, nor shall anything contained in the said convention be construed to

imply a relinquishment by the United States of its traditional attitude toward purely American questions.

"Resolved, further, as a part of this act of ratification, that the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in Article 53 of said convention to exclude the formulation of the 'compromis' by the permanent court and hereby excludes from the competence of the permanent court the power to frame the 'compromis' required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States and further expressly declares that the 'compromis' required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise." [1]

The second Hague conference adjourned on the 18th of October, 1907, after a session of some months. Its results, where not discussed under the present heading, will be discussed later, when the subjects treated by the conference come up for separate treatment.

Of the conference as a whole there must be expressed the general feeling of disappointment accompanying the close of all conferences assembled under the name of peace conferences.

Higgins, in his comment on this conference, says:

"Some of these causes of want of greater success are capable of remedy by a future conference, but the more fundamental and permanent cause was political. Each delegation had the primary duty to discharge of defending its state's national interests; the conference was not composed merely of lawyers intent on framing a scientific code of international law; it

[1] See Scott's "Hague," etc.

was a battle-field of diplomatists. In questions where political considerations were supreme compromise was often impossible.

. . . . . .

"Notwithstanding all these circumstances, the conference was not a failure; it was disappointing, but it is not discouraging. War will not be banished from the world by peace conferences; nevertheless such gatherings, by removing doubts in international rules and bringing into greater prominence the solidarity of the interests of mankind, may do much to encourage arbitration and to remove the causes of war." [1]

35. **The Declaration of London.**—The international prize-court formulated at the second Hague convention, and which has been duly ratified by the United States, contains in the second part of Article 7 the following words:

"In the absence of such (treaty) provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity."

As a strong feeling existed on the part of Great Britain and other maritime powers as to what rules of maritime international law might be considered to exist at the present day, it was considered wise by Great Britain to call a conference to determine what laws should govern the international prize-court in the cases to be brought before it for trial. Accordingly, on the invitation of the British Government, delegates from Germany, the United States, France, Great Britain, Italy, Austria, Russia, Japan, Holland, and Spain met in London from December, 1908, to February, 1909, and formulated a convention popularly known as the declaration of London, settling many important matters in the relations of belligerents and neutrals in matters connected with prize laws that were liable to be within the jurisdiction of an international prize-court and about which there had existed great differences.

[1] Higgins, "Hague Conferences," pp. 525, 526.

This declaration is known officially as the "declaration concerning the laws of naval war," while the conference is known as the London naval conference of 1909. The preliminary provision of the declaration states that the signatory powers are agreed that the rules contained in the chapters that followed correspond in substance with the generally recognized principles of international law. The subjects treated were those of blockade in time of war, contraband of war, unneutral service, destruction of neutral prizes, transfer to a neutral flag, enemy character, convoy, resistance to search and compensation, finishing with a wish (*vœu*) with regard to the international prize-court, which was adopted at the request of the United States in order to avoid what seemed to be a constitutional difficulty with respect to appeals to the prize-court from our Supreme Court. According to this wish, the delegates were to point out to their governments the advantage there will be in arriving at an agreement of a kind to dispel the difficulties of a constitutional nature which face some of them. It is a proposition for attaining the same end under another form; instead of annulling a decision appealed from, the prize-court will award compensation. The result, however, remains the same; the individual affected will be able to obtain a new trial which will in the end do him justice. The method alone is different.

The declaration of London has been approved by the President of the United States and was ratified by the Senate April 24, 1912. Whether formally ratified or not by the signatory and other powers, it has the authoritative weight due to the unanimous vote of the representatives of the great maritime powers and to their declaration that it represents the actual principles of international law upon the subjects dealt with. It is highly satisfactory to know that so many questions of the conflicting schools of continental Europe and of England and America have been finally and formally agreed upon. The criticisms in regard to the conference and the declaration of

London have been more as to its omissions rather than as to its agreements and results.

36. Events since 1909 Bearing upon International Law.— Events occurring since the London naval conference that have a direct and indirect bearing upon international law may be mentioned in closing this chapter upon the development of modern international law. They will be referred to more fully later under their various headings. The first, chronologically speaking, was the arbitration at The Hague between the United States and Great Britain as to the disputes arising from the interpretation of the treaty of 1818 on the subject of fishery rights on the coasts of Newfoundland, Labrador, etc. (this took place in 1910 and involved a definition of territorial waters); the questions of intervention and mediation in certain Latin-American states; matters involved in the formation of the state of Panama and the use of the Panama Canal; the fate of the arbitration treaties of the United States; the progress of the codification of maritime international law, including the action of the Institute of International Law at Oxford in 1913; the Turkish-Italian and Balkan Wars of 1913 and the questions incident thereto, and especially the deliberations and actions of the great European powers. To this may be added the many questions involved in the great European war in progress in 1914.

TOPICS AND REFERENCES

1. The Thirty Years' War and the Peace of Westphalia—

   Walker, "Science of International Law," 72, 89, etc., 247. Wheaton's "History of the Law of Nations," 69. Bernard, "Lectures on Diplomacy," II, chap. VII.

2. The Successors of Grotius—

   A. D. White, "Seven Great Statesmen," 113, 161. Wheaton, "History of Law of Nations," 193, 200, 219–229, 309–322. Hershey, "Essentials," 59–63.

3. From the Peace of Westphalia until the Peace of Utrecht—

   Wheaton, "History of Law of Nations," 78, etc. Walker, "Science of International Law," 74. Oppenheim, 2d ed., 61, 62, 63.

4. From the Peace of Utrecht to the Outbreak of the French Revolution—

   Wheaton, "History of the Law of Nations," 87, 106, 210. Hosack, "Rise and Growth of Law of Nations" (1882), chaps. VIII–X. Oppenheim, 2d ed., 64–65. Halleck, Baker's 4th ed., 21, 22.

5. From the French Revolution to the Congress of Vienna—

   Henry Adams, "History of the United States," vol. IV, chap. IV. Wheaton, "History of Law of Nations," 372. Mahan's "Influence of Sea Power upon French Revolution," vol. II, chap. XVII. Manning, "Law of Nations," bk. V, chap. X.

6. From the Congress of Vienna to the Declaration of Paris—

   Fyffe, "History of Modern Europe," chap. I. Phillips, "Modern Europe," 4th ed. Hazen, "Europe since 1815."

7. Monroe Doctrine—

   Coolidge, "The U. S. as a World Power," chap. V. Moore's "Digest," chap. XX. Chadwick, "The Diplomatic Relations of the United States with Spain," chap. X.

8. The Declaration of Paris—

   Higgins, "The Hague Peace Conferences, 1909," 1–4. Woolsey, 314. Oppenheim, 119.

9. Questions of International Law Arising During Our Civil War—

   The *Deerhound* affair. The blockade. Continuous voyage. The *Alabama* claims. The treaty of Washington of 1871. "Letters of Historicus—Blockade," 89–118. Woolsey, §§ 202–6. Westlake, chap. IX. Moore's "Digest," vol. II, 979; vol. V, 723; vol. VI, 999; vol. VII, 697, also Moore's "Arbitrations," vol. I, chaps. XIV, XV, and XVI. Walker, "Science of International Law," 458, 502. Bernard (English), "Neutrality of Great Britain During American Civil War." Cushing, "Treaty of Washington."

10. The Hague Conferences—

    "Naval War College, 1908," 117, etc. Scott's "Hague Conferences." Higgins, "Hague Conferences."

11. Declaration of London—

    Bentwich, "The Declaration of London." Higgins, "Hague Conferences." "Naval War College, 1910." See appendix of this book, no. IV.

PART II

STATES IN INTERNATIONAL LAW

CHAPTER IV

STATES: THE PRIMARY SUBJECTS OF INTERNATIONAL LAW; THEIR CHARACTERISTICS AND CLASSIFICATION

37. Sovereign States the Subjects of International Law.—Sovereign states, or states fully independent and members of the family of nations, are primarily the subjects of international law. In the sense used here and ordinarily in this treatise, the term a sovereign state is synonymous with that of a nation. Nations that are less than civilized, part-sovereign states, communities, corporations, and individuals, though not regarded as principal persons or subjects, are, however, affected by the rules of international law and, according to circumstances, more or less governed by them.

38. Definition of a Sovereign State.—A sovereign state may be defined in general terms to be a fully independent and civilized community of persons, permanently located within a fixed country, organized under common laws into a body politic for mutual advantage, exercising the rights of government over all persons and things within its territory, and capable of entering into relations and intercourse with the other states of the world.[1]

39. Characteristics and Conditions of Sovereign States.—A sovereign state, to be in full standing as such, must have the following characteristics and conditions:

[1] Moore's "Digest," vol. I, p. 12.

First. There must be a normal political community of persons with common laws, customs, and habits.

Second. There must be a fixed territory within which these persons permanently live.

Third. There must be a supreme government normally controlling all persons and things within its boundaries and capable of entering into and maintaining full relations with other states, with the power of making offensive and defensive war and also peace.

Fourth. The state must be fully independent of all other states but governing its intercourse with them according to the tenets of international law.

Fifth. The state must be recognized as a sovereign state and an equal in law by the other sovereign states of the world.

Sixth. It must possess a certain elevated standard of civilization.

As to other matters, Phillimore says: "It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that international law has no concern with the form, character, or power of the constitution or government of a state; with the religion of its inhabitants; the extent of its domain; or the importance of its position, and influence in the commonwealth of nations. . . . Provided that the state possess a government capable of securing at home the observance of rightful relations with other states, the demands of international law are satisfied." [1]

It may be mentioned here that the territory of a sovereign state includes its colonies, dependencies, and insular possessions, no matter how governed.

40. **Equality of Sovereign States in a Legal Sense.**—Legally all sovereign states within the purview of international law are equal, that is, equal in their rights and in their obligations, equal in their sovereignty and in their independence. It does

[1] Phillimore, "Int. Law," 3d ed., vol. I, p. 81.

not follow, of course that this equality extends to their influence.

" Nations," says Vattel, " composed of men and considered as so many free persons living together in the state of nature are naturally equal and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." [1]

41. States, Communities, Corporations, and Institutions That Are Not Primarily Subjects of International Law.—Among communities and institutions which are not directly subjects of international law are the members of a federated union like the States and Territories forming the United States of America. Of this Union the Supreme Court of the United States, in a recent decision, speaks as follows:

" While under our Constitution and form of government the mass of local matters is controlled by local authorities, the United States in their relations to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of nations." [2]

The states that are members of the German Empire and the cantons composing the federation of Switzerland are not of the same status as the States composing the United States of America, as they possess certain international qualifications,

[1] Vattel, "Preliminary," pars. 18, 21.
[2] The Chinese Exclusion Act, 1889, 130 U. S. 581, 604.

such as a limited right of legation and right to grant exequatur to consuls and to conclude certain treaties. They lack, however, the full rights and qualifications of sovereign states and hence are not subjects of international law.

The public corporations and companies chartered by the state also come under this exclusion. They were represented in the past by the famous East India Companies and in the present time by such corporations as the German East Africa Company, the Royal Borneo Company, and the British South Africa Company. These corporations, though exercising almost sovereign powers with respect to the native chiefs and peoples, do so by delegation from the supreme government of their sovereign states to which they are subordinate. Their charters can be revoked at any time for cause, and they can be totally abolished by act of the home government. Nevertheless, as Lawrence says of a corporation of this type: "Like Janus of old, it has two faces: on that which looks toward the native tribes all the lineaments and attributes of sovereignty are majestically outlined. On that which is turned toward the United Kingdom are written subordination and submission." [1]

The papacy, or the Vatican, at Rome is also without a membership in the family of sovereign states since it lost its temporal power in 1870. The Pope has no international rights; his status is regulated by the law of guarantees of 1871 enacted by the Italian parliament. This Italian law guarantees the inviolability of the Pope and secures to him the enjoyment of certain rights and privileges ordinarily enjoyed by sovereigns. He still continues to an extent to send and receive envoys and to make with certain Roman Catholic countries ecclesiastical treaties known as concordats. As an evidence of his exclusion from international affairs it may be recalled that the Vatican was not invited nor its representative admitted to either of The Hague conferences of 1899 or 1907.[2]

[1] Lawrence's "Principles of Int. Law," 4th ed., p. 75.
[2] See text of law in Halleck (Baker's 4th ed.), vol. I, p. 153.

42. **Neutralized States.**—There is a group of states the limitation to whose sovereignty, though definite and permanent, is so slight that they can be considered as sovereign states though they are ordinarily called in a technical sense neutralized states. They are not in the fullest sense independent and yet it would be too drastic to call them part or semi sovereign states. These states are permanently neutralized by a treaty on the part of the great powers of Europe or such of them as are definitely interested in the matter. They are required by convention to abstain from war, except when they are attacked or their existence or territory threatened. Their immunity from attack is guaranteed by states who are generally neighbors and who are closely interested. Switzerland, Belgium, and the grand duchy of Luxemburg occupy this position of guaranteed and permanent neutrality provided they avoid all belligerent operations save such as are necessary to protect themselves from attack. This neutralization is the only safeguard to the small countries concerned as to their nationality and independence, which is treasured by them, especially by the Swiss and Belgians. The neutrality of Belgium was carefully observed by the Germans in the war of 1870, when the policy of that country was guided by Bismarck.

It may be mentioned here incidentally that insurgent communities that have become recognized belligerents attain a certain status which gives them a place in international law not as sovereign states but as entitled to be considered as having rights and obligations in connection with neutrals especially and for purposes of warfare under the rules of which they are obliged to conform.

Afghanistan and Abyssinia, being less than civilized as nationalities, are not entered into the community of sovereign states, while such weak communities as Liberia, Andorra, Monaco, and San Marino are neither strong enough nor sufficiently free from protecting entanglements to preserve an independence to the extent required by sovereign states.

So far as those communities, tribes, and peoples who are less than civilized, or who are classed as barbarous and savage, are concerned, the quality of their government as well as the conduct and lack of intelligence of their peoples places them out of the sphere of subjects, primary subjects, of international law and, consequently, of members of the family of nations. They are entitled to be treated with humanity and justice in all relations held with them. The rules and moral sense of international law should be applied to them as far as practicable. The accountability with which such peoples should be held depends upon their intelligence and the nature and circumstances attending upon their conduct. Certainly the law of retaliation should not be indiscriminately applied to them.

The permanent neutrality of Switzerland was guaranteed under the settlement treaties of 1815.[1] Belgium was declared permanently neutralized by the treaty of London confirmed by the quintuple treaty,[2] and Luxemburg was similarly dealt with in 1867.[3] "One or two unfortunate episodes," says Walker, "have from time to time suggested the necessary weakness of all such human arrangements. Chablais, Faucigny, and the Genevese districts of Savoy, neutralized in 1815, were, in spite of the protests of the Swiss Government, ceded to Napoleon III in 1860;[4] and on December 3, 1870, a Prussian circular announced that, in view of the violation of the neutrality of the Grand Duchy by the transit of French soldiers, the Prussians held themselves no longer bound to respect the neutral sanctity of Luxemburg."[5] But with these exceptions the neutralization of these countries has been maintained either by agreements of co-operation on the part of states up to the present war (1914) or, as in the case of Switzerland in 1870,

[1] Wheaton, "Int. Law," pp. 416–420.
[2] Hertslet, "Map of Europe by Treaty," II, pp. 979–998.
[3] Hertslet, "Map of Europe by Treaty," III, p. 1801.
[4] Hertslet, "Map of Europe by Treaty," II, pp. 1415, etc., to 1450.
[5] Walker, "Science of Int. Law," p. 449.

by a determined policy and the exhibition of military strength and efficiency. Norway has been classed with the neutralized states; but as the treaty of 1907, made by the leading European powers, respects its integrity and agrees to support its government in case this integrity should be "threatened or impaired by any power whatsoever," Norway seems to be in the status more of a protected than a neutralized state.

43. Part-Sovereign States and Protectorates.—In defining in a previous paragraph a sovereign state it was stated that it should be fully independent of all other states. In other words, as Moore says, "a state is sovereign from the point of view of the law of nations *when it is independent of every other state* in the exercise of its international rights externally and in the manner in which it lives and governs itself internally."[1]

A state which, while retaining a certain unity or individuality in international law is at the same time subject to the authority or direction of another state, or group of states, especially in its foreign intercourse, is generally known as a part-sovereign or semisovereign state. The paramount state is sometimes called the suzerain, and its relation to the other states, suzerainty; but the extent of the authority and of the subordination varies so greatly that it is difficult to comprehend the dependency or the limitation in a single phrase or by general rules. Probably the term "part sovereign," or "with limited sovereignty," is the best expression that can be found for use in a general sense. The conditions differ in almost every case.

In fact, there has been attempt to separate what is known as a protected state from the class of semisovereign states. "In a sense," as Moore says, "every semisovereign state may be regarded as a protected state, and protected states are regularly classed as semisovereign."

Semisovereign states existed in the loose German and American confederations of the past. Part-sovereign states are found in states occupying the positions of Egypt, Zanzibar,

[1] Moore's "Digest," vol. I, p. 18.

and Borneo under England, Tunis and Morocco under France, and Cuba and Panama under the United States. Referring to protectorates, so called, in uncivilized regions, I quote the following from Westlake:

"In recent times," he says, "a practice has arisen by which in such regions civilized powers assume and exercise certain rights in more or less well-defined districts, to which rights and districts, for the term is used to express both the one and the other, the name of protectorate is given by analogy. The distinctive character of those rights are: first, that they are contrasted with territorial sovereignty, for as such sovereignty extends there is the state itself which has acquired it, and not a protectorate exercised by that state; secondly, that the protectorate first established excludes all other states from exercising any authority within the district, either by way of territorial sovereignty or protectorate—that is to say while it lasts, for the question remains whether a protectorate, like an inchoate title to territorial sovereignty, is not subject to conditions and liable to forfeiture on their non-fulfilment; thirdly, that the state enjoying the protectorate represents and protects the district and its population, native and civilized, in everything which relates to other powers. The analogy to the protectorate exercised over states is plainly seen in the last two characteristics—exclusiveness and representation with protection. It is less visible in the first character, for, where there is a protected state, the territorial sovereignty is divided between it and the protecting state, according to the arrangements existing in the particular case, while in an uncivilized state it is in suspense."[1]

44. The North American Indians and the Native Princes of British India.—The relation existing prior to 1871 between the United States and the North American Indians was, perhaps, unlike that of any other peoples. Of this condition, Chief Justice Marshall said: "Though the Indians are acknowledged

[1] Westlake, "Int. Law," p. 178.

to have an unquestionable and heretofore unquestioned right to the land they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether these tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly perhaps, be denominated domestic dependent nations."[1]

In 1871 it was enacted by Congress that no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation; but provided that no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired. It was probably under the latter provision that the State Department, in 1894, ruled, in a letter to the British ambassador in relation to the case of British subjects who claimed that they were unjustly removed from the Choctaw country, that "those people who go into that country must be held to have done so with full knowledge of those treaties and of the Choctaw laws and must accept the consequence if they are found to be there without proper authority."[2]

The conditions existing between the United States and the North American Indians bear a resemblance to those existing between Great Britain and the native princes of British India. The latter, though more civilized and more autonomous, like the North American Indians, have no relations with foreign powers or with one another. In 1891 the government of India declared that the principles of international law have no bearing upon the relations between the government of India, as representative of the Queen Empress and the native states under her protection. The paramount supremacy of the former presupposes and implies the subordination of the latter.[3]

[1] C. J. Marshall, Cherokee Nation *v.* State of Georgia, 1821.
[2] Moore's "Digest," vol. I, p. 35.
[3] Westlake, "Chapters on Int. Law," p. 213.

TOPICS AND REFERENCES

1. Sovereign States Subjects of International Law—

   T. J. Lawrence, "Principles of International Law," pars. 34–37. Wheaton's "International Law," par. 16. Moore's "Digest," vol. I, par. 3.

2. Definition and Characteristics of Sovereign States—

   Holland, "Jurisprudence," 44–46. Scott, "Cases of International Law," 24–37. Moore's "Digest," vol. I, 12, etc.

3. Form of Government or Religion Not a Consideration in Foreign Relations—

   Phillimore, "International Law," I, 3d ed., 81. Westlake, "Chapters," etc., 141. Oppenheim, part I, chap. I.

4. Legal Equality of Sovereign States—

   Vattel, "Preliminaries," par. 18, 21. Walker, "Science of International Law," 115. Davis, "International Law," 3d ed., 36.

5. Status of States in a Federal Union with Respect to International Law and Treaties—

   Chinese Exclusion Act, U. S., 581, 604. Hart, "Introduction to Federal Government," 178–192. Halleck, vol. I, Baker's 4th ed., 78.

6. Communities, Corporations, etc., That Are Not Subjects of International Law—

   Lorimer, "Institutes, etc." (1883), bk. II, chaps. II and XVII; bk. III, chap. II. Hershey, "Essentials," 96. Baty, "International Law in South Africa," chap. II.

7. Status of the Vatican—

   Halleck, Baker's 4th ed., vol. I, 111, 128, and 153. Westlake, 2d ed., I, 37–39. Oppenheim, vol. I, 2d ed., 159–162.

8. Neutralized States—

   Hertslet's, "Map of Europe by Treaty," vol. II, 979–998, 1415 to 1450; vol. II, 180. Wheaton's "Elements of International Law," pars. 416–421. Walker, "Science of Int. Law," 448–451.

9. Part-Sovereign States and Protectorates—

   Moore's "Digest," vol. I, 18. Westlake, "Int. Law," 2d ed., part I, 21–25. Hershey, "Essentials," 107–109.

10. Status of North American Indians—

Marshall in Cherokee Nation *v.* State of Georgia, 1821, 5 Peters I. Moore's "Digest," 35–37. Justice Miller in U. S. *v.* Kagama (1886), 118 U. S. Reports, 375. Butler, "Treaty-Making Power," chap. XIV.

11. Status of Native Princes of British India—

Westlake's "Int. Law," 2d ed., part I, 41–43. Hall, "Int. Law," 27–28. Tapper, "Our Indian Protectorate."

CHAPTER V

FORMATION, RECOGNITION, AND CONTINUITY OF STATES. CHANGES OF GOVERNMENTS. DE FACTO GOVERNMENTS. EXTINCTION OF STATES

45. The Formation of States.—It is generally said that questions with respect to the origin of states belong rather to the province of political philosophy than to that of international law. This may be so in an abstract sense, but it can hardly be claimed to be so in the question of the formation of a modern sovereign state in its historical and legal phases. The matter of its recognition as a sovereign state and its relations thus established with other states comes clearly within the domain of international law.

The actual system of sovereign states, or the family of nations, in the civilized world dates from the peace of Westphalia in 1648, and the members of this system or family in Europe at that date were members because of their existence as states at the time. "The modern international society was thus founded," says Westlake, "and the states which belonged to it in 1648, including those which continue their identity under different names and with varied limits, as Savoy became Sardinia, and Sardinia Italy, may be called its original members. Since 1648, without reckoning the growing intercourse with states of Oriental civilizations, new members have been added to the full international society by many different processes."[1]

The following are circumstances and conditions under which states can in the present day attain the qualities and char-

[1] Westlake, "Int. Law," part I, p. 43.

acteristics necessary to their recognition as sovereign states by the community of nations:

First. After occupation or colonization in a territory without civilized population.

Second. By the attainment, after previous existence, of sufficiently full civilization and standing.

Third. By the division of a state into two or more nationalities.

Fourth. By attaining independence as a nationality from the subjection of another state.

Fifth. By the combination of a number of minor states into a federal union or confederation.

Sixth. By the attainment of independence of an insurgent political community.

46. The Formation of a State by Occupation or Colonization in a Territory Without Civilized Population.—A sovereign state has been already defined as among other things a community of persons permanently located within a fixed territory. The mode of acquiring this territory varies according to circumstances. It may have been discovered before but not occupied. A claim to territory by a nation on the ground of discovery alone is not sufficient; there must be also actual and beneficial occupation. As to the aboriginal inhabitants, formerly little attention was paid to them and their claims of ownership and possession. The English colonies settled in America, however, did better. They, as a rule, paid for the territory occupied, and in the main this policy has been followed by the United States. As a rule, however, if the land occupied is "peopled by uncivilized tribes which are not politically organized under any government possessing the marks of sovereignty" an occupation by civilized peoples is tolerated or accepted.

A modern case under this head is that of the Transvaal Republic. In 1836 a number of Dutch farmers left Cape Colony and went into an unsettled portion of South Africa.

A number of them located themselves in the country now known as the colony of Natal and established a government of their own. Upon the absorption of this territory by Great Britain they again moved and, joining other sections of the original party, settled in the uplands beyond the Vaal River. In 1852 they were dealt with by the British Government as an independent state or series of states. Other powers followed the lead of the British Government, and from 1864 until 1877 the Transvaal Republic of the Boers was an international person and sovereign state in every sense. Subsequently, there was a peaceful annexation, a revolt followed by the establishment of a British suzerainty, a war, and, finally, the extinction of the republic and a union with the British Empire as a self-governing colony. The creation of the Congo Free State and the Republic of Liberia are still further modern examples of state formation under this head.[1]

47. The Formation of a State by the Attainment, after Previous Existence, of Sufficiently Full Civilization and Standing.—Under this head we may mention the entrance of Russia into the community of nations in the eighteenth century. Before that time, though Russia was a Christian empire, she had but little contact and intercourse with central and western Europe. In these times, in conjunction with Poland, Sweden, and Denmark, it may be said that Russia formed another system or community of nations with retarded civilization. As a consequence of the reforming spirit of Peter the Great and his ambitious projects, Russia of her own volition entered in the European family of nations and the two communities of states became fused in one.[2]

By the seventh article of the treaty of Paris of 1856, England, Austria, France, Prussia, Russia, and Sardinia declared the Sublime Porte admitted to participate in the advantages of the public law and system of Europe. This agreement was

[1] Lawrence's "Principles," 4th ed., pp. 84, 85.
[2] Westlake, "Int. Law," part I, p. 45.

a matter of public policy on the part of the nations concerned rather than as a recognition of the full attainment of civilization on the part of Turkey. In fact, the full application of the tenets of international law was not made to Turkey, as the foreign consular jurisdictions remained and still remain in Turkey under the name of capitulations as another form of exterritoriality.

Japan is an example under this heading and, unlike Turkey, became a full member of the international society when, by action of the European and American powers, she was freed from the foreign consular jurisdiction and the condition of exterritoriality. Upon the absorption of Korea by Japan she partook as a province of the status of Japan in this respect.

48. Formation of States by the Division of a State into Two or More Nationalities.—A case under this head came with the separation of Portugal from Spain and the later peaceful separation of Brazil from Portugal, of which state Brazil was a possession. The King of Portugal became the Emperor of Brazil; since that time both countries have become republics. Another case is the subdivision of the old republic of Colombia, which divided itself, in 1832, into Venezuela, Ecuador, and New Granada, the latter becoming, in 1863, the present republic of Colombia, from which Panama separated in 1903.

The separation of Texas is also a case in point, as it existed some little time as an independent republic before it was annexed as a State by the United States. Probably the most recent creation of new states by separation is the peaceable one of Norway from Sweden in 1905.

49. The Attainment of Independence by Relief from the Subjection of Another State.—A case in point under this head was the erection of Belgium into a kingdom after the Belgian insurrection of 1830, thus relieving the Belgian or Flemish people from the subjection of the United Netherlands and the Dutch monarchy. England and France took up the cause of the insurgents, and finally the other European powers joined

them, which led to the acceptance of the new order of things by the Netherlands in 1839, the new kingdom having been made a neutralized power. Greece, Rumania, and Servia were carved out of Turkey, Russia having been the leading power to favor these emancipations. Bulgaria and Montenegro were also freed by the action of the European powers and have become independent kingdoms with certain restrictions, the principal one being that of religious toleration, which so far has been quietly ignored by Rumania.

The states just mentioned under this head have become so partly by their own exertions, partly by the aid of the great powers of Europe.[1]

50. The Combination of a Number of Minor States into a Union or Confederation.—This, when a federal union, is called in German a *Bundesstaat*, and refers to unions in which the central authority deals directly with foreign powers and exercises the external sovereignty of the federation. A federation of this kind does not differ, so far as international law is concerned, from any other ordinary sovereign state. The best examples at the present time under this head are the United States since the adoption of the Constitution, Switzerland since 1874, and, to a less degree, the German Empire since its establishment after the Franco-German War of 1871. There are other unions that represent sovereign states, like the incorporated union of the United Kingdom of Great Britain and Ireland in its successive states, of the incorporation of England and Scotland in 1707, and of Ireland in 1800. Austria and Hungary are externally the Austro-Hungarian Empire, though internally the empire is known as the dual monarchy, while Sweden and Norway were united as a common nation from 1814 until 1905.

51. The Attainment of Independence by an Insurgent Community.—This is the sixth and last method to be discussed. The evolution of a state by a successful insurrection or revolu-

[1] Westlake, "Int. Law," part I, pp. 46, 47.

tion is also the most important and interesting of the methods of the formation of a sovereign state. It generally causes different stages of progress toward independence and recognition of statehood and is likely to involve the recognition of various conditions by other states of the community of nations.

In the forcible separation and formation of a new state there are usually, but not necessarily, two antecedent stages through which the new community passes before arriving at successful independence. The first or preliminary stage is now named as that of insurgency and takes place shortly after the appeal to arms; the second is when the insurrection has established itself with sufficient stability and strength to have conceded the state of belligerency or the rights of belligerents, so far as the war is concerned, afloat and ashore.

In some cases the insurrection may not get beyond the first stage, that of insurgency, as in the Brazilian insurrection of 1894, or it may reach the second stage of belligerency and get no further, as with the Southern Confederacy of 1861–5, or it may gain its end as insurgents, never having been recognized as belligerents, as in the case of the Chilian insurgents of 1891.[1]

52. The State of Insurgency.—Practically every revolution or civil war begins in insurrection, and generally neutrals become at once affected; this is especially the case when hostilities extend to the territorial waters of the contestants or to the high seas. The right of insurgents to carry on hostilities on land within the territory of the parent state has never been challenged, but when the hostilities originate or reach the seaports and the coastal waters of the country concerned or extend to the high seas an anomalous condition arises under former usages and the ordinary rules of international law. This creates the necessity for an intelligent dealing under international law with the state of insurgency as anterior to the status of belligerency. Progress has already been made in this direc-

[1] Stockton's "Manual," p. 33.

tion, and especially as to the definition of the condition of affairs existing between peace and civil war.

The definition of the state of insurgency generally used is that contained in the decision of the case of the *Three Friends*, made by Chief Justice Fuller in 1897, during the Cuban insurrection which preceded the Spanish-American War. "The distinction," the chief justice goes on to say, "between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in the material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a de facto belligerent engaged in hostility with Spain but has recognized the existence of insurrectionary warfare prevailing before, at the time, and since this forfeiture is alleged to have occurred."[1]

The proper dealing with the state of insurgency on land is well outlined in a despatch of Secretary Hay to Mr. Bridgman, minister to Bolivia in 1899, as follows: "You will understand that you can have no diplomatic relations with the insurgents implying their recognition by the United States as the legitimate government of Bolivia, but that, short of such recognition, you are entitled to deal with them as the responsible parties in local possession, to the extent of demanding for yourself, and for all Americans within reach of insurgent authority within the territory controlled by them, fullest protection for life and property."[2]

The appearance of insurgent vessels of war upon the high seas flying a flag not recognized by the various sovereign states has created an anomalous condition of affairs and caused such vessels to be classed as akin to pirates. Even at so late a date as 1885 in the case of the vessel *Ambrose Light* it was declared by the decision of a United States court that such an insurgent armed vessel was technically a pirate. The weight of authori-

[1] *Three Friends* case (1897), Scott's "Cases," p. 743.
[2] Cited by Moore's "Digest," vol. I, p. 243.

tative opinion is now, however, against such holding, and, as Hall observes: "It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may, in fact, have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private as contrasted with public ends." [1]

The recognition of the status of insurgency by third or neutral powers does not relieve such powers from the enforcement of their neutrality laws. It relieves the insurgents from treatment as pirates and, within their territorial limits which they have acquired or are contending for, it is not too much to say that they have the right to prevent the supplying of contraband to the other belligerent from any source, but this right does not extend to the high seas nor is it accompanied with the right of general visit and search or the usual belligerent rights outside the field of their operations.

The cases of insurgency afloat in recent times are as follows: In 1873 the Spanish vessels of war in Cartagena Harbor, Spain, fell into the hands of insurgents, whom the Madrid Government at once proclaimed as pirates; but the British, French, and German Governments instructed their naval commanders that they were not to be interfered with so long as the lives or property of their respective subjects were not affected.

In 1877 the steamer *Montezuma*, a Spanish vessel, was seized by the Cuban insurgents and, under the new name of the *Cespedes*, was sent to attack Spanish merchantmen off the Rio Plata. The government of Spain requested Brazil to treat this

[1] Hall, 6th ed., p. 255.

vessel as a pirate if she entered Brazilian ports. This Brazil refused to do on the ground that the vessel did not fulfil the definition of a pirate and, furthermore, confined her hostilities exclusively toward Spain.

In 1891 the congressional party of Chile seized the major portion of the Chilian navy, and was allowed freedom of operation by the various foreign naval forces in Chilian waters and thereabouts, excepting as to blockade against foreign vessels. The seizure of contraband in neutral vessels was, however, acquiesced in. This insurrection became finally successful, and its government was duly recognized as the titular government of Chile.

In 1893 the greater part of the Brazilian fleet revolted, but, as at first in the Chilian insurrection, there was no territorial possession in the hands of the insurgents. Admiral Benham, the commander-in-chief of the American naval forces, took the ground that, during the hostilities in the harbor of Rio, any American vessels that moved about the harbor did so at their own risk, especially if they crossed the fire from the insurgents upon the city of Rio or upon the fortifications of the harbor, but that American merchant vessels were to be protected during their loading and unloading of cargo. No blockade was acknowledged as existing so far as foreign vessels were concerned. The landing of contraband or military supplies to the belligerents on shore from neutral vessels in Brazilian waters alone could be stopped by the insurgents as a logical result of their military operations. Practically the right of the insurgents to carry on hostilities afloat and ashore was recognized except toward neutrals in such matters as the right of visit and search, blockade, and, generally, as belligerents in neutral ports. Secretary Hay, in 1902, said in this connection that "to deny to an insurgent the right to prevent the enemy from receiving material aid cannot well be justified without denying the right of revolution."

"Perhaps," Professor Moore says, "the clearest recognition

of the state of insurgency or revolt as a distinctive condition may be found in the case of the Cuban insurrection, from 1895 to 1898. On June 12, 1895, the President of the United States issued a proclamation reciting that Cuba was 'the seat of civil disturbances, accompanied by armed resistance to the authority of the established government of Spain,' and admonishing all persons within the jurisdiction of the United States to abstain from taking part in the disturbances adversely to that government, by doing any of the acts prohibited by the neutrality laws." In his annual message of December 2, 1895, the President stated that Cuba was greatly disturbed and described the condition of things as an insurrection of flagrant condition of hostilities and a "sanguinary and fiercely conducted war." On July 27, 1896, he issued another proclamation, referring again to the civil disturbances in the island and the provisions of the neutrality laws. In his annual message of December 7, 1896, he stated that "the insurrection in Cuba still continues with all its perplexities," and reviewed the situation at length.[1]

In 1896 both houses of Congress passed a concurrent resolution expressing the opinion that a condition of public war existed requiring or justifying the recognition of a state of belligerency in Cuba. But the power of such recognition remained with the President, who wisely determined against such policy. Finally, on the 11th of April, 1898, President McKinley in a special message declared that the intervention of the United States in the insurrection of Cuba would be justified on the grounds of humanity, protection to our citizens, protection of our commerce, and to relieve us of a constant menace to our peace. War soon followed.

53. **The State of Belligerency and Its Recognition.**—A condition may be attained in an insurrection which entitles the insurgents to the status and consequent rights of belligerency. The status is that of a belligerent nation so far as

[1] Moore's "Digest," I, p. 242.

warfare alone is concerned. The requirements are that a state of war exists, that the insurgents have an actual and responsible political organization for government, that they possess fixed territory with resources and population, and that they have armed forces capable of carrying on war like a state in accordance with the conventional rules of warfare on shore and afloat. The insurgent government must have the power and will to protect neutrals and to fulfil neutral obligations. If the parent state exchanges prisoners with the insurgents, exercises the right of blockade of the insurgent ports against neutral commerce, and exercises the right of searching neutral vessels at sea, these latter clinch the matter and establish the status of belligerency and make its recognition by a neutral inoffensive, especially if neutral rights and interests are affected or likely to be affected by the continuance of the war.

The effect of the recognition of a state of belligerency by other states transforms the insurgents into legal belligerence and should require the parent state to treat them as such and not as traitors or pirates while the war is in operation. So far as the neutral governments and the parent state are concerned, the status of neutrality becomes effective with its limitations upon belligerents, especially as to their use of neutral territory and their conduct of war at sea. Blockades must be properly notified and declared, and neutral vessels if captured or detained must be condemned by properly constituted prize-courts in order to have a valid transfer of property.

Sir Alexander Cockburn, in his opinion at the Geneva arbitration tribunal upon the question of a premature recognition of the belligerency of the Southern Confederacy, said that "the principles by which a neutral state should be governed as to the circumstances under which or the period at which to acknowledge the belligerent status of insurgents have been nowhere more fully and ably, or more fairly, stated than by Mr. Dana in his edition of Wheaton in a note to Sec. 23." This opinion has been generally accepted by English and Amer-

ican writers, and the article by Mr. Richard Henry Dana will be found in full in the Appendix of this book.[1]

In the war for the Union of 1861–5 a recognition of the belligerency of the Confederate States by Great Britain was made by the proclamation of neutrality of the Queen of England under date of May 13, 1861. The French declaration of neutrality was issued June 10, 1861, and that of Spain on June 17, these being followed shortly afterward by the other maritime powers. The recognition by Great Britain of the belligerency of the Southern States was received with great disfavor by the government and people of the Northern States as being untimely and precipitous and as an evidence of unfriendliness. Time has softened the feelings which were aroused by this act of Great Britain—the first nation to announce recognition of the belligerency of the Southern States and its intention to observe neutrality in the Civil War just begun. From a legal point of view, and from the point of view of international law, it is difficult not to concede that the action of Great Britain was one of obligation under the circumstances and not one of unfriendliness. In the correspondence between our minister to Great Britain, Mr. Charles Francis Adams, and Earl Russell, then the British foreign minister, in 1868, the question was fully discussed and there is strong ground in the position taken by Earl Russell. "He referred," says Mr. Dana, "to the extent of the territory, population, and resources of the rebellion; the existence of its completely organized state and general governments, its unequivocal determination to treat as war, by sea and land, any acts of authority which the United States, on the other hand, had equally determined to exert; the long antecedent history and preparations for this revolution and the certainty of the magnitude and extent of the war and its rapid development whenever it should begin, and also, in consequence, that it would require the instant decision of maritime questions by neutral vessels of war and

[1] Appendix I.

merchantmen alike. Hence he argued that it was necessary for England to determine at once, upon facts and probabilities, whether she would permit the right of search and blockade as acts of war, and whether the letters of marque and public ships of the rebels, which might appear at once in many parts of the world, should be treated as pirates or lawful belligerents."[1] Earl Russell further asserted "that the proclamation of President Lincoln establishing a blockade under date of April 19, 1861, was itself a recognition and the first recognition of the state of belligerency of the Confederates States." As to the particular question of the precipitate nature of the Queen's proclamation, he says that "it was, on the contrary, your own government which, in assuming the belligerent right of blockade, recognized the Southern States as belligerents. Had they not been belligerents, the armed ships of the United States would have had no right to stop a single British ship upon the high seas."

In the decisions of the Supreme Court of the United States the whole matter is found cogently expressed in the opinion that "the rights and obligations of the belligerent were conceded to the Confederate Government, in its military character very soon after the war began, from motives of humanity and expediency, by the United States."[2]

I have already narrated the history of the insurrections in Cuba in relation to the status of insurgency. President McKinley, in 1897, said in regard to the further recognition of belligerency that such a recognition would weigh heavily in behalf of Spain. "Possessing a navy," he said, "and controlling the ports of Cuba, her maritime rights could be asserted not only for the military investments of the island, but up to the margin of our own territorial waters."[3]

The manner in which the status and rights of belligerency

[1] Dana's "Wheaton," 8th ed. (Appendix I).
[2] Moore's "Digest," I, p. 192. Thorington *v.* Smith, 8 Wall.
[3] Moore's "Digest," I, p. 199.

are accorded to insurgents varies; it may be done tacitly or by express declarations or proclamations of neutrality, such as that issued by Great Britain in our Civil War, or as in declarations of neutrality in a regular war, with sovereign states as belligerents.

"Recognition of belligerency," says Hall, "when once it has been accorded, is irrevocable except by agreement, so long as the circumstances exist under which it was granted; for, although as between the grantor and grantee it is a concession of pure grace and therefore revocable, as between the grantor and third parties new legal relations have been set up by it which, being dependent on the existence of a state of war, cannot be determined at will so long as the state of war continues in fact. In other words, a state, whether it be belligerent or neutral, cannot play fast and loose with the consequences of a certain state of things; it cannot regulate its conduct simply by its own convenience."[1]

54. The Recognition of a New State.—The recognition of the independence of a state and of its membership in the family of nations is the last of the conditions which are passed through by peoples or political organizations in insurrection before the attainment of full status as a sovereign state. This recognition is a matter of much gravity, as it involves possible disputes with the parent state. Of course, if there should be a tacit or definite recognition of the independence of a community in revolt by the parent state, its recognition by other nations would follow almost automatically. Otherwise the recognition of independence involves a question of fact as well as a question of interests and policy. The parent state sometimes delays a recognition of a state which has actually attained independence so unreasonably long that the interests of other states and possibly their sympathies make it necessary or advisable for them to recognize such independence without waiting for the recognition of the parent state.

[1] Hall, 6th ed., p. 35.

Holland, for instance, was not recognized by Spain until nearly seventy years after the declaration of its independence, and the recognition of the Spanish-American republics by the mother country took place in 1834, the first revolt and declaration of independence having been by one of them in 1815. The final recognition of the independence of the United Colonies in North America by Great Britain terminated the Revolutionary War, though the premature recognition of the independence of the American colonies by France, in 1778, was at once followed by a declaration of war against that country by the parent state, Great Britain. In 1782, when Great Britain herself recognized our independence, the other states followed in the recognition without giving offence. The independence of Panama was recognized virtually by the United States in three days after its creation and formally within ten days after its declaration of independence. Naturally, Colombia was affronted, and, as Hershey says, "such action on the part of the United States was really a case of political intervention."[1] The United States recognized the independence of Cuba, in 1898, by a declaration that the people of Cuba were free and independent. This may also be fairly called an instance of intervention. It can be seen that the time of the recognition of the independence of a new state plays an important part. On this subject Oppenheim says: "But between this recognition as a belligerent power and the recognition of these insurgents and their part of the country as a new state, there is a broad and deep gulf, and the question is precisely at what exact time the recognition of a new state may be given instead of a recognition as a belligerent power. For an untimely and precipitate recognition as a new state is a violation of the dignity of the mother state, to which the latter need not patiently submit." [2]

The aspects of a recognition of the independence of a new

[1] Hershey's "Essentials," p. 124.
[2] Oppenheim, 2d ed., vol. I, p. 119.

state from the point of view of other states and the point of view of the new state is given in the following opinions of Westlake and Rivier.

Westlake says: "When insurgents aiming at separation have established a state occupying a certain tract of territory with supreme authority and a good prospect of permanence, the question of the recognition of the new state by foreign powers arises. They will find that intercourse with the local authorities, of a more regular and political kind than can be supplied by the expedients resorted to during the earlier stage of the insurrection, is necessary for their interests and that of those of their subjects residing in the territory or trading with it. The new authorities, in the position which they have achieved, will probably decline to tolerate irregular expedients any longer, and the old government, being dispossessed in that part of its territory, will be unable to supply the need. In these circumstances the case of necessity will have arisen which, by depriving the recognition of all gratuitous character, will take from the old government all reasonable ground for offence at it. It cannot be expected that foreign powers shall wait till the old government has itself made such recognition or even till it has withdrawn from all armed contest if there is no reasonable chance of its success in that contest. When the United States and England recognized the Spanish-American republics, Spain still maintained small forces at a few points in her vast former possessions, but their recognition was not further postponed by England except in the case of one of them and there only because of the internal instability of the new government."[1]

On the other hand, "recognition," says Rivier, "is the assurance given to a new state that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations. The rights and attributes of sovereignty belong to it, independently of all recognition,

[1] Westlake, "Int. Law," I, p. 57.

but it is only after it has been recognized that it is assured of exercising them. Regular political relations exist only between states that reciprocally recognize them. Recognition is therefore useful, even necessary, to the new state. It is also the constant usage, when a state is formed, to demand it. Except in consequence of particular conventions, no state is obliged to accord it. But the refusal may give rise to measures of retorsion. When, after the formation of the kingdom of Italy, certain German states persisted in refusing to recognize it, Count Cavour withdrew the exequaturs of their consuls. Recognition was then accorded."[1]

A state may be recognized as a sovereign state without being considered a member of the family of nations. This was the case of Turkey before 1856 and is the case of some Asiatic states, like China and Siam, with whom European and American states entertain continual relations while refusing to comprehend them among the society of nations.

The manner of recognition of a new state varies; it may be by treaty, by formal declaration, or by proclamation. A recognition of the independence of a state may be made by implication, by the sending or receiving of diplomatic agents and the opening of full diplomatic intercourse, or by the granting of exequaturs to consuls. It may be done by the formal recognition of the flag of the new state by a salute of guns, as France did with respect to the American flag at the French port of Quiberon. Recognition may also be a collective one of nations or of European powers, as of Belgium in 1831, of Greece in 1832, of Rumania, Servia, and Montenegro in 1878, and of Bulgaria in 1908.

55. Continuity of States.—In speaking of a state we are apt at times to consider that word as synonymous with the government of the state. It must, however, be distinctly borne in mind that the government is but the agent of the state. There must be a government in order that the state

[1] Quoted by Moore's "Digest," vol. I, p. 72.

should fulfil the necessary conditions of statehood, but the state exists no matter what form of government may be in power and also no matter what change may be made in the form of government and also while the change is being made. Hence, although the government changes, the state remains, with all of its rights and with all of its obligations unimpaired. This principle of the continuity of states requires that a state should accept the obligations of its predecessors, even if the successor should claim the earlier government as a usurpation, so long as it is the actual government or, as it is technically termed, the *de facto* government, either in possession of the capital and the machinery of the government or the major portion of the territory, and having recognition as such. The governments of Louis XVIII and of Louis Philippe in France, for instance, as far as practicable reimbursed foreigners for losses occasioned by the government of Napoleon, while the King of Naples made compensation to foreign subjects for the acts of Murat. By an application of this principle, if a monarch assume a higher title—that is, from king to emperor—he does not raise himself in the scale of international precedence. "The rank of a state is part of its relation to other states and, without their consent, is not affected by a change of internal designation."[1]

Besides the continuance of states throughout changes of government, continuity extends also through changes of territory, as, for example, when a portion of the territory of a state is ceded by one state to another, the continuity of neither state is affected. Of course, this has certain limitations in the treaties and obligations of the two states, which will be treated more definitely under the head of treaties. An evident instance of this kind would be when a state has been a grantor of the neutrality of a certain country but loses such amount of territory as to affect vitally its resources and hence to be unable to fulfil such obligations.

[1] Westlake, "Int. Law," vol. I, p. 58.

56. **De Facto Governments.**—Reference has been made in the previous paragraphs to a *de facto* government. A *de facto* government may be defined as a political organization, arising during a civil war or rebellion, which has established itself by hostilities or otherwise to such an extent that it can exercise sovereign powers and be entitled to all of the rights of war and commercial intercourse.

De facto governments vary in condition, according to the circumstances of the case and the strength of their position. They may be in a condition of insurgency or belligerency. These governments have been discussed in previous paragraphs. The *de facto* government now under consideration is one which approaches very closely the status of a permanently established and recognized government. It is located in the usual capital city, has control of the various departments of the government, and is transacting the business of the state in the buildings devoted to those departments to such an extent that it may be considered as replacing the former government of the state, or, at least, in a major part of its territory, and thus representing the sovereignty of the country.

"The distinguishing characteristics of such a government are that adherents to it in war against the government *de jure* do not incur the penalties of treason and, under certain limitations, obligations assumed by it in behalf of the country or otherwise will in general be respected by the government *de jure* when restored."[1]

In addition to the general *de facto* government of the state, there may be local *de facto* governments maintained by active military power within certain limited territory, operating against the established government in the capital of the country. As a government of dominating force it must from necessity be obeyed by private citizens and domiciled aliens of the locality. The government referred to is akin to that of a military occupation.

[1] Moore's "Digest," I, p. 41.

The recognition of a *de facto* government in a foreign state is a matter, with the United States, placed in the hands of the executive department and is not considered a question of fact alone, as it may involve a serious question of state policy. The government of Maximilian in Mexico, for instance, involved in its recognition the question of a violation of the Monroe Doctrine. Although for a time practically the *de facto* government of Mexico, it was never recognized by the United States, though its administration lasted several years. Maximilian was considered as the creature of the French intervention and its continuance would probably have led eventually to military operations on the part of the United States and a restoration of Juarez to the capital city.

In the case of the Maximilian government, as in the case of the Confederate Government, no succession of the obligations of these governments was assumed or recognized by the republic of Mexico or the government of the United States.

57. **Extinction of States.**—A state as a sovereign state may become extinct by conquest, by forcible division, or by voluntary arrangement. The recognition of such an extinction is the recognition of an accomplished fact after sufficient delay for the assurance of its reality and permanency. States that lose their identity and sovereignty lose, of course, their international personality, and their subjects acquire the rights and obligation of those of the absorbing state.

An example of forcible annexation and state extinction is found in the annexation of the South African Republic by Great Britain, and an example of separation by force, accompanied by extinction of a nation, is that of Poland. A case of voluntary extinction as a sovereign state is found in the incorporation of Texas into the Union of the United States and of peaceable separation is that of the dissolution of the United Kingdom of Norway and Sweden in 1905.

In case of total extinction, it is generally agreed that the absorbing state, as a rule, succeeds to the rights and obligations

of the absorbed state. It is incorporated subject to all of its engagements and obligations toward other states. This is especially the case as to the public debt of the absorbed state, while its successor inherits in turn the assets, revenues, and resources of the extinguished state, subject to the charges resting upon them.

Westlake remarks, in this connection, that "the succession of a state to its predecessor is qualified by the circumstances that it is the public law and policy of the successor which are to prevail in the future, as being inseparable from his person, which remains his own, while he steps into the other's position."[1]

TOPICS AND REFERENCES

1. The Formation of States—

   Lawrence's "Principles," etc., 4th ed., 83–90. Westlake's "International Law," I, 44–49. Holland's "Jurisprudence," 10th ed., 385.

2. The Formation of a State by Occupation or Colonization in a Territory Without Civilized Population—

   Hall, 6th ed., 88–91, 101–6. Maine, "International Law," 66–76. Hershey, "Essentials," 117.

3. Formation of a State by the Attainment, after Previous Existence, of Sufficiently Full Civilization and Standing—

   Westlake, "International Law," I, 45–47. Lawrence's "Principles," 4th ed., 84. Hershey, "Essentials," 65, 117.

4. Formation of a State by the Division of a State into Two or More Nationalities—

   Hershey, "Essentials," 117. Phillimore, vol. II, 21, 28, 32. Halleck, Baker's 4th ed., vol. I, 97, 98.

5. The Attainment of Independence as a Nationality from the Subjection of Another State—

   Phillimore, "International Law," vol. II, 28, 32; Hall, 6th ed., 86–88. Westlake, "International Law," 46–47.

[1] Westlake's "Int. Law," I, p. 82.

6. Formation of a State by Combination of Minor States into a Union or Confederation—

   Manning (Amos), "Law of Nations," 94–95. Oppenheim, 2d ed., vol. I, 113, 115, 123, and 133–140. Woolsey, 6th ed., 36–37.

7. The Attainment of Independence by an Insurgent Political Community—

   Stockton's "Manual for Naval Officers," 25, 37. Phillimore, vol. II, 21 and 27. Westlake's "International Law," I, 57, 58.

8. Insurgency—

   Moore's "Digest," I, par. 74. Scott's "Cases," 743. Wilson, "International Law," par. 18.

9. The State of Belligerency and Its Recognition—

   Appendix I. Harcourt, "Letters of Historicus," 1–37; Moore's "Digest," pars. 59–71. Taylor, pars. 145–7.

10. The Recognition of a New State—

    Hershey, "Essentials," 123–6. Oppenheim, 2d ed., vol. I, pars. 71–75. Westlake, vol. I, 57–58. Walker, "Manual," par. 1. Moore's "Digest," I, chap. III, pars. 27–42.

11. Continuity of States—

    Hershey, "Essentials," 125–6. Wheaton, 8th ed., pars. 28–32. Twiss, I, pars. 18, 21.

12. *De Facto* Governments—

    See Appendix I. Moore's "Digest," I, 41. Halleck, I, Baker's 4th ed., note to 85. Hall, 6th ed., 21 and 291. Westlake, "International Law," I, 59, 60.

13. Extinction of States—

    Westlake's "International Law," I, 63–69. Halleck, I, Baker's 4th ed., 95. Lawrence's "Principles," par. 49.

CHAPTER VI

THE SUCCESSION OF STATES. FUNDAMENTAL RIGHTS AND DUTIES OF STATES. INDEPENDENCE AND EQUALITY OF STATES. SELF-PRESERVATION. RESPECT FOR THE DIGNITY AND HONOR OF THE STATE

58. The Succession of States and Sovereignty.—The matter of the extinction of states has been dealt with in the previous chapter. The subject of the succession of a state to one extinguished or the succession of an absorbing state to an acquisition of territory remains to be discussed. It is a matter difficult to establish by the general rules laid down by writers upon international law, as the exceptions seem to be equal in number to the compliances with the rules.

A very good enunciation of the general doctrine is shown in a discussion by Westlake and his translation of the statement made by Huber in his "Staaten-Succession," comprising probably the best that has been written upon the subject. It reads as follows:

"The notion of succession is a general one in law and belongs exclusively neither to private nor to public law. Succession is substitution *plus* continuation. The successor steps into the place of the predecessor and continues his rights and obligations; so far the successions of private and public law agree. But we now have to distinguish between those kinds of succession. A civil successor who steps into the place of his predecessor steps into his rights and obligations as though he were himself the predecessor. That is the universal succession of private law in the Roman sense, at least according to the prevailing doctrine. But the successor of international law steps into the rights and obligations of his predecessor as

though they were his own. . . . State succession is substitution plus continuation *quoad jura* not *quoad defunctum*."[1]

In the syllabus of Attorney-General Griggs as to public and private laws in the case of succession of sovereignty in acquired territory, he quotes as follows: "Those laws of the former government which have for their object a certain governmental public policy, of which character are the laws for the disposition of the public domain and the granting of quasi-public franchises, rights, and privileges to private individuals or corporations, ceased to have any force or effect after the sovereignty of the former government ceased."[2]

Afterward he says: "On the cession of territory by one nation to another, those internal laws and regulations of the former designated as municipal continue in force and operation until the new sovereign imposes different laws and regulations."

"The laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty."[3]

As to the inhabitants of an extinct state there seems to be general agreement that those who continue to reside in the conquered or acquired state or return there permanently become the subjects of the absorbing state. The state acquiring territory, no matter how done, holds it subject to its own constitution and laws and not according to those of the late government, and the inhabitants remaining there accept its rule and protection. Emigration is not forbidden and they do not necessarily participate in political power. This is the case with the acquisition of territory by the United States until the territory is admitted by its will as a State of the Union. Before that political citizenship is given or withheld by the action of Congress, if no treaty has been made to the contrary, they may be held as nationals but not as citizens.

[1] Westlake, I, p. 69.
[2] Harcourt *v.* Gailliard, 12 Wheat. 523.
[3] Moore's "Digest," I, pp. 304, 310, 311.

With respect to property, especially public property and obligations, the instructions of Mr. Adams as secretary of state to Mr. Everett on the 10th of August, 1818, in the main hold good at the present time, the absorbing state having the right to scrutinize the obligations and their validity. Mr. Adams said: "The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfilment of which then becomes his own duty."[1] There is no doubt as to the assumption of all the assets of the vanquished community. As to the debts as mentioned previously, a scrutiny of their origin is not unusual. It is hardly to be supposed that debts made for revolutionary purposes or to obtain the means of carrying on a war against the conquering state would be honored. When Cuba was freed from Spain, the United States for herself and for Cuba refused to consider as a proper debt the loans which Spain had charged to Cuba for the cost of suppressing the insurrections of Cuba against Spain.

Westlake concludes also "that if the territory changing masters is merged for revenue purposes in that of the annexing state the liability of the latter will be unlimited, but that, if it is maintained as a separate fiscal unit, the obligations of the extinguished state, or those of the ceding state connected with the territory, will not pass over beyond the value of the assets received, including such taxation of the territory as it can reasonably bear without reference to the political convenience of the annexing state."[2]

The effect of a change of sovereignty in acquired territory upon the treaty relations existing and, further, as to a choice of nationality during military occupation will be discussed under the appropriate headings.

As to private laws, it is well established that, in cases of cession or conquest in civilized countries with laws of property, these laws, usages, and regulations remain in force until

[1] Moore's "Digest," I, p. 96. [2] Westlake, "Int. Law," I, p. 77.

changed by the state succeeding to the acquired territory. The decisions of Chief Justice Marshall in our country, as well as those of Lord Mansfield and Ellenborough in England, agree that the laws of a conquered country continue until they are altered by the conqueror.

As to private rights, I can quote no better authority than that of Chief Justice Marshall when he says: "It is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to each other and their rights of property remain undisturbed."[1]

The same general principles apply not only to territory acquired by conquest or cession but to the territory of a country which has acquired independence by successful revolution or lost temporary independence by unsuccessful rebellion.

59. Fundamental Rights and Duties of Sovereign States.— There are certain rights and duties of a fundamental nature inherent to sovereign states. They can be classified as follows:

1. The right of independence and legal equality among other states.
2. The right of self-preservation.
3. The right of respect for the dignity and honor of the state.
4. The right of exclusive jurisdiction over its own territory.
5. The right to hold and acquire property.

These rights, to a less degree, exist in and toward states not fully sovereign.

The duties of a state corresponding to these rights require a proper observance of them in international relations, accom-

[1] Moore's "Digest," I, p. 416.

panied by the recognition of the obligations of good faith, a redress for wrongs, and good-will, comity, and courtesy in their intercourse.

These may be termed the rights and obligations existing in the normal times of peace. In time of war other rights and obligations arise peculiar to that state of affairs, embracing the status of belligerents and of neutrals. Although these are strictly within the domain of international law, they may, I hope, be now considered as abnormal rights and duties as peace becomes more and more, fortunately for the world, the normal condition of mankind and among nations.

60. **The Right of Independence and Legal Equality.**—The right of independence carries with it naturally, if full and complete, the right of legal equality with other sovereign states. By independence is meant that condition, essential to a sovereign state, by which it controls its own affairs, external as well as internal, without interference from other states. This includes, as has been previously mentioned, the right to organize itself as it chooses and do within its boundaries whatever it may think wise to develop its existence, its strength, and its prosperity. It must be recognized, however, that there are times, even with sovereign states, when restrictions are imposed upon them by events and circumstances. These restrictions, however, are in the main temporary and are not permanently legal conditions of their life. The same can be said also of individuals who voluntarily or involuntarily accept certain restrictions for the common good. An example in this connection is that of two powerful nations, Great Britain and the United States of America, who were bound for many years by the Clayton-Bulwer treaty not to acquire territory in Central America. Other nations have entered into obligations by which they have restricted their spheres of influence and colonization in Asia, Africa, and the Pacific Ocean. A declaration was made as late as 1908 by which the states bordering upon the Baltic and North Seas pledged themselves to re-

frain from disturbing the existing boundaries within a certain sphere named therein.[1]

There are occasions also where states are obliged to submit to certain restrictions due to peculiar conditions that are imposed by the victor at the end of a successful war, or sometimes without the actual use of force by a single great power, or by a combination of powers for what is considered the general good of all concerned. Pertinent cases of this kind can be found in the history of the Napoleonic wars when Prussia was restricted to a standing army of 40,000 men; another later case is that of Russia, which was forbidden to create military and naval arsenals or a fleet in the Black Sea. Both of these restrictions are now removed, and it is not uninteresting to note that both were evaded before their formal removal.

In a more constant manner there has been and still exists a predominance assumed by the great powers of Europe over the affairs of that continent looking to the settlement of matters which might lead to war. This is generally known as the concert of European powers and has been of service to mankind by the prevention of actual warfare and by the settlement of vexed questions. The success of this combination of the great powers with the powers concerned in the late Balkan wars seems to have been less marked than in other times.

The attitude of the United States toward certain powers in the West Indies and Central America has had a certain similarity. An occasional yielding on the part of these states and of the European nationalities concerning them does not deprive them of their rights of legal independence and equality under international law. This exercise of authorities in both cases falls short of what is known as armed or threatened intervention, which is a display or threat of force upon an unwilling state. This subject of intervention will now be taken up as a topic bearing directly upon both the independence and equality of states.

[1] Supplement to *A. J. I. L.*, vol. I, p. 425, and vol. II, p. 270.

61. Intervention.—The two elements that enter into intervention are the exhibition of actual force, naked or veiled, on the part of the intervening country and the want of consent on the part of the other country affected. The only circumstance under which intervention can be considered a legal right or obligation is when it is exercised in accordance with a guarantee under a treaty or other mutual agreement; this exercise of a treaty right may be, of course, with or without the momentary consent or willingness of the other party to the treaty.

There are other cases where there is moral justification for intervention by one or more nations. These are cases of intervention upon the ground of humanity; they cannot be called legally right, but they may be morally justifiable and even commendable. They come under what "Historicus" calls "a high act of policy above and beyond the domain of law."[1] A case in point was the intervention of the great powers of Europe in regard to the persecution and murder of Christians in Asia Minor in 1860.

Interventions in order to preserve the balance of power in Europe were until recent times considered admissible and at times just. It can no longer be considered as justifiable—and in Europe, at least, is not practised—and, as Westlake remarks, "the natural growth of a nation in power, and even the menace of its armaments in a fair proportion to its population and wealth and to the interests which it has to defend, must be looked on without jealousy and without any attempt to check it by those nations which by an inferiority of character or situation are destined to a decline in relative power."[2]

The growth by increase of territory is not quite the same question. It is a matter of legitimate interest to all of the states of Europe in their present crowded condition. The system, or concert, of European nations, certainly, in regard to

[1] Historicus, "Letters on Some Questions of Int. Law."
[2] Westlake's "Int. Law," I, pp. 303, 304.

southeastern Europe, considers the matter within their scope, though events prove not always within their authority to regulate. As to its fading authority, Lawrence says that in the past "it distributed provinces and rounded off the boundaries of kingdoms without regard to the wishes of the populations and their affinities of race, religion, and sentiment. It repressed popular movements when they interfered with its calculations. Italian unity and German unity were achieved in spite of it; and it is bound to lose influence as the wishes of peoples become more and more a necessary element in the calculations of rulers."[1]

The question of intervention can then be called a matter of state policy rather than one of international law, except that, as a general rule, when practised it is a violation of the right of independence so far as this is an inherent right of a sovereign state.

It may be of interest to briefly recount recent events in our own history which properly come under the head of intervention.

The first, chronologically, was the effort upon the part of the United States to prevent the continuance of the interference by France with the political independence of Mexico. France by force of arms established the Archduke Maximilian of Austria as Emperor of Mexico during our Civil War, when the attention of the country was engaged in the struggle for the preservation of the Union. In 1865, when the Civil War was over, our government informed the French Government that their treatment of Mexico was regarded as injurious and menacing to republican institutions, and an American army was massed on the Rio Grande under General Sheridan. As a result, Napoleon III withdrew his forces from Mexico and the empire of Maximilian came to an end.

In 1898 the President of the United States in a special message declared that the intervention of the United States in the

[1] Lawrence's "Principles," 4th ed., p. 132.

affairs of Cuba, then in insurrection against Spain, would be justified on the grounds of humanity and of protection to our citizens and to our commerce as well as removing a constant menace to our peace. As a result, action by Congress followed which brought on the war with Spain.

In June, 1900, on account of the Boxer movement, unprecedented disturbances arose in China directed largely against all foreign life and property. These disturbances grew until all of the foreign legations at Peking were besieged and attacked by forces acting under orders from the imperial officials. Foreigners elsewhere, especially missionaries, were tortured and murdered and other outrages were committed. An international expedition which included an American detachment was formed and raised the siege of the legations and took possession of Peking after overcoming the resistance of the Chinese troops, the imperial household having fled.

This joint intervention was explained by Secretary Hay as being necessary to open communication with Peking to rescue our officials and with the purpose of affording all possible protection everywhere in China to American life and property and to guard all legitimate American interests.

In November, 1903, the United States intervened to prevent the suppression by Colombia of the local revolution of Panama by preventing the landing of Colombian forces on the Isthmus and the consequent bombardment of the town of Panama. Justification for this intervention was claimed to be found in our treaty rights, our national interests and safety, and in the interests of collective civilization.

In 1906 the United States intervened in Cuba, in accordance with our treaty rights and guarantees, on account of the disorders arising upon the island before and after the resignation of President Palma. After the establishment of peace and good government in 1909 the United States evacuated the island and self-government was resumed.

In closing this subject it may be well to repeat what many

writers upon the subject have said: that any nation feeling it desirable or necessary to interfere with or intervene in the affairs of another state must do so with a military and naval force sufficiently strong to make it clearly understood to the family of nations, as well as to the state concerned, that its voice must be attended to and its requests heeded.

There may be a previous stage of diplomatic intercourse consisting of advice and reproof alone; in this case it is important to consider the weighty words of Westlake, one of the most learned as well as one of the most able writers upon the subject. He says: "It only remains to observe that the tender of advice to a foreign government, even about the internal affairs of its state, is not intervention, and violates no right, though it is generally injudicious. Statesmen must remember that though governments and states are different, and it is to states that the rights given by international law belong, yet it is governments that they have to live with and whose susceptibilities they will, therefore, find it needful to consult."[1]

Still another word can be said as to the legal equality, so closely linked to the independence, of states before closing this discussion. "Russia and Geneva have equal rights," said Chief Justice Marshall in 1825. But it is hard to realize that Salvador and the United States are even legally upon an equality. In fact, it must be recognized as a material fact that states, like individuals, exercise power in proportion to their influence, strength, and riches.[2]

62. The Right of Self-Preservation.—A sovereign state having attained a recognition of its existence and independence with the concomitant of legal equality has naturally the right of preserving that existence; in other words, there is an underlying principle or right of self-preservation.

As a matter of fact, it is rarely that the preservation of the

[1] Westlake's "Int. Law," I, pp. 307, 308.
[2] Moore's "Digest," I, p. 63.

existence of a state demands the use of this right, which, as Hall says, suspends in general "the obligation to act in obedience to other principles." . . . "There are, however," he goes on to say, "circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved. This class of cases is not only susceptible of being brought under distinct rules, but evidently requires to be carefully defined, lest an undue range should be given to it."[1]

An instance which is generally quoted as a striking example of the use of this right of self-preservation occurred at the time of the Canadian rebellion of 1838.

"A body of insurgents collected to the number of several hundreds in American territory and, after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots were fired into Canada and where preparations were made to cross into British territory by means of a steamer called the *Caroline*. To prevent the crossing from being effected, the *Caroline* was boarded by an English force while at her moorings, within American waters, and was sent adrift down the falls of Niagara. The cabinet of Washington complained of the violation of territory and called upon the British Government 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.' There was no

[1] Hall, 6th ed., p. 264.

difficulty in satisfying the requirements of the United States, which though, perhaps, expressed in somewhat too emphatic language, were perfectly proper in essence. There was no choice of means, because there was no time for application to the American Government; it had already shown itself powerless, and a regiment of militia was actually looking on at the moment without attempting to check the measures of the insurgents. Invasion was imminent; there was, therefore, no time for deliberation. Finally, the action which was taken was confined to the minimum of violence necessary to deprive the invaders of their means of access to British territory. After an exchange of notes the matter was dropped by the government of the United States."[1]

Cases have occurred under the right of self-preservation which have been quoted also as matters of intervention. These are against states which are not for the time free agents and whose actions or resources may be commanded or are used against the state whose safety is threatened in a more or less degree. This action is not against persons of the state or on their territory, but against the state itself by invasion or by an attack upon its military resources or armed forces.

A case of this kind, which has been the source of much discussion and animadversion, is that of the capture of the Danish fleet at Copenhagen by Lord Nelson, in 1807, during the Napoleonic wars. The following description is given by Hall, an English author: "At that time the Danes were in possession of a considerable fleet and of vast quantities of material of naval construction and equipment; they had no army capable of sustaining an attack from the French forces then massed in the north of Germany; it was provided by secret articles in the treaty of Tilsit, of which the British Government was cognizant, that France should be at liberty to take possession of the Danish fleet and to use it against England; if possession had been taken, France 'would have been placed in a commanding

[1] Hall, "Int. Law," 6th ed., pp. 265, 266.

position for the attack of the vulnerable parts of Ireland and for a descent upon the coasts of England and Scotland'; in opposition, no competent defensive force could have been assigned without weakening the Mediterranean, Atlantic, and Indian stations to a degree dangerous to the national possessions in those regions; the French forces were within easy striking distance, and the English Government had every reason to expect that the secret articles of the treaty of Tilsit would be acted upon. Orders were, in fact, issued for the entry of the corps of Bernadotte and Davoust into Denmark before Napoleon became aware of the despatch, or even of the intended despatch, of an English expedition. In these circumstances the British Government made a demand, the presentation of which was supported by a considerable naval and military force, that the Danish fleet should be delivered into the custody of England; but the means of defence against French invasion and a guarantee of the whole Danish possessions were at the same time offered, and it was explained that 'we ask deposit—we have not looked for capture; so far from it, the most solemn pledge has been offered to your government, and it is hereby renewed, that, if our demand be acceded to, every ship of the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag.' The emergency was one which gave good reason for the general line of conduct of the English Government. The specific demands of the latter were also kept within due limits. Unfortunately, Denmark, in the exercise of an indubitable right, chose to look upon its action as hostile and war ensued, the occurrence of which is a proper subject for extreme regret but offers no justification for the harsh judgments which have been frequently passed upon the measures which led to it."[1]

This matter has been, as just said, a matter of controversy, but at least one French historian like Lanfrey and an American writer upon the subject like Admiral Mahan uphold the

[1] Hall, "Int. Law," pp. 268, 269.

conduct of England in the matter as a due exercise of the right of self-preservation.

The case of the *Virginius* has been put by some writers under the category of an exercise of the right of self-preservation. It is as follows:

"On October 31, 1873, the steamer *Virginius*, flying the American flag and having an American register, was captured by the Spanish man-of-war *Tornado* on the high seas. The *Virginius* was taken into Santiago de Cuba, where, after a trial by a court martial upon the charge of piracy, fifty-three of those on board, Americans, British, and Cubans, were condemned to death and shot. The rest were held as prisoners. The British man-of-war *Niobe*, arriving at Santiago on November 8, demanded that no further executions of British subjects should take place until after further investigation by higher authorities. This was done. The charge of piracy appears to have been based upon the fact that the vessel was engaged in the service of Cuban insurgents in conveying arms, ammunition, and men to aid the Cuban insurrection.

"After some correspondence by telegraph upon the matter, Secretary Fish and the Spanish minister agreed upon the following:

"Spain stipulated to return forthwith the *Virginius* and the survivors of her passengers and crew, and on December 25 following to salute the flag of the United States unless before that date Spain should prove to the satisfaction of the United States that the *Virginius* was not entitled to carry the American flag, in which case the salute was not to be required but a disclaimer of intent of indignity to the flag was to be expected by the United States. If on or before December 25 it was made to appear to the satisfaction of the United States that the *Virginius* did not rightfully carry the American flag, the United States was to institute legal proceedings, after inquiry, against the *Virginius* and against any of the persons who may appear guilty of illegal acts.

"It was finally found that the *Virginius* at the time of her capture was improperly carrying the American flag, and the salute was hence dispensed with. The *Virginius* was delivered over to the United States navy at Bahia Honda, but on her passage to New York sunk off Cape Fear in bad weather, being in an unseaworthy condition. The prisoners who survived the massacre were surrendered at Santiago and reached New York in safety, and an indemnity of $80,000 was paid for the relief of the families of persons who were American citizens.

"The British Government demanded and obtained compensation for the families of the British subjects who were executed. Their ground of complaint against the Spanish officials at Santiago was that after the capture of the people of the *Virginius* had been made there existed no emergency of self-defence, and that the offenders should have been prosecuted in proper form of law and regular proceedings of a civil nature should have been instituted. It was also maintained that had this been done it would have been found that 'there was no charge either known to the law of nations or to any international law under which persons in the situation of the British in the crew of the *Virginius* could have been properly condemned to death.'

"The charge of piracy against those executed from the *Virginius* was without reason and their execution was without justifiable excuse. The *Virginius* was not fitted for offence or defence as a ship by reason of her equipment and also offered no resistance. At most, she was engaged in an illegal expedition and could have been seized within territorial waters of Spain or Cuba for that reason. It does not seem, however, that such a seizure would have been justifiable on the high seas, as the emergency for self-defence and self-protection was not sufficiently great or imminent. The result of landing a motley force of one hundred men on Cuban soil does not justify the arrest of a foreign vessel on the high seas in times of peace. The necessity for self-defence should be 'instant, overwhelming,

and leaving no choice of means and no moment for deliberation.' So far as the question of the rightfulness of the *Virginius* to carry the flag was concerned, at the time of her arrest, this was not known. She was arrested as an American vessel; it was discovered at a later date only that she had no such right."[1]

63. Respect for the Dignity and Honor of the State.—A jealous regard for the dignity and honor of a state increases with the cultivation and refinement of its inhabitants and also with the increase and intimacy of its intercourse with the other civilized and enlightened nations of the world. A national insult to a country directly, or to its emblems, is not only resented by the officials of its government but by every patriotic citizen or subject at home or abroad. It is well that it should be so, for one of the strongest forces that compel an observance of the tenets of international law is that fear of censure from its fellows and of bad repute in the family of nations which now results from a deliberate violation of the law and comity of states. A sensitiveness as to honor and dignity is as important for the state as it is for the individual. As Woolsey says: "The Fijis or the Hottentots care little how the world regards them, but the opinion of civilized nations is highly valued by all those states which are now foremost in human affairs."[2]

It has been already stated that the rights of states carry with them corresponding obligations on the part of states with respect to each other. It becomes then a matter of obligation properly a subject for the municipal law of each state, that the citizens or subjects of each state shall be prevented from doing acts that would violate the dignity of foreign states, and punishment should be awarded to those who have transgressed in such matters. There must, however, be discrimination and care exercised in such matters so that punishment shall be

[1] Stockton, "Naval Manual," pp. 92, 93, 94.
[2] Woolsey, "Int. Law," 6th ed., p. 17.

given or expected only when the dignity of a state is really violated.

"Mere criticism," as Oppenheim says, "of policy, historical verdicts concerning the attitude of states and their rulers, utterances of moral indignation condemning immoral acts of foreign governments and their monarchs need neither be suppressed nor punished."[1]

The delicacy of international intercourse should require care on the part of the agents of one state in discussing matters and policies of other states, and documents reflecting upon foreign governments should always be preserved from undue publicity. Besides the courtesy extended by one state to the diplomatic agents of another, there are certain ceremonials that are in vogue between the armed forces of the states, especially as to the fortified ports and as to foreign vessels of war entering them as well as between vessels of war of different nations meeting in port or at sea. The courtesy extended by the way of salutes of flag, etc., between merchant vessels and men-of-war of different states may be said to be entirely voluntary and depend entirely upon the courtesy of the merchantman concerned. It is in no sense obligatory. It no longer includes the striking of sails, the lowering of topsails, or the firing of guns. At most, it consists of lowering, or, as it is termed, dipping, the national colors a short distance and generally three times. This is answered in return in the same way by the man-of-war.

As between men-of-war the arrangements are matters of international usages and regulation and consist of a mutual display of colors, a salute to the flag of the port or ship if it can be returned, salutes to officers of flag-rank, salutes to other foreign officials upon their visit to men-of-war, the parading of a guard, and the playing of national airs by the band of music of the vessel, etc.[2]

[1] Oppenheim, vol. I, p. 176.

[2] "United States Navy Regulations of 1913," pp. 127R, 128R.

TOPICS AND REFERENCES

1. The Succession of States and of the Sovereignty in Acquired Territory—

   Hall, "International Law," 6th ed. (Atlay), 91–100. Moore's "Digest," I, chap. IV, secs. 92–99, etc. Scott's "Cases," 85–116.

2. Fundamental Rights and Duties of States—

   Hershey, "Essentials," 143. Stockton, "Manual," 38. Lawrence's "Principles," 4th ed., 116, 117.

3. The Right of Independence and Legal Equality—

   Oppenheim, 2d ed., vol. I, 168–174. Halleck, vol. I, Baker's 4th ed., 100–2. Wheaton, part II, chap. I, par. 12, 8th ed., 132.

4. Intervention—

   Walker, "Manual," pars. 5–7. Wilson, "International Law," sec. 23. Woolsey, sec. 43.

5. The Right of Self-Preservation—

   Hershey, "Essentials," 144, 145. Westlake, "International Law," I, 296–300. Westlake's "Chapters," 123–8.

6. The Case of the *Caroline* on the Canadian Frontier—

   Snow's "Cases," 177–8. Moore's "Digest," vols. II and VII, pars. 217 and 300. Westlake, "International Law," 300, etc.

7. The Case of the Capture of the Danish Fleet by Admiral Nelson—

   Rose, "Life of Napoleon," II, 129. Mahan's "Sea Power upon French Revolution," vol. II, 277. Lanfrey's "Napoleon," vol. XIV, 146–9.

8. The Case of the *Virginius*—

   Moore's "Digest," vol. II, 895, 967, 980. Chadwick, "Relations of the United States and Spain," chaps. XVI and XVII.—H. Taylor, secs. 404, etc.

9. The Question of the Obligation of a State with Respect to the Dignity and Honor of Another State—

   Hershey, "Essentials," 157, 158. Oppenheim, 174–7. Wheaton, sec. 160.

10. International Ceremonials—

    Davis, 3d ed., 128–131. Halleck, I, 4th ed., 139–153. "U. S. Navy Regulations, 1913," 127, 128, etc.

CHAPTER VII

TERRITORIAL JURISDICTION OF A STATE

64. Exclusive Jurisdiction over Its Own Territory.—This is given as fourth among the fundamental rights of a sovereign state. It is an exclusive right of jurisdiction of a state, practically speaking, over all territory, things, and persons within its boundaries. It includes a jurisdiction over its citizens or subjects, of a certain limited nature, who are travelling or located in foreign countries. This jurisdiction of the state is also extended to include upon the high seas all of the private and public vessels legally carrying its flag. The extension of its rights of jurisdiction in time of war on the high seas and all conquered territory also exists and will be treated especially under the proper heads. There are some exceptions and immunities to these general rules which also will be discussed hereafter.

Hall defines in more detail the territorial property of a state to consist "in the territory occupied by the state community and subjected to its sovereignty, and it comprises the *whole* area, whether of land or water, included within definite boundaries, ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and when such area abuts upon the sea, together with a certain margin of water."[1]

The question of the jurisdiction of a state over the air above it, is treated in a separate chapter upon aerial warfare. It may be considered that such a jurisdiction exists and is exercised.

[1] Hall, 6th ed., Atlay, p. 101.

65. The Right to Hold and Acquire Property is the fifth right of the fundamental rights of states. This is necessarily an inherent right. A state, like a private corporation, is in law also a legal person and, in its corporate capacity, may have absolute ownership of property, just as an individual in the state has ownership in his property. Thus arsenals, public buildings, public lands, etc., are owned by the state in the same way but for more general uses. States also own, in some cases, railways, telegraphs, telephones, canals, and public works.

This state-owned property, so long as it is within the boundaries of the state, plays no particular part in international law, but when found in a foreign state it is not subject to the jurisdiction of the owning state, excepting that kind of property which enjoys certain immunity—generally known as exterritoriality. Residences of ambassadors and ships of war are instances of this kind. As a matter of fact, this immunity has been extended also to other kinds of property of a state, such as public vessels not armed, munitions of war, etc., found within foreign territory.

When a new state is recognized as duly formed from the parent state, the fixed public property of the latter within the new boundaries goes to the new state. On the other hand, in the case of an unsuccessful insurrection, in the course of which the property of the state was seized, the parent state resumes possession of what was formerly its own and succeeds to what the insurgents have created, or acquired, for their public uses during the insurrection.

In addition to the state ownership of property for public uses, a state has control over the property of its inhabitants to the extent of levying taxes to be paid by them in a manner required by law. Besides this, there is the right of *eminent domain,* which is a natural right pertaining to the state resting upon its power, in case of necessity, to use private property for public purposes.

Of this a learned writer says: "The term, eminent domain,

properly speaking, is not applicable to the property of the state but only to the property of individuals, for the right of the state to dispose of its property results from the right of ownership, and not from the right of eminent domain, which latter right remains in the state after it has transferred the ownership of its property. It is a right which, from its very nature, is inseparable from the sovereignty and is necessarily transferred with the sovereignty."[1]

A state may acquire property by any of the recognized ways by which individuals acquire private property, and it may dispose of property under the same absolute right.

"Such disposition," says the writer above quoted, "is sometimes a question of peculiar interest to foreign states who may acquire such property by purchase, exchange, cession, conquest, and treaties of confirmation, and especially where such acquisitions are made from states continually subject to revolutions and fluctuations in the character of its government and in the powers of its rulers. The act of a government *de facto*, a government which is submitted to by the great body of the people and recognized by other states, is binding as the act of the state; and it is not necessary for others to examine into the origin, nature, and limits of that authority. If it is an authority *de facto*, and *sufficient* for the purpose, others will not inquire how that authority was obtained."[2]

Territory may be acquired by occupation, as previously mentioned. The title gained by such occupation arises from the discovery, use, and settlement of territory not occupied by any civilized power. Discovery alone is not enough to give domain and the attendant jurisdiction to the state to which the discoveries belong. Such discovery must be followed by possession and occupation to maintain the right of jurisdiction against the rest of the world.

The extent of possessions gained by discovery and settle-

[1] Halleck, 4th ed., Baker, I, p. 163.
[2] Halleck, 4th ed., Baker, I, pp. 164, 165.

ment has been held to extend from the seacoast first occupied into the unclaimed interior, or back country, and generally to the sources of the rivers emptying within that coast-line, as well as to all of their branches and the country they cover (the hinterland). It has also been held in this connection that when two portions of a seacoast have been taken possession of by two different states that the midway distance between them becomes the boundary if their acquired territory is contiguous.

By a declaration adopted at the Berlin conference of 1885, the thirteen powers there assembled agreed that "any power which henceforth takes possession of a tract of land on the coast of the *African Continent*, outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the power which assumes a protectorate there, shall accompany the respective act with a notification thereof, addressed to the other signatory powers of the present act, in order to enable them, if need be, to make good any claims of their own."[1]

A title may be acquired to lands or islands formed by accretion from the mainland, and it was so decided as to the new islands of Louisiana, formed in the vicinity of the delta of the Mississippi, by Sir William Scott, in the case of the *Anna*, in 1805. Acquisition by cession depends upon the treaties or agreements by which it is made.

Title to territory of the state can be acquired by prescription. Of this Hall says: "Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right or has been unable to do so. The principle upon which it rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application to beings for whose dis-

[1] Moore's "Digest," vol. I, pp. 267, 268.

putes no tribunals are open some modifications are necessarily introduced. . . . Internationally, therefore, prescription must be understood not only to confer rights when the original title of the community to the lands which form the territory of the state or its nucleus is too mixed or doubtful to be appealed to with certainty or, as has sometimes occurred, when settlements have been made and enjoyed without interference within lands claimed, and perhaps originally claimed with right, by states other than that forming the settlement."[1]

Territory may be acquired as a result of military operations by conquest. This may in the course of time become more than simple military occupation, as the acquisition may harden to conquest, in a legal sense, with a permanent title. At the close of a war this may be incorporated either into the treaty of peace or a special treaty as a matter of cession. Properly speaking, title by conquest is not accompanied by a treaty of cession. If territory obtained by military conquest is ceded by treaty afterward, it becomes acquisition by cession.

There are, of course, cases of cession by good-will or purchase in times of peace entirely disconnected with warlike proceedings.

"In that way," says Taylor, "the colony of Louisiana was ceded by France to Spain, in 1762, as indemnity for the loss of Florida, transferred to England by the treaty of Paris; and, in 1850, Great Britain ceded to the United States a part of the Horseshoe Reef, in Lake Erie, for lighthouse purposes. As instances of cessions for valuable considerations, reference may be made to the transfers to the United States of Louisiana from France in 1803; of Florida from Spain in 1819; and of Alaska from Russia in 1867. In the treaty of Berlin, 1878, Rumania returned to Russia that portion of Bessarabia secured at her expense through the treaty of Paris, 1856, in exchange for the Dobrudja, taken from Turkey."[2]

In our acquisitions after the Mexican War and also after

[1] Hall, 6th ed., pp. 119, 120.

[2] H. Taylor, pp. 275, 276.

the Spanish-American War, we voluntarily paid large sums of money as a compensation for territories acquired from each state.

There are forms of temporary or quasi cessions that may or may not become permanent. Examples of these may be found in the leasing of the ports of Kiao-chau to Germany, of Port Arthur and Talien-wau to Russia, and of Wei-hai-wei to Great Britain, on the part of China. Instances of another but of a related nature are found in the administrative occupation of Cyprus and Egypt by Great Britain, the nominal sovereignty in these latter cases remaining with Turkey. So far as the lease of Kiao-chau to Germany is concerned, the then imperial government of China transferred to Germany, for the period of the lease, all of its sovereign rights within the leased territory. The best authorities seem to agree as to this case that the restoration of the territory in question at the end of the specified time is not likely, and that generally the pretended leases are really alienations so disguised as to spare the feelings of the state concerned and its inhabitants. As to Cyprus, there has been a real dismemberment of its sovereignty. Along with the whole of its name, the Sultan of Turkey retains only an insignificant portion of its sovereignty. The British high commissioner makes and unmakes "laws and ordinances with the advice of a legislative council, subject to a power of disallowance retained by the British crown, which can also legislate directly for the island by order in council."[1]

There are yet to be discussed what are generally known as colonial protectorates and spheres of influence. As to the former, Westlake, the best authority upon the subject, says that "a colonial protectorate, then, may be defined as a region in which there is no state of international law to be protected, but which the power that has assumed it does not yet claim to be internationally its territory, although that power claims to exclude all other states from any action within it. The British

[1] Westlake, "Int. Law," I, pp. 137, 138.

protectorates in Africa which appear still to bear that character are those of the Gambia, Sierra Leone, and Lagos, respectively adjoining the three colonies of those names, and those of Northern and Southern Nigeria, British Central Africa, British East Africa, Uganda, and Somaliland. In the Indian archipelago there is a protectorate which the British Government proclaimed, in 1888, over the so-called state of North Borneo, to which name there is nothing to answer except the territory held by the British North Borneo Company, under grants made by the sultans of Brunei and Sulu, both Mohammedan rulers, and which is now administered by the company, subject to its appointment of the governor being approved by the British secretary of state."[1]

There are two kinds of spheres of influence, or, as they are sometimes called, spheres of interest.

The first kind consists of agreements between two or more nations to abstain reciprocally from territorial expansion. As an example of this kind, we can cite the declaration of April 6, 1886, between Germany and Great Britain, by which a line of demarcation was set up in the western Pacific and a reciprocal engagement entered into as follows:

"Germany (or Great Britain) engages not to make acquisitions of territory, accept protectorates, or interfere with the extension of British (or German) influence and to give up any acquisitions of territory or protectorates already established, in that part of the western Pacific lying to the east, southeast, or south (west, northwest, or north) of the said conventional line."[2]

Hall, in discussing this question, says: "It is not likely that an influencing government will find itself able, for any length of time, to avoid the adoption of means for securing the safety of foreigners and, consequently, of subjecting the native chief to steady interference and pressure. Duty toward friendly coun-

[1] Westlake, "Int. Law," I, pp. 123, 124.
[2] Westlake, "Int. Law," I, p. 128.

tries and self-protection against rival powers will alike compel a rapid hardening of control, and probably, before long, spheres of influence are destined to be merged into some unorganized form of protectorate analogous to that which exists in the Malay Peninsula."[1]

A case of this nature is the delimitation of the Anglo-Egyptian and French spheres of influence in North Central Africa as a result of the Fashoda incident in 1898.

A not uncommon method of arrangements of spheres of interest or influence is by agreements in the Far East, by which a state there binds itself not to alienate territory to another power, either European or Oriental. China is generally the subject of such agreements so far as territory is concerned. In 1898 China made an agreement with Great Britain not to alienate any territory in the provinces adjoining the Yangtze to any other power, in any form or designation; with France not to alienate any portion of the provinces of Kwantung, Kwangsi, and Yunnan; and with Japan not to alienate the province of Fokien. In 1897 China made the same promise also to France so far as the Island of Hainan in southern China was concerned. "By these means the respective stipulating power makes known to the world that it claims, next to the state actually in possession, an interest in the given territory."[2] It is hardly necessary to tell how closely connected the United States and Cuba are by reason of engagements of a somewhat similar nature.

66. Boundaries of States.—In the treaty between Great Britain and Venezuela concluded at Washington, February 20, 1897, for the settlement of the boundaries between British Guiana and Venezuela, in which the United States took part, the following rules were drawn up and agreed to by the three parties. These rules deal largely upon the determination of boundaries by prescription.

[1] Hall, "Foreign Powers," etc., p. 230.
[2] Hall, "Foreign Powers," etc., p. 132.

"(*A*)—Adverse holding or prescription during the period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

"(*B*)—The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever, valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case and which are not in contravention of the foregoing rule.

"(*C*)—In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require."[1]

In the determination of boundaries between the United States and a foreign nation, courts of the United States recognize the question as a political one and hence follow the decision of the legislative and executive departments to which the assertion of its interests against foreign powers is confided.[2]

Generally, boundary lines are defined either by natural characteristics or follow imaginary astronomical or mathematical lines. If they are not based upon prescription or immemorial custom they are fixed by treaties.

Natural boundaries are formed mostly by mountains, rivers, or other waters, or by the open sea. Artificial boundaries are based upon latitude and longitude and are marked by various walls, stones, monuments, or landmarks. These artificial lines, so marked and agreed upon, are considered as the established boundaries, even if it should afterward appear that, by error of calculation or observations, they varied from the proposed lines, or were not straight.

[1] Moore's "Digest," vol. I, p. 297.

[2] Moore's "Digest," vol. I, p. 743.

When the boundary line is marked by a river, if it should be navigable the line follows the deepest channel (the Thalweg), if navigable, and the middle line of that channel. In case the deepest channel is unfitted by rocks, etc., for purposes of navigation, the middle of the most suitable channel is generally used for the purpose, the islands being allotted according to their relative position therewith. Sometimes the original state grants to a separating state the territory on one side only, in which case the whole of the river remains under the jurisdiction of the original state, the domain of the new state extending only to the low-water mark of the stream, whether tidal or otherwise. Public navigable rivers can be defined as those which are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel can be conducted in the ordinary ways of water travel. If the river should not be navigable, the boundary line is construed to run down the middle of the stream. If a river is declared to be a boundary between states, it continues to be the boundary even if it should gradually change its position and channels from natural causes. But if a river should suddenly change its course or desert the original channel, it has been declared by law that the boundary remains in the middle of the deserted river bed.[1]

Where a boundary follows mountains or hills, the water divide, if well defined, constitutes the frontier.[2] Where the mountains or hills are a confused mass, the question becomes more difficult. Lord Curzon speaks of the "geographical fact that, in the greatest mountain systems of the world, for instance the Himalayas and the Andes, the water divide is not identical with the highest crest." Great difficulties have arisen to make an approved line in mountains which are the boundary between the Argentine and Chilian republics and also, later, in the mountains of the Alaskan boundary between Canada and the United States.

[1] Scott's "Cases," pp. 123 and 131.

[2] Hall, 6th ed., p. 123.

When states are separated by lakes or landlocked seas, the boundaries follow the middle of such bodies of water. Among the Great Lakes of America, Lakes Huron, Erie, and Ontario, which belong to Canada and the United States, carry the boundary line in the middle of the lakes, though the use of these waters is common to both bordering states.

In a strait, or narrow passage of water, the boundary line can be determined by practically the same principles as that of boundary navigable rivers unless special treaties make other arrangements. In our own country we have, as an example of such a case, the Strait of Juan de Fuca and its continuous waters on our extreme northwest boundary. By the treaty of June 15, 1846, with Great Britain, the boundary line between the possessions of the two countries follows the 49th parallel of north latitude until it reaches the middle of the channel separating the continent from Vancouver Island and thence proceeds southerly through the middle of this channel and by the Strait of Fuca to the Pacific Ocean, providing that the navigation of the strait and contiguous channel remained free and open to both parties. In this case the channels are bordered on either side by the territories of Great Britain and the United States alone, and the use of the channels is largely limited to an approach to the ports of the respective countries and not for general passage and commercial use.

In the case of the Straits of Magellan it is different. The connection afforded by these straits is interoceanic, while the bordering territory is that of one country—the republic of Chile. The United States has always insisted that these straits make one of the great highways of the world and that no obstacle in war or peace time should be allowed to exist and interfere with their use by all nations. Fortunately, the treaty between the Argentine Republic and Chile, of July 23, 1881, which settled the question of boundary lines and territories in this part of the world, provides that these straits are neutralized forever and guarantees to the vessels of all nations free navigation.

To insure both this liberty and neutrality, no fortifications or military defences were to be constructed or allowed that could interfere with these objects.

67. State Servitudes.—State servitudes have been defined by Oppenheim as "those exceptional and conventional restrictions on the territorial supremacy of a state by which a part or the whole of its territory is, in a limited way, made perpetually to serve a certain purpose or interest of another state. Thus a state may, by a convention, be obliged to allow the passage of troops of a neighboring state, or may in the interest of a neighboring state be prevented from fortifying a certain town near the frontier."[1]

This seems to be a proper comprehension of the subject, although there is considerable difference among writers both as to the definition and scope of state servitudes. There is a general agreement, however, as to its existence and to the fact of its limitation to and between states alone. State servitudes are territorial in their nature and have for their objective the territory of a state, in part or whole, and the consequent restriction of its territorial supremacy. "Since the territory of a state," Oppenheim goes on to say, "includes not only the land but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these can, as well as the service of the land itself, be an object of state servitudes. Thus a state may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another state, or a right to lay telegraph-cables through a foreign maritime belt, or a right to make and use a tunnel through a boundary mountain, and the like."[2]

A classification is often made of state servitudes. Hershey divides them into positive and negative, while Oppenheim adds military and economic servitudes. Following the former classification, it can be said that positive or affirmative servitudes

[1] Oppenheim, vol. I, pp. 273, 274.
[2] Oppenheim, vol. I, pp. 276, 277.

can be defined as those which give a state a right as a state to perform certain acts on the territory of another state, such as to build and work a railway, to collect customs dues, and the exercise of certain judicial functions. Examples of these are the control and use of certain railways in Manchuria by Russia and Japan, the collection of customs dues in San Domingo by the United States, and the exercise of consular rights of jurisdiction in Turkey and China.

Negative servitudes are those requiring a state to abstain from doing certain acts inherent to its territorial supremacy. The agreement on the part of the United States and Great Britain not to keep a strong naval force in the Great Lakes is of that nature and also the one which required Montenegro not to allow foreign men-of-war in the harbor of Antivari.

Military servitudes would include the use of a port or island as a naval port, or coaling station, as in the case of Guantanamo in Cuba and coaling ports in the state of Panama. The agreement between Russia and Japan, contained in the treaty of Portsmouth, not to construct fortifications in their respective parts of the island of Sakhalin is also of that nature, as well as the obligation imposed upon Russia not to maintain arsenals or fleets upon the Black Sea.

Economic servitudes are those which are obtained or exist for commercial reasons or for intercourse, such as the right of fisheries, to build and work railways, or to lay a cable in or through foreign territorial waters. Servitudes, as a rule, are not extinguished by conquest or cession and are obligatory upon the annexing state. As servitudes come into existence by compact, they are naturally brought to a close in the same way or by renunciation on the part of the state enjoying such privileges. The theory of state servitudes was restricted by the decision in the opinion of the court of arbitration at The Hague, in 1910, in the case of the north Atlantic fisheries between Great Britain and the United States, to an express grant of a sovereign right; if this means a restriction upon the terri-

torial supremacy of a state, it seems beyond dispute; but if it means more, it does not accord with present facts and usage.

68. Territorial Waters.—The open sea is not within the jurisdiction of any one state primarily, because it is incapable of occupation or possession.

This incapacity for occupation or possession does not remain, as the sea borders closely the land territory of a state. Of this Wheaton says "that by the generally approved usage of nations, which forms the basis of international law, the maritime territory of e.ery state extends:

First. "To the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state.

Second. "To the distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the state.

Third. "To the straits and sounds, bounded on both sides by the territory of the same state, so narrow as to be commanded by cannon shot from both shores and communicating from one sea to another."[1]

The waters given under the first head are manifestly capable of being occupied by the exercise of the sovereignty of the state which they adjoin or by whose land territory they are enclosed.

The occupation of these waters results from the command over them given by permanent or temporary fortifications, by mobile artillery and infantry on shore, by submarine mines, and, finally, by the naval forces of various kinds belonging to the state. These forces are not required to be omnipresent any more than the police force of the state is required to be so, but they should be sufficiently in existence to meet the probable demands made upon them. As the matter stands, there is no moral or physical reason why the waters, as enumerated, should not be under the exclusive control of the state within whose limits they partly lie.

[1] Dana's "Wheaton," 8th ed., p. 270.

"Consequently," says Wheaton, "the state within whose territorial limits these waters are included has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied, but its existence is founded upon the mutual independence of nations, which entitles every state to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other states to establish similar regulations in respect to their own waters."[1]

Some states claim jurisdiction over certain bays whose points of entrance are at a distance of over six miles, and which may be too great to be commanded by batteries placed at the entrance. If these claims are based upon settled usage of long duration, they are generally conceded by other nations. The United States claims, for instance, the entire area of the Chesapeake and Delaware Bays, while Great Britain claims the whole of Conception Bay, in Newfoundland, which has an entrance of fifteen miles. In the case before The Hague tribunal of the United States and Great Britain in regard to the north Atlantic coast fisheries, it was decided that the three marine miles are to be measured at right angles from a straight line across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the marine league is to be measured from the shore line, following the sinuosities of the coast.

69. The Marine League.—Under the second head of the classification just given comes what is generally known as the marine league, or the three sea miles. Representing, as this league did, the range of cannon, this distance may be said to be now obsolete as a maximum range of artillery, but as a distance measured from low-water mark it has become an accepted and existing usage for the width of the littoral sea. Certainly no state claims less.

As to a maximum distance, the agreement is not so universal,

[1] Dana's "Wheaton," 8th ed., p. 271.

the range of modern artillery, as just said, having greatly increased, and hence consequent claims have been made by Spain, for instance, for a distance of six sea miles and by Sweden for four miles. The Institute of International Law has even recommended a distance of six miles. In the Suez Canal convention and the Hay-Pauncefote treaty the distance of three miles is stated, however, as the official distance for the observance of neutrality, and so far as these treaty obligations are concerned they remain binding.

The area of the land or island from which the marine league is based is of no consequence so far as the principle is concerned. An isolated rock of minute area, incapable of holding a great gun, can, however, be considered as beyond the principle of the dependent marine league.

The case of pearl fisheries is an exceptional one. When carried on, as in the cases of those of the island of Ceylon or in the Persian Gulf, they have been considered as a proper extension of the territorial limits over the bed of the sea and its overlying waters beyond the marine league. These fisheries are under the protection and control of British vessels and authority, to the extent of a virtual occupation, which is sanctioned, so far as the Persian Gulf is concerned, by treaties made with chiefs on the neighboring mainland of Arabia.

Oppenheim gives the following principles, which he considers as in accordance with the theory and practice of the jurisdiction of the bordering or littoral state over the marine league:

"1. The littoral state can exclusively reserve the fishery within the maritime belt for its own subjects, whether fish or pearls or amber or other products of the sea are in consideration.

"2. The littoral state can, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called *cabotage*, and reserve this *cabotage* exclusively for its own vessels. *Cabotage* meant, originally, navigation and trade along the same stretch of coast

between the ports thereof, such coast belonging to the territory of one and the same state. However, the term *cabotage*, or coasting trade, as used in commercial treaties, comprises now sea trade between any two ports of the same country, whether on the same coasts or different coasts, provided always that the different coasts are, all of them, the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of colonial dependencies of such country.

"3. The littoral state can exclusively exercise police control within its maritime belt in the interest of its custom-house duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

"4. The littoral state can make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt."[1]

In accordance with general usage, the marine league of a maritime state is open to merchant vessels of all states for innocent navigation. This rule is, however, not an absolute one, as the principles first quoted show. If the innocent passage is necessary to reach other waters, such passage cannot be denied in time of peace. If the passing vessel anchors, the police control becomes closer.

"As a rule, crimes committed within the maritime belt on board of merchantmen passing through for other regions, either against property or persons within the vessel, are considered to be outside the jurisdiction of the bordering state, but if they involve the rights or interests of this state or its inhabitants or citizens outside of the ship, they are then to be taken cognizance of.

"The right of foreign men-of-war to pass freely and inoffensively within the maritime belt of a state is in a different category. Such passage, however, can be considered as a permitted

[1] Oppenheim, 2d ed., vol. I, p. 258.

usage, but hardly as a well-established right except when used as a transit over a necessary highway to other waters and countries."[1]

The right of hot pursuit beyond the marine-league limit, has been exercised by Great Britain, France, and the United States and has been accepted without opposition except with the limitations shown in the *Itaia* case, below given.

In 1891, during the civil war in Chile, the leaders of the congressional party, which had not then been accorded belligerent rights, sent to the United States the armed transport *Itata*, for the purpose of carrying to Chile a cargo of arms and munitions of war for the insurgents. The *Itata* was subsequently seized at San Diego, Cal., on a charge of violation of the neutrality laws. While in charge of a care keeper of the United States marshal, the *Itata*, against his will and protest, left the port. The marshal's keeper was put on shore, and the *Itata* then proceeded to San Clemente Island near by, still within the jurisdiction of the United States; here she received a cargo of arms and ammunition which had been sent from San Francisco and then proceeded to Iquique, Chile, under the convoy of the Chilian cruiser *Esmeralda*, then in the service of the insurgents. Orders had been given in the meantime to the U. S. S. *Charleston*, and the U. S. S. *Omaha* to go in search of the *Itata*, and if she were found at sea to seize her and bring her into port. If she was found under convoy of a Chilian war vessel, the circumstances of the escape were to be explained and a demand made for her restoration to the possession of the United States; if this demand was refused, it was to be enforced, if practicable. The *Itata* arrived, however, at Iquique, Chile, without being intercepted; but before her arrival there the insurgent Chilian authorities expressed disapproval of what had been done and promised to restore her to the possession of the United States, together with the cargo of arms, etc., taken on board at San Diego. When they found

[1] Stockton, "Manual," pp. 91, etc.

that the arms, etc., had been taken on board at San Clemente Island instead of San Diego, the insurgent authorities desired to retain them, but Rear-Admiral McCann, the senior United States naval officer at Iquique, declined to accede to this request, as the arms were taken on board within the jurisdiction of the United States, and consequently the vessel, though no demand for her surrender had been made, was given up to the naval authorities, together with her cargo, and taken back to San Diego to abide the judgment of the court.[1]

This case was brought, finally, before the mixed commission constituted to settle United States and Chilian claims, which declared, after examination of many authorities, that the United States committed an act for which it was liable for damages, and for which it should be held to answer. The *Itata* not only was pursued for a very considerable distance and space of time on the high seas but was pursued while following the ordinary track of vessels bound to a Chilian port, and was taken possession of while in the territorial waters of Chile.

As to straits and sounds which are mentioned in the description of the maritime territory of a state, it may be said that the marine league of three miles remains as the defining element of territorial distance. If a strait is six miles or less in width and is bordered on both sides by the territory of one state only, it belongs to the territory of that state. Thus the Solent, which divides the Isle of Wight from England, is British, and the Dardanelles and the Bosphorus are Turkish. On the other hand, if a narrow strait is bordered by two different states, it is divided between the two states, the boundary line normally passing midway between the countries through the mid-channel. Of course, this can be modified by special treaty. The status of the Strait of Juan de Fuca has already been referred to, and the Lymoon Pass between the British territory of Hong Kong and the mainland of China was half British and

[1] Stockton, "Naval Manual," pp. 95, 96.

half Chinese so long as the territory opposite Hong Kong was Chinese.

70. **Straits.**—"The claims of states over wider straits," says Oppenheim, "than those which can be commanded by guns from coast batteries are no longer upheld. Great Britain," he says, "used formerly to claim the narrow seas—namely, the St. George's Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial," and Phillimore asserts that "the exclusive right of Great Britain over these narrow seas is uncontested." "But," Oppenheim goes on to say, "it must be emphasized that this subject *is* contested, and I believe that Great Britain would now no longer uphold her former claim; at least the Territorial Waters Jurisdiction Act, 1878, does not mention it."[1] Certainly such rights are not claimed or conceded by any other writers than some English ones who claim various maritime areas under the name of the King's Chambers. Of this Westlake, one of the best of English authorities, says: "But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage."[2]

When a territorial strait connects two parts of the high seas or open waters foreign merchantmen cannot be excluded from a free passage, and it is the policy of the United States to insist upon the same privilege for men-of-war. If the strait connects two tracts of open sea as the Gut of Canso, between Cape Breton Island and the mainland of Nova Scotia, or the Straits of Magellan, "the lawful ulterior destination," says Westlake, "is clear, and there is a right of transit both for ships of war and for merchantmen. If the strait leads through a single country into an inland sea lying entirely within the same country, as was formerly the case of the Bosphorus, leading

[1] Oppenheim, vol. I, p. 266. [2] Westlake, "Int. Law," I, p. 188.

through Turkish territory land on both sides into the Black Sea, entirely surrounded by Turkish land until Russia gained a footing on its coast by the treaty of Kainardji, in 1774, nothing is presented but an extreme instance of a bay the entrance to which is less than twice the width of the littoral sea. The rule that the inner part of such a bay, no matter how widely extended, belongs to the country in which it lies must be applied. It will be within the right of that country to exclude foreign navigation from its internal waters, and, consequently, from the strait which leads to them; and, in fact, at the time mentioned, the Black Sea was a closed sea of the Turkish Empire, and navigation through the Bosphorus was forbidden to foreign ships of war and merchantmen equally."[1]

By various treaties since 1774 Turkey has agreed to the free navigation of the Dardanelles by merchant vessels. By treaty with the principal European powers, in 1841, Turkey declared the maintenance of its old doctrine by which the entrance of foreign men-of-war into the Dardanelles and the Bosphorus was prohibited. This was agreed to by the participating powers, as was also the declaration of the Sultan that he reserves to himself the right to deliver firmans of passage for small vessels of war to be employed as stationary vessels for the various missions of foreign powers at Constantinople. He has also, as a matter of fact, given firmans of passage to vessels carrying crowned heads, and in one case to the flag-ship with Admiral Farragut on board.

By the treaty of London of 1871 the right of exclusion of men-of-war from the Dardanelles and the Bosphorus was again upheld, and at the same time the right of free navigation for merchantmen of all nations was confirmed. The United States was not a participating power in this case, but, without agreeing to the validity of the arrangement, it is respected by it. An additional power was given to the Sultan by the same treaty of London to open the strait in time of peace to vessels of war

[1] Westlake, "Int. Law," I, p. 197.

of friendly and allied powers, in case he should consider it necessary in order to secure the execution of the treaty of Paris of 1856 which closed the Crimean War.

In the meantime the conditions formerly existing in the Black Sea have changed. Instead of being enclosed within the territory of one power—Turkey—its shore-line is also owned by Russia, Rumania, and Bulgaria, and as a result the Black Sea can be considered as an open sea and a part of the Mediterranean. It is no longer neutralized, and men-of-war are no longer excluded from its limits.

Finally, it cannot be said that the straits leading to the Black Sea from the Mediterranean are closed to men-of-war, as a matter of legal principle, but specifically by the free determination of the European powers to continue to that extent the ancient state of things, as an engagement with the Sultan, and not as an international obligation,[1] in which the United States acquiesces.

Upon the general question of straits the following resolutions, adopted by the Institut de Droit International at its sessions in 1894, are worth quoting. They are

"1. That straits whose shores belong to different states form part of the territorial waters of the bordering states which exercise sovereignty to the middle limit.

"2. That straits whose shores belong to one state form, so far as concerns approach to the coast, part of the territorial waters of such state, although they may be indispensable so far as a means of maritime communication between two or more states.

"3. That straits that serve as a passage from one free sea to another can never be closed. From the operation of these rules, straits actually subject to conventions or special usages were expressly reserved."

Through the persistent efforts of the United States, in which matter Mr. Henry Wheaton, then our minister to Denmark,

[1] Westlake, "Int. Law," I, pp. 194–6.

contributed very largely, the *Sound Dues* of ancient usage, levied by Denmark on vessels passing through the sound and the belts forming a passage between the North Sea and the Baltic were abolished in 1857, and the Baltic is also held as an open sea.

It can be said as an established general rule that if a strait forms an international highway the right of innocent passage for foreign war-ships and merchant vessels exists, even in the case of straits which are less than six miles wide.

Lakes and landlocked seas which are entirely surrounded by the land territory of a single state are, naturally, territory of that state, which has exclusive jurisdiction. Lake Michigan of the Great Lakes of North America is in this category. If a lake or sea is wholly enclosed by more than one state, the waters and jurisdiction are divided accordingly, in the absence of treaties to the contrary.

71. **Rivers.**—As to great navigable rivers lying in their entire course within the territory of one state, they are national in character, and the power of excluding foreign vessels remains with the territorial state. This may be modified by treaty, however. If a seaport is situated on the banks of a river of that kind, of course navigation to that port to foreign vessels is freely conceded. Philadelphia on the Delaware River and New Orleans on the Mississippi are familiar instances of that kind in this country.

The question of the navigation of the Mississippi River has a peculiar history. The treaty of peace at the close of the Revolutionary War, in 1783, provided that the navigation of the Mississippi, from its source to the ocean, shall forever remain free to the subjects of Great Britain and citizens of the United States. At that time it was supposed that the headwaters of the river were in British territory, while the river was our western boundary except where it flowed through Louisiana and the Floridas. Hence at the time it was an international river, subject to navigation by British, Spaniards,

and Americans. By the subsequent acquisition of Louisiana and the Floridas by the United States and the discovery that its headwaters were within the limits of the United States, the Mississippi ceased to be an international river, and the right to control its navigation became an exclusive right within the United States.

In 1871, by the treaty of Washington, the rights of navigation were given, in an international sense, to the St. Lawrence River and also to the Yukon, Porcupine, and Stikine Rivers. In South America the flags of all nations, as well as those of the coriparian states, have the right of navigation to the Amazon, the Rio de la Plata, and the Orinoco. The great rivers of the continent of Europe, like the Rhine, the Scheldt, and the Danube, are examples of rivers in this class also.

The Amazon River, after various changes in policy, has been declared open to merchant vessels of all nations; this includes men-of-war so far as the maritime ports of the Amazon are concerned, but the Brazilian Government, in 1899, stated that, according to the rule of Brazil, the commander of a foreign man-of-war, before ascending the Amazon, must obtain a formal permission from the governor of Para, on a written request made by the proper consul there.

By the general act of Berlin of February 25, 1885, Article II, all nationalities have free access to the Congo and its affluents, including the lakes, as well as to any canals that may be constructed to unite the watercourses or lakes within the territories of the state. This includes the free navigation of the Congo and all of its branches.[1]

As to these rights of navigation, technically a state possessed of one portion of an international river can exclude the vessels of a coriparian state unless otherwise provided by treaty. Yet, as a matter of comity amounting to an imperfect right, it does not withhold such privilege. "Usage," as Lawrence says, "is turning against the ancient rules. It is now set

[1] Stockton, "Manual," p. 88.

aside by treaty stipulations, but in time the new usage founded on them will give rise to a new rule, and no treaty will then be required to provide for the *free* navigation of an international river by the coriparian states, while in all probability the vessels of other nations will be allowed to come and go without let or hinderance. It is, and no doubt will remain, an admitted principle that the right of traversing the stream carries with it the right of using the banks for purposes incidental to navigation."[1]

72. **Interoceanic Canals.**—Ordinary canals within the territory of one and the same state have somewhat the same status as rivers under international law in similar situations and conditions. The Kiel Canal is an example of this nature, being entirely within German jurisdiction, though connecting the Baltic and the North Seas. Germany allows the navigation of this canal under ordinary circumstances by vessels of all nations. Being built mainly for strategical purposes, its navigation is directly and exclusively under the government of the German Empire under all conditions. The first interoceanic canal in operation worthy of the name was the Suez Canal, which connects the Mediterranean with the Red Sea, and affords a route to the Orient as an alternative to that by the way of the Cape of Good Hope. This canal is in Egyptian territory, which in a titular sense is Turkish, but practically the territory is under the control of Great Britain. The canal itself was constructed under French auspices, and it is worked as a private canal for commercial profit and purposes. Great Britain is a large shareholder and politically, though not exclusively, is greatly interested in it as a route to Asiatic waters and to the great British Asiatic and Australian possessions. Naturally the interest in this route as one of the great sea routes of the world is international, and its status is one of great and general diplomatic concern. Its position and use have much influence in all questions dealing with other interoceanic canals.

[1] Lawrence's "Principles," p. 211.

In regard to canals in general, the decisions quoted by Moore, that "while a natural thoroughfare, although wholly within the dominion of a government, may be passed by commercial ships of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases."[1] This, of course, is modified or restricted by any treaties which may exist or which may be entered into with other states by the state which constructs the canal or controls the territory through which it passes.

A brief history of the diplomacy connected with the Suez Canal is as follows:

By the convention of Constantinople of 1888 the Suez Canal was declared open in time of war and peace to merchantmen and vessels of war of all nations, without distinction of flag, and also that the canal should not be liable to blockade in time of war or peace. This convention was signed by Great Britain, Austria-Hungary, and Turkey. The whole treaty comprises seventeen articles, the substance of Article I having just been given, while the others comprise the following stipulations:

In time of war no act of hostility is allowed either inside the canal or within a marine league from either end. The usual rules as to the stay and departure of vessels of war for neutral ports are in force with the canal. Turkey, though suzerain of the soil, is not permitted to commit any act of hostility within the canal limits. Troops, munitions of war, etc., are neither to be shipped nor landed within the canal or its terminal ports.

No men-of-war can be stationed within the canal, but men-of-war can have access to the terminal ports, while no permanent fortifications are allowed in connection with the canal. During the Spanish-American War Mr. Hay, then our ambassador in London, inquired of the foreign office of Great Britain whether there had been any modification of the convention of 1888 which would place the non-signatory powers,

[1] Moore's "Digest," vol. III, p. 268.

like the United States, on any different footing from those signing the convention, to which answer was made that there had been none, and as a result in that war the Suez Canal was open to both belligerents, as had been the case in the Franco-German War of 1870, the Russo-Turkish War of 1877, and since in the Russo-Japanese War of 1904.

In the declaration respecting Egypt and Morocco, signed at London in 1904 by Great Britain and France, Article 6 reads as follows: "In order to insure the free passage of the Suez Canal, his Britannic Majesty's Government declares that they adhere to the stipulations of the treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the canal being thus guaranteed, the execution of the last sentence of par. I as well as par. II of Article 8 of that treaty will remain in abeyance." These paragraphs refer to a watching over the canal with regard to men-of-war in time of war and peace by the agents of the signatory powers.[1]

The expression neutralization is often used with respect to the status of the Suez Canal in time of war. But this term varies in use and meaning. It is neutralized in the sense that no acts of hostility can be committed, without a violation of treaty, within its limits or those of the terminal waters. But it is not neutralized in another sense, as it can be used in war time for passage through by belligerents for any warlike expedition whose objective is exterior to the canal. It is not even similar to marginal territorial waters of a neutral, as these waters have no limitations as to time of arrival and departure. Certainly it is not like neutralized land territory, for passing through such territory is denied. It is *sui generis,* common to all vessels, to whom warlike operations are denied while passing through. It remains to be seen how it will be operated when Great Britain becomes a belligerent against another powerful naval belligerent. In this connection, and it is useful as a precedent for Panama, we must remember that, in 1882, Great

[1] Stockton's "Naval Manual," pp. 107–9.

Britain occupied the canal from end to end and made it the base of warlike operations in Egypt.

73. **The Panama Canal.**—As to the Panama Canal, now completed within the Canal Zone ceded to the United States for that purpose by the republic of Panama, its status differs from the Suez Canal or any other canal mentioned.

In the first place, it has been constructed directly by the United States of America, under the auspices of the general government, in territory originally foreign but now held according to treaty in perpetuity. On account of the existence of a previous treaty dealing with the interoceanic canal and transit across the American isthmus, connecting North and South America, and generally known as the Clayton-Bulwer treaty, a relationship existed in this question between Great Britain and the United States. This treaty between the two states has been succeeded by another treaty on the same subject known as the Hay-Pauncefote treaty of 1901 and now in force. In addition, the canal question is governed also by the treaty between the United States and the republic of Panama, concluded in 1903 and proclaimed after ratification, February 26, 1904. This treaty is known as the Hay-Bunau-Varilla treaty. The territory through which the canal passes may be considered as being affected by the treaty of 1846, between the United States and Colombia, still in force, the settlement of the questions concerned being still a matter of negotiation between the two countries.

In a physical sense the Panama Canal differs from other canals, as its connection is more direct than any existing canal between the two great oceans of the world, and it creates, to a large extent, new sea routes, some of them to countries which, though governed by the white race, are but imperfectly developed. In a military sense it may become of the greatest importance to the United States, while commercially it opens exceptional possibilities for sea trade and intercourse.

The Clayton-Bulwer treaty was the first treaty negotiated

which governed the question of international waterways across the American isthmus. It was formulated, in 1850, between Great Britain and the United States, and, though perpetual in its nature, it was superseded by mutual consent by the Hay-Pauncefote treaty of 1901.

The preamble of the Clayton-Bulwer treaty declared that the two countries desired to consolidate their friendship by "setting forth and fixing in a convention their views and intentions with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific Oceans." The first article forbade exclusive control and also further fortifications, colonization, and occupation over territory likely to be used for a canal.

In case of the construction of a canal, vessels of both states were to be exempt from blockade, detention, or capture within the limits of the canal and a certain distance of the terminal waters. The neutrality of the canal was to be guaranteed, and it was to be forever open and free. The eighth article declared that a general principle was to be established by which the protection of both countries was extended to any inter-oceanic transit, either by canal or railway.

The first objection to the treaty, that of its perpetuity, was, in general, the objections that pertain to all perpetual treaties; circumstances change in time, and such treaties become either of doubtful benefit or antagonistic to the present interests of one or both of the parties concerned. This was the case of this treaty, and the objections to the treaty as it stood were very ably and specifically enumerated by Secretary Blaine in a communication to Mr. Lowell, then minister to Great Britain, under date of November 19, 1881. In this communication Mr. Blaine states the following, which is interesting even at the present time: "Nor does the United States," he says, "seek any exclusive or narrow commercial advantage. It frankly agrees and will by public proclamation declare at the present time, in conjunction with the republic on whose soil the canal

may be located, that the same rights and privileges, the same tolls and obligations for the use of the canal shall apply with absolute impartiality to the merchant marine of every nation on the globe."[1]

The Hay-Pauncefote treaty provides in the first article the agreement that this treaty should supersede the Clayton-Bulwer treaty. In the second article it is agreed that the canal may be constructed under the auspices of the government of the United States and that, subject to the provisions of the present treaty, the said government should have all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

The following rules were contained in the third article of the treaty:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

"2. The canal shall never be blockaded, nor shall any right of war be exercised, nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

"3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force and with only such intermission as may result from the necessities of the service.

"Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

"4. No belligerent shall embark or disembark troops, muni-

[1] Moore's "Digest," vol. III, pp. 190, 191, 193.

tions of war, or warlike materials in the canal, except in case of accidental hinderance of the transit; and in such case the transit shall be resumed with all possible despatch.

"5. The provisions of this article shall apply to waters adjacent to the canal, within three miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

"6. The plant, establishment, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purpose of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal."

This treaty differs from both the Suez Canal convention and the Clayton-Bulwer treaty in that it does not forbid the erection or maintenance of fortifications. It differs from both also in that it does not provide for war between the contracting parties or between the United States and other powers, the dual guarantee by the Clayton-Bulwer treaty being replaced by a single assumption by the United States. It has no provision for the adherence of any other powers, either in the treaty or the guarantee.[1]

The first draught of the Hay-Pauncefote treaty was not ratified by the Senate of the United States, and while the second draught was being arranged between the United States and Great Britain the discussion between the negotiators included the subject of the fortification of the canal by the United States. Upon this question Lord Lansdowne, then the British foreign minister, said in a memorial that "as to this (the

[1] "The Status of Panama Canal," etc., *A. J. I. L.*, H. S. Knapp.

fortification question), I understand that by the omission of all reference to the matter of defence the United States Government desires to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hand of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from the principles of neutrality laid down by the rules. As to the first of these propositions, I am not prepared to deny that contingencies may arise when, not only from a national point of view but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defence of the canal at a moment when they were themselves engaged in hostilities."[1]

The necessity for defence, founded on the right of self-preservation, chimes in with the remarks quoted above, which are also applicable to the Suez Canal. When it is considered of how little value improvised works of defence would be, hastily constructed for the moment, full justification is given to the action of the United States in erecting permanent fortifications with ordnance of large calibre. Too much is involved to trust to flimsy works, armed and equipped with such guns as may be at hand, at such a distance from home resources.

74. **Hay-Bunau-Varilla Treaty.**—In Article II of the treaty with the new republic of Panama, commonly known as the Hay-Bunau-Varilla treaty, which has been already referred to, Panama grants, not cedes, to the United States in perpetuity, the use, occupation, and control of a zone of land under water for the construction, maintenance, operation, sanitation, and protection of said canal. There is also a further grant in perpetuity of any lands or waters outside of the zone which may be found necessary and convenient for the purposes just mentioned in the enterprise.

[1] Moore's "Digest," vol. III, p. 215.

Article XVIII states that "the canal when constructed and the entrances thereto shall be neutral in perpetuity and shall be opened upon the terms provided by Section I, Article III of, and in conformity with all the stipulations of, the treaty entered into by the governments of the United States and Great Britain, on November 18, 1901 (Hay-Pauncefote treaty)."

Article XXIII reads: "If it should become necessary at any time to employ armed forces for the safety or protection of the canal or of the ships that make use of the same or the railways and auxiliary works, the United States shall have the right at all times and in its discretion to use its police and its land and naval forces or to establish fortifications for these purposes."

Article XXV reads: "For the better performance of the engagements of this convention and to the end of the efficient protection of the canal and the preservation of its neutrality, the government of the republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the republic, at certain points to be agreed upon with the President of the United States."[1]

The two treaties which have just been given in part cover the external relations of the Panama Canal and provide for its free use in time of peace, and in war time by belligerents in general; it does not, however, include in these belligerents any state at war with the United States, as was done by the Suez Canal convention with respect to Turkey. It really puts the Panama Canal in the same status as a fortified port of a neutral state, so far as its use and the length of stay of belligerent vessels are concerned. Such ports can be used in common by all belligerent vessels, subject to restrictions as to length of stay and times of departure, and no acts of hostilities can be performed within its territorial limits when it is neutral; but the United States has the means of defence, when a belligerent,

[1] "Compilation of Treaties in Force, 1904," p. 609.

against the enemy. Its fortifications can be used, if necessary, to prevent any violation of its status of neutrality. The canal is free and open by treaty to vessels of commerce and of war of all nations observing the specified rules; hence, for violation or non-observance of the rules referred to such vessels can be excluded from the canal by the agents of the United States.

There is a conflict between provisions of the Hay-Bunau-Varilla treaty and the Hay-Pauncefote treaty, as well as some of the provisions of the treaty of 1846 between the United States and the republic of Colombia. As this latter conflict is a matter of present negotiation it is to be hoped that the questions under discussion will be settled satisfactorily to all countries. The principal conflict arises from the guarantee conveyed in the treaty of 1846 for the sovereignty of Colombia on the Isthmus of Panama, the question arising from the rental due to Colombia from the Panama Railway and the action of the United States in connection with the establishment of the republic of Panama.

TOPICS AND REFERENCES

1. The Right of a State to Exclusive Jurisdiction over Its Own Territory—
   Hershey, "Essentials," 159, 160, 233–5. Oppenheim, 2d ed., vol. I, 229–237. Lawrence's "Principles," 4th ed., 139–147.

2. The Right to Hold and Acquire Property—
   Hall, 6th ed., Atlay, 101–116. H. Taylor, 264–277. Scott's "Cases," 70–75.

3. Boundaries of States—
   Halleck, vol. I, 4th ed., Baker, 182–5. Moore's "Digest," vol. I, 615–621. Wheaton's "Elements," 8th ed., Dana, 274.

4. State Servitudes—
   Phillimore, "International Law," 3d ed., I, 388–393. Holland, "Jurisprudence," 10th ed., 214–221. Westlake, "International Law," I, 141–2. Wheaton, 8th ed., Dana, secs. 192, 194–6, 202.

5. Territorial Waters—The Marine League—
   Wheaton, 8th ed., Dana, 255–272. H. Taylor, 293–9. Walker, "Manual," sec. 17. Vattel, I, secs. 287–290.

6. Straits—

   Wheaton, 8th ed., Dana, 271–3. H. Taylor, 281–9. Snow's "Cases," 41–55.

7. Rivers—

   Phillimore, I, secs. 155–171. Wheaton, 8th ed., Dana, 274–288. Moore's "Digest," secs. 130–1.

8. Interoceanic Canals—Suez Canal—

   Cromer, "Modern Egypt," II, chap. XLVII, 382–7. Lawrence, "Essays," etc., 2d ed., Essay II, 41, etc. Penfield, "Present-Day Egypt," 184–217.

9. Panama Canal—

   Johnson, "Four Centuries of Panama Canal," 1906. List of books and articles on "Interoceanic Canals and Railway Routes," published by Library of Congress, 1900. Hershey, "Essentials," 208–212.

10. Governing Treaties—

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CHAPTER VIII

THE HIGH SEAS. IMMUNITIES OF FOREIGN VESSELS IN PORTS AND WATERS

75. What Is Meant by the High Seas.—By the term the high seas, in municipal and international law, is meant all that continuous body of salt water in the world which is navigable in its character and which lies outside of the territorial waters and maritime belts of the various countries. This great extent of salt water is represented by the five great oceans and the various bodies of water dependent upon and connected with them.

The oceans, of course, represent the greater part of the open salt-water area of the world, the remainder of the high seas consisting of dependent bodies of water, like the Gulf of Mexico, the Caribbean Sea, the Mediterranean, the Black Sea, and others. These dependent seas have often still other dependent seas, like the Adriatic with respect to the Mediterranean, and so the subdivisions continue. Even the enclosure of waters by one or more states does not properly remove such waters from the area of the high seas, Hudson Bay, in British America, with its wide entrances, being a fair example of that nature.[1]

In connection with international law, which is the reigning law upon the high seas outside of the narrow sphere of the vessel, the sea bears a most important part, both in peace and war time. This is the case in war especially, not only with regard to the belligerents concerned therein but also with respect to the neutral powers and their vessels.[2]

[1] Thomas W. Balch, *A. J. I. L.*, vol. VII, no. 3.
[2] Stockton's "Naval Manual," pp. 78. 79.

76. The Freedom of the High Seas.—In early days, including the first portion of the Middle Ages, navigation upon the high seas was free to the world. Definite claims to parts of the high seas began, however, in the latter part of the Middle Ages. At the end of that period the republic of Venice claimed and was recognized as the sovereign of the Adriatic and the republic of Genoa as the ruler of the Ligurian Sea. Portugal claimed, by virtue of papal decree, to be the sovereign over the whole of the Indian Ocean and of the parts of the Atlantic Ocean lying south of Morocco. The Pope of Rome also gave to Spain the authority for her claim over the Pacific Ocean and the Gulf of Mexico. Sweden and Denmark claimed sovereignty over the Baltic. Great Britain claimed and attempted to enforce her sovereignty over the narrow seas; that is, the North Sea and the Atlantic Ocean from the North Cape to Cape Finisterre.

But the extravagant assertions of Spain and Portugal were not submitted to by the French, Dutch, and English navigators, "and when, in 1680, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific, Queen Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air was common to all, and that no title to the ocean could belong to any nation, since neither nature nor regard for the public use permits any possession of the ocean."[1]

In 1609 Grotius appeared on the scene with his treatise "Mare Liberum," arguing that the sea cannot be under the jurisdiction of the state because it cannot be held in possession through occupation, and consequently it is free from the sovereignty of any state. This work of Grotius met with responses from writers of several nations. The most important answer was by John Selden, written in 1619 and printed in 1635. Selden sought to establish the propositions: "1. That

[1] Oppenheim, 2d ed., I, p. 318.

the sea may be property. 2. That the seas which washed the shores of Great Britain and Ireland were subject to her sovereignty even as far as the northern pole."

So fully did Charles I accept the arguments of Selden that "he instructed Carleton, the British ambassador, to complain to the states general of the Dutch provinces of the audacity of Grotius in publishing his "Mare Liberum," and to demand that he should be punished."[1]

In spite of opposition and after due time the doctrines of Grotius prevailed, ably seconded, as he was, by such writers as Bynkershoek, Vattel, G. F. de Martens, and others, until at the end of the first quarter of the nineteenth century Great Britain herself became a champion of the freedom of the high seas. When Russia, in 1821, attempted to forbid all foreign vessels from approaching the shore-line of Russian Alaska within the distance of one hundred Italian miles, both the United States and Great Britain protested, and Russia gave up her claims in treaties concluded with the two countries in 1824 and 1825.

An incidental claim to jurisdiction beyond the marine league in the Bering Sea has led to the statement that the United States revived the Russian claim during the controversy in regard to the seal fisheries from 1886 to 1893.

Though this claim was undoubtedly used by some of the agents and officials of the United States during the controversy, neither the secretary of state, Mr. Blaine, nor our minister to Great Britain sanctioned this argument. The main argument of the United States was that the seals were its property and that the consequent right of protection followed on the high seas and elsewhere. This claim was founded upon the fact that the seals in the eastern Bering Sea habitually go to the Pribylov Islands, belonging to the United States, for breeding purposes, leaving there to go into the high seas in search of food and returning there successively each year for

[1] Phillimore, 3d ed., I, p. 258.

the establishment of their harems.[1] The decision of the court of arbitration in this controversy was against the United States upon all points.

In concluding this narration, it may be stated that it is now an accepted rule of international law that the high seas are free and cannot be denied to the use of all nations at all times. This rule is based largely upon the necessity of absolute freedom of intercourse by means of the sea, as the sea is becoming more and more an international highway and less and less an obstacle for international communication.

Besides these grounds, there is the traditional one also that it is practically impossible to retain possession of the high seas by permanent occupation, in the sense that territory on land is so occupied. This physical control naturally increases in its possibility as the approach is made to land and as we enter into the marginal waters of a state.

For the purposes of mutual safety in navigation it has been found necessary, by treaty and by municipal law, to agree upon and promulgate certain rules for the avoidance of collisions, etc., upon the high seas. Besides these rules, there are others enacted by Congress that are applicable to seagoing vessels of all nations within the waters of the United States. This is, of course, purely municipal federal law. In neither case can the rules be called international law, but the so-called international rules are the result of international maritime conferences, and the rules in regard to the avoidance of collisions will doubtless continue to be subject to such conferences and arrangements as the changes in vessel and circumstances dictate. The same can be said as to proposed arrangements for greater safety in case of shipwreck and for communication between vessels by wireless and other means of signalling. The great opportunities for assistance in danger have been multiplied to such an extent by means of wireless telegraph that provisions for common safety will necessarily increase, so

[1] Moore's "Digest," I, sec. 172.

many nationalities being interested in every transoceanic steamship carrying large and heterogeneous numbers of passengers.

In cases of collisions occurring upon the high seas between vessels of different and foreign states, the Supreme Court of the United States has decided that the admiralty courts of the United States may take jurisdiction.[1]

Great Britain in her admiralty courts also claims jurisdiction between two foreign ships if the guilty ship is in a British port at the time an action is entered for damages, the collision having taken place on the high seas.

All countries have freedom of fishing upon the high seas, which right is limited only by treaty or common usage founded on treaty. The latter would include servitudes. Treaties and regulations have been negotiated with respect to the fisheries in the North Sea between various maritime countries in Europe. This includes a suppression of the liquor trade among the fishing vessels in that sea. As a result of the Bering Sea arbitration, rules were drawn up with regard to seal fishing, but they have never been generally established or recognized. A further convention was agreed to bearing on this subject and signed at Washington, July 7, 1911. A treaty for regulating the fisheries in the vicinity of Iceland was signed in June, 1901.

So far as telegraph and telephone cables are concerned, the high seas are free and open to all, but no state is required to permit their entry into its territorial waters. A convention was agreed upon, in 1884, by most of the maritime powers for protecting submarine telegraph cables in time of peace upon the high seas; this does not restrict, however, the action of belligerents in time of war.[2] Regulations have been perfected as to wireless telegraphy on the high seas, so that ready communication can now be maintained with vessels of all nations, in time of peace, as to dangers seen and vessels in distress.

[1] Moore's "Digest," vol. II, p. 79. [2] Oppenheim, 2d ed., I, chap. VII.

77. **Jurisdiction over Vessels upon the High Seas and Other Waters.**—In order to carry practically into effect the jurisdiction of a state over its vessels upon the high seas, it is necessary that every state which has shipping should adopt regulations under which its national vessels can legally carry its maritime flag. These regulations provide for certain official documents to be carried by the privately owned vessels, and which give the vessel an identity as to nationality, ownership, its personnel, cargo, and destination. If a vessel carries the flag of a state without proper authority upon the high seas, she is punishable by that state under its municipal law. When the vessel under jurisdiction of a state has its proper papers, it is authorized to carry the maritime flag and is under the exclusive domain of that state on the high seas and within the territorial waters of the state. This jurisdiction includes all the persons and cargo carried by it.

The flag carried by such privately owned vessel may be a special flag adopted by the state for such vessels or it may be the flag used as an evidence of nationality for all purposes, ashore and afloat. With the United States there is but one national flag, with the exception of the flag used in home waters for the revenue marine service and the flag prescribed under the law of the secretary of the navy for regularly enrolled yachts. The French republic has a common flag for all national purposes, while other countries vary as to their maritime and other national ensigns.

Vessels of war are the representatives of the sovereignty of the state under whose flag they sail, being a part of their armed forces. They possess this character with its immunities upon the high seas as well as in foreign territory. They must, however, be commissioned and manned as a national vessel by the state and under the command of a regularly enrolled official, responsible to and commissioned by the state as a member of its naval or marine service.

Other public vessels consist of despatch vessels, school-

ships, transports, store-ships, colliers, revenue marine vessels, lighthouse tenders, and vessels temporarily or permanently employed in the service of the state for public purposes only.

Vessels of war or public vessels are under the absolute jurisdiction of their state, and no war rights of belligerents extend toward them. In foreign ports and waters they have practically an immunity from the local jurisdiction.

A vessel of war is identified by her external appearance and by the flag and pennant which should be carried. As a rule, the pennant is not allowed to be carried by other than vessels of war. The armament of a vessel of war and the military appearance of her personnel are also evidences of her character. The commission of the state held by the commanding officer of a man-of-war is conclusive as to the employment of the vessel which he commands, though as a matter of courtesy the declaration of the commanding officer as to the nature of his vessel is generally accepted.

The civil and criminal jurisdiction on the high seas over persons and things on board of the vessel of the state whose flag is carried includes foreign persons of the crew or passengers then on board, this being a similar condition with respect to these aliens as that existing on shore with regard to them when in the jurisdiction of a state.

The home state may legislate with respect to its citizens who travel in foreign vessels, but such laws cannot be enforced until they come within their territorial jurisdiction.

The right of citizens of the United States to acquire property in foreign and foreign-built ships has been held to be a national right independent of statutory laws, and such property is as much entitled to protection by the United States as any other property of a citizen. A consular officer may make record of a bill of sale in such cases and deliver to the owner a certificate which will be the certificate of nationality in place of the usual official document known as the "register" of the vessel. As vessels of this class carrying the American flag

are not registered, enrolled, or licensed, they cannot import merchandise from foreign ports into the United States or engage in the coasting-trade of the United States.

While they have the right to fly the flag of the United States, it is not required that the officers be citizens of the United States. It has been further determined as to this anomalous type of vessel, by a decision of the United States Supreme Court, that a British subject on board such a vessel comes within the jurisdiction of a United States consular court, whenever it may be reached in the case of a crime committed on board.

There are certain exceptions, in time of war, to the freedom of the high seas which are permitted under international law as agreed upon by all nations. These are war rights, and consist of the right of search and visit of neutral vessels and that of seizure of neutral vessels for the violation of blockade, unneutral service, and for the carriage of contraband of war. There is also existing the right of capture of the merchant vessel of an enemy as well as of the hostile man-of-war, or public vessel of an enemy. By the treaty made in 1890 by the participating powers in the conference of Brussels, called for the purposes of putting an end to the African slave-trade and to which the United States adhered at a later date, a right of visit and search of vessels in time of peace was agreed upon within a limited area or zone at sea on the eastern coast of Africa. The vessels, susceptible to visit and search, were to be of less than five hundred tons in dimensions and of a peculiar type and rig. The French alone refused to ratify this right of visit and search in the maritime zone thus established by treaty, but the results from this agreement seem to have been very effective in diminishing this trade.[1]

78. **Piracy.**—"Pirates being the common enemies of all mankind," says Wheaton, "and all nations having an equal interest in their apprehension and punishment, they may be

[1] Moore's "Digest," II, pp. 948–951.

lawfully captured on the high seas by the armed vessels of any particular state and brought within its territorial jurisdiction for trial in its tribunals. . . . "[1]

"Piracy, under the law of nations, may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy so termed and created by municipal statute can only be tried by that state within whose territorial jurisdiction and on board whose vessels the offence thus created was committed."

To constitute piracy, it is necessary, of course, that the offence be adequate in degree and that the persons concerned should have acted in defiance to lawful authority and, it may be said, in general, with a view to plunder.

By the law of nations, the proper punishment for piracy is death, but this is not mandatory upon states which do not award death as a penalty for crime. It may be said, also, that a state is not obliged to punish piracy. According to the German law, piracy committed by foreigners against foreign vessels cannot be punished by the German law courts.

Piracy has at times by municipal law, on the other hand, been given a range beyond that given by international law. In the United States the slave-trade is made by law the same offence as piracy, and the law as to piracy includes offences which would ordinarily be punished on shore by death.

To deliberately burn, cast away, or destroy any ship is piracy under the statutes of the United States, while by English law any English subject who transports slaves on the high seas or who gives aid or comfort upon the sea to the king's enemies during a war is deemed to be a pirate.

79. **Right of Approach.**—As an accessory to the right to seize piratical vessels or vessels violating municipal laws on the high sea, there exists what has been termed the right of a vessel of war to approach another vessel to determine her character, or, in shorter terms, the "right of approach." The

[1] Wheaton, 8th ed.; Dana's ed., "Int. Law," sec. 124.

authority for the exercise of this right with us was the decision of the United States Supreme Court in the case of the *Marianna Flora,* in which the late Commodore Stockton was involved. The *Marianna Flora* was a small Portuguese vessel of war which was met upon the high seas by Captain Stockton, then commanding the U. S. S. *Alligator,* cruising in general search of pirates. While approaching the *Marianna Flora,* which resembled in appearance the type of pirates and slavers then existing, the *Marianna Flora* opened fire upon the *Alligator* on the supposition that she was a South American privateer, and a fight ensued, which resulted in the capture of the *Marianna Flora* and her rendition to port for trial, etc. She identified herself as a Portuguese vessel of war and claimed damages for the action of the commanding officer of the *Alligator.* The matter was brought before the United States Supreme Court in a personal suit; the court decided in favor of Captain Stockton upon the grounds that, first of all, "ships of war sailing under authority of their government, instructed to arrest pirates and other public offenders, may approach vessels at sea to ascertain their character."

Second, that "a ship under such circumstances is not bound to lie by and await approach, but she has no right to fire at an approaching cruiser upon a mere conjecture that she is a pirate, especially if her own conduct has invited the approach; and if this be done the cruiser may lawfully repel force by force and capture her." The third point decided was that "the rule of territorial waters is inapplicable to ships on the high seas; hence a ship cannot draw around her and appropriate so much of the ocean as she may deem necessary for her protection and prevent any nearer approach."[1]

80. Papers Carried by Merchant Vessels.—In general, merchant vessels are required by the municipal laws of their various states to carry all or most of the following papers:

1. A document showing the right to carry the national flag

[1] "The *Marianna Flora,*" 11, Wheaton, I.

as an evidence of nationality. This is generally known as the register.

2. The muster-roll of the crew.

3. A log-book of daily occurrences.

4. A manifest, or list of the cargo. This is not absolutely necessary, as it is a summary of the bills of lading. It generally indicates position of storage.

5. A bill of lading, which is virtually a receipt for the cargo, and should give ports of shipment and discharge and the consignees.

6. A charter party or contract between the owner of the vessel and some other party by which the vessel is hired for some certain length of time.

7. The shipping articles. The contract between the master and seamen, signed by both parties.

8. Invoices of goods, with account of the nature of the goods.

9. Bill of health. As this states to what port the ship is bound, it checks other papers.

10. Clearance, which is a certificate that permission to sail has been given.[1]

In discussing the question of the high seas, it may be said that a vessel violating, by means of boats or craft proceeding from and belonging to the vessel, any municipal law within the marginal waters of a state is, by the best authorities, held to be liable for such violation, even if the vessel herself is indisputably upon the high seas and outside of the marine league.

In the case of the British sealer *Araunah*, which was seized by Russian authority, in 1888, in the Bering Sea, it was affirmed that the crew of the vessel was carrying on operations against seals in canoes within a half of a mile from Russian territory, although the *Araunah* was herself outside of the maritime belt. Lord Salisbury, then British foreign minister, decided that this action in violation of Russian law warranted her seizure and confiscation.

[1] Stockton's "Naval Manual," p. 99.

By the act of Congress of 1856, when any citizen of the United States discovers and works a deposit of guano on any rock or island, not within the jurisdiction of any other state and not occupied by any foreign citizen or subject, and occupies the island, it may be considered as territory of the United States. Such islands and rocks, however, are not made a part of the United States, and all offences committed thereupon and in its adjacent waters are held as being committed on the high seas and should be punished accordingly.[1]

81. Immunities of Foreign Vessels of War in Ports and Waters.—A port of entry for the free use of men-of-war and merchant vessels and for commercial purposes in connection with them is created by municipal law. A foreign vessel can by the comity of nations take refuge and anchor in the case of bad weather, as a matter of safety, in any bay or harbor of a foreign jurisdiction, even where entrance to a port is generally denied to such visits and confined, as in China and Japan, to what are known as treaty ports.

There are certain ports which men-of-war or other vessels are denied the use of, in part or in whole or in peace or war, for military reasons alone. In other ports, for military reasons, there are limits imposed as to the number of foreign war vessels to be allowed at any one time, of any one nation, in the port. Examples of this latter kind will be found as to Constantinople in Turkey, Vladivostok in Siberia, and the New Harbor of Singapore.

No foreign, national, or privately owned vessel in time of peace or war is permitted to visit, except by special authority of the United States Navy Department in each case, the ports of Pearl Harbor in the Hawaiian Islands, Subig Bay in the Philippines, Guam, Great Harbor, Culebra, the Guantanamo Naval Station, Cuba, the Dry Tortugas, Florida, and Kiska in the Aleutian Islands.

As a rule, however, where there are no express prohibitions, the ports of one state are considered to be open to the public

[1] Brightley's "Digest," p. 301.

and privately owned vessels of every other nation with whom it is at peace.

In the case of the *Exchange*, the decision of Chief Justice Marshall of the Supreme Court of the United States gives sound and well-defined reasons for the exemption of men-of-war from the general jurisdiction of the state in which the port is situated. Such vessels are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under an express permission, stipulated by treaty, or a permission implied from the absence of prohibition.

The *Exchange* had originally belonged to an American citizen but had been seized and confiscated at St. Sebastian, in Spain, and converted into a public armed vessel by the Emperor Napoleon in 1810, and upon her arrival in Philadelphia was claimed by her original owner. Chief Justice Marshall said: "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit as promoted by intercourse with each other and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent might, in some instances, be tested by common usage and by common opinion growing out of that usage. . . ."

"It is impossible to conceive," said Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power. . . . Equally impossible was it to conceive that a prince who stipulates a passage for his troops or an asylum for his ships of war in distress should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked. . . .

"A clear distinction is to be drawn between the rights ac-

corded to private individuals or private trading vessels and those accorded to public armed vessels which constitute a part of the military force of the nation. . . . The situation of a public armed vessel is, in all respects, essentially different; she constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him on national subjects; he has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state; such interference cannot take place without seriously affecting his power and dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the court should be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality."[1]

Besides the vessel itself, the immunity of a man-of-war is extended to its boats, tenders, rafts, and other appurtenances. The ship must, however, respect the administrative and sanitary rules of the port, such as to pilots when used, to places and methods of anchoring, regulations for quarantine, landing-places, and the disposal of refuse, etc. In case of war, the foreign vessel is held to observe the neutrality of the port.

A vessel of war, according to the best authorities, is exempt from the visitation and search of the officials of the customs of the foreign port. By the regulations of the United States navy, commanding officers are strictly forbidden to allow any examination whatsoever of the ships or boats under their command by foreign officers of the customs.

They are also forbidden to permit any ship of the navy under their command to be searched by any person representing a foreign state, nor are any of the officers or crew to be taken out of her so long as they have the power to resist. If force is used for such purpose it must be repelled.[2]

[1] "The *Exchange*," 7 Cranch 135, and Scott's "Cases."
[2] "U. S. Navy Regulations, 1913," secs. 2045, 2046, 2047.

Lampredi, a distinguished Italian authority, in referring to the immunity of a vessel of war in a foreign port, says: "Such a ship of war cannot exist and be governed without the perpetual duration of military command, which consequently continues to be exercised in all of its extent within the vessel, more in virtue of the concession of the prince who receives the ship than from any right on the part of the captain, much less in virtue of any territorial right."[1]

As expressed above, the commanding officer of a vessel of war retains, of course, his usual authority to maintain order and discipline and to establish the necessary tribunals to punish offences committed on board or on shore by persons under his command, in violation of the laws or discipline of the naval service of his country. It is not legal, however, in the United States navy to have such courts convene or hold session on shore in foreign territory. In case a crime is committed on board a vessel of war, by a person or persons not belonging to the ship or the naval service of his country, the commanding officer may, with propriety, deliver the parties concerned to the local authorities. If the offender and injured person are both citizens of the state in which the port is situated, it is his duty in ordinary cases to deliver the criminal to the local authorities.

As to ordinary criminals seeking to escape arrest and punishment for crimes committed on shore by taking refuge on board foreign vessels of war, it is wrong to harbor them, whether they are of the nationality of the port or of the vessel of war. By usage, this privilege of refuge may be said to be confined to fugitive slaves or persons who are pursued for political offences alone. The surrender and denial of refuge is at the discretion alone of the commanding officer. This is especially the case if the person concerned has reached the ship; he cannot be taken out without the order or permission of the commanding officer. Under no circumstances have the local authorities

[1] Lampredi, "Tratt. del Comm.," chap. X, p. 1.

the right of seizure or arrest on board foreign vessels of war. If delivery is refused, further proceedings must be by means of diplomatic channels.

82. Immunity from Arrest When Asylum Is Sought on Board Vessels of War.—Under the general rule of international law and courtesy it is considered wrong to offer or afford an asylum to a criminal or to a person charged solely with a crime against the state in whose friendly waters a vessel of war happens to be for the time. If, however, a criminal of any kind succeeds in getting on board a foreign vessel of war, he cannot be apprehended or followed on board by the police or local authorities. The commanding officer has a right to judge for himself whether the crime charged as non-political is so or is only used as a pretext to prevent asylum being granted to a person in flight for his life on account of his political acts.

The regulations of the United States navy read as follows upon this subject: "The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries, officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not, directly or indirectly, invite refugees to accept asylum."[1]

It is hardly necessary to add that a rigid impartiality should prevail in all such cases between political parties, and that refugees granted asylum should not be allowed to open nor maintain communication with the shore for political or any other purpose.

In former times, when slavery existed in countries that were classed as enlightened, it was customary to surrender fugitive slaves who had sought refuge on board vessels of war. This

[1] "U. S. Navy Regulations, 1913," Art. 344.

was urged as a policy of the United States in the earlier days of the republic. Since slavery is now practically abolished by all members of the family of nations, the right of such slaves to refuge and freedom has become the usage. By Article 28 of the general act of the Brussels conference relative to the African slave trade, signed July 2, 1890, and ratified by the United States and most of the civilized states, it is agreed that any slave who may have taken refuge on board a ship of war flying the flag of one of the signatory powers shall be immediately and definitely freed. Such freedom, however, shall not withdraw him from the competent jurisdiction if he has committed a crime or offence at common law.

Before closing this portion of the subject which deals with the conduct and privileges and obligations of the officers and men of a man-of-war in foreign ports, it is well to give an article of the "United States Navy Regulations" upon the subject of their dealings with foreigners when in foreign ports.

The commander-in-chief of a fleet, or in his absence the commanding officer, is directed to "impress upon all officers and men that when in foreign ports it is their duty to avoid all possible causes of offence to the authorities or inhabitants; that due deference must be shown by them to the local laws, customs, ceremonies, and regulations; that in all dealings with foreigners moderation and courtesy should be displayed, and that a feeling of good-will and mutual respect should be cultivated."[1]

"No officer or man can be allowed to violate the jurisdiction on shore by arresting or attempting to arrest a deserter or straggler from his vessel. If any officer or member of the crew while on shore commits an offence against the laws of the country, the local authorities have jurisdiction over such persons while they are on shore and may cause them to be arrested while there and to be tried and punished in accordance with the laws of the foreign state. The commanding officer of the

[1] Stockton's "Manual," pp. 63–65.

vessel, or the admiral if he should be present, should be at once informed of the arrest and the causes which led to it, so that either he or the diplomatic or consular agents of his government may procure the return of the person accused to his vessel or be enabled to observe the manner of treatment and trial. If the offender, however, escapes to his vessel he cannot be apprehended by the local authorities; but the commanding officer can, if he sees fit, without loss of dignity or prestige, surrender the offender for trial and punishment by the local courts, or the matter can be left to the usual diplomatic channels, as mentioned above.

"It must not be understood, however, that this doctrine of the immunity of a ship of war goes so far as to deprive a state of all power over the acts of a foreign ship of war. Entrance into the harbors of a state may be denied to any ship refusing to respect the local laws; her stay may be limited; she may be ordered to depart, and, if necessary, force may be used to expel her, as in the case of a diplomatic agent or even a sovereign. Such expulsion is provided for in Section 5288 of the Revised Statutes of the United States, in which the President is empowered to use for this purpose the land and naval forces of the United States, or the militia thereof."[1]

"Finally," as Hall says, "the immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew she is merely property; if members of her crew go outside the ship or away from her tenders or boats, they are liable in every respect to the territorial jurisdiction. Even the captain is not considered exempt in respect of acts not done in his capacity of agent of the state."[2]

In 1871 Rear-Admiral Boggs, U. S. N., commanding the

[1] F. Snow, ed. by Stockton, p. 24.

[2] Hall, 6th ed., p. 196.

European fleet, refused to give up certain persons on board a vessel of his command who were charged by the Italian Government with larceny. Secretary Fish, while observing that any person attached to a foreign man-of-war was liable to arrest on shore for any offence committed there, said: "In the event that a person on board the foreign ship should be charged with a crime, for the commission of which he would be liable to be given up, pursuant to the extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require.

"In such case, however, it would always be advisable to consult the nearest minister of the United States. This was done in this instance, and the decision of Mr. Marsh that the persons were not liable to be given up, pursuant to the treaty with Italy, is approved by the department."

"On January 17, 1879, the United States frigate *Constitution* went ashore on the English coast, having on board at the time a cargo of machinery belonging to individuals and intended for the Paris exhibition. She was pulled off by tugs. The owners of one of them, being dissatisfied with the amount of remuneration offered him, brought an action for salvage and applied for warrants for the arrest of the ship and cargo. The court refused to issue the warrant, Sir Robert Phillimore, who rendered the decision, saying that 'ships of war belonging to a nation with whom this country is at peace are exempt from the civil jurisdiction.'"[1]

"A midshipman of the U. S. S. *Mohican,* who had gone on shore at the port of St. Louis in Maranham, Brazil, was arrested and taken before the chief of police for having fired five shots from his pistol in the streets of the city at one of his boat's crew, who had attempted to desert. On learning his official and national character the chief of police discharged him, calling his attention to his disregard of the laws of the land and the safety of the people in the streets and warning him

[1] Moore's "Digest," vol. II, p. 579.

against a repetition of the offence. The commanding officer of the *Mohican* requested the United States consul to make a complaint to the governor of Maranham against the chief of police for his expressions. The case was then presented by the consul to the United States minister at Rio, Mr. James Watson Webb, who declined to bring it to the attention of the government of Brazil but referred it to our Department of State. The State Department replied that the act of the midshipman 'in using a pistol at a deserter in a street of Maranham was a breach of the peace, offensive to the dignity of Brazil, which the government of that country may well expect the United States to disallow and censure.'"[1]

"Besides men-of-war, other public vessels, such as transports, colliers, auxiliary vessels, surveying vessels, and vessels fitted out for scientific work by the government, are, to the extent that is required by the service of the state owning them, exempt from the local jurisdiction of the port. In the case of the *Parlement Belge*, a mail packet, the property of the King of Belgium, carrying his pennant and commanded by officers of the Royal Belgian navy, which had been assimilated by a special treaty to a man-of-war, a decision in the matter of collision was given in 1878 by Lord Justice Brett, of the English Court of Appeals, to the effect: 'That as a consequence of the absolute independence of every sovereign authority and the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign ambassador or public property be within its territory and therefore, but for the common agreement, subject to its jurisdiction.'"[2]

"In the case of the British steamer *Tartar*, chartered by the

[1] Moore's "Digest," vol. II, p. 590.

[2] Scott's "Cases," p. 222.

government of the United States as a transport in its military service, the position was taken by the State Department that while she was so employed she was entitled to be treated in British ports as a troop-ship of a friendly power and, hence, exempt from the local regulations as to the number of passengers which vessels might carry."[1]

83. **Status of Merchant Vessels in Foreign Ports.**—Chief Justice Waite, in his decision in the Wildenhus case, says:

"It is part of the law of civilized nations that when a merchant vessel of a country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in the case of the *Exchange*, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction and the government to degradation if such . . . merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country, and the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. . . . As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

"From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew toward the vessel or among themselves. And so by comity it came to be generally understood among civil-

[1] Moore's "Digest," vol. II, pp. 577–9.

ized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her and did not involve the peace or dignity of the country or the tranquillity of the port should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."[1]

Westlake says further upon this subject: "Matters concerning the ship herself, as the proprietary title to her, damage done by her, salvage due from her, or her seizure in satisfaction of a debt, will belong to the local courts whenever referred to them by the accepted rules of national jurisdiction applied to her actual situation or to the person of her owners or others interested in her. If the crew, whether on shore or while remaining on board, commit offences against other ships in the anchorage or against the inhabitants of the land, the local courts will punish them, and the local authorities will not be under the necessity of requiring her to quit their waters but will use on board of her whatever force may be needed. Even offences committed on board of her against persons and things also on board of her will fall under the local jurisdiction if . . . they involve a violation of the rights and interests of a littoral state or of its subjects not forming part of its crew or passengers."[2]

The rule held by the French Government has tended to modify the usage of complete jurisdiction in all matters over the merchant ship and its personnel in a foreign port. This modification is shown both in the decision of Chief Justice Waite in the case of the Belgian steamer *Noordland*, just given, generally known as the Wildenhus case, and the remarks just quoted of the English publicist Westlake. These two cases show the English and American advance toward the French rule, or view, which is that the officers and crew of a merchant

[1] Scott's "Cases," pp. 225–6. Wildenhus Case.
[2] Westlake, part I, p. 259.

ship lying in a foreign port are not like a party of isolated strangers travelling in a foreign country, but are a body of organized men, governed internally by laws of their country, enrolled under the authority, and placed under a master or captain who has a standing and recognition by law. The French Government and courts holding this view find a distinction between acts and offences connected with the internal order and discipline of the ship, when the peace of the port is not disturbed, and other acts which have an external effect. The former they leave to the laws of the state to which the ship belongs; the latter they regard as subject to the jurisdiction concerned.

"The general rendering of the reciprocal conventions upon the matter is that consular officers shall have exclusive charge of the internal order of the merchant vessels of their nations. The local authorities are not in any way to interfere except in cases where the differences on board ship are of a nature to disturb the peace and public order, in port or on shore, or where persons other than the officers and crew of the vessel are parties to the disturbance. Otherwise the local authorities confine themselves to the rendering of forcible assistance if required by the consular authorities."[1]

"Apart from acts affecting their internal order and discipline and not disturbing the peace of the port, merchant vessels, as a rule, enjoy no exemption from the local jurisdiction. It is, therefore, generally laid down that they cannot grant asylum."[2]

Certain cases in which opposite ground was taken, especially as to passengers in transit, are herewith mentioned as matters of interest and information. The case of Sotelo is one of interest and is given by Moore as follows:

"In 1840 the French packet-boat *L'Océan*, which made regular voyages between Marseilles and the coast of Spain and

[1] Moore's "Digest," vol. II, p. 303.
[2] Moore's "Digest," vol. II, p. 855.

Gibraltar, received on board, at her anchorage at Valencia, M. Sotelo, a Spanish ex-minister who was under prosecution for political offences. The vessel, having put to sea without knowledge of the number and personality of the passengers who had embarked, entered the port of Alicante, where, during the customs and police inspection, M. Sotelo was recognized, seized, taken ashore, and imprisoned. The captain of *L'Océan* protested against what he described as a violation of his flag and in vain demanded that his passenger be set at liberty, invoking at the same time the right of asylum and the principle of extraterritoriality.

" Diplomatic communications on the subject which were exchanged between the governments of France and Spain established it in the clearest manner that the conduct of the authorities of Alicante was above reproach; that no injury was done to the flag, since the acts in question pertained to an ordinary merchant ship and to a high measure of police executed inside the port; that M. Sotelo, surreptitiously embarked at Valencia, a Spanish port, could have been regularly seized and arrested on *L'Océan* at another port of the same country; and, finally, that the fact that she had been on the high seas a certain time before entering Alicante could not alter the nature of the act done at the place of departure and proved at the place of arrival, under the dominion of the same laws and of the same territorial legislation."[1]

" The case of Gámez was that of a political fugitive from Nicaragua who voluntarily took passage at San José de Guatemala for Punta Arenas, Costa Rica, on board the Pacific mail steamship *Honduras*, knowing that the vessel would enter en route the port of San Juan del Sur, Nicaragua. Upon learning the fact of his being on board this steamer, the government of Nicaragua ordered the commandant of the port of San Juan del Sur, Nicaragua, to arrest Gámez upon the arrival of the *Honduras*. When the *Honduras* reached San Juan the

[1] Moore's "Digest," vol. II, p. 856.

authorities of that port requested the captain of the steamer to deliver up Mr. Gámez, which he declined to do, and set sail without proper clearance papers. Of this case Mr. Bayard, the secretary of state, says: 'It is clear that Mr. Gámez voluntarily entered the jurisdiction of a country whose laws he had violated.'

"Under the circumstances, it was plainly the duty of the captain of the *Honduras* to deliver him up to the local authorities upon their request.

"It may be safely affirmed that when a merchant vessel of any country visits the ports of another for the purposes of trade it owes temporary allegiance and is amenable to the jurisdiction of that country and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.

"Any exemption or immunity from local jurisdiction must be derived from the consent of that country. No such exemption is made in the treaty of commerce and navigation concluded between this country and Nicaragua, on the 21st day of June, 1867."[1]

"In the Barrundia case the facts were as follows: General Barrundia, an ex-minister of war of Guatemala, had been attempting for some time to incite an insurrection in Guatemala from his temporary residence within the Mexican border, Guatemala being at war with Salvador at the time. When, upon complaint of Guatemala, the government of Mexico required Barrundia to leave the borders of Guatemala, he proceeded with two of his followers to Acapulco, a Mexican port, and embarked on board an American mail-steamer ostensibly for Panama, but with reasonable certainty for Salvador, to join the Salvadoran forces against Guatemala. Upon reaching a Guatemalan port, Champerico, his arrest was determined upon by the Guatemalan authorities, but the master of the mail-steamer declined to give him up without the written

[1] Moore's "Digest," vol. II, p. 868.

authority of the American minister resident in Guatemala City. Upon arrival at San José, the second Guatemalan port of call, the letter of the minister was brought on board by the arresting force, which advised the master to give Barrundia up to the Guatemalan officials, stating that the government had promised that his life would be spared. The arrest was then permitted, but Barrundia, resisting arrest with firearms, was killed on board the steamer by the officials attempting arrest. The American minister was removed by the government of the United States for authorizing the arrest, and the senior naval officer of the United States in port, commanding the U. S. S. *Ranger,* was relieved from his command for not offering an unsolicited asylum to Barrundia on board of his vessel.

"The Guatemalan Government desired the arrest of Barrundia both for common crimes and as an enemy of the country within its borders. The arrest was desired as a matter of self-preservation, as Barrundia was on his way to wage war from the southern border, as he already had attempted to do upon the northern border.

"It can hardly be claimed that Barrundia possessed immunity from arrest because he was on board of a merchant vessel carrying the American flag, as there is no foundation in international law for this position. As to offering an unsolicited asylum on board the *Ranger,* it is needless to say that the position of both the State and Navy Departments is in opposition to such voluntary action. The reason given for claiming immunity from arrest under the circumstances is that an exceptional rule should be adopted or usage acknowledged to exist in Spanish-American states which is in violation of their rights as sovereign states. Secretary Gresham's letter of December 30, 1893, must be conceded to give the final and authoritative statement of our policy in the matter. In the paragraph that is applicable to the Barrundia case he states as follows:

" 'The so-called doctrine of asylum having no recognized application to merchant vessels in port, it follows that a shipmaster can found no exercise of his discretion on the character of the offence charged. There can be no analogy to proceedings in extradition when he permits a passenger to be arrested by the arm of the law. He is not competent to determine whether the offence is one justifying surrender or whether the evidence in the case is sufficient to warrant arrest and commitment for trial or to impose conditions upon the arrest. His function is passive merely, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest. The diplomatic and consular representatives of the United States in the country making the demand are as incompetent to order surrender by way of quasi-extradition as the shipmaster is to actively deliver the accused. This was established in the celebrated Barrundia case by the disavowal and rebuke of Minister Mizner's action in giving to the Guatemalan authorities an order for the surrender of the accused.

" 'If it were generally understood that the masters of American merchantmen are to permit the orderly operations of the law in ports of call, as regards persons on board accused of crime committed in the country to which the port pertains, it is probable, on the one hand, that occasions of arrest would be less often invited by the act of the accused in taking passage with a view to securing supposed asylum and, on the other hand, that the regular resort to justice would replace the reckless and offensive resort to arbitrary force against an unarmed ship which, when threatened or committed, has in more than one instance constrained urgent remonstrance on the part of this government.' " [1]

[1] Moore's "Digest," vol. II, p. 881.

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5. Right of Approach—

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6. Papers Carried by Merchant Vessels—

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7. Immunities of Men-of-War in Foreign Ports—

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9. Status of Merchantmen in Foreign Ports—

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CHAPTER IX

NATIONALITY. ALIENS. EXTRADITION

84. Nationality.—It must be recalled that a state, besides having territory, is composed of certain persons who are its members, that is, individuals who are known as citizens or subjects, or, to use a more comprehensive term, its nationals. All other persons residing within the limits of the territory of the state are known as aliens or foreigners.

For internal purposes there may be a distinction made between different classes of a state. Individuals though permanent inhabitants of a state may be denied the name of citizens though fully entitled to its protection. Thus in the United States inhabitants of the Philippine Islands or of Porto Rico are not citizens, but they are nationals and, as such, fully entitled to the protection of the United States at home and abroad. The name and rights of citizens are also refused by France to certain subjected populations in Africa.

In Great Britain the term citizen can be used under certain circumstances, but the word subjects is used for all portions of its permanent population, whether civilized, semicivilized, or barbarous. In British India, for instance, there are different laws for the Hindoo, the Mohammedan, or the British whites. They are not under any foreign authority, however, and they are subjects as well as nationals of the British Empire.

The national tie between a state and its nationals is not severed by a departure from the territory of the state. The national is entitled to the protection of his state abroad as well as at home. Aliens are not entitled to the protection of any other state than their own when outside of the territory of

that state, except that due to any domiciled person and in certain other exceptional cases.

The first of these exceptions is that of the alien in the United States who has renounced, or has been renounced by, his own country but who has not had the necessary time of residence to attain citizenship. By the act of Congress of 1907 it is provided that passports can be issued for six months, without renewal, to persons not citizens of the United States, entitling them to the protection of the United States in any foreign country except the country of which he was a national before making his declaration of an intention to become a citizen of the United States, a residence of three years in the United States being also necessary.

A second exception as to the protection of aliens is when by international agreement, or for purposes of humanity, a state through its diplomatic or naval agents abroad assumes or gives this protection. Agreements have been made by a small state like Switzerland for permanent protection of its nationals where they have no representative agents, as in Turkey, while a temporary protection may also be given by neutral diplomatic agents in time of war in an enemy's country, as in the Franco-German War of 1870, when the American minister in Paris assumed, by request, the care and protection of German subjects in Paris during its siege by German forces. These subjects were called protégés of the American minister.

Instances of naval protection afforded to foreign nationals have occurred also in uncivilized or weak countries like China, and in isolated territory like that of Chile in the Strait of Magellan during penal revolts, and also, in 1877, by men-of-war on the occasion of a negro insurrection in the Danish West Indies.

A third exception takes place in Eastern countries, especially in the Turkish dominions, where protection, in accordance with local custom, may be given to aliens actually in discharge of

official and personal service under the direction of consular officers.

In addition to these protégés there existed others in times past more than now. For example: "By the laws of Turkey and other Eastern nations," Secretary Marcy wrote in the case of Martin Koszta, "the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulates."[1]

The case of Martin Koszta was as follows: Koszta, by birth a Hungarian and hence an Austrian subject, took an active part in the insurrection of 1848–9 for the independence of Hungary. At the unsuccessful termination of that movement Koszta escaped to Turkey, which country refused to return him to Austria but expelled him from their territory with the consent of Austria and with the understanding that he should go to foreign parts. Koszta came to the United States and established a domicile in this country. In 1852 he made a declaration of his intention to become a citizen of the United States before the proper tribunal in the usual legal manner. After remaining nearly two years in the United States he proceeded to Smyrna, in Turkish territory, on account, it is stated, of private business of a temporary nature, claiming the rights of a naturalized citizen of the United States, and offering to place himself under the protection of the United States consul at Smyrna; the latter official, after a delay, extended protection to him, giving him a letter of safe conduct, which, under the Turkish laws, they have a right to do. While waiting in Smyrna, as is alleged, for an opportunity to return to the United States, he was seized by some people without any authority, treated harshly, and finally thrown into the sea, from which he was picked up by a boat from the Austrian brig of

[1] Moore's "Digest," vol. III, p. 832.

war *The Hussar*, taken by force on board that vessel, and confined in irons. Application on the part of the American consul and our chargé d'affaires for his release was unsuccessful. The U. S. S. *St. Louis*, under the command of Captain Ingraham, arriving in the harbor of Smyrna at this time, representation was duly made to Captain Ingraham concerning the state of affairs. After full investigation of the matter, and after being convinced that it was the intention of the commander of *The Hussar* to convey Koszta to Austrian territory, Ingraham made a demand for his release, intimating that he would resort to force if the demand was not complied with by a certain hour. An arrangement was, however, made by which Koszta was delivered to the French consul-general at Smyrna, there to remain until he should be disposed of by the mutual agreements of the consuls of the respective governments at that place. Pursuant to that agreement he was released and returned to the United States.[1]

"According to the principle established in this case," Secretary Marcy further states, "Koszta was invested with the nationality of the United States, if he had it not before, the moment he was under the protection of the American consul at Smyrna and the American legation at Constantinople. That he was so received is established by the *tezkereh* they gave him and the efforts they made for his release."[2]

85. Citizenship by Birth.—Persons who have citizenship by birth may acquire it by being born within the territory of their state (*jure soli, jus soli*) or, if abroad, through the nationality of their parents (*jure sanguinis*). The Fourteenth Amendment to the Constitution of the United States says that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where they reside."

This law would not apply to persons born in the United

[1] Stockton's "Naval Manual," pp. 43–45.
[2] Moore's "Digest," vol. III, 832–3.

States but of parents enjoying the immunities of foreign diplomatic officers and hence not subject to the jurisdiction of the United States. On the other hand, children of American diplomatic or consular agents residing abroad, if born abroad are citizens of the United States. This is extended by the law of 1855 which reads that "all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Children born abroad of persons once citizens of the United States but who have become citizens or subjects of a foreign power are not citizens of the United States nor entitled to protection as such according to the ruling of the attorney-general of the United States in 1873.[1]

Under the law of 1855 quoted above, nationality is not inherited through women, and an illegitimate child born abroad of an American woman is not a citizen of the United States.[2]

The rules just given are those prevailing in the United States and, in principle, in Great Britain, Portugal, and most of the Latin-American states.

A modification of this system prevails in Germany, Austria-Hungary, Sweden, and Switzerland, whereby children born within the territory and jurisdiction of a state, to alien parents, are regarded as aliens or foreigners.

Another system prevails in France by which every child of a Frenchman is held to be of French nationality, whether born in France or abroad; whereas an individual born in France to alien parents and not domiciled in France at the age of majority is regarded as a foreigner. But until the completion of his twenty-second year such an individual has the option of making an act of submission by declaring his intention to ac-

[1] Moore's "Digest," vol. III, p. 282.
[2] Moore's "Digest," vol. III, p. 285.

quire a French domicile; and if he acquires such a domicile within a year after his act of submission, he may claim French nationality by means of a declaration, which will be registered with the ministry of justice. Every individual born in France to a foreigner and who is domiciled there at the time of his majority is regarded as a Frenchman, unless, within the year following his majority, he has declined French nationality and proved that he has preserved the nationality of his parents by means of an attestation drawn up in due form by his government.[1] These principles apply also to Belgium, Holland, Greece, Turkey, Russia, Spain, and Italy.

The act of February 10, 1855, which has already been referred to, is incorporated in Section 1993 of the Revised Statutes of the United States. The act of 1907 supplementing this section declares in Article 5 "that a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of, or resumption of American citizenship by, the parents. Provided, that such naturalization or resumption takes place during the minority of such child; and provided, further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

In Article 6 of the same act it is stated that "all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of Section 1993 of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this government, be required, upon reaching the age of eighteen years, to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."[2]

[1] Hershey's "Essentials," pp. 238–9.
[2] Supplement to *A. J. I. L.*, 1907, p. 259.

86. Naturalization.—Citizenship can be acquired after birth by naturalization. This generally involves the change from the allegiance and sovereignty of one state to that of another. It is defined as the reception of an alien into the citizenship of a state through a formal act on application of the favored individual. This is naturalization in the ordinary sense. Besides this method of naturalization it may also take place through marriage, legitimation, resumption, option, acquisition of domicile, or appointment as a government official. It is a customary rule also in international law that the inhabitants of conquered and ceded territory lose one nationality and acquire another by the annexation of the territory to that of the conquering state. This is often known as collective naturalization or citizenship.

Naturalization is regulated by municipal law, but it is also a matter of importance in connection with international law as questions of legal nationality may become of serious importance involving grave matters of international policy and action. The doctrine of perpetual allegiance which once prevailed in several countries may be considered as no longer existing, while the right of expatriation is generally conceded in fact if not in principle.

It does not always follow that naturalization, which is an act of municipal law, grants all rights alike to the naturalized citizen and to one native-born. The Constitution of the United States, for instance, restricts the presidency of the nation to native-born citizens.

As has been previously mentioned naturalization is with us a judicial act, while the power to make naturalization laws rests alone with Congress. A certificate of naturalization in regular form by a proper court is treated, as a rule, as conclusive evidence of citizenship.

The declaration of intention to become a citizen of course does not convey citizenship; it is a necessary preliminary intention and is an assurance of sincerity and stability of purpose.

A certificate that such declaration has been made must be carefully distinguished from a certificate of naturalization. When any alien, however, who had declared his intention to become a citizen of the United States dies before he is actually naturalized, it is held that his widow and minor children may, by complying with the other provisions of the naturalization laws, be admitted to citizenship without having to make, on their part, the declaration of intention.

As to the question of expatriation which follows naturalization, an American citizen is deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its municipal law. On the other hand, if a naturalized American citizen resides continuously for two years in the foreign state from which he came, or for five years in any other foreign state, it is presumptive evidence that he has ceased to be an American citizen. Such presumption can be overcome on the presentation of satisfactory evidence to the contrary. An American citizen is not allowed to expatriate himself when his country is at war.

By a convention adopted in the third Pan-American conference in 1906 and ratified by the United States in 1908 the following articles were adopted:

"1. If a citizen, a native of any of the countries signing the present convention, and naturalized in another, shall again take up his residence, in his native country without the intention of returning to the country in which he has been naturalized, he will be considered as having reassumed his original citizenship, and as having renounced the citizenship acquired by the said naturalization.

"2. The intention not to return will be presumed to exist when the naturalized person shall have resided in his native country for more than two years. But this presumption may be destroyed by evidence to the contrary.

"3. This convention will become effective in the countries that ratify it three months from the dates upon which said

ratifications shall be communicated to the government of the United States of Brazil; and if it should be denounced by any one of them it shall continue in effect for one year more, to count from the date of such denouncement.

"4. The denouncement of this convention by any one of the signatory states shall be made to the government of the United States of Brazil and shall take effect only with regard to the country that may make it."[1]

All naturalized citizens while in foreign countries are entitled to the same protection as to persons and property which is due native-born citizens. The United States has many special treaties covering the status of naturalized citizens when returning to their native countries. The right of protection goes, however, with the right to demand the allegiance and support from the naturalized citizen on the part of the state.

The necessity for special treaties on the subject of naturalization will be evident when it is realized that some states still take the ground that a renunciation of nationality without the consent of the government is punishable or results in practical exile from the original state. Turkey permits tacitly the expatriation of Ottoman subjects so long as they remain outside Turkish territory.

By the laws of the United States only white persons or aliens of African descent are capable of being naturalized. The law of 1906 also provides that no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language unless he is physically unable to speak, and it has been held by the proper courts that neither Chinese, Japanese, Burmese, Hawaiians, nor American Indians can be naturalized under the statute law. No alien who is a natural citizen or subject or a denizen of any country with which the United States is at war at the time of his application can be admitted to citizenship. Anarchists, especially those of a militant character, are not allowed by statute to become

[1] Supplement to *A. J. I. L.*, p. 227, October, 1913.

citizens of the United States. Any woman who is or becomes married to a citizen of the United States and who is not barred from naturalization by being other than white or of African descent is also deemed to be a citizen of the United States This applies to the wife of an alien who becomes naturlized after his marriage. As to a divorced woman, it is assumed in a case decided in the courts of the United States that she remains a citizen of the state in which her husband held citizenship unless she changes her nationality in some legal manner.

By law it has been finally provided in general that a foreign woman acquires American citizenship by marrying an American, retaining it after termination of the marriage by any method unless she renounces the nationality in ways duly provided. Any American woman, on the other hand, who marries a foreigner in the same way acquires the nationality of her husband, and if the marriage terminates she can recover her American nationality in a manner provided by law. Missionaries and others living in barbarous countries or countries where exterritoriality exists under our laws retain their citizenship.

The subject of naturalization is and has always been a matter of great importance to the United States from the large emigration which has brought to this country millions of people, who have become its citizens in the due course of law by naturalization. On account of the varying laws and usages of the native countries of naturalized citizens, a conflict of laws often occurs. The systems of military conscription and service in the countries of continental Europe add to the friction and confusion generally involved in this subject. Military service requirements have compelled many special treaties to be made, carrying differing provisions upon the subject. Seamen on board of American merchant vessels hold a peculiar position as to citizenship, as they are given protection collectively without regard to their ordinary status of nationality.

By the "Consular Regulations" of 1889 the term American seamen includes the following:

1. Seamen, being citizens of the United States, regularly shipped in an American vessel, whether in a port of the United States or in a foreign port.

2. Seamen, foreigners by birth, regularly shipped in an American vessel, whether in a port of the United States or a foreign port, who have declared their intention to become citizens of the United States and who have served three years thereafter in an American merchant vessel.[1]

87. Corporations as Citizens.—Corporations are held to be citizens of a state so far as their rights are concerned. It was decided in a well-known case that, under the treaties of 1783 and 1794 between the United States and Great Britain, corporations are entitled in respect of security for their property to the same rights as natural persons.

The treaty of Guadalupe Hidalgo between the United States and Mexico makes no distinction, in the protection it provides, between the property of individuals and the property held by towns under the Mexican Government.

After the war of 1898 with Spain and under the treaty which closed the war, it has been decided in the case of the board of harbor works of Ponce, Porto Rico, that this Spanish corporation became, as between the United States and other governments, an American citizen.[2]

88. Aliens.—Aliens, by whom we mean foreigners, either domiciled in or passing through a country, are, if admitted into a country, subject to its laws unless they are exempted by these laws. A distinction is naturally made between aliens who are travelling, and hence whose stay in the country is only temporary, and others who take up their residence either permanently or for a period of some duration.

Both classes of aliens are, however, entitled to protection of

[1] "U. S. Consular Regulations," sec. 170.
[2] Moore's "Digest," vol. III, pp. 800, 801, 804.

life and property, and in order to secure this protection they are entitled to access to the courts of the country in the same manner as citizens or subjects of the country. In turn, they are, as just mentioned, subject to the local laws of the country, punishable for crimes or any violation of such laws, and are also subject to any regulations adopted by the authorities of the state with respect to registration, passports, etc.

In time of war it has been held by the United States that military commissions and courts martial take cognizance of and try complaints against foreigners as well as citizens, without discrimination except that of the obligations of allegiance and citizenship, which are required from citizens alone, and also that the rights especially belonging to domiciled aliens under treaties or the laws of nations are to be observed. The suspension of the right of habeas corpus applies to aliens as well as citizens.[1]

An entire exclusion of the subjects of states of the white race from the territory of another state with whom they are at peace does not exist in modern times. It would not be in accordance with the usage of mutual intercourse, and it would most probably conflict with existing treaties between the nations. The power and usage to exclude undesirable persons, however, do exist, are provided for by the passport system, and are practised extensively by the United States and to a less extent by other nations, including Great Britain. This power and practice of exclusion apply both to Oriental races and undesirable persons of the white race. As to the white race, not only has a head tax been levied by law, but paupers, idiots, criminals, polygamists, anarchists, etc., are denied entry by law, as well as the more innocent contract laborers. In other words, the law purposes to exclude "such aliens as may be regarded as mentally, morally, or physically undesirable."[2]

In states like Russia, which regard Hebrews as a special and

[1] Moore's "Digest," vol. IV, p. 17.
[2] Act of February 20, 1907, *A. J. I. L.*, 1907, pp. 239–241.

inferior class of persons and otherwise undesirable, there is no rule of international law requiring the reception of them in that country as aliens, notwithstanding that they enjoy full rights of citizenship in the country from which they come.

With the right of exclusion may be said to go the right of expulsion, but, as Westlake says, "in most countries the power of expulsion is left to the executive department of the government, which habitually exercises it for purposes of police, subject to the restraint of opinion, which, as is natural, appears to operate more strongly against the expulsion of persons already allowed to reside than against an initial refusal of admission."[1]

89. **Domicile.**—The division between aliens in temporary residence or in transit and those more particularly known as domiciled aliens is not very sharp or definite. A very transient residence may involve the following of certain regulations, such as the publication of banns in Great Britain for a person's marriage, while the distinction varies until it reaches the time when an alien makes his only home or domicile in the foreign country a matter extending purposely over his entire life.

By domiciled aliens, then, we mean foreigners who have not relinquished their allegiance to a foreign state and are consequently not citizens or subjects of the country of which they are residents. They have, however, made their home in the country of their residence, with no well-defined intention of returning to their former homes. This residence, then, becomes, under the usages of international law, their domicile and is so termed.

"To acquire domicile in a place," says Moore, "there must be (1) residence and (2) an intention to remain permanently or indefinitely. Where the physical facts as to residence are not disputed, the sole question is that of intention."[2] We may add to this that time may become also an element in the matter. The jurisdiction which a state exercises over its

[1] Westlake, I, p. 213. [2] Moore's "Digest," vol. III, p. 813.

domiciled aliens may be called civil in contradistinction to political jurisdiction. It affects their civil rights and obligations and may also affect the extent of their liabilities, especially as to taxation. Their status becomes very different from merely transient persons in extent and duration. Domicile in one manner only is generally, but not universally, admitted to determine national character, and that is in matters of determination of the nationality of prize in war time, which will be referred to later in its proper place.

When nationals reside more or less permanently in countries where the right of exterritoriality is possessed by them, as in the case of China, they retain the domicile as well as the citizenship of the country of their allegiance, as they are still to a great extent living under the protection and laws of their own country.

Aliens are not liable, as a rule, to be incorporated into the military service of the country in which they hold domicile, but they can, if permitted, voluntarily enlist in such service. They are, however, subject to call for service in the militia or local police to maintain social order, provided the duty is police duty and not political in its nature. This liability to military service would include a defence against savages, anarchists, and uncivilized people generally, whose success would jeopardize the life of the community.

In many States of the United States of America an alien who has declared his intention to become a citizen of this country may vote at elections, but this does not make him a citizen. In some States of the United States aliens are prohibited from purchasing, holding, or inheriting real estate; these prohibitions do not hold good if they are in violation of treaties. Aliens are subject to local jurisdiction whether the government under which they live is a titular one or is only one of a *de facto* kind.

"According to British and American authorities it is possible to possess either a *domicile of origin,* which in the case of

legitimate children is the domicile of the father at the time of birth, and in the case of illegitimate children, that of the mother at the same time, or a *domicile of choice,* which is the domicile deliberately adopted by a person of full age." [1]

For testamentary and general purposes an alien can be said to have but one domicile; but for commercial purposes it is considered by many authorities that he may have more than one, as his place of business may be in one country while his residence is in another; or he may be a partner in several commercial houses situated in several different countries. A domicile may be changed by taking up a residence in another country with the intention of remaining there. Mere absence from a previously fixed residence does not involve a change of domicile without an intention duly declared. "Students are not considered as acquiring a domicile in the place where they sojourn merely for the purpose of prosecuting their studies. Servants may or may not have the same domicile as their masters, according to the particular circumstances of the case." [2]

90. **Extradition.**—By extradition is meant the delivery, to accredited authorities, of criminal fugitives or persons accused of crime committed in one country, upon the request of the government of the country in which the crime was committed, by the government of the country in which they have sought refuge. This is not considered to be an obligation under international law but is one proceeding from treaty obligations, or one that is granted as a matter of comity and mutual convenience. As to the United States, it has been ruled by Attorney-General Legare that without the consent of Congress no State of the Union can enter into any agreement, express or implied, to deliver up fugitives from the justice of a foreign state who may be found within its limits.[3]

As a rule, states refuse to extradite their own citizens or subjects. England and the United States are exceptions to this

[1] Westlake, "Private Int. Law," secs. 243, 253.
[2] Halleck, Baker's 4th ed., vol. I, p. 456.
[3] Legare, Att.-Gen., 1841, 3 Op. 661.

rule. This arises from the fact that so far as the United States is concerned, we do not, except in case of such international crimes as piracy and the slave-trade, punish our citizens for crimes committed beyond our territory and England punishes her subjects only for such crimes as treason, murder, bigamy, etc., when committed abroad.

In the absence of a clause expressly exempting nationals from extradition, the State Department at Washington holds that they should be surrendered upon demand.[1]

This ruling was upheld in the recent case of Charlton, an American, who was extradited to Italy, being charged with the murder of his wife at Lake Como, notwithstanding that Italy had previously refused to deliver up her subjects to the United States, the extradition treaty between the two countries containing no such exemption.

It is now considered to be an established rule that a criminal must be tried only for the offence named in the demand for extradition. Political offenders are not subjects for extradition according to established usages. Just what may be called a political offender is somewhat difficult to define, and with us a committing magistrate has jurisdiction and it becomes his duty to determine whether the offence charged is or is not of a political character.

Some cases are given in the following paragraphs, which show the difficulties attending the subject of political offenders, especially if attended with the charge of murder.

"In June, 1894, the British Government, after full consideration of the question by the court of Queen's Bench, delivered up to France a fugitive from justice who was charged with causing the explosion at the Café Véry, in Paris, as well as another explosion at certain government barracks. The court held 'that in order to constitute an offence of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other'

[1] Hershey's "Essentials," p. 265.

and that the offence must be 'committed by one side or the other in pursuance of that object.'"[1]

"An interesting case occurred on March 31, 1891, in Buenos Ayres, in regard to a mutiny which occurred on board the Chilian gunboat *Pilcomayo*, then lying at the docks. At the request of the commanding officer twelve of the mutineers were taken in charge by the local police, with the further request from the Chilian minister that they be held in custody until the *Pilcomayo* was ready to sail for Chile, in order that they might be taken there for trial. The *Pilcomayo* was being partially dismantled at the time by the order of the Chilian Government, after which she was to be taken to Chile and placed out of service. The mutineers obtaining a writ of habeas corpus, the judge of the federal court decided that the exemption of a man-of-war from the local jurisdiction did not extend to the conferring of jurisdiction over persons in foreign territory in charge of foreign authorities and that the Chilian minister, by requesting the men to be taken from on board the vessel of war under the Chilian flag and placed in the custody of the Argentine authorities, had lost the right to remove them to Chile and have them tried there. It was also intimated that by dismantlement the *Pilcomayo* had lost its character as a vessel of war. On appeal from this decision the Supreme Court of the Argentine Republic 'held that as the mutiny appeared to be for political reasons, it was to be considered as a political offence; that as the mutineers were brought on shore and delivered to the Argentine authorities because of the inability to retain them on board the vessel, their return to the representative of Chile could not be granted without violating the exemption of political offenders from extradition; that their delivery up would also violate the principle of public law, which protects prisoners of war, whether public or insurrectionary, from surrender; and that it is a rule of international law that where acts of hostility are committed by foreign in-

[1] Moore's "Digest," vol. IV, p. 354.

surgents in territorial waters of another state, only the vessels or things taken from them, and not the persons, are to be delivered up.'"[1]

91. Extradition of Deserters.—In regard to the arrest or extradition of deserters from ships of war, it has been held both by the State Department and the federal courts that in the absence of treaties to that effect officials of the United States cannot at home arrest foreign seamen as deserters from foreign vessels, even upon the request of the consular or other officers of foreign governments, and that it is naturally improper in reciprocal cases for our consular or other authorities to cause foreign officials to arrest deserters from our ships in the absence of treaties authorizing and providing for such arrest.

In the case of Tucker *v.* Alexandroff there were circumstances surrounding this case which involve several interesting questions as to the return and extradition of a deserter, so that it is considered desirable to narrate the matter in full as given by Moore in his "Digest."

"Leo Alexandroff, a conscript in the Russian naval service, was sent in October, 1899, as one of the detail of fifty-three men under command of an officer, from Russia to Philadelphia, to take possession of and man the Russian cruiser *Variag*, then under construction by the firm of Cramp & Sons in that city. . . . The *Variag* was still on the stocks when the detail of men arrived in Philadelphia. She was launched in October or November, 1899, and was lying in the stream still under construction, not having been accepted by the Russian Government, when on April 20, 1900, Alexandroff went to New York and declared his intention to become a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed on a charge of desertion. By Article IX of the treaty between the United States and Russia of 1832, the consular representatives of the contracting parties were authorized

[1] Moore's "Digest," vol. IV, pp. 351–2.

to require the assistance of the local authorities for the recovery of 'deserters from the ships of war and merchant vessels of their country'; and it was stipulated that for this purpose they should apply to the competent tribunals, and 'in writing demand said deserters, proving, by the exhibition of the registers of the vessels and rolls of the crews or by other official documents established, that such individuals formed part of the crews.' Alexandroff was committed under Section 5280, Revised Statutes of the United States, which provides, in language similar to that just quoted, for the recovery of deserters from vessels of governments having treaties with the United States on the subject. It was contended that the treaty and statute were inapplicable to Alexandroff for the reasons (1) that the *Variag* was not yet a Russian ship of war, (2) that he was not a deserter from such ship, and (3) that his membership of the crew was not proved by the exhibition of the register of the vessel, her crew roll, or by any official document. It was held, however, by the court that the *Variag*, inasmuch as she had been launched and was lying in the stream when Alexandroff deserted, was a ship within the meaning of the treaty; that she was also a Russian ship of war within the meaning of the treaty, notwithstanding that she had not been finally accepted and taken possession of by the Russian Government and that the Russian flag had never been hoisted upon her; that Alexandroff consequently was a deserter from a Russian ship of war within the meaning of the treaty; and that, as it was admitted and appeared by the record in the case, Alexandroff came to the United States as a member of the Russian navy for the express purpose of becoming one of the crew of the *Variag*, it could not properly be objected in his behalf that no official documents were produced, especially as it appeared that on the trial of the case below, Alexandroff, through his counsel, waived the production of the passport issued by the Russian Government to the men detailed to man the vessel." [1]

[1] Stockton's "Manual," pp. 74–77.

TOPICS AND REFERENCES

1. Nationality in General—

   Moore's "Digest of International Law," vol. III, chap. X. Phillimore, "International Law," 3d ed., vol. I, 443, 444. Oppenheim, 2d. ed., vol. I, 306, 369–374.

2. Citizenship by Birth—

   Taylor, "International Law," 212. Moore's "Digest," vol. III, 276–289. Hall, 6th ed., 221–6.

3. Naturalization—

   Wheaton, 8th ed., Dana, 142, etc. Moore's "Digest," vol. III, 297–358. Holland's "Jurisprudence," 10th ed., 361, 364.

4. Aliens—

   Moore's "Digest," vol. IV, 237; vol. II, p. 79. Wheaton, 8th ed., Dana, 138, 139, 220. Lawrence's "Principles," 4th ed., 222–5.

5. Domicile in Time of Peace—

   Moore's "Digest," vol. III, 811–835. Hall, 6th ed., 238–241, 277. Jacobs, "Law of Domicile," 1887.

6. Extradition—

   Moore's "Extradition," 1891. Piggott, "Extradition," 1910. Biron and Chalmers, "The Law and Practice of Extradition," 1903.

PART III

INTERCOURSE OF STATES IN TIME OF PEACE

CHAPTER X

THE HEAD OF THE STATE. DIPLOMATIC INTERCOURSE. THE RIGHT OF ASYLUM IN LEGATIONS AND EMBASSIES

92. **The Head of the State.**—"When a state has an individual head, he is to be considered as a representative, or rather embodiment, of the sovereignty of the state, and he is entitled as a consequence to respectful personal consideration from the other states of the family of nations and from their representatives. As the object of this consideration is to express the respect due to a sovereign state, any international omission to comply with the customary and proper observances must be regarded as an insult to the state which it has a right to resent."[1]

Furthermore, as emperor, king, or president he is, as head of the state, the peer legally of the head of any other state and is the organ or supreme representative of the state with respect to foreign and exterior relations. For instance, Napoleon III of France and Francis Joseph of Austria, each exercising of his own right sovereign powers, met and signed the preliminary peace of Villafranca in 1859.

The chief agent of a state subordinate to its head in its foreign relations, residing at home, is the person to whom the

[1] Snow's "Int. Law," ed. by Stockton, 2d ed., p. 58.

immediate and detailed management of foreign affairs is committed. This person in the United States is the cabinet minister who is at the head of the Department of State, and who is known as the secretary of state.

Under this agent are other officials or agents, resident in foreign countries, who represent the state in a public capacity, and are known as its diplomatic and consular officials.

The secretary or minister for foreign affairs, under the head of the state, is also charged with all affairs with which the members of the diplomatic corps—resident at the seat of government of his country—are concerned.

93. Immunities of the Head of a State.—It has not been an uncommon thing either in past or present history for the sovereign or head of a state to visit another sovereign for purposes of friendship, for discussions of state policy, or for the outlining of important negotiations or alliances. Under these circumstances the head of a state can be considered as being engaged in the highest diplomatic business of the state.

Whether a head of the state enters another state for this or any other purpose, he is, as a head of a state, entitled to certain rights and immunities in time of peace between the states concerned, which can properly be mentioned at this time. If the sovereign or head of a state is duly recognized as such he is entitled to be treated, especially by the public functionaries of another state, with consideration and respect and to be addressed with the proper titles assigned to him by his own country. The president of a republic, when he represents the republic, is entitled to the same rank, consideration, and honors as a sovereign. Heads of a state are exempt from the civil and criminal jurisdiction of the country and are entitled to seek redress in the courts of justice of the country for libel upon their character. If, however, they should abuse the hospitality of the state, they may be requested or ordered to depart from its territory without delay.

By accepted usage, the movable effects of the head of a state

are exempt from the payment of custom duties and from the visitation of custom-house officers.

The immunities of the head of a state or sovereign cease with the termination of his office by time, abdication, or deposition. This was the case of ex-President Castro of Venezuela. While travelling abroad in Europe he was deposed after a successful revolution, and upon the recognition of the new government by the countries concerned he ceased to have any immunities.

94. Diplomatic Intercourse.—In a previous chapter I have said that the duties of a state include a recognition of the obligations of good faith, of a redress for wrongs, and of goodwill, comity, and courtesy in their intercourse. This, of course, presupposes an intercourse between nations of an official nature as distinguished from personal, commercial, and other intercourse. This official intercourse is known as diplomatic intercourse and is founded upon what is termed technically the right of legation. By the right of legation is generally meant the right of a state to send and receive diplomatic officials for the purposes of negotiation, for the observation of all matters in which the home states are interested, and, finally, for the protection of persons, property, and interests of the country within the territory of the countries to which they are severally accredited.

This right of legation existed before modern international law was known. Diplomatic agents or, as they were then generally called, "ambassadors," enjoyed in early days special duties, special protection, and peculiar privileges. They were not, however, permanently placed in the various countries, permanent legation, as we understand it, being unknown until late in the Middle Ages.

The use of permanent legation created diplomatic officials, and as Oppenheim says: "Although the art of diplomacy is as old as official intercourse between states, such a special class of officials as are now called diplomatists did not and could

not exist until permanent legations had become a general institution. In this as in other cases, the office has created the class of men necessary for it."[1]

The right of legation, as a general rule, extends only to full sovereign states. Other states, such as part-sovereign states and uncivilized peoples, possess the right in a conditional way alone. No state is obliged to send diplomatic agents, although practically all states do send them where the intercourse justifies it. It is, of course, impossible for any state to receive diplomatic agents from two claimants to the headship of the same foreign state.

On account of the growth and rapidity of communication between nations caused by railways and steamships, by telephone and telegraph, it has been argued that the use of diplomatic agents has greatly diminished in value, or in minor countries entirely passed away. But, on the other hand, it can be said that this rapidity of communication creates a greater interchange of persons between countries and a greater interweaving of interests, of trade, and of all matters that are capable of transit. As a former secretary of state has well said: "One reason why the value and importance of the diplomatic service are not readily recognized is because its work is carried on quietly and usually without the knowledge of the public. It is almost always the handmaid of peace and good-will. Very many more international controversies are settled by the unobtrusive or secret methods of diplomacy than by either arbitration or war."[2]

The existence of war between two countries does not excuse a state from receiving an embassy from the other belligerent. Such embassy would be for negotiation but not for other than temporary residence.

In the relations with the navy there is independence on both sides in both the diplomatic and naval services. Any

[1] Oppenheim, 2d ed., vol. I, p. 439.
[2] Foster, "Practice of Diplomacy," p. 6.

joint action carries with it separate responsibility on the part of each official to the head of his department.

The regulations of the navy covering this subject are given in full under the head of consuls, to whom such matters equally apply.

95. **The Appointment and Reception of Embassies or Diplomatic Agents.**—States which have the right to send embassies or diplomatic agents have the right to receive them. Although a state may have the right to receive and to send an embassy, there is no obligation to send or to receive an embassy without regard to circumstances.

If an embassy should have a mischievous purpose or an especially objectionable ambassador or diplomatic agent, that particular embassy can be refused entry into a territory of a state or a reception at its capital or court. The reasons for such refusal or, rather, a reason for such refusal should be given, and arbitrary action without reason is regarded as improper.

Most countries decline to receive their own subjects or citizens as diplomatic agents. The term *persona non grata* is generally applied to those whose reception is refused, which expression can be defined as meaning a person who is not acceptable on political or personal grounds.

The laws of the United States forbid the appointment of any one other than a citizen of the United States to the diplomatic service. Generally it is a rule with the State Department that no citizen of the United States shall be received as a diplomatic representative of a foreign government. This rule was, however, suspended in the case of Mr. Burlingame, who was the head of a diplomatic delegation from China, and in the case of Mr. Camacho, a native of Venezuela but a naturalized citizen of the United States, who was received as a minister from Venezuela in 1880.

No state is bound to receive a papal legate or nuncio, especially if his instructions, or the general canon law, give him powers injurious to an established church, or one of another

faith, or to the sovereignty of the state over all causes ecclesiastical as well as civil. The Protestant states have never received a permanent legation from the popes, even when the latter were heads of a state, and they still observe this rule, although one of them, Germany, keeps a permanent legation at the Holy See. Italy refused, in 1885, to receive Mr. Keiley as minister from the United States of America because he had, as an individual, in 1871, protested against the annexation of the Papal States by Italy.

The sex of the diplomatic agent is not essentially objectionable, as women have at times acted in the capacity of ambassadors or diplomatic agents. The league of Cambrai, in 1508, was signed by Margaret of Austria in the name of her brother, Charles V. In the same place, Louisa of Savoy, mother of Francis, signed a peace sometimes called *Les Traités des Dames.*

The fact of the ambassador not being a native of the state which sent him would not alone afford a reasonable cause for refusal. In 1871 Count Beust, who had been a subject of the King of Saxony and very recently prime minister of that country, was received by Great Britain as ambassador from Austria. In order to prevent unpleasant incidents arising from rejection of a diplomatic agent by the state to which he is accredited, it is customary to make confidential inquiries as to his acceptability to the government of the country. This practice is usually known as that of *l'agréation.*

Another case as to rejection by a foreign country of an appointed minister was that of the Honorable H. W. Blair, who after a long and successful career in the United States Senate was appointed and confirmed as minister to China. The Chinese Government refused to accept him on the ground that he had voted for the Chinese exclusion act. As China persisted in holding that his assuming the position of minister at Peking "might be detrimental to the intercourse of the two nations," Mr. Blair finally resigned his commission before he had sailed from the United States.

If a diplomatic agent is obliged to pass through a third country on the way to his post, he is accorded as a matter of comity the immunities of an envoy while in transit. In case of war in the country through which he is passing, or for other circumstances, this privilege of free and unrestricted transit may be limited.

The case of Mr. Soulé, American minister to Spain in 1854, illustrates a case of restriction. Mr. Soulé was born in France but became a naturalized citizen of Louisiana; after his arrival in Spain he took affront at the conduct of the French ambassador and two duels resulted in which Mr. Soulé and his son were engaged. Afterward, when *en route* from England to Spain, he was detained in France at Calais. Upon complaint, the French Government stated that the government recognized the privilege of the envoy to traverse French territory, but that Mr. Soulé's antecedents awakened the attention of the authorities, and that in the interests of public order if he went direct to Madrid the route by France was open to him, but that a stay in Paris would not be allowed. Mr. Soulé returned to England and reached Spain by another route and the incident was thus closed. Mr. Foster states that this affair "simply afforded Louis Napoleon the opportunity and gratification of manifesting his hostility toward an intemperate diplomatist."[1]

"In case a state does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he has arrived at the place of his designation. But the mode of reception differs according to the class to which the envoy belongs. If he be one of the first, second, or third class, it is the duty of the head of the state to receive him solemnly in a so-called public audience with all the usual ceremonies. For that purpose the envoy sends a copy of his credentials to the foreign office, which arranges a special audience with the head of the state for the envoy when he delivers

[1] Foster, "The Practice of Diplomacy," pp. 53–54.

in person his sealed credentials.[1] If the envoy be a chargé d'affaires only, he is received in audience by the secretary of foreign affairs, to whom he hands his credentials. Through the formal reception the envoy becomes officially recognized and can officially commence to exercise his functions. But such of his privileges as exterritoriality and the like, which concern the safety and inviolability of his person, must be granted even before his official reception, as his character as diplomatic envoy is considered to date not from the time of his official reception but from the time when his credentials were handed to him on leaving his home state, his passports furnishing sufficient proof of his diplomatic character."[2]

96. Rank and Classification of Diplomatic Officials.—"For the sake of convenience and uniformity in determining the relative rank and precedence of diplomatic representatives, the Department of State has adopted and prescribed the seven rules of the congress of Vienna found in the protocol of the session of March 9, 1815, and the supplementary or eighth rule of the congress of Aix-la-Chapelle of November 21, 1818. They are as follows:

"In order to prevent the inconveniences which have frequently occurred, and which might again arise, from claims of precedence among different diplomatic agents, the plenipotentiaries of the powers who signed the treaty of Paris have agreed on the following articles, and they think it their duty to invite the plenipotentiaries of other crowned heads to adopt the same regulations:

"Article I. Diplomatic agents are divided into three classes: that of ambassadors, legates, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers for foreign affairs.

"Article II. Ambassadors, legates, or nuncios only have the representative character.

[1] Twiss, I, sec. 215, and Rivier, I, p. 467.
[2] Oppenheim, "Int. Law," p. 451, art. 376.

"Article III. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.

"Article IV. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

"Article V. A uniform mode shall be determined in each state for the reception of diplomatic agents of each class.

"Article VI. Relations of consanguinity or of family alliance between courts confer no precedence on their diplomatic agents. The same rule also applies to political alliances.

"Article VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

"Article VIII. It is agreed that ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between ministers of the second class and chargés d'affaires.

"The diplomatic representatives of the United States are of the first, the second, the intermediate, and the third classes, as follows:

"(*a*) Ambassadors extraordinary and plenipotentiary.

"(*b*) Envoys extraordinary and ministers plenipotentiary and special commissioners, when styled as having the rank of envoy extraordinary and minister plenipotentiary.

"(*c*) Ministers resident.

"These grades of representatives are accredited by the President.

"(*d*) Chargés d'affaires commissioned by the President as such are accredited by the secretary of state to the minister for foreign affairs of the government to which they are sent.

"In the absence of the head of the mission the secretary acts ex officio as chargé d'affaires *ad interim* and needs no

special letter of credence. In the absence, however, of a secretary and second secretary, the secretary of state may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs." [1]

The subordinate officers of the United States to the diplomatic representative are the secretaries of embassies and legations of the United States who have their equivalents in the counsellor or chancellors of foreign diplomatic services. Subordinate secretaries are numbered in order of their precedence, while the military and naval attachés rank next and after the first secretaries of the embassy and legations, as these latter may become ex officio chargés d'affaires in the absence of the head of the mission. Among themselves they rank as they would do when engaged in any joint service.

97. The Duties of Diplomatic Officials.—The duties of diplomatic envoys can be comprehended in a general way under three heads: that of negotiation, that of observation, and that of protection to persons and interests. But beyond this classification come many duties that are more or less indefinable, such as the cultivation of friendly relations, etc.

"As the agent of his home government the envoy takes charge of all communications between the two states on the part of his home government and is both counsel and advocate of his country in regard to any negotiations between the two states that are pending or that may arise in the future. In the great mutual agreements between the civilized nations of a continent or the world, he is an important link in notification and arrangement. As for the negotiation of treaties, it has been well said that it is the highest function which a diplomatic representative is called upon to discharge, and the one which requires the greatest skill and circumspection on his part. . . . As indicating the broad scope of this branch of international law and comity, it may be stated that the treaties of the

[1] "Instructions to Diplomatic Officers of U. S.," pp. 7, 8.

United States with other nations now in force alone exceed three hundred in number."[1]

An envoy is also charged with the observation of all matters of interest and importance to his home state occurring in the nation to which he is accredited. He should keep his home government well informed in regard to the public opinion, the readiness for war, the commerce and industry, and the general attitude of the country toward his own. It is generally conceded that no state that receives a diplomatic agent has a right to prevent him from exercising the function of such observation and report, unless it is done in an objectionable manner or in regard to matters withdrawn from ordinary observation.

A third and with us a constant function of the diplomatic envoy is the protection of persons, property, and interests of such nationals of the home state as are living or are found within the boundaries of the state to which this representative is accredited. This protection is limited by the regulations of his own state and by the general municipal law of the state to which he is accredited in regard to aliens. The relations of the diplomatic agent over the consular agents of the same country is with most countries one of full authority and control, but with the United States it is one of supervision alone. There are, in addition, numberless minor duties of a miscellaneous nature, which vary with the number of resident and travelling Americans and their varying wants and needs.

Though it may be one of the duties of the diplomatic official to watch the course of political events and the action of the political parties and report such observations to the home government, he has no right whatever to share in the political life of the state or to encourage one party or threaten another. No self-respecting state would, if able, allow any foreign envoy to exercise such interference but would either request his recall or, if necessary, deliver to him his passports and dismiss him.

The case of Lord Sackville-West was one somewhat in point.

[1] Foster's "Practice of Diplomacy," pp. 243–4.

During the presidential campaign of 1888 a letter marked private was mailed in California to Lord Sackville, purporting to be from a citizen of English birth, asking advice as to the presidential candidate most favorable to British interests. Lord Sackville, in his reply, also marked private, stated that any political party which openly favored the mother country would lose popularity but indicated that President Cleveland's election would be more likely to promote British interests.

The letter proved to be a wretched decoy to entrap the minister, and his reply was at once published in the newspapers. When confronted with his letter Lord Sackville acknowledged the letter but stated that it was private. He, however, submitted to newspaper interviews, which aggravated rather than improved his statements. After an interchange of despatches with the British Foreign Office to expedite matters, Secretary Bayard thought that it would be incompatible with the best interests of both governments that he should continue any longer to hold his official position in the United States and sent him his passports.

Lord Sackville was undoubtedly guilty of an indiscretion, but his offence does not seem to have been of such a character as to justify the unseemly haste of the recall.

98. The Rights and Privileges of Diplomatic Officials.— Diplomatic agents, like heads of states, are inviolable in their persons while holding their offices in the receiving state. This inviolability consists not only in special rules as to the safety of their persons but also as to their exemption from all kinds of criminal jurisdiction of the state to which they are accredited.

The protection of diplomatic agents is not restricted alone to themselves but is extended to the members of their private and official families, to their official residence and its contents and archives, as well as to the means of communication with their home state.

In the instructions to the diplomatic officers of the United States it is stated that the immunity from criminal and civil

process is one pertaining to the office of the envoy and cannot be waived except by the consent of his government. Even if he is called upon to give testimony under conditions which do not concern the affairs of his mission and which are in the interests of justice, he is not allowed to do so without the consent of the President.

From the representative character of his office an affront to an ambassador or envoy is not only an affront to his ruler and country but is a violation of the common welfare and general concern of all nations. It was this latter phase that placed so serious an aspect upon the incidents and surrounding circumstances of the Boxer trouble in China.

"It is not meant, however," as Oppenheim says, "that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonizes with the internal order of the receiving state. He is, therefore, expected voluntarily to comply with all such commands and injunctions of the municipal law as do not restrict him in the effective exercise of his functions. In case he acts and behaves otherwise and disturbs thereby the internal order of the state, the latter will certainly request his recall or send him back at once."[1]

The criminal law of England makes it a misdemeanor, in case a person violates, by force any privilege, which is conferred upon the diplomatic representatives of foreign countries or who causes the arrest or imprisonment of any foreign diplomatic representative or the person of a servant of any such representative.

The statutes of the United States (secs. 4063 and 4064) state that any writ or process of any court of the United States or of any State against a diplomatic minister or a servant of such minister shall be void, and severe penalties are prescribed against any person who shall obtain or execute such a writ or process.

[1] Oppenheim, 2d ed., vol. I, pp. 458–9.

Summing up the whole subject, we can say with Phillimore that:

"*First.* The right of inviolability extends to all classes of public ministers who duly represent their sovereign or their state. . . .

"*Secondly.* The right attaches to all those who really and properly belong to the household of the ambassador; those who—to use the ordinary description—accompany him as members of his family or his suite. . . .

"*Thirdly.* The right applies to whatever is necessary for the discharge of ambassadorial functions. . . . It seems to follow, therefore, that he is entitled, among other immunities, to an exemption from all criminal proceedings and to freedom from arrest in all civil suits. . . .

"*Fourthly.* The right attaches from the moment that he has set his foot in the country to which he is sent, if previous notice of his mission has been imparted to it, or, in any case, as soon as he has made his public character known by the production either of his passport or his credentials.

"*Fifthly.* The right extends, at least so far as the state to which he is accredited is concerned, over the time occupied by the ambassador in his arrival, his sojourn, and his departure.

"*Lastly.* The right is not affected by the breaking out of war between his own country and that to which he is sent."[1]

The real estate of a diplomatic envoy, other than his actual immediate dwelling, is not exempt from court jurisdiction. The only question in this case is as to the mode of notifying the envoy of a civil action in which his property is concerned. This should be done by courteous letter. To prevent any further complications on account of private trade or commerce, every state should forbid their diplomatic agents to engage in private trade or commerce, including dealings with corporations, or as members or directors of mercantile corporations.

A secretary of a mission is, in accordance with admitted

[1] Phillimore, 3d ed., vol. II, pp. 200, 201.

usages of international law, given the same privileges and same exemptions generally as the diplomatic representative of whose official household he forms a part.

During Mr. Gallatin's mission in London, in 1827, an incident occurred, involving a question of diplomatic privileges, which led to an exposition of the British views on the rights of embassy. His coachman was arrested in his stable, on a charge of assault, by a warrant from a magistrate. The subject having been informally brought to the notice of the foreign office, a communication was addressed to the secretary of the American legation by the under-secretary of state, Mr. Backhouse, May 18, 1827, in which he informed Mr. Lawrence of the result of a reference made by order of Lord Dudley to the law officers of the crown. In it it is said that "the statute of the 7th Anne, chap. 16, has been considered in all but the penal parts of it nothing more than a declaration of the law of nations; and it is held that neither that law nor any construction that can properly be put upon the statute extends to protect the mere servants of ambassadors from arrest upon criminal charges, although the ambassador himself and probably those who may be named in his mission are, by the best opinions though not by the uniform practice of this country, exempt from every sort of prosecution, criminal and civil. His lordship will take care that the magistrates are apprised, through the proper channel, of the disapprobation of his Majesty's government of the mode in which the warrant was executed in the present instance and are further informed of the expectation of his Majesty's government that, whenever the servant of a foreign minister is charged with a misdemeanor, the magistrate shall take proper measures for apprising the minister, either by personal communication with him or through the foreign office, of the fact of a warrant being issued, before any attempt is made to execute it, in order that the minister's convenience may be consulted as to the time and manner in which such warrant shall be put in execution."

"An official character was given to the preceding communication by a note from Earl Dudley, secretary of state for foreign affairs, June 2, 1827, in which he says that it is only necessary for him to 'confirm the statement contained in the private note of Mr. Backhouse, referred to by Mr. Gallatin, as to the law and practice of this country upon the questions of privilege arising out of the arrest of Mr. Gallatin's coachman, and to supply an omission in that statement with respect to the question of the supposed inviolability of the premises occupied by a foreign minister. He is not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations.'

"He adds that courtesy requires that their houses should not be entered without permission being first solicited in cases where no urgent necessity presses for the immediate capture of an offender."[1]

Among the privileges which the usage of nations has imparted to the diplomatic agent is the exemption of his person from taxation. He is, moreover, generally exempt from the payment of customs dues upon articles imported for the use of himself and his family. These privileges are ones of usage and comity rather than those of inherent right.

Although it is not within the power of a diplomatic envoy to waive the rights and privileges of the members of a legation, the home state itself can waive these privileges. In 1909 the chancellor of the German legation in Santiago de Chile murdered the porter of the legation, a Chilian subject, and then set fire to the chancery in order to conceal his embezzlement of money of the legation. The German Government consented to his trial by the Chilian Government. He was found guilty and executed at Santiago on July 5, 1910.[2]

99. Right of Asylum in Legations and Embassies.—The privilege of immunity from local jurisdiction does not embrace

[1] Moore's "Digest," vol. IV, pp. 656, 657.
[2] Oppenheim, 2d ed., vol. I, p. 474.

the right of asylum for persons outside of a representative's diplomatic or personal household.

In regard to the right of asylum Bynkershoek states very strongly "that, whether common sense, the reason of the thing, or the end and object of embassies be considered, there is not even that faint color of reason which the most absurd pretensions can generally put forth to be alleged in favor of such a custom."

Spain seems to be the only nation in Europe in which the right of asylum for political refugees is sanctioned or tolerated in later years. In the revolutionary period of 1865–75, which in respect to disorder and violence reproduced the decade of 1840–50, the practice was resumed. In 1873, after the abdication of Amadeus, Marshal Serrano, who had taken an active part in placing that prince on the throne, was hunted by a mob. He fled from house to house, but at last repaired to the abode of the British minister, Mr. Layard, who subsequently disguised him and accompanied him by rail to Santander, where he embarked for St. Jean de Luz.

Secretary Fish in a letter to Mr. Caleb Cushing, our minister to Spain in 1875, says: "The frequency of resort in Spain to the legations for refuge and the fact mentioned by you that nobody there disputes the claim of asylum but that it has become, as it were, the common law of the land may be accounted for by the prevalence of 'conspiracy as a means of changing a cabinet or a government,' and the continued tolerance of the usage is an encouragement of this tendency to conspiracy.

"It is an annoyance and embarrassment probably to the ministers whose legations are thus used but certainly to the governments of those ministers, and, as facilitating and encouraging chronic conspiracy and rebellion, it is wrong to the government and to the people where it is practised—a wrong to the people, even though the ministry of the time may not remonstrate, looking to the possibility of finding a convenient

shelter when their own day of reckoning and of flight may come."[1]

To a limited extent the practice of asylum still exists in certain Spanish-American countries. In these countries, where frequent insurrections occur and consequent instability of government exists, the practice of seeking asylum has become so firmly established that it is often invoked by unsuccessful insurgents and is practically recognized by the local government. "The government of the United States does not sanction the usage and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its representatives to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice."

100. **Termination of Diplomatic Mission.**—A diplomatic mission may come to a close in various ways. In a general way it is most likely to end by a recall from the sending state. If this recall is not brought about by unfriendly actions or words of the receiving state a letter of recall is sent from the head of his home state to the envoy, which he presents formally to the head of the state to which he has been accredited. In return he receives a letter of acknowledgment and his passports.

There are instances of recall for cause of an envoy by his own state because his conduct has made him *persona non grata* to the receiving government.

"The first and most notable instance of this kind in our own history was the recall of Mr. Gouverneur Morris from Paris at the instance of the French Government. He entered upon his duties in January, 1792, and was a witness of the exciting period which marked the overthrow of the monarchy,

[1] Moore's "Digest," vol. II, p. 771.

the execution of the king, the rapid succession of Republican governments, and the bloody reign of terror. No minister could have so conducted himself as to be *persona grata* to all these rapidly succeeding governments, but Mr. Morris was especially unfortunate and far from circumspect in his conduct. He had warm sympathy for Louis XVI and allowed his feelings to lead him into a plot for the king's escape; he counselled with the Monarchists and did not conceal his disgust at the bloody excesses of the Republicans, by whom he was regarded as hostile. Finally, in 1794, when Washington was forced to ask for the recall of the intemperate French minister, Gênet, the French Directory requested the recall of Morris, and he was forced to leave France." [1]

" The practice of some retired American ministers of making a public vindication of their conduct in cases where they have differed from their government is to be reprehended. So much abuse has grown out of the practice that the department in its 'Printed Instructions' has forbidden retiring diplomatic officers from retaining any draughts or copies of official correspondence. A minister should trust to time and the official publication of the correspondence for his vindication. It has been well said that a diplomatist who necessarily assumes confidential relations to his government is not at liberty to dissolve that confidential connection for his own vindication. The interests of the country have suffered more from the exposure than the character of the minister could possibly have done from his silence." [2]

101. **Agents of the State Without Diplomatic or Consular Character.**—Besides diplomatic and consular officers, it may and does happen that states send to other countries agents of various character. They may be political agents, public or secret, or commissioners to obtain information or to enter into negotiations independently of the duly accredited diplomatic

[1] Foster's "Practice of Diplomacy," p. 179.
[2] Foster's "Practice of Diplomacy," pp. 189, 190.

agent of the state. They may be sent to peoples in a state of insurgency or revolution or to the authorities of a *de facto* government in a state which has not been recognized as such.

A public political agent of this class may be sent to another duly recognized state or government for purposes of special negotiations. As they are not invested with a diplomatic character, they are given a commission for the special purpose or a letter of recommendation but no letters of credence. For this reason they are often designated as commissioners. They are not often given or requested to be given the full diplomatic privileges of diplomatic agents, but they are entitled, nevertheless, as public agents, to the protection of the state, and as a matter of comity or courtesy it would not be improper for the receiving state to grant them full privileges. A sufficient inviolability of person and residence and of papers should be granted them so as to enable them to execute their office. Secret political agents, of course, will not be in this category. In the history of the United States such agents have been used upon a number of occasions.

Probably the first case on record was the appointment by President Washington of Mr. Gouverneur Morris as a "private agent" to London, in 1789, before either country was represented in the other by a minister. As he was directed to converse with the ministers of the British Government as to certain matters concerning the relations between the two countries, his status approached that of a political or diplomatic agent.

In 1849 Mr. A. Dudley Mann was appointed by President Taylor as a special and confidential agent to Hungary, then in a state of insurrection against Austria, in order to determine the question of recognition of its independence. The United States had at the time a diplomatic representative at Vienna.

In 1852 Commodore M. C. Perry, U. S. N., was appointed by the President to conclude a treaty with Japan.

In 1861 Archbishop Hughes and Bishop McIlvaine were

sent to Europe by the secretary of state with the approval of President Lincoln as confidential agents in relation to questions growing out of the Civil War.

In 1893 Mr. James H. Blount was appointed a special commissioner to the Hawaiian Islands with paramount authority, a letter of credence, etc., there being a minister to the islands at the time.

In 1900 Mr. W. W. Rockhill was appointed commissioner to China with diplomatic privileges and immunities, owing to the state of affairs and isolation of the legations at Peking during the Boxer War.

An unusual mission in our history occurred in 1902, as follows:

"The United States Commission in the Philippines having recommended, as a means of allaying certain native discontents of long standing, the purchase by the government of the lands of the religious orders in the islands, it was deemed essential definitely to ascertain the attitude of the Vatican on the subject. To that end it was decided to send to Rome Governor Taft, the head of the Philippine Commission, who was then in Washington. His commission, which was dated May 9, 1902, was a letter of instructions, addressed to 'Hon. William H. Taft, Civil Governor of the Philippines,' and signed by 'Elihu Root, Secretary of War.' After adverting to the apparent impossibility of arranging a purchase directly with the friars, it authorized Governor Taft to ascertain what 'church authorities' had the power to negotiate for and determine upon a sale of the lands; and if he should find, as the information at hand indicated, that 'the officers of the church at Rome' possessed such power, he was to endeavor to reach at least a basis of negotiation along lines which would be satisfactory to them and to the Philippine Government. Certain rules were laid down for his guidance, and it was expressly declared that his errand would 'not be in any sense or degree diplomatic in its nature,' but would be 'purely a business matter of negotiation' by him 'as governor of the Philippines for the

purchase of property from the owners thereof and the settlement of land titles in such manner as to contribute to the best interests of the people of the islands.' In conclusion he was assured of any assistance which he might desire to enable him to perform his duties in a manner satisfactory to himself; and he called to his aid Judge James S. Smith, then a member of the Supreme Court of the Philippines, and Major Porter of the judge advocate's bureau in the United States army.

"Governor Taft bore with him a friendly letter from President Roosevelt to the Pope, asking him to accept a set of the President's works, and an American bishop of the Catholic Church arranged for an audience. Governor Taft was duly received by his Holiness, and he then entered into communication with Cardinal Rampolla, papal secretary of state, Major Porter acting as his bearer of despatches. Each step in the correspondence was duly reported to the secretary of war, who gave fresh instructions as they were needed. The negotiations at Rome were concluded late in July, 1902, with the understanding that the Holy See would send, as afterward was done, an apostolic delegate to Manila to treat with the local government."[1]

The case of the appointment of the Hon. John Lind as a commissioner or agent to observe upon and report as to the affairs of Mexico is an instance of a mission of this kind in recent times.

The question of such appointments and their validity without confirmation by the Senate has been discussed in the Senate several times, but on the whole the precedents are that the President has the right to make such appointments especially for the negotiation of treaties.

Members of arbitration and other conferences are also appointed and employed by the President without reference to the Senate.

[1] Moore's "Digest," vol. IV, pp. 447, etc.

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3. The Appointment and Reception of Embassies and Diplomatic Agents—
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4. Rank and Classification of Diplomatic Officials—
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5. The Duties of Diplomatic Envoys—
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7. Right of Asylum—
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8. Agents of the State Without Diplomatic or Consular Character—
   Oppenheim, 2d ed., vol. I, 508–512. Moore's "Digest," vol. IV, 447–458. Foster's "Practice of Diplomacy," 197–204.

CHAPTER XI

CONSULS. EXEQUATUR. RIGHTS, IMMUNITIES, AND DUTIES OF CONSULAR OFFICERS

102. Historical Sketch of Consulates.—The establishment of consuls within the territory of foreign countries antedates by several centuries the maintenance of permanent legations and embassies. "The origin of this institution is in all probability traceable," says Phillimore, "to that domestic consulate which, after the fall of the Western Empire, was during the earlier part of the Middle Ages founded in most of the maritime cities of the south of Europe connected with commerce and navigation, the jurisprudence and authority of which rested mainly upon principles gleaned from the Roman and Greek law."[1]

About the eleventh century commercial settlements or depots, and a consequent jurisdiction, grew up under consuls appointed to deal with maritime and commercial questions in the Levant, especially and generally on the Mediterranean Sea. This growth or commercial expansion gradually extended beyond the limits of the Mediterranean to the rest of maritime Europe. The jurisdiction of consuls in foreign countries also came to include a local government of their fellow countrymen in matters other than commercial, in accordance with their home laws. Consuls at this time enjoyed all of the immunities which ambassadors hold at the present time.

The modern system of consuls can be said to date from the latter part of the sixteenth century, and in this establishment the French led the way. The special advantages which France

[1] Phillimore, 3d ed., vol. II, pp. 265, 266.

had, due to her alliance with Turkey, gave rise to what are known as the "capitulations," or the right of exterritoriality. Under these capitulations the French consuls were endowed with diplomatic immunities, while the traders of all other nations were placed under the protection of the French flag. In 1675 English consuls were established in Turkey under the "capitulations" negotiated by France, which exist under that name in Turkey and Turkish territory to the present time.

The earlier consulates had a character very much like those now existing in many Oriental countries, with a local jurisdiction over the nationals of the consular office. With the growth of the idea of national independence and sovereignty, exterritorial jurisdiction in Christian countries, both civil and criminal, became at variance with the principle of national sovereignty, and at the same time the advancement of civilization and of law and order rendered it unnecessary, and the modern system of consular officers without local territorial jurisdiction in foreign countries came into being.

In its changed character the consular office became of a limited nature, consisting of a watchfulness on the part of the consul over the commercial and maritime interests of his state and a limited authority over his fellow countrymen within his assigned territory. Although limited in authority, the subjects dealt with by the consul are growing in number and extent in consequence of the rapid growth of international relations and commerce. While their judicial authority has been restricted, their commercial duties have been made more comprehensive and detailed.

The United States in its early history accepted the consular system as it existed in the civilized nations of the world. Among its first treaties was a consular convention with France, and it has always taken a prominent part in securing for consuls a defined status and recognized function under international law. Washington, as President, appointed fifteen consular officials before the enactment of the law of 1792 upon the

subject. Congress has been less progressive than the executive department, the law of 1856 being the first attempt on the part of the legislative department to provide an act for its proper establishment.[1] Finally, by the passage of the act of April 30, 1905, the consular service was reorganized and placed upon a better basis. This act has been supplemented by the consular regulations of the State Department, which has tended toward greater efficiency and permanence of tenure. The more important of these regulations should be enacted into statute law and the consular service given by law a more permanent and stable nature.

103. Definition of a Consul and His General Functions.—A consul, in which term are included all grades of consular officials, is a public functionary and representative agent named by one state to act with the consent of the receiving state within its jurisdiction and domain. He has for his mission the supervision and protection, within certain lines, of the commercial and national interests of his country and countrymen, in accordance with the treaties existing between the two states, the principles of international law, the regulations of his own government, and the usages of his consular jurisdiction.[2]

The consul has many functions which can hardly be enumerated by law or regulation. These functions, with the rapid growth of intercourse between nations and the general tendency for increased international administration, are adding constantly to the number and complexity of consular duties.

The importance of the position of consul has found expression in a final paragraph of the regulations drawn up by the Institute of International Law upon the subject of consular immunities, at a session held on September 26, 1896, which should be gravely considered by all those concerned with the subject. It reads as follows:

"The institute having adopted the regulations regarding

[1] Foster's "Practice of Diplomacy," pp. 216, 217.
[2] Stowell, "Le Consul," p. 223.

immunities of consuls, expresses the wish that governments whose functionaries are likely to be in a position to be benefited by them will exercise the greatest care in the choice of such functionaries, that they may be worthy in all respects of the immunities specified."[1]

Notwithstanding that, by act of Congress, a consul cannot exercise diplomatic functions without special authority from the President of the United States, the circumstances surrounding a consul-general in large and distant colonial countries like British India, the Dominion of Canada, the Commonwealth of Australia, and the South African Union are such that his position with regard to the local authorities becomes of a quasi-diplomatic and political nature. This is also not only true with respect to British colonies just cited but is also applicable to French and other colonies, like Algeria, Madagascar, and the German colonies in Africa and the southern Pacific. Formerly, when Cuba was a colony of Spain, the consul-general corresponded directly with the United States Department of State. Besides this there are more or less intangible political and diplomatic duties which pertain to the official agent of the United States on the spot.

In fact, it is stated in the consular regulations of the United States that, in the absence of a diplomatic representative, there may be circumstances which, apart from usage, make it proper for him to address the local government upon subjects which relate to the duties and rights of his office and which are usually dealt with through a legation or embassy. Under such circumstances he has an undoubted right of access to the authorities of the state in all matters appertaining to his office.

Consuls can and have been made chargés d'affaires by executive authority as just stated and hence invested with direct diplomatic functions, but these duties are exercised at the capital of the state, and such functions do not change the legal status of the consuls.

[1] "Annuaire," etc., 1896.

In the absence of both a diplomatic and consular officer of the United States in foreign waters or on the high seas, the commander-in-chief or the senior naval officer present "has authority by law to exercise the powers of a consul so far as seamen of the merchant service of the United States are concerned."[1] He is also directed, in such absence, by the regulations of the navy "to communicate or remonstrate with foreign civil authorities as may become necessary and urge upon the American citizens in the locality the necessity of abstaining from participation in political controversies or from the violation of the laws of neutrality."

The naval commander-in-chief is directed by the naval regulations to preserve the most cordial relations, so far as possible, with the diplomatic and consular representatives of the United States in foreign countries and extend to them the honors, salutes, and other official courtesies to which they are entitled. He, furthermore, shall carefully and duly consider any request for service or other communication from any such representative.

Although due weight should be given to the opinions and advice of such representatives, a commanding officer is solely and entirely responsible to his own immediate superior for all official acts in the administration of the command.

As a general rule, when in foreign ports he communicates with local civil officials and foreign diplomatic and consular authorities through the diplomatic and consular representative of the United States on the spot.

Furthermore, on occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the commander-in-chief shall consult with the diplomatic representative or consul of the United States and take such steps as the gravity of the case demands, reporting immediately to the secretary of the navy all the facts. The responsibility for

[1] Sec. 1433, Revised Statutes of the United States.

any action taken by a naval force, however, rests wholly upon the commanding officer thereof.[1]

It may be said that no state can be supposed to tolerate the interference by a consul in the political affairs of the country of his residence. So far as the United States is concerned, it is considered a sufficient ground for his recall.

104. Classification and Precedence of Consuls.—In a general way consular officers can be divided into two classes.

The *first* class consists of those who are public officials of the sending country and hence are purely professional. These consular officers are not permitted by their country to engage in any other business or profession. Though not required by law to be citizens of the United States, they are almost invariably citizens and, of preference, native citizens.

The *second* class is composed of those who are engaged in a business or profession, their consular functions being of a secondary nature.

The latter class are not necessarily of the nationality of the sending state and are of inferior status and do not from their position enjoy full consular privileges and immunities.

With respect to rank consuls are generally of four grades—consuls-general, consuls, vice-consuls, and consular agents.

The consular service of the United States consists of consuls-general, consuls, vice-consuls-general, deputy-consuls-general, vice-consuls, deputy-consuls and consular agents, consular assistants and interpreters.

The American consular representative at Cairo, Egypt, has by law the title of diplomatic agent and consul-general. In other cases, when diplomatic functions have been assigned to the office, there is no authority for the consular officer to assume the title of diplomatic agent.

Consuls-general at large are inspectors of consulates; those not so defined are designated for specific jurisdiction and either exercise supervision or control over several consular districts or are placed over one large consular district.

[1] "U. S. Navy Regulations of 1913," Arts. 1642, 1643, 1644, 1646.

Consuls serve within jurisdictions of smaller size or importance or are assigned to certain places or seaports.

In precedence a consul-general ranks with, but after, a commodore in the navy or a brigadier-general in the army, and with a secretary of an embassy; but when thrown together in matters other than of a diplomatic nature the consul-general takes precedence. He is entitled in the port or ports within his jurisdiction to a salute of eleven guns. A consul under the same circumstances is entitled to a salute of seven guns and a vice-consul to one of five guns.

A vice-consular officer takes the place and exercises all the functions or powers of a consul-general or consul when the latter is temporarily absent or relieved from duty.

A deputy-consular officer is a subordinate of a consul-general or consul, under whose supervision he exercises consular functions which are generally of a routine character. He never assumes the responsible charge of the office, that being the duty of the vice-consul.

A consular agent is an officer subordinate to a consul-general or consul, exercising similar powers at ports or places different from those at which the consulate-general or consulate is situated. He acts under the direction of his principal and is paid from the fees of his office.

There are thirty consular assistants who are appointed by the President and hold office during good behavior. They may be assigned from time to time to such consular offices and with such duties as the secretary of state may direct.

Marshals are provided for certain of the consular courts in China and Turkey, where the American consuls are invested with judicial powers over American citizens. Their duties are to execute all process issued by the ambassador or minister of the United States or by the consuls at the port in which they reside and to perform the duties required in the regulations of the consular court.

As a matter of explanation of the general policy of the United States, it may be well to quote a letter of Secretary Fish

written April 7, 1876, which says that "the experience of the government has demonstrated the inconvenience and often serious embarrassment resulting from the appointment of naturalized citizens to consulates within the country of their nativity, while with regard to appointments in other countries they stand on the same footing as all other citizens."[1]

105. **Exequatur—Installation of the Consul.**—After the appointment of a consul, the sending government remits to the government of the country within whose jurisdiction his post exists his commission. This is done through its diplomatic representative accredited to that government, accompanied by instructions to apply for an exequatur. An exequatur is called in Turkey a *barat.*

By an exequatur is meant a recognition of the consul by the foreign receiving state, and a warrant that he is permitted to proceed to perform the duties of his office as consul in the jurisdiction or territory for which he is appointed in accordance with law and usage.

The conveyance of the exequatur may be by a formal document or letter patent signed by the sovereign and countersigned by the minister of foreign affairs, or it may be simply a notification that he is recognized and an exequatur granted, or it may be as in Austria that his commission is indorsed with the word "exequatur" and stamped with the imperial seal.

If the foreign state accords the exequatur without reservation, the rights, privileges, and immunities of the consul will be, as mentioned before, determined by the treaties and by the general principles of international law governing consular relations. If there are restrictions or interpretations that the receiving state desires to place upon the consular office to which the appointment has been made, such conditions will be named in accompaniment of the exequatur. If the state by which the consul is appointed accepts the exequatur with its restrictions the two states will be bound by the agreement.

[1] Moore's "Digest," vol. V, p. 11, and Schuyler's "American Diplomacy," p. 79.

All states can refuse, by withholding an exequatur, to receive consuls on personal grounds or to receive them only in certain parts of their territory, so that a state has the right, if it so declare, to limit the exercise of consular functions by certain conditions. These conditions, however, must apply to consuls of all nations and not be based upon personal or national considerations. Such conditions, moreover, must not be in violation of any treaty existing between these two countries.

The exequatur once granted, it becomes a duty on the part of the granting state to notify the local authorities and to give such publicity as may be necessary to inform the general public as well as the nationals of the state to which the consul belongs who happen to be residing within his district. It is established usage that the district named by the sending state should, as a rule, be accepted by the receiving state, as it is more particularly a matter of convenience of the sending state.

In case of unsettled or changed political conditions in the district to which the consul is to be sent, the sending state has the right of naming the authorities to which application for an exequatur should be made, as it may easily involve a grave political question. This is even a graver matter when the receiving government grants recognition to a government by giving an exequatur to a consul of their appointment.

It is not always necessary to ask for and obtain a formal exequatur for a consular agent. Frequently, on application, the foreign minister of the receiving state gives such exequatur in the form of a certificate of recognition.[1]

In the case of delay, due to absence of the proper central authorities or the distance of the capital from the district of the newly appointed consul, he may proceed to his post and enter upon the discharge of his duties on receiving permission from the proper local authorities of the place to act in his official capacity until the exequatur arrives.

If a consul be guilty of illegal or improper conduct, he is liable to have his exequatur revoked, and if his conduct be

[1] Stowell, "Le Consul," pp. 257, etc.

criminal to be punished according to the laws of the country, or he may be sent out of the country at the option of the offended government.

There have been a number of cases of the revocation of an exequatur as well as a refusal to grant it by various governments.

Mr. Eugene Schuyler, in his work "American Diplomacy," says "refusals to grant the exequatur are not uncommon. An English consul was refused by Russia in the Caucasus because it was alleged he was hostile to the Russian Government and had expressed strong opinions about Russian movements in Asia. In our own history, without going further, a consul recently appointed to Beirut was rejected by Turkey because he was a clergyman and might be too much connected with the missionaries; another was rejected by Austria on account of his political opinions, he having previously been an Austrian subject."

During the Civil War, in 1861, Mr. Bunch, the British consul at Charleston who was exercising consular functions under an exequatur from the United States Government, had this exequatur revoked on account of various communications he had entered into with the Confederate Government and also because his conduct had all along "been that not of a friend to this government or even of a neutral, but of a partisan of faction and disunion." The British Government, although denying the charge that Mr. Bunch had acted as a partisan, did not dispute the President's right to withdraw Mr. Bunch's exequatur. Mr. Bunch continued to reside in Charleston during the time it remained in possession of the Confederate Government.

Conviction of a person by a United States military commission at Manila of publishing seditious newspaper matter in violation of the articles of war precluded the recognition of such person as the consular agent of a foreign power at that place.

The fundamental rights and privileges of consular officers

depend, as has been said, upon the principles of international law and the customs and usages of nations. Certain rights and privileges are, however, formally guaranteed by treaties and consular conventions. The principal rights and privileges from all of these sources are given in the following paragraphs in succession, but it must be remembered that these vary with the nations concerned, and reference must be made to various treaties and to the consular regulations for the nations concerned.[1]

The following rights and privileges of consular officers are more or less general, the consular regulations of the various countries entering into fuller details. They are:

1. Those rights and privileges that arise under the *favored-nation* clause by which can be claimed all those granted consuls of other countries.

2. The inviolability of the archives and public papers of the consulate.

3. Exemption from criminal arrest except for grave infractions of the law.

4. Exemption from obligations to appear as a witness except through deposition.

5. Exemption from taxation except in certain cases.

6. Exemption from military billeting and service and from other public services.

7. The right to communicate with his nationals in temporary or permanent residence.

8. The right to communicate and correspond with his government and its agents.

9. The right to correspond with the local authorities upon official matters.

10. The right to display the arms of his country and upon proper occasions to display the flag of his country upon or over the consular office or dwelling.

11. The right to take depositions.

[1] Treaties of the United States. U. S. Consular Regulations, 1896.

12. The right to reclaim deserters in accordance with treaties.

13. The right to act in matters of salvage and wrecks.

14. The charge, etc., of the personal effects of deceased citizens of the United States.

15. The right of requesting the extradition of fugitive criminals in absence of diplomatic representatives.

16. The right to exercise judicial and notarial powers of a miscellaneous nature and to watch trial proceedings in which his nationals are concerned. This is especially the case with merchant seamen.

17. Inviolability of the consular office and dwelling in certain countries by treaty, but this does not authorize the use of the building as an asylum.

18. In countries where the right of exterritoriality exists consuls have the right to exercise judicial power in civil or criminal cases.[1]

Requests have been made at times by foreign governments upon the government of the United States to permit or direct their consular officers to assume functions as their agents and, as such, to extend protection to their nationals who may desire it and who happen to be domiciled where there are at the time no consular or diplomatic officials of the country concerned.

Authority has been given in certain cases by our government to our consuls and diplomatic officials to do this, provided, however, that the consent of the government within whose jurisdiction they reside is obtained.

When this function is accepted, which must be done only with the approval of the Department of State, the diplomatic or consular officer becomes the agent of the foreign government as to the duties he may perform for its nationals. He becomes responsible directly to it for his discharge of those duties, and that government alone is responsible for his acts in relation thereto. He does not, however, for this purpose become a diplomatic or consular officer of the foreign govern-

[1] Art. 5, U. S. Consular Regulations, 1896.

ment concerned. This is forbidden by the Constitution of the United States.[1]

106. **Duties of Consular Officers.**—It is a primary duty of consular officers "to endeavor on all occasions to maintain and promote all the rightful interests of citizens and to protect them in all privileges that are provided for by treaty or are conceded by usage."[2] The powers and duties of consular officers in regard to their nationals is governed largely by the laws of the United States. As representatives of their country they should do their utmost to protect them before the authorities of the country in all cases where they are unjustly treated. It is, of course, an obligation upon all nationals of the United States to observe the laws of the country where they are sojourning. If consular officers fail to secure redress from the local authorities in the case of ill treatment, the consular officer should report it to his consular or diplomatic superior in the country and to the Department of State.

For many and evident reasons it is considered desirable that a consular officer should keep a register of American citizens domiciled in his jurisdiction. This is especially of importance, since the act of 1906 requiring under certain circumstances a declaration of citizenship and the establishment of such a register and its upkeep may easily become a most important duty on the part of the consul. All naturalized citizens of the United States while in foreign countries are entitled to receive the same protection of persons and property which is accorded to native-born citizens.[3]

The duties of a consul in seaports with respect to the merchant vessels of the United States are very extensive. They are set forth in detail in the consular regulations and include certain jurisdiction over the vessel, its officers, and crew which has already been discussed elsewhere, and the shipment and

[1] U. S. Consular Regulations, 1896, pp. 60, 61, 178.
[2] Art. 171, U. S. Consular Regulations, 1896.
[3] Revised Statutes of the U. S., sec. 2000.

discharge of seamen, their wages and effects, their relief and transportation, their desertion and disputes, etc.

Among the miscellaneous matters with which the consul is charged by law or otherwise are the issuance of passports, the collecting and reporting of commercial opportunities, those concerning Chinese laborers, quarantine regulations, the importation of cattle and hides, immigration, customs regulations, invoices of importations, notarial services, and the care of personal effects of citizens dying within their jurisdiction.

In addition to these duties in countries, principally in the Orient, where exterritoriality exists, consular officers have judicial powers of a more or less extended jurisdiction, varying with the country and the treaties entered into by the United States and the countries concerned. Among these countries are Turkey in Europe and other Turkish territory, China, Persia, Siam, and certain of the South Sea Islands. Consuls in these countries have both civil and criminal jurisdiction, but they are to be exercised in conformity with the laws of the United States, with the common law and the law of equity and admiralty, and, finally, with decrees and regulations having the force of law made by the ministers of the United States, in each country respectively, to supply defects and deficiencies when the above-mentioned laws fail to apply.[1]

The jurisdiction allowed to consular officers in civilized countries over disputes between their countrymen on shore is, on the other hand, voluntary and in the nature of arbitration and relates more especially to matters of trade and commerce.

In case of arrest and imprisonment of fellow nationals it is the duty of a consular officer, if appealed to and if possible, to see that both the place of confinement and the treatment of the prisoners are such as would be regarded in the United States as proper and humane. If a request for assistance is refused, the consular officer should claim all the rights conferred upon him by treaty or convention and communicate at

[1] U. S. Consular Regulations, 1896, Art. 30.

once with the diplomatic representative in the country, if there be one, and with the Department of State. When reasonable requests of this nature, in accordance with long-established usage, are made, he should, if they are refused, make suitable representations to the proper local authority and also advise the legation or embassy and the home government.

A consular officer of the United States has no power to celebrate marriages in a Christian country between citizens of the United States, unless specifically authorized to do so by the laws of the country in which his consulate is placed. On account of the uncertainty which is involved in such matters, the State Department deems it wiser and safer to forbid the solemnization of marriages by consular officers in any case. They may, however, act as official witnesses where one of the persons concerned is a citizen of the United States, and they shall give the certificate of such marriage to each person and send one to the Department of State.[1]

In time of war it is the duty of consuls to report movements of war and other vessels of the enemy and to endeavor to guard against violations of the laws of neutrality and of the carriage of contraband to such an extent as the laws of the foreign country, the existing treaties, and the rules of international law permit.

107. Foreign Consular Systems.—In France the consular system was in 1880 and 1883 practically constituted a branch of the diplomatic service. It originates from the same source and is to an extent interchangeable. They have practically the same preliminary preparation for both services and the same examination for regular entry into the services preceded by probationary services out of France and French territory. This union of the diplomatic and consular service remains peculiar to the French service, although such transfers are not unknown in the English service but without the complete assimilation of the French service.

[1] U. S. Consular Regulations, 1896, pp. 164–6.

The present German system of consuls and consulates was established in 1873. The legal and commercial experts are directly responsible to the central government and charged as one of their principal duties with the task of keeping the government informed of all that may be of interest to German traders. "These reports are said to have contributed greatly to the recent and wonderful expansion of German trade."[1]

The British consular system is not unlike that of the United States but with less intimate relation to commerce and trade, partly due, so far as the consuls of the United States are concerned, to the system of consular invoices required of our consuls. It has connection and relations with the government board of trade of Great Britain not unlike those existing between the department of commerce and the consular system of the United States. The trade reports emanating from consular officers of both countries have become more important in late years and serve to stimulate trade and commerce abroad. In the absence of naval vessels and authorities the British consul becomes the senior naval officer present.

108. **Termination of Consular Functions.**—The term of a consular officer ends through death, resignation, promotion, recall, dismissal, revocation of exequatur, or a war between the two countries with which he is concerned.

A request for the recall of a consul by the foreign government is less drastic than the revocation of his exequatur, but the absolute right remains with the country to which he is accredited to withdraw the exequatur, which automatically closes his functions at that place. But it not only closes the functions of the individual holding the position of consul, but it leaves the sending state without any representative or agent in the locality and hence, if done abruptly and without explanation, becomes a slight to the sending government and may easily lead to reprisal.

Under these circumstances it may become necessary to place

[1] "Encyclopædia Britannica," vol. VII, p. 21, 11th ed.

the archives and, to an extent, the duties of the departing consul in the hands of a consul of a third state, which should be readily permitted by the foreign state.

A change in the ruler of a country does not cause a termination of the functions of a consular officer; a state of anarchy naturally requires his presence at his post, and it is doubtful whether his functions cease if his district is annexed, occupied, or conquered by another state than the one to which he is accredited.

109. Exterritoriality. Consuls with Judicial Functions.— The general principles causing ex- or extra-territoriality are given by Moore as follows:

"Owing to diversities in law, custom, and social habits, the citizens and subjects of nations possessing European civilization enjoy in countries of non-European civilization, chiefly in the East, an extensive exemption from the operation of the local law. This exemption is termed 'extraterritoriality.' It is generally secured by treaties and in some instances is altogether based upon them, and its exercise is usually regulated by the legislation of the countries to whose citizens or subjects the privilege belongs. Under this system jurisdiction is exercised by foreign officials, most frequently the diplomatic and consular officers, over persons of their own nationality."

The power of commencing original civil and criminal proceedings is vested in consuls exclusively except in capital or very grave criminal cases or when consuls are interested as principals or witnesses. In these cases when there is no judicial court established the matter comes under the charge of the diplomatic agent.

In countries not inhabited by any civilized people or recognized by any treaty with the United States, consular officers are given power by law to hear and determine civil cases where the amount does not exceed $1,000, exclusive of costs, and where the imprisonment does not exceed sixty days.

Candidates for appointment to countries where consular

courts and judicial powers exist are required to pass a supplementary examination in the principles of common law, the rules of evidence, and the trial of civil and criminal cases.

By the creation of a United States court in China, with a federal judge, a district attorney, and other officers, and with headquarters at Shanghai, the minister and consuls in China are relieved from a great burden of duties. The consuls, however, still have original jurisdiction in minor civil and criminal cases, with right of appeal to this court.

As a rule, it may be said in conclusion that by the treaties made with countries possessing a degree of civilization by which exterritoriality is granted that "the national sovereignty and law are transferred bodily onto a foreign soil and made applicable to citizens or subjects of the nationality dwelling there. Under this jurisdiction are their rights as between themselves, and as between them and the natives, and, with certain restrictions, between them and resident foreigners of other nationality."[1]

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[1] Foster, "Practice of Diplomacy," p. 231.

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CHAPTER XII

INTERNATIONAL AGREEMENTS. NEGOTIATIONS. CONGRESSES AND CONFERENCES

110. International Agreements.—The development of modern states is accompanied by constant and increasing international intercourse, which in turn creates various international agreements differing in kind and importance. Of these, as Nys well says, the smaller portion only is devoted to the settlement of conflicts and the regulation of differences; they have become instead more pacific in their aims, with a general desire to better relations already peaceable or to create new regulations as a result of increasing intimacy of intercourse and friendship. They are largely, in fact, agreements to better accomplish worthy ends by the common effort of several or many states.[1]

111. Negotiations.—The negotiations of modern days are more direct and frank than those of times gone by. Diplomacy and the art of negotiation in earlier times produced a number of treatises bearing upon this subject. Whatever may have been their utility in those times, they have become largely obsolete, the experience and the knowledge of the negotiator supplanting the theoretical maxims and the lengthy dissertations that served as the instructions of the home government. Perhaps no better guide to the modern diplomatist can be found than the instructions given by the first secretary of state to Mr. Jay, to the effect that "it is the President's wish that the characteristics of an American minister should be marked on the one hand by a firmness against improper compliances, and

[1] Nys, "Le Droit International," 1912, vol. II, p. 480.

on the other hand by sincerity, candor, truth, and prudence, and by a horror of finesse and chicane."[1] It might be well to add to this the words of Montague Bernard when he says "that the real end of negotiating is to find a point at which the interests of both parties can be made to coincide."[2]

Negotiations generally begin with an oral exchange of views upon the subject under discussion between the minister of foreign affairs and the diplomatic agent of the state with whom he treats. This is generally known as the state of *pourparlers*. This may be followed by final *exchange of notes*, written and official in their character and which may settle the matter under treatment between the two states, and which communications are often known as memoranda. At other times a formal convention or treaty duly signed by the diplomatic agents may result, which settles the dispute; or a working agreement may be established of a more or less temporary character—in other words, a "modus vivendi."

112. Congresses and Conferences.—A very important function is performed by the creation of a congress or conference to deal with international negotiation and the settlement of affairs. These bodies have often marked historical epochs and accomplished arrangements of the highest value, even when they mark the triumphant results of sanguinary warfare, for they establish peace and replace brute force by peaceable discussion and a final agreement. Commencing with the congress of Westphalia or, more properly speaking, of those of Münster and Osnabrück, in session from 1644–8; these were followed by the important ones of Utrecht, in 1713, of Vienna, in 1814 and 1815; of Paris, in 1856; and of Berlin, in 1878; after these came the conferences of The Hague in 1899–1907, and of London, in 1908–9, all being of world-wide importance, but marking varying historical epochs and agreements.

There is a similarity in the constitution and routine of a

[1] American State Papers, "Foreign Relations," 497.
[2] "Lectures on Diplomacy," Bernard, p. 150.

congress and a conference, but there is a difference in the rank of the delegates and in the dignity of the two bodies. Although sovereigns of states attended by their ministers no longer appear in a congress, yet its representatives are generally prime ministers and ministers of foreign affairs of the various countries represented, and the congress of the present day as a consequence is of more political force and prestige than a conference which is composed simply of authorized envoys and plenipotentiaries of moderate rank. Bluntschli gives as the difference that in a congress the governments themselves in a sense compose the membership of the congress, while, as a rule, the conference is composed of their delegate plenipotentiaries.[1] The tendency both in large congresses and conferences in latter years is to become more and more deliberative assemblies, unknown in former days, with special commissions and committees from the general body to study the complex questions. M. F. de Martens, in speaking of The Hague conferences, draws a picture of a plenary session of that conference, where lengthy discourses were delivered, sometimes very eloquent, which provoked applause and almost ovations, being unexpectedly visited by distinguished diplomatists of the past like Kaunitz, Metternich, Talleyrand, and even the later Bismarck, who, struck with amazement and horror at such extraordinary proceedings, beg to be reconducted to the peaceful kingdom of shades from which they have for the moment appeared.

A decided advantage in modern times is the publicity of the proceedings and remarks and the fact that often a running commentary of the results is given by the Comité de Redaction, which reduces the doubt in many cases and aids in the interpretation of the resulting conventions or declarations.

In both congresses and conferences the states have but one vote, and all governments are upon an equality, and a unanimous conclusion is generally necessary to become finally ac-

[1] Bluntschli, "Le Congrès de Berlin," etc., *R. D. I.*, LXI, p. 31.

cepted. The formal minutes of these bodies are known as the protocol and, though not recording all details, give the votes as well as the reservations, the dissenting opinions, and the protests of the various countries.

The language employed in the various conferences and congresses of the present day is French as the language best understood by countries of continental Europe. It has been an accepted usage to keep the minutes, memoranda, and other records of these bodies in that language. Of late, following the procedure of The Hague conferences, in addressing the conferences, etc., the use of the mother tongue of the speaker is permitted, accompanied by a running translation of his remarks in French.

No state can be a party to a conference or congress unless it has been invited or admitted upon its own request or that of another participating state. It is customary, however, to invite all important civilized states interested in the objects of the particular congress.

It is customary but not mandatory to select as the president the first delegate of the state in whose territory the meeting is held. In case the first delegate is not the foreign minister of this state, the foreign minister generally opens the congress. In the London naval conference the Earl of Desart, the first British delegate, was president of the body; the British delegation presented the programme with the bases and suggestions presented by the other states represented. It is desirable for each delegation with the assistance of experts to study the subjects proposed for the congress or conference at an early date in order to save valuable time and expedite the proceedings of the body.

The finished product, convention, or declaration of the conference is signed by the delegates of the states of which they are representatives, the precedence being generally arranged in alphabetical order as their names read in French. A personal seal accompanies the signature of the name of the delegate.

The name given to the result of a congress or convention varies, being variously called "the final act," "the general act," "the protocol," "the convention," or "the declaration." The word convention was generally used by The Hague conferences and that of declaration by the London naval conference.

TOPICS AND REFERENCES

1. International Agreements—

   Oppenheim, 2d ed., vol. I, 512–518, 536–9. Montague Bernard, "Lectures on Diplomacy," lectures II and III. Moore's "Digest," vol. V, 210–214.

2. Negotiations—

   Oppenheim, 2d ed., vol. I, 529–532. Foster's "Practice of Diplomacy," 243–261. Phillimore, 3d ed., vol. III, 1–17.

3. Congresses and Conferences—

   Higgins, "The Hague Peace Conferences." Bernard's "Lectures on Diplomacy," chap. I. Baldwin, I, *A. J. I. L.*, 1907, 569–623. Scott's "The Hague Conferences," chaps. I, II, and III. Nys, "Le Droit International," 2d ed., vol. II, 486–496.

CHAPTER XIII

INTERNATIONAL TREATIES

113. Definition of a Treaty. Early Existence of Treaties.—Treaties between states are formal agreements or contracts, the result of international negotiation, by which we mean in this case such intercourse, discussion, and agreement as become necessary for the attainment of a final understanding between the contracting parties on certain questions of common interest.

A treaty is under international law a legal obligation and under the proper rules of conduct a moral obligation.

Treaties form one of the sources of international law and are of very early origin. Recent discoveries give accounts of a treaty of alliance concluded before the Christian era between the King of Babylon and the King of Egypt. So far as it can be ascertained this treaty was faithfully observed by both parties concerned. Rome also at a later date in the ante-Christian era through her treaties laid the foundation of Roman domination in Italy. The treaties of these ancient countries, sanctioned by an oath, became almost a religious obligation and were apparently at least as faithfully observed as at the present day.

As to the obligations of a treaty, the words of Vattel apply to the present time as well as the times of the writer. He says: "He who violates his treaties violates at the same time the law of nations; for he disregards the faith of treaties—that faith which the law of nations declares sacred; and so far as depends on him he renders it vain and ineffectual. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind."[1]

[1] Vattel, book II, chap. XV, sec. 221.

114. Nature and Classification of Treaties.—It is very difficult, if not practically impossible, to make any general classification of treaties; they can be and have been, it is true, grouped in regard to their purposes, but these purposes are growing in number and diversity every day; they are, for instance, treaties of alliance, of peace, of protection, of guarantee, of commerce, etc. As to the names of treaties, there are also many terms such as treaties, conventions, protocols, declarations, concordats, cartels, modi vivendi, sponsions, exchanges of notes, oral agreements, or momentary arrangements by symbols like the mutual display of the white flag of truce.

The purposes of treaties with respect to state property are such as those of cession, boundary, and in regard to post, telegraph, and railways. For political purposes there are those of alliance, of protection, of neutrality, of guarantee, of arbitration, of mediation, and of peace and those which are the products of The Hague conferences relating to international law and usages. For commerce and intercommunication and navigation there are consular treaties, commercial and reciprocity treaties, treaties in regard to extradition, copyright, trade-marks; with respect to money, measures and weights, to taxes and customs duties, the rules of the road at sea; with regard to health, agriculture, industry and emigration; as to the rules of naval and land warfare; and also with respect to the humane efforts of the Red Cross activities.

Treaties or conventions, especially of a special temporary nature, can be agreed upon not alone in writing but by oral statements or even by symbols. The display of the white flag in time of war is a proposition for the suspension of hostilities in order to enter into a brief truce for negotiation. This offer, if met by the display of a similar flag, conveys the acceptance of the offer and establishes an agreement which is by usage as binding as any written one should be.

Oral treaties of alliance and friendship have been known, such as that concluded, in 1697, by Peter the Great of Russia

with the elector of Brandenburg and the treaty of Tilsit, the results of the personal conference on the raft on the Niemen between the Czar Alexander and Napoleon I in 1807.

In the present days, with the exception of the brief truces just alluded to, treaties take the form of written documents signed by specially authorized representatives of the parties concerned and ratified by the home governments in accordance with their constitutional law. No matter whether a treaty takes the name of an act, convention, or declaration, or that of a treaty pure and simple, there is no essential difference in such international agreements, and their binding force after ratification remains the same whether it is the Geneva convention, the declaration of Paris, the final act of the Vienna congress, or the treaty of Berlin.

115. The Parties to a Treaty.—The right to enter into a treaty with other states is an inherent right of every independent state. As to a protected or partly independent state, if it has been allowed to retain its sovereignty to the extent of making treaties by its protector or suzerain, it can legally be a party to a treaty. Cuba, for instance, has by its treaty with the United States limited its treaty-making power, while the various States of the United States by the term of their union are not competent to enter into treaties with foreign nations.

States with limitations as to jurisdiction over foreigners like Turkey, China, Siam, and Persia have full competency as to treaty-making power, and the same may be said of peoples less than civilized. The treaties made by the British-American colonies and the United States with the native American Indians are a part of the history and policy of our country.

Egypt can enter into negotiations of a certain kind independently of Turkey, while some colonial states like the Dominion of Canada can be parties to international negotiation with the consent of the mother state, but without the negotiations being in charge of the mother state. Negotiations of a

state with the Pope are not international negotiations, although the formalities connected with such negotiations are usually observed in such cases. Negotiations on the part of a state with a body of foreign bankers or contractors concerning loans, the building of railways, etc., are not international negotiations.

Besides the capacity for contracting treaties which exists in the state itself, the persons or representatives who negotiate the treaty must have full powers from their government. Of course, there are certain persons under certain circumstances who have a limited authority of treating within their sphere of power. As an instance, we may refer to commanding officers of naval and military forces in time of war, who can enter into agreements for certain purposes without special authority and without requiring ratification by the home governments.

If any agent of a state exceeds his powers, the state he represents is not bound thereby unless, as Hershey says: "When certain material advantages have been derived from such action, it is the duty of the state receiving such benefits either to make compensation or to restore things to their former conditions so far as practicable."[1]

The treaty-making power of the United States is vested in the President, but by and with the advice and consent of the Senate, provided two thirds of the senators present concur. If the concurrence is not given, the treaty fails, by our municipal law, in attaining legal reality and ratification.

In accordance with the French Constitution the President of the French Republic exercises treaty-making power, but treaties of peace, of commerce, and of finance are not valid without the co-operation of the French legislative body.

The Emperor of Germany, also, has the treaty-making power; but treaties that concern boundaries, commerce, and certain other matters require the co-operation of the Bundesrath and Reichstag.

116. Matters Necessary to the Validity of Treaties.—The first of these, after the recognition of the powers and legitimacy

[1] Hershey's "Essentials," p. 313.

of the agents and of the completion of the negotiations, is the fact of the free reciprocal consent of both contracting parties, which is indispensable to the validity of a contract between individuals, and is especially requisite for a treaty between states. Mere negotiations, preparatory communications, are in their nature not of a binding nature. Consent must not have been given in error or produced by deceit, either by misinterpretation or by concealment of important facts.[1]

Contracts which have been procured by force or menace may in accordance with municipal law be rendered void. This does not in a general way apply to treaties. Treaties of peace are, for instance, the result of force exerted by one state upon another. But force exerted personally upon a sovereign or a representative of a state is another matter. The resignation under duress, personal restraint, of Ferdinand VII, by Napoleon, from the throne of Spain was invalid, while the abdication of Napoleon himself at Fontainebleau, being the result of defeat in open war, was valid, as it was not the result of personal force or treachery.

Treaties cannot contain engagements that are inconsistent with those already entered into with other states. Neither can they contain engagements that are contrary to the broad principles of morality and justice or the accepted tenets of international law, such as the freedom of the high seas. They may become invalid also on the ground of physical impossibility existing at the time of the signing of the treaty or arising under later circumstances.

117. Form and Ratification of Treaties.—"The importance of the subject-matter," says Crandall, "the frequent changes in the *personnel* of the contracting organs, the inability to confirm by witness the utterances of a state, render it more necessary that contracts between nations should be carefully expressed in writing than contracts between individuals. While no particular form is essential to the validity of a treaty, it is the practice in formal treaties to make out and sign under seal

[1] Phillimore, 3d ed., vol. II, p. 75.

as many counterparts as there are parties, one counterpart to be retained by each. In case of two parties only which have no common language each counterpart is usually made out in the languages of both."[1]

There exists no established rule concerning the arrangement of the different parts of a treaty. It is customary but not mandatory, however, to commence such an instrument with a preamble comprising the names of the heads of the contracting states, the states being placed in alphabetical order in French, with their accredited representatives, followed by the reasons for making such a treaty; after that come the principal agreements of the treaty in numbered articles; then follow the miscellaneous stipulations concerning the duration of the treaty and as to its ratification, the accession of its powers, and the provisions for putting it in force; then come the regulations.

By the ratification of a treaty is meant the final consent and approval by the necessary department or departments of the home governments. Until this is done the treaty is not in operation or its binding force obligatory. Any alterations made in the treaty while in process of confirmation or ratification are not valid so far as that treaty is concerned and involve the formation of a new treaty.

The reasons generally given for ratification are that states should have an opportunity of examining the treaty with a view to its whole effect upon their interests and also to its effect upon public opinion. Another reason is that according to the law of most states having constitutional governments treaties are not valid without some kind of consent from the legislative assemblies. These two reasons show the necessity of ratifications and may not reflect upon the work of the representatives of the states concerned in their endeavor to make a satisfactory agreement to attain the desired objects. In practice ratification is given or withheld at discretion.

[1] Crandall, "Treaties, Their Making," etc., p. 15.

By accession to a treaty is meant the formal entrance of an additional state so that such state becomes a party to the treaty with all the rights and duties consequent to such a treaty. "Such accession," states Oppenheim, "can take place only with the original contracting parties, and accession always constitutes a treaty of itself. Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain state. . . .

"But there is, secondly, another kind of accession possible. For a state may enter into a treaty between other states for the purpose of guarantee. This kind of accession makes the acceding state also a party to the treaty; but the rights and duties of the acceding state are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty." [1]

A third state can, without accession to the entire treaty, announce its adhesion to such parts or principles of the treaty as it desires to adhere to. In such a case it becomes a party to those parts of the treaty to which it has definitely announced its adhesion. This term is sometimes used synonymously with that of accession.

Article II, Section 2, Clause 2 of the Constitution of the United States says: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur."

A treaty, however, like a statute law, must conform to the Constitution of the United States, and if a provision either in a treaty or in a law is in opposition to the letter or principles of the Constitution, such a provision must yield to the superior force of the Constitution, which, as organic law of the United States, is binding alike upon the government and nation.

Secretary Fish, in a letter to our minister to England, says in regard to action by the Senate upon a treaty that "it is wholly unnecessary to say to statesmen of the intelligence

[1] Oppenheim, "Int. Law," vol. I, p. 569.

which always marks those of the British Empire that the rejection of a treaty by the Senate of the United States implies no act of discourtesy to the government with which the treaty may have been negotiated. The United States can enter into no treaty without the advice and consent of the Senate, and that advice and consent, to be intelligent, must be discriminating; and their refusal can be no subject of complaint, and can give no occasion for dissatisfaction or criticism."[1]

Conditional ratification, as has been said, makes a new treaty and is not ratification in the proper sense and creates a new treaty especially if some of the stipulations of the treaty not previously reserved are omitted or if new clauses or an amending clause is added to the treaty.

"It is," as Oppenheim remarks, "quite legitimate for a party who has signed a treaty with certain reservations as regards certain articles to ratify the approved articles only, and it would be incorrect to speak in this case of a partial ratification."

"Again," he says, "it is quite legitimate—and one ought not in that case to speak of conditional ratification—for a contracting party who wants to secure the interpretation of certain terms and clauses of a treaty to grant ratification with the understanding only that such terms and clauses should be interpreted in such and such a way. Thus when, in 1911, opposition arose in Great Britain to the ratification of the declaration of London on account of the fact that the meaning of certain terms was ambiguous and that the wording of certain clauses did not agree with the interpretation given to them by the report of the draughting committee, the British Government declared that they would only ratify with the understanding that the interpretation contained in the report should be considered as binding and that the ambiguous terms concerned should have a determinate meaning. In such cases ratification does not introduce an amendment or an alteration but only fixes

[1] Moore's "Digest," vol. V, p. 198.

the meaning of otherwise doubtful terms and clauses of the treaty."[1]

In various cases the President of the United States has entered into agreements which have not been submitted to the Senate for ratification, either on account of their minor importance or temporary nature. These include the adjustment of private claims against foreigners or foreign governments, the arrangement of reciprocal crossing of frontiers between the United States and Mexico in the pursuit of marauding Indians, also the peace protocol in 1898 between the United States and Spain preliminary to the treaty of peace, the protocol signed at Peking at the close of the Boxer troubles, and in a number of cases with Great Britain in the establishment of modi vivendi as to questions of fisheries and boundaries.

In addition to the class of agreements made by the executive alone without reference to the Senate of the United States, there are other agreements involving customs duties, copyright arrangements, and postal conventions that are entered into under provisions enacted by Congress. Treaties formulated with the various tribes of American Indians are now arranged for by the legislative department by act of Congress.

118. Enforcement of Treaties.—Article VI of the Constitution of the United States reads as follows:

" This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

"The design of this article, so far as it relates to treaties, was primarily to insure their execution by the public authorities, State as well as national, in spite of any adverse State action. That this was accomplished was fully established by the decision of the Supreme Court, in 1796, in the case of Ware

[1] Oppenheim, "Int. Law," 2d ed., vol. I, p. 560.

v. Hylton. In all the opinions of the judges, including the sole dissenting opinion by Mr. Justice Iredell, it is unanimously held that a treaty under the Constitution repeals *ipso facto* State laws inconsistent with it."[1]

"The supremacy of treaties over State legislation has since been drawn in question only when they relate to subjects not embraced in the powers delegated to the central government. . . . The tendency of the Supreme Court on the question is disclosed in its decisions on treaty stipulations defining the privileges of aliens in succeeding to and disposing of property located within the States, a matter, in the absence of a treaty, not within the province of the central government yet naturally subject to treaty regulation." This matter was tersely put by Mr. Justice Swayne, "who observed that if the National Government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to enter into any treaty, alliance, or confederation."[2]

Some treaties are, however, dependent upon legislative aid or action. In the case of Foster *v.* Neilson in the Supreme Court of the United States (2 Peters, 2531) the court ruled that "while a treaty is the supreme law of the land and operates as such in all matters not requiring legislative action, yet when made dependent on legislative action it does not take effect until such action is had."

Mr. Richard Henry Dana says further upon this subject: "If a treaty requires the payment of money, or any other special act which cannot be done without legislation, the treaty is still binding on the nation, and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the government. Each nation is responsible for the right working of the internal system by which it

[1] Crandall, "Treaties and Their Making," etc., p. 106.
[2] Crandall, "Treaties and Their Making," etc., p. 107, 108.

distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these, so they are not to be affected or concluded by them to their own injury."[1] This is true if the action of the treaty is constitutional.

"The approval by Congress of a preliminary appropriation has never been considered necessary to give validity to the proceedings under a convention by which disputed claims have been submitted to a tribunal of arbitration. President Jefferson, before opening the negotiations of 1803 for the purchase of Louisiana and of 1806 for the purchase of Florida, and President Polk, before opening the Mexican negotiations, obtained provisional appropriations. The act of Congress of June 28, 1902, made a provisional appropriation for the acquisition by treaty of the right to construct an interoceanic canal. In the treaty with Denmark of April 11, 1857, for the abolition of the Sound dues, it was provided that the treaty should take effect as soon as the stipulated sum had been tendered by the United States or received by Denmark. These are exceptions. The practice has been to proceed to the ratification on the authority of the Senate alone, and the treaty thus ratified has been recognized both by this and foreign governments as valid and definitively concluded and Congress has never failed to vote the required appropriation."[2]

From a historical review made by Crandall in his valuable work on "Treaties," it appears that treaties made which affect the revenue laws of the United States require the execution of Congress. This action has not been confined to the House of Representatives alone, though on January 26, 1880, the house voted that the negotiation by the executive department of the government of commercial treaties fixing rates of duty to be imposed on foreign goods entering the United States was a violation of Section 7 of Article I of the Constitution of

[1] Dana's "Wheaton," par. 543, note 250.
[2] Crandall, "Treaties," etc., p. 135.

the United States and an invasion of one of the highest prerogatives of the House of Representatives.[1]

119. The Operation of Treaties.—As a rule, with a very few exceptional cases in history, a treaty is not valid or in operation until an exchange of ratifications takes place. In those cases the operation and consequent acts may be considered as tentative previous to ratification. The treaty, however, dates, unless otherwise provided, from its signing.

"In the case of the cession of territory the exercise of sovereignty by a ceding state ceases, except for strictly municipal purposes, with the signing. The national character of the acquiring state is not, however, imposed for commercial purposes until the exchange of ratifications."[2]

An instance of such a cession is the case of Porto Rico, which was ceded to the United States by a treaty signed December 10, 1898, the authority of Spain being superseded by the previous military occupation by the United States. Still Porto Rico and the United States were, as to commercial purposes, foreign countries until the exchange of ratifications." [3]

In a treaty of peace hostilities cease from the date of its signature without waiting for ratifications. Captures and recaptures, made thereafter even in ignorance of the signing of the treaty, are to be restored, and damages where possible to be compensated. In modern international wars the practice has been to precede the treaty of peace by armistice or preliminary agreement.[4]

Various conditions, however, have been made as to the closing of hostilities which may be mentioned here. "In the treaty between Spain and the Low Countries, signed at Münster, January 30, 1648, a period of a year was allowed for the receipt of the news of peace in the possessions of the East India Company, and a period of six months in those of the

[1] House Journal, 46th Congress, 2d Session, p. 323.
[2] Crandall, "Making of Treaties," etc., p. 214.
[3] Dooley *v.* U. S., 182 U. S. 223.
[4] Crandall, "Treaties," etc., p. 215.

West India Company. Hostilities were, however, to cease in these places if advice of peace was received earlier.[1] With the modern facilities of communication a much shorter period is required. In the armistice signed January 28, 1871, between France and Germany, provision was made for the cessation of military operations on the day of signing in Paris and within three days in the departments.[2] Provision was also inserted for the restitution of captures. In the treaty of peace between China and Japan, signed April 17, 1895, it was agreed that offensive military operations should cease upon the exchange of ratifications, which did not take place till May 8.[3] The protocol between the United States and Spain, of August 12, 1898, provided that hostilities should cease upon the signing of the protocol and that notice to that effect should be given as soon as possible by each government to the commanders of its forces. Between the signing of the protocol and the receipt of the notice occurred the capitulation, on August 14, of Manila to the American forces. Article III of the protocol provided that, pending the conclusion of a treaty of peace, the United States should occupy and hold Manila, together with the bay and harbor. The Spanish Government sought to maintain that the United States continued the occupation solely by virtue of this article, and that the capitulation of August 14 was 'absolutely null by reason of its having been concluded after the belligerents had signed an agreement declaring the hostilities to be suspended.' The government of the United States was unable to concur in this view and took the ground that, as it had been expressly provided in the protocol that notice should be given of the suspension of hostilities, the suspension was to be considered as having taken effect 'at the date of the receipt of the notice,' which had been immediately given.[4] While this seems to be a natural con-

[1] Art. VII, "Collection of Treaties," vol. II, p. 340.
[2] Art. I, "British and Foreign State Papers," vol. LXII, p. 49.
[3] Art. X, "British and Foreign State Papers," vol. LXXXVII, p. 803.
[4] "Foreign Relations," 1898, pp. 813, 814, 830.

struction of the article—otherwise the clause providing for the immediate notification is redundant—the Spanish Government was not inclined to accept it and in the first conference of the peace commission at Paris, requested the immediate restoration of the *status quo* at the time of the signing of the protocol. To this request the American commissioners, who had been specifically instructed that the city and suburbs of Manila were held 'by conquest as well as by virtue of the protocol,' refused to yield." [1]

Where the treaty fixes a future date for the cessation of hostilities in remote places, it is generally agreed that hostilities must cease upon the receipt of official notice, although the time allowed has not expired.[2] Obviously the notification, in order to be binding on the officer, must be duly authenticated and attested to by his own government.[3]

TOPICS AND REFERENCES

1. Definition of Treaties—Early Existence of Treaties—

   Hershey's "Essentials," 31, 311. Phillimore's "International Law," 3d ed., vol. II, 67. Montague Bernard's "Lectures on Diplomacy," 164–6.

2. Subjects and Classification of Treaties—

   Phillimore, "International Law," 3d ed., vol. II, 70–72. Hershey's "Essentials," 311–312. Westlake's "International Law," 2d ed., vol. I, 290–1.

3. Parties to Treaties—

   Butler's "Treaty Making Power in the United States." Foster's "American Diplomacy," chap. XII. Phillimore, "International Law," 3d ed., vol. II, 74–77.

4. Validity of Treaties—

   Hershey's "Essentials," 312–314. Moore's "Digest," vol. V, 156–175. Lawrence's "Principles," 4th ed., 326–330.

[1] Sen. Doc. 148, p. 6, 56th Cong., 2d sess.; Sen. Doc. 62, pp. 13, 15.
[2] Wheaton, sec. 548; Halleck, vol. I, p. 319.
[3] See "Case of the Swineherd," Hall, p. 582. Crandall, "Treaties, Their Making," etc., pp. 215–227.

5. Form and Ratification of Treaties—

Hall, 6th ed., 321–6. Foster's "American Diplomacy," chap. XIII. Moore's "Digest," vol. V, 184–210.

6. Enforcement of Treaties—

Crandall, "Treaties, Their Making and Enforcement." Bernard's "Lectures on Diplomacy," lect. IV. Moore's "Digest," vol. V, 221–244.

7. Operation of Treaties—

Crandall's "Treaties," etc., 213–217. Hall, 6th ed., 343–351. Oppenheim, 2d ed., vol. I, 561–5.

CHAPTER XIV

INTERPRETATION OF TREATIES. TERMINATION OF TREATIES

120. Interpretation of Treaties.—As to the interpretation of a treaty it can be said that in a general way the most important matter is to ascertain the real intention of the parties concerned at the time of the making of the treaty. This should be construed equitably and not too technically.

Phillimore says: "The imperfection of language as an instrument of expressing intention must occasionally, if there were no other reasons, render interpretation necessary.

"But in truth," he goes on to say, "there are other reasons; in all laws and in all conventions the language of the rule must be general and the application of it particular. Moreover, cases arise which have, perhaps, not been foreseen which may fall under the principle but which are not provided for by the letter of the law or contract. Circumstances may give rise to real or apparent contradictions in the different dispositions of the same instrument or of another instrument which may require to be reconciled. These are difficulties which may arise between contracting parties disposed to act honestly toward each other. But they may not be so disposed; one of them may endeavor to avoid his share of the mutual obligation. . . .

"The interpretation is the life of the dead letter, but what is meant by the term 'interpretation'? The meaning which any party may choose to affix?—or a meaning governed by settled rules and fixed principles, originally deduced from right reason and rational equity and subsequently formed into laws? Clearly the latter."[1]

[1] Phillimore, 3d ed., vol. II, p. 95.

As a further answer to the query of Sir Robert Phillimore the following general rules can be accepted as largely covering the matter of the interpretation of international treaties. They are gathered mainly from Oppenheim with modifications and additions.[1]

1. All treaties should be interpreted according to their reasonable and customary reading rather than from a strictly literal sense. The interpretation should be derived from a due consideration of the language of the whole instrument rather than from particular portions or sentences.

2. Terms used in a treaty should be interpreted according to the meaning they had at the time in common parlance unless a certain technical or exceptional meaning is required. (*All* nations, for instance, does not mean *some* nations.)

3. If the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate to the inadequate, the consistent to the inconsistent. Previous treaty obligations toward other states must be considered as well as the generally recognized principles of international law.

4. If the meaning of a stipulation is ambiguous, the less drastic interpretation is to be preferred to be applied to the party under obligation or whose territorial or other supremacy would be affected or restricted.

5. The wording of previous treaties between the same parties or between one of the parties and a third party can be referred to for the principle involved or for clearing up the meaning of a phrase or a stipulation.

6. If there is existing a discrepancy between the clear meaning of a stipulation, on the one hand, and the intentions of one of the parties duly stated during the negotiations preceding the signing of the treaty, the decision must depend upon the merits of the particular case, and the interpretation must be in accordance with the real intentions of the contracting parties.

[1] Oppenheim, 2d ed., vol. I, pp. 583–6.

7. In case of a doubt as to the general or special meaning of a stipulation and a different reading shown from the intentions of all the parties unanimously declared during the negotiations preceding the signing of the treaty, the meaning corresponding to the real and declared intentions of the signatory parties must prevail over the other meaning given to the text.

If, therefore—as in the case of the London naval conference of 1908–9—the letter of the draughting committee contains certain commentaries and interpretations which were unanimously agreed to by all of the negotiators previous to the signing of the declaration, these interpretations should prevail.

8. If two meanings of a stipulation are possible according to the text of a treaty, the meaning to prevail is the one which the party proposing the stipulation knew at the time was the meaning desired by the party accepting it.

9. If it should be a matter of common knowledge that a state insists upon a meaning of a phrase which is different from the usually accepted meaning of the term and a second state enters into a treaty where such phrase or term is used, the meaning upheld by the first state prevails.

10. If a meaning of a stipulation to a treaty is ambiguous and one of the parties to the treaty makes known its interpretation before confirmation, or as a reservation or condition to confirmation, or before a case under this stipulation occurs, then the other parties cannot insist upon a different meaning. This was the case with Article 23 of the first Hague convention in regard to the laws and usages of war on land, and also as to the expression *ennemi* and *commerçant* in the declaration of London understood by England and others and made known by Italy in the Italo-Turkish War.

11. An interpretation that would make a stipulation of a treaty meaningless is not admissible.

12. All treaties should be interpreted so as to exclude fraud and to make their rules consistent with good faith.

13. The rules commonly applied by national courts are in

so far only applicable to the interpretation and construction of treaties and especially law making treaties as they agree with general rules of jurisprudence.

14. A prohibition which is more or less specific takes precedence and modifies a general permission.

15. If a penalty for non-observance is attached to one or two prohibitory stipulations, preference is given to that which is better guarded.

16. The later date of two or more conflicting treaties governs, even if made by different parties.

Article 38 of The Hague convention of 1907 for the pacific settlement of international disputes, of which the United States is a party, says: "In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting powers as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the contracting powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit." [1]

121. The Most-Favored-Nation Clause.—Westlake in discussing the question of the interpretation of treaties brings in the question of what is known as the most-favored-nation clause, one in which the United States has taken a stand different from many other countries. "It seems best in the interest of peace that when an agreement," he says, "on broad lines has been reached, that it should be expressed in language not striving to hide a felt doubt but, on the other hand, not maliciously seeking occasions for doubt; and to such a style of draughting, which we believe to be most common in treaties, a large and liberal spirit of interpretation will reasonably correspond. Perhaps no better instance can be given of the difference between the two modes of interpretation which we

[1] Higgins, "The Hague Peace Conferences," p. 123.

have in mind than this. State A has concluded with State B a treaty on tariffs containing what is known as the most-favored-nation clause promising to B the benefit of lower duties than conceded to any other state. A then concludes with State C a treaty which, for some valuable consideration, concedes to it lower duties on certain articles than are provided in the treaty with B. Can B demand the admission of its goods at the same rates of duty as those of C? On a literal system of interpretation it can, but on a broader system it cannot, unless the case admits of its giving to A the same consideration that is given by C and it is willing to do so. The latter answer has been made by the Supreme Court of the United States and in our opinion justly."[1] The case referred to is that of Whitney *v.* Robertson. This was a suit to allow San Domingo sugar to come in under the same conditions as Hawaiian sugar, which was then admitted free of duty in accordance with a reciprocity treaty drawn up between the United States and the Kingdom of Hawaii, the treaty being made effective by congressional act.

The 9th Article of the treaty between the Dominican Republic and the United States reads that "no higher or other duty shall be imposed on an importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article of growth, produce or manufacture of the United States or its fisheries than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country or its fisheries."

Justice Field, who delivered the opinion, said, with respect to this clause, "that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles that are the growth, product, or manufacture of their respective countries in favor of articles of like character

[1] Westlake, "Int. Law," 2d ed., vol. I, pp. 293–4.

imported from any other country. It has no great extent. It was never designed to prevent special concessions, upon sufficient consideration, touching the importations of certain articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries which might in the future be of the highest importance to its interests."[1]

Our interpretation of the most-favored-nation clause, especially as it is applied to Canadian reciprocity, Hawaiian reciprocity, and the sugar-bounty-paying countries of Europe, has led to much discussion especially with Germany, Great Britain, and Russia.

With Germany the question arose also as to salt, which was admitted free to nations who admitted our salt free—Germany placed a duty on our salt but claimed under the favored-nation clause that her salt should be admitted free to our country. Attorney-General Olney said of this that, "the form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted here free, while any country putting a duty upon American salt shall have its salt dutiable here under the pre-existing statute. In other words, the United States concedes 'free salt' to any nation that concedes 'free salt' to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the most-favored-nation clause which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price."[2]

Of course, in tariff matters this bears against governments which have light tariffs or free trade, but the principle with us extends to other concessions besides those of tariffs and duties

[1] Scott's "Cases," p. 42. [2] Wharton's "Int. Law," vol. II, p. 58.

and dates back to the early days of the republic with respect to tonnage and harbor duties.

122. **Termination of Treaties.**—A treaty may be modified or terminated by the following conditions:

1. When the parties mutually consent.
2. When continuance is conditioned upon terms which no longer exist.
3. When either party refuses to perform a material stipulation.
4. When all the material stipulations have been performed.
5. When a party having the option elects to withdraw.
6. When performance becomes physically or morally impossible.
7. When a state of things which was the basis of the treaty and one of its vital conditions no longer exists.

In addition there are other causes for the abrogation or termination of a treaty which will be given specifically. "When, for instance, a state loses entirely its identity by incorporation into another its obligation to execute pre-existing treaties ceases. This results from the impossibility of performance. The annexation of the Hawaiian Islands by the United States is a case in point. . . .[1] When one state unites or confederates with another but still retains to a limited degree its separate character, the continued validity of treaties is less easily determined. If the confederated state retains liberty of action with respect to the matter touched upon by the treaty its obligation will still exist."[2] The treaties made with Prussia, before the formation of the German Empire, by the United States are held to be still effective, as the King of Prussia is considered to still retain as Emperor the power to carry into effect international obligations in this respect.

"A state formed by separation from another, whether the identity of the original state still exists or is completely lost by

[1] Crandall, "Treaties," etc., pp. 233–4.
[2] Crandall, "Treaties," etc., p. 236.

disintegration, succeeds to such treaty obligations as are peculiarly local. Of this character was the boundary agreement of January 12, 1828, between the United States and Mexico, which, 'having been entered into at a time when Texas formed a part of the United Mexican States,' was recognized by Texas after its separation as a binding compact.[1] Stipulations with respect to water-courses and the navigation of rivers are here included. Likewise the provisions of Article XXXV of the treaty of 1846 between the United States and New Granada, in which the right of way or transit across the Isthmus of Panama upon any modes of communication then existing, or which might thereafter be constructed, was guaranteed to the government and citizens of the United States together with the correlative obligations on the part of the United States, have been considered as forming a covenant 'that runs with the land, to the duties and benefits of which the new state of Panama succeeded.' The doctrine of the liability of the seceding portion to treaty obligations of the parent state has, in some instances, been asserted in latitude sufficient to include those of a purely national character. For instance, the government of the United States, soon after recognizing Texas, gave notice that it considered the treaty of amity, commerce, and navigation between the United States and Mexico of April 5, 1841, as mutually binding upon the United States and Texas. The obligation was subsequently recognized by Texas."[2]

The annexation or absorption of Madagascar was held by the French to render invalid all of its previous treaties with the United States, but made Franco-American treaties applicable.

123. Effect of War upon Treaties.—As to the effect of war upon treaties, it may be said with certainty that those treaties that concern war, such as those dealing with the rules of war and neutrality, and treaties of alliance and subsidy come into full vigor and force.

[1] "Treaties and Conventions," p. 1079.
[2] House Doc. 12, 27th Cong., 2d sess.

Treaties which refer to conditions of peace and pacific relations, such as treaties of friendship, are necessarily terminated as impossible in a state of war. As to treaties which are not incompatible with a state of war and which do not necessarily presume a state of peace, modern opinions vary; many hold that these treaties are suspended during the time of war but become valid and in force when the war is over.

Calvo holds that such treaties revive at the termination of the war and the establishment of peace, unless they are modified by the treaty of peace or by material changes resulting from warfare. A war resulting in cession of territory would naturally affect boundary and similar treaties.[1]

On the other hand, Westlake says in what is the best statement on the subject that "the outbreak of war removes the controversy out of which it arose from the domain of law. It will be settled at the peace on such terms as the superiority of force decides, and if it turns on the disputed interpretation of a treaty and such interpretation is not declared at the peace for the future the treaty will be regarded as annulled. There cannot be a contract unless the minds of the parties are agreed, and the war will have shown that their minds are not agreed on the treaty in question.

"Further, war interposes a practical obstacle to dealing on the footing of law even with obligations which have not been in dispute, and it may result in such a change of the relative strength of the parties and in the surrounding circumstances that the parties, or at least the stronger of them, will not desire that those obligations should continue. It is, therefore," he claims, "the general rule that war abrogates the treaties existing between the belligerents and that their revival, if desired, must be expressly provided for in the treaty of peace.

"To this rule, however, there are certain exceptions. First, all conventional obligations as to what is to be done in a state of war must continue in force or they would have no operation

[1] Calvo, 4th ed., vol. V, p. 381.

at all. Such is the Anglo-French convention providing for a continuance of the postal service between the two countries in the case of a war between them, and such is the St. Petersburg declaration against the use of explosive bullets, and all other conventions relating to the laws of war. Another instance is the provision in very numerous treaties for the treatment which the subjects or citizens of the respective parties and their property are to receive in case of war between them. A treaty providing for the neutralization of a territory in war time naturally becomes effective in war time, being the particular period for which the treaty is made.

"Secondly, transitory or dispositive treaties, including all those which are intended to establish a permanent condition of things, form another exception. Not only treaties of cession, boundary, recognition of independence or of a dynasty, and such like fall under this head but also those stipulations which confer rights intended for use in daily life and having no conceivable connection with the causes of war or peace. An example is the clause in the treaty of 1795 between Great Britain and the United States giving to their respective subjects and citizens the right to hold and transmit land then held by them in the other country, notwithstanding their or their heirs and assigns being aliens. The treaty of 1760 between France and Sardinia, now applying to Italy, relative to the execution in either country of judgments rendered by the courts of law of the other country and the conventions of 12th June, 1902, and 17th July, 1905, between numerous states. . . . All these are delimitations of rights as real and implying permanence as plainly as delimitations of boundaries. During a war the rights may be dormant for want of the opportunity to enforce them, just as boundaries may be transgressed by arms; but the peace, when concluded, is a peace with and on behalf of each belligerent state with all its known equipment of territory and permanent rights, and needs no expression to that effect.

"A third exception is that of treaties establishing arrangements to which third powers are parties, such as guarantees and postal and other unions. These cannot be abrogated by the war, because it cannot affect the rights of third parties. There may during the war be practical difficulties in the way of carrying out their provisions, but at least a belligerent ought not actively to violate them unless they are of a non-political nature and his necessity is great. Guarantees are political, and the plea that he is at war with another party to them will not avail a power which actively violates them to the detriment of the state guaranteed. But although treaties making political arrangements are not destroyed by the mere fact of a war in which all the parties to them are not engaged, it may happen that one of the belligerents is so weakened by the war or by the terms of peace that he can no longer fulfil a guarantee or some other political stipulation to which he has agreed, or that to do so would be a greater burden than in his reduced condition he can be expected to bear. Then he will be freed, not by any rule of law but by the force of circumstances of which those with whom he has contracted must take account.

"Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial, or other. It is for them to define on what terms they intend to close their interlude of savage life and to re-enter the domain of law. Those terms are at their disposal or at that of the stronger, and if the price exacted for peace is heavy it ought not to be spoken of as a fine or penalty. Indignation at what was regarded as an unjust pretension or resentment at what is regarded as a too obstinate resistance may have contributed to fix it, but law has had no concern in fixing it. It is the last act of the lawless period, and both opinion and practice allow the victor to take advantage of that period by insisting on terms having no relation to the

cause or occasion of the war. The terms may be just; more often the consciousness of their injustice is obscured in the victor's mind by his excited feelings; but in any case the genius of law does not inhabit a temple shared by the god of battles and only returns when he has withdrawn from it."[1]

124. Abrogation or Modification of Treaties.—Treaties are abrogated or materially modified by the withdrawal by notice of one party from conditions or stipulations of a treaty. Something can be said as to such action on both sides, more especially when circumstances have in the course of time materially changed the conditions. Although the obligations of a treaty may be perpetual as to time limitation, it may be easily recognized that changes of attendant circumstances may make a change or relaxation almost imperative.

T. J. Lawrence sagely remarks upon this subject that it is clear that perpetual treaties cannot remain unchanged forever. He goes on to say that "no one now proposes to go back to the treaties of Münster or of Utrecht, and few would consider it desirable to return to the stipulations enacted at Vienna after the downfall of the last Napoleon. As circumstances alter, the engagements made to suit them go out of date. When and under what conditions it is justifiable to disregard a treaty is a question of morality rather than law. Each case must be judged on its own merits. It is impossible to lay down a hard and fast rule, such as was embodied at the conference held at London in 1871 to settle the Black Sea question, in the words: 'It is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty or modify the stipulations thereof unless with the consent of the contracting powers by means of an amicable arrangement.' This doctrine sounds well, but a little consideration will show that it is as untenable as the lax view that would allow any party to a treaty to violate it on the slightest pretext. If it were invariably followed, a single obstructive power would have the

[1] Westlake, "Int. Law," vol. II, pp. 32–35.

right to prevent beneficial changes that all the other states concerned were willing to adopt. It would have stopped the unification of Italy in 1860 on account of the protest of Austria, the consolidation of Germany in 1866 and 1871 because of the opposition of some of the minor states."[1]

A recent case of the violation of the obligations of a treaty occurred when Austria-Hungary notified the European powers of the annexation to her domain of the provinces of Bosnia and Herzegovina, which had been governed by her, according to the terms of the treaty of Berlin, for thirty years. Various provisions of this treaty had been violated, and by means of a sudden revolution Turkey had become, in name at least, a constitutional state. It was evident from these changes that the order of things at the time of the making of the treaty of Berlin no longer existed. The action was not so blameworthy as the methods. The state of the affairs at the time of the signing of the Clayton-Bulwer treaty had also materially changed, but the Hay-Pauncefote treaty, by its negotiation and supersession, met this fact properly and honorably. Austria-Hungary, however, ignored the Berlin treaty altogether in enlarging her position with respect to these provinces by the change from administrative to sovereign rights, and thus, in a way, the peace of Europe was threatened. Finally, she was obliged to ask for and obtain the consent of the European powers separately and not by the proper means of a conference or a new treaty.

TOPICS AND REFERENCES

1. Interpretation of Treaties—

   Phillimore, 3d ed., vol. II, chap. VIII, 94–126. Crandall's "Treaties," etc., 217–230. Oppenheim, 2d ed., vol. I, 582–7.

2. Most-Favored-Nation Clause—

   Moore's "Digest," vol. V, 257–285. Whitney *v.* Robertson, 1887, 124 U. S. Reports, 190. Hornbeck, "The Most Favored Nation Clause," in 3 *A. J. I. L.*, 1910, 395, etc.

[1] Lawrence's "Principles," 4th ed., pp. 327–8.

3. Termination of Treaties—

Butler, "Treaty Making Power of the United States." Crandall, "Treaties," etc., 231–253. Moore's "Digest," vol. V, 319–371.

4. Effect of War upon Treaties—

Moore's "Digest," vol. V, 372–386. Westlake, "International Law," 2d ed., vol. II, 32–35. Hall, 6th ed., 378–383 and 552–8.

5. Abrogation or Modification Without Mutual Consent—

Moore's "Digest," vol. V, 356–363. Oppenheim, 2d ed., vol. I, 570–580. Lawrence's "Principles," 4th ed., 326–331.

CHAPTER XV

MEDIATION. ARBITRATION. ARBITRAL TRIBUNALS AND CONFERENCES

125. Mediation.—Higgins in his valuable work on The Hague conferences says that "there is, according to many writers on international law, a theoretical difference between mediation and good offices. . . ." It is, however, conceded that both consist in a friendly interposition of a third power to reconcile differences either in a controversy that threatens to lead to war or in case of actual hostilities.

In Convention No. I of the two Hague conferences for the pacific settlement of international disputes, the articles contained therein numbered from No. 2 to No. 8, inclusive, cover the ground of mediation under the head of good offices and mediation.[1]

This entire convention was ratified by the Senate of the United States on April 2, 1908, with the reserve and declaration which reads as follows: "Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state, nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

"Resolved further, as a part of this act of ratification, that the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto

[1] See Appendix II.

through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute, and the United States now exercises the option contained in Article 53 of said convention to exclude formulation of the 'compromis' by the permanent court and hereby excludes from the competence of the permanent court the power to frame the 'compromis' required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the 'compromis' required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise."

This convention covers the ground of both mediation and arbitration and gives the full definition of a *compromis*, which is the preliminary agreement covering the nature and limits of the controversy and indicating the procedure and general rules of the proceedings of the negotiators or arbitral body. The articles of the convention as to mediation are as follows:

"Article 2. In case of serious disagreement or dispute, before an appeal to arms, the contracting powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers.

"Article 3. Independently of this recourse, the contracting powers deem it expedient and desirable that one or more powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance.

"Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

"The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

"Article 4. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance.

"Article 5. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

"Article 6. Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of powers strangers to the dispute have exclusively the character of advice and never have binding force.

"Article 7. The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

"If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

"Article 8. The contracting powers are agreed in recommending the application, when circumstances allow of special, mediation in the following form."[1]

The parties to the treaty of Paris in 1856, at the conclusion of the Crimean War, expressed the formal desire that nations, "before appealing to arms, should have recourse, as far as circumstances may allow, to the good offices of a friendly power and stipulated that, before the employment of force again in similar circumstances to that which existed before the Crimean War, an opportunity should be afforded of having recourse by the mediation of other powers. Westlake expresses the belief that if the formal desire of the Paris congress had been honestly carried out the Franco-German War of 1870 would not have occurred.

He goes on in his discussion of the subject to observe "that there is a class of cases in which mediation might usefully be combined with arbitration—namely, where a difference which calls for the application of legal rules can, nevertheless, not be entirely disposed of by such rules. For instance, suppose that

[1] See Appendix II.

in a boundary dispute referred to arbitration it appeared that there was some territory to which neither party could establish a title in accordance with the acknowledged rules of international law. It would be desirable that the arbitrator, after awarding to each party all that it could lawfully claim, should possess the power of a mediator to propose a division of what remained. And he might be clothed with that power by special agreement, where the possibility that occasion might arise for its exercise could be foreseen."[1]

The value of good offices and mediation is very great. It is true that many opportunities have not been utilized which, if availed of, would have prevented hostilities; but, on the other hand, war has been prevented by such mediation; and if, as it seems probable, a period for negotiation and good offices will be created by a series of treaties, the possibility of the prevention and of a diminution of hostilities will be greatly increased. The articles of The Hague convention bearing upon the use of good offices and mediation and which give a legal right to nations to offer these friendly offices before and during hostilities have greatly increased the value of mediation. They were effectively used by France to effect an agreement between Great Britain and Russia in 1904, as to the Dogger Bank affair, and also by President Roosevelt to cause an opening of negotiations which led to the treaty of peace of Portsmouth between Russia and Japan, on September 5, 1905.

126. Arbitration.—"It is important," says Mr. John Bassett Moore, "from the practical as well as from the theoretical side of the matter, to keep in view the distinction between arbitration and mediation—a distinction either not understood or else lost sight of by many of those who have undertaken to discuss the one subject or the other. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. And while it doubtless may be true that nations have, for this reason, on various

[1] Westlake's "Int. Law," part I, p. 366.

occasions accepted mediation when they were unwilling or reluctant to arbitrate, it is also true that they have settled by arbitration questions which mediation could not have adjusted. It is, for example, hardly conceivable that the question of the *Alabama* claims could have been settled by mediation. The same thing may be said of many boundary disputes. In numerous cases the efforts of mediators have been directed, and successfully directed, to bring about an arbitration as the only means of putting an end to controversy.

"But while bearing in mind the distinctively judicial character of arbitration, it would not be proper to minimize the importance of mediation as one of the forms of amicable negotiation. The congress of Paris of 1856, as well as the Congo conference of 1884, made a declaration in favor of systematic mediation."[1] [2]

Arbitration for the settlement of international difficulties or for the prevention of hostilities existed in the earliest times; with the Persians it was used and imposed upon cities which were engaged in disputes, and so far as the Greeks were concerned they repeatedly attempted to prevent war in this way, although it must be said they were not altogether successful in their efforts. In fact, the Greeks confined their efforts largely to themselves and not with foreign nations. Their arbitrations, moreover, did not cover great political questions, as every Greek city carefully preserved its independence, but they related "to disputes," says a French writer, "touching religion, commerce, boundaries, and the possession of contested territories, especially of the numerous islands scattered among the Grecian seas. . . ."[3]

"Under the influence of religious and feudal ideas arbitrations were very frequent in the Middle Ages, which affords the remarkable spectacle of conciliation and peace making their

[1] See Calvo, "Le Droit Int.," 4th ed., III, 413.
[2] Moore, "International Arbitration," vol. V, p. 5042.
[3] Moore, "International Arbitration," vol. V, p. 4822.

way amid the most warlike populations that have ever existed. They were especially frequent in Italy, where in the thirteenth century there were not less than a hundred between the princes and inhabitants of that country. But when the papacy had renounced its rule over civil society and absolute monarchies gradually became established in Europe on the ruins of feudalism, arbitrations became more rare. They diminished during the course of the fourteenth and fifteenth centuries, and it is stated that from the end of the sixteenth century till the French Revolution they had almost disappeared from international usage."[1]

In the revival of the use of arbitration the Jay treaty of 1794 may be said to have paved the way. This treaty between the United States and Great Britain included in its stipulations the reference of several questions to arbitration. The same nations in the latter half of the nineteenth century gave a great impetus to arbitration by the celebrated and successful settlement of the *Alabama* and other claims by the Geneva arbitral tribunal of 1872. There have been two hundred and twenty-eight instances of formal arbitration between 1794 and 1901. The Hague conferences of 1899 and 1907 have also been particularly stimulating in the recourse had to such methods of settling international disputes. The first Hague conference produced the convention for the pacific settlement of international disputes already referred to under the head of mediation. This was readopted by the second Hague conference with slight changes (see Appendix II), and also a convention relative to the establishment of an international prize-court. This has been also amended by agreement of the powers at the request of the United States and will be found in the final form in Appendix III.

The second Hague conference also declared itself in principle in favor of obligatory arbitration and stated that those differences relating to the interpretation of international conventional

[1] Moore, "International Arbitration," vol. V, p. 4829.

stipulations are susceptible of being submitted to obligatory arbitration without any reservation. The failure of this conference to agree upon a definite plan of obligatory arbitration was mainly due to the opposition of Germany and Austria.

127. **International Commissions of Inquiry.**—In the convention for the pacific settlement of international disputes adopted by the first Hague conference there were six articles devoted to the subject of international commissions of inquiry. These articles proved their value by the formation of the North Sea commission of inquiry of 1905, which was originated to deliberate upon the Dogger Bank affair in the North Sea, an occurrence which took place in the cruise of the Russian Baltic fleet to the Far Eastern waters during the Russo-Japanese War. It happened as follows:

On the night of October 21, 1904, a portion of the Russian fleet fired on the fishing fleet from Hull, England, which was engaged in fishing on or near the Dogger Bank in the North Sea, apparently mistaking the fishing vessels for a squadron of torpedo-boats. Two men were killed, several were wounded, one of the craft sunk and others damaged. The tension at the time resulting between Great Britain and Russia was very great, and for a short time war appeared to be inevitable. The Russian Government maintained that Japanese torpedo-boats were concealed among the fishing fleet and that the firing was an operation of war. The presence of the Japanese torpedo-boats was denied by Great Britain. Russia expressed her readiness to make proper compensation if the facts were not as she stated. The dispute turned, therefore, on a question of fact, and hence finally the two governments agreed to an international commission of inquiry in accordance with the articles previously referred to of the first Hague conference. The commission made its report, which was practically accepted by Russia, and a sum of £65,000 was paid as a matter of indemnity.

As a result of this commission of inquiry and its rules of

procedure and general experience The Hague conference of 1907 made considerable additions and changes in the articles of the convention referred to, which now number twenty-eight on the subject of commissions of inquiry. These additions and changes are a decided advance upon those of The Hague conference of 1899. As Higgins well says: "If Great Britain and Russia had, at a time when relations between them were strained almost to the breaking point, been enabled to terminate the period of tension in a friendly manner, it was thought that other states might on future occasions do the same."[1]

The United States has in its diplomatic history created at various times mixed commissions for the settlement of various international claims and disputes. These commissions are particularly useful in settling questions of disputed boundaries, and, being small in number, they can do such work effectively.

A mixed commission was established in Europe to draw up regulations for the navigation and policing of the Danube River. It was in due time succeeded by another mixed commission which supervised the carrying out of these regulations. This commission has executive powers, comes to a decision by a majority vote, and prescribes and enforces penalties for the violation of the river regulations.

These mixed commissions consist as a rule of representatives of the two contesting powers and a neutral element with the deciding vote. In the Alaska boundary tribunal of 1903 the neutral element was wanting, the tribunal consisting of American and British members, the British members being composed of Canadian and one English member, the chief justice of England, who was president. The commission consisted of equal numbers on each side.

128. Obligatory Arbitration.—The final act of the second Hague conference of 1907 states that the delegates admitted the general principle of obligatory arbitration and goes on to say that certain disputes, such as those applying to the inter-

[1] Higgins, "Hague Peace Conferences," p. 170.

pretation and application of international treaties, may be submitted to obligatory arbitration without restriction. This was adopted by the conference by forty-one votes, the United States, Japan, and Rumania not voting.

Attempts were made to draw up a more definite convention, giving a certain number of subjects to which obligatory arbitration would apply, but without success.

In the second convention of The Hague of 1907 which treats of the limitation of the employment of force for the recovery of contract debts, Article 1 reads as follows: "The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration or, after accepting the offer, prevents any compromise from being agreed on or, after the arbitration, fails to submit to the award."

The United States Senate, however, in ratifying this convention on April 17, 1908, stated that the United States approves this convention with the understanding that recourse to the permanent court for the settlement of the differences referred to in said convention can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded.

129. The Judicial Settlement of International Disputes.— There has been existing a feeling which is, to a great extent, well founded, that arbitration bodies are apt to reach compromises rather than judicial decisions based upon international law and treaties. This has caused a movement in favor of more definite decisions like those delivered by judges rather than those arrived at by tribunals or conferences where the findings are more diplomatic than judicial. In fact, the Supreme Court of the United States, the tribunal of appeal for disputes between the different States forming the Union, has

been often quoted as the tribunal which might serve as a model for cases of international disputes.

Perhaps the best differentiation of the two methods of settlement of international disputes can be found in Secretary Root's instructions to the American delegation to the second Hague conference of 1907. It reads as follows: "It has been a very general practice for arbitrators to act not as judges deciding questions of fact and law, upon the record before them, under a sense of judicial responsibility but as negotiators effecting settlement of the questions brought before them in accordance with traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be more ready to submit their controversies to its decision than they are now to take the chance of arbitration. It should be your effort to bring about in the second conference a development of The Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing less, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility."

As a matter of fact, the court established by the conference of 1899 lacks continuity and coherence. It is, in reality, a panel of judges rather than a court. In practice it has also

been slow in coming into being and in its subsequent workings.

As a result of this condition and to meet the defects found, an attempt was made, mainly by the American delegates, to remedy matters under the instructions just quoted. The result adopted by the second Hague conference was first in the form of a declaration, which was afterward changed in title to that of a *vœu* (or wish). It left out, however, the provisions relating to the nomination of the judges or their rotation in office. In this form it remains with the recommendation that it be brought into force as soon as an agreement can be reached respecting the selection of the judges and the constitution. Although it was adopted in this form finally by thirty-six votes and six abstentions, it has never been put in force.

The Department of State has secured an amendment at the international prize convention of the second Hague conference, so that it could be used when ratified as a working system for an arbitral court, but so far this has not been utilized.

Of the arbitral court and its difficulties in the second Hague conference Mr. Higgins writes as follows: "The labor of weeks spent in discussing the various projects for the composition of the proposed court of arbitral justice was frustrated and rendered fruitless for the present by the opposition of the smaller powers, headed by the Brazilian delegate, M. Ruy Barbosa. To them the doctrine of the equality of states was a dogma accepted in its crudest meaning. Equality before the law and equality in influence are two very different things. The 'primacy of the great powers' is a fact, if it is not a legal principle, and if these powers should be able in the future to agree upon a method for the appointment of the judges for the court, the lesser powers will, in course of time, gradually be found desirous of taking their part in an institution which would contain the germs of the most important judicial body ever known to the world. But are these powers really in earnest in their desire to establish such an institution? The international *Palais de*

Justice has been built, furnished, and decorated and is ready for the judges to take their seats; it is for the powers to open the doors and send them in."[1]

TOPICS AND REFERENCES

1. Mediation—

   Moore, "History of International Arbitration," vol. V, 5042–6. Oppenheim, 2d ed., vol. II, "International Law," pars. 10–15. "La Médiation," etc., 1900. Mélik.

2. Arbitration—

   Moore, "History and Digest of International Arbitrations to Which the United States Has Been a Party," in 6 vols., 1898. Lake Mohonk Conference Reports on International Arbitration since 1895. List of References on International Arbitration, published by the Library of Congress, 1908. "For the Arbitration and the Hague Court," 1904.

3. International Commissions of Inquiry—

   Hershey, "International Law and Diplomacy of the Russo-Japanese War," 1906, chap. VIII. Oppenheim, 2d ed., vol. II, 7, 15. Higgins, "The Peace Conferences," 107, 167, 170.

4. Obligatory Arbitration—

   Oppenheim, 2d ed., vol. II, 25–26. Hershey's "Essentials," 329–332. Scott, vol. I, "Hague Peace Conferences," chap. VII.

5. The Judicial Settlement of International Disputes—

   Hershey's "Essentials," 321. Westlake, "International Law," 2d ed., vol. I, 363–5. Nys, "Le Droit International," vol. II, chap. V. Proceedings of Society for Judicial Settlement of International Disputes.

[1] Higgins, "Hague Peace Conference," p. 517.

CHAPTER XVI

MEASURES OF CONSTRAINT SHORT OF WAR

There are several methods that are of a non-amicable nature by which pressure more or less forcible is brought to bring about a solution of international difficulties without actually causing formal war. The advantage of these measures over actual war is that not only do they avoid the actual fighting with its bloodshed but also the complications, commercial and otherwise, that arise in the intercourse and relations with neutrals in formal and declared warfare.

These measures are the suspension of diplomatic relations, retorsions, reprisals, embargo, and pacific blockade.

130. The Suspension of Diplomatic Relations.—The suspension of diplomatic relations by the withdrawal of the diplomatic agents is a marked manifestation of disapprobation of the action and policy of one government toward another. Mr. Hannis Taylor says, with respect to this method of redress, that "as permanent ministers and ambassadors are maintained as the best mediums through which views may be exchanged and business amicably adjusted between nations, a refusal to settle just claims within a reasonable time may become a sufficient cause for the withdrawal of a diplomatic agent from the offending capital. Under such circumstances the representative may retire, leaving the business of his embassy or legation in the hands of a chargé d'affaires; or the mission may be entirely closed, and the envoy of some friendly power requested to look after the interests of citizens. Thus, in 1827, the American chargé at Rio de Janeiro, when 'his representations in behalf of the rights and interests of his countrymen were disregarded

and useless, deemed it his duty, without waiting for instructions to terminate his official functions, to demand his passports and return to the United States.' Not until the Brazilian Government promised 'that indemnity should be promptly made for all injuries inflicted on citizens of the United States or their property contrary to the laws of nations' did President Adams authorize the renewal of diplomatic intercourse. In 1834, when France failed to pay the indemnity due under the spoliation treaty, like pressure was applied; and when in 1858 a tax was imposed by Mexico which unduly discriminated against citizens of the United States, it was deemed such an unfriendly act that the American minister, under instructions, suspended diplomatic relations with that country.[1] A notable repetition of the same procedure recently occurred during the boundary controversy between Great Britain and Venezuela. Mild as this remedy appears to be, it is often efficacious, especially when the injury results from mere delay rather than from hostile intention."[2]

In the case of the suspension of diplomatic relations as an event preceding war, the charge of the nationals and interest of the withdrawing country is placed in the hands of the representative of another country.

President John Quincy Adams, in his annual message of December 4, 1827, said: "At their last session Congress were informed that some of the naval officers of that empire (Brazil) had advanced and practiced upon principles in relation to blockade and to neutral navigation which we could not sanction and which our commanders found it necessary to resist. It appears that they have not been sustained by the government of Brazil itself. Some of the vessels captured under the assumed authority of these erroneous principles have been restored, and we trust that our just expectations will be realized, that adequate indemnity will be made to all the citizens of the

[1] Wharton, "Int. Law Digest," sec. 317.
[2] Taylor, "Int. Public Law," sec. 433.

United States who have suffered by the unwarranted captures which the Brazilian tribunals themselves have pronounced unlawful.

"In the diplomatic discussions at Rio de Janeiro of these wrongs sustained by citizens of the United States and of others which seemed as if emanating immediately from that government itself, the chargé d'affaires of the United States, under an impression that his representations in behalf of the rights and interests of his countrymen were totally disregarded and useless, deemed it his duty, without waiting for instructions, to terminate his official functions, to demand his passports, and return to the United States. This movement, dictated by an honest zeal for the honor and interest of his country—motives which operated exclusively on the mind of the officer who resorted to it—has not been disapproved by me. The Brazilian Government, however, complained of it as a measure for which no adequate intentional cause had been given by them; and upon an explicit assurance, through their chargé d'affaires residing here, that a successor to the late representative of the United States near that government, the appointment of whom they desired, should be received and treated with the respect due to his character and that indemnity should be promptly made for all injuries inflicted on citizens of the United States or their property contrary to the law of nations; a temporary commission as chargé d'affaires to that country has been issued, which it is hoped will entirely restore the ordinary diplomatic intercourse between the two governments and the friendly relations between their respective nations."[1]

131. **Retorsions.**—The difference between retorsion and reprisal is well defined by Nys, who says that retorsions are caused by a want of justice, while reprisals are used for a violation of law.[2] Westlake defines it more fully when he says that retorsion is "the action taken by a state in order to com-

[1] Moore's "Digest," vol. VII, pp. 103–4.
[2] Nys, "Le Droit Int.," vol. II, p. 582.

pensate it for some damage suffered through the action of another state, or in order to deter the latter from continuing the action complained of. There may be no breach of law on either side, as when state A imposes customs duties which do not contravene any treaty, and state B, which believes its interests to be damaged by them, imposes by way of retorsion customs duties from which it also is not debarred by any treaty." These are matters of policy, and retorsion generally is retaliation in kind. It has been resorted to often as a means of securing fair treatment, rather than as a means of punishment, and always as a step in avoidance of war by a rectification or remedy for grievances. It is less serious than reprisal, as the offence is less serious than the ones calling for reprisals.

"By the act of April 18, 1819, the ports of the United States were closed, after September 30, 1818, against British vessels arriving from a British colony which, by the ordinary laws, was closed against American vessels.

"A British ship, coming from a foreign port, not British, to a port of the United States, did not become liable to forfeiture under this act by touching at an intermediate British closed port from necessity, in order to procure provisions, and without trading there. Nor did the act prohibit the coming of British vessels from a British closed port, through a foreign port, not British, where the continuity of the voyage was actually and fairly broken."

In 1855 Secretary Marcy gave the following instructions: "The Chinese Government having persistently refused to pay a claim for personal injuries to a citizen of the United States which it admitted to be due, the United States minister at China was, in 1855, instructed, at his discretion 'to resort to the measure of withholding duties to the amount thereof.'"[1]

132. Reprisals.—Reprisals in what may be termed peace time are sometimes known as general reprisals to distinguish them from special acts done in the course of regular warfare

[1] Moore's "Digest," vol. VII, p. 106.

and in accordance with the laws of modern warfare. These reprisals are in accord with modern tendencies exercised more against the state whose subjects have committed acts which may be considered as culpable rather than against the subjects themselves.

Bonfils makes a general definition of reprisals as being measures of constraint, of more or less extent, causing injuries more or less considerable; ways and means which vary indefinitely according to the nature of the disputes, according to the means of forcible action of the states, and in accordance with the form of the injustice committed.[1]

The following acts of general reprisal may be considered as having the sanction of usage and of jurists:

1. The seizure and sequestration of the property of the offending state found in the territory of the other state.

2. The withdrawal of rights which had been conceded to subjects of the offending state.

3. The refusal to allow such subjects to enter the offended state.

4. Expulsion of all subjects of such state from the territory of the offended state.

5. A prohibition of the vessels of the offending state from entry into the ports of the offended state.

6. A suspension of the treaties between the two states.

7. A suspension partial or complete of the commercial intercourse between the two states.

8. A display of naval force in the littoral waters of the offending state.

9. A seizure and management of the custom-houses.

10. A pacific blockade. This will be treated separately elsewhere.

The occupation by force of certain portions of the territory to be held until redress is given, or the capture of vessels, ports, or arsenals, to be held as pledges, are practically hostile opera-

[1] Bonfils, "Int. Law," 3d ed., p. 553.

tions, and it is difficult to reconcile them with the existence of peace or as simple reprisals. The rights of neutrals will become so involved that a state of war must be considered as existing and it is extremely doubtful if not impossible for a state of quasi-war to exist again, as in the case between France and the United States in the West Indies in 1798. It is hardly necessary to say that the more forcible reprisals cannot be used without war against any other country than a weak nationality.

The sequestration or seizure of property belonging to the offending state or of its citizens has been more than once threatened and actually enforced. In 1849 Great Britain in the *Don Pacifico* case enforced an embargo upon Greek shipping, that is, enforced their detention in port, to their loss, and also seized several ships of war in the Pireus. In 1895 Great Britain, having been unable to secure the required redress and indemnity from Nicaragua for the expulsion of the British vice-consul and other British subjects and their property from Bluefields and the Mosquito Reservation, sent a naval force to Corinto, a Pacific seaport of Nicaragua, and gave an ultimatum that unless the indemnity was paid within three days Corinto would be occupied by the British forces. Proper response not having been made, a force was landed and the custom-house and public offices of Corinto were occupied. Finally the government of Nicaragua agreed to pay the indemnity within fifteen days after the evacuation of Corinto by the British forces, the payment of the same being guaranteed by the government of Salvador. The British fleet left on May 5, 1895, the public property of Nicaragua being in its possession during the occupation. As to the sequestration of the property of citizens or nationals of the offending state, this is exemplified by the action of Great Britain in 1861 by the seizure of Brazilian merchant vessels, and in 1873 by that of Germany in the seizure of Haytian merchant vessels.

As to embargo, or the suspension of intercourse between two nations, a practical example of this occurred in our own history in 1807 after the *Chesapeake* affair, it being further di-

rected that all English men-of-war should be denied our ports. Great Britain apologized for this affair and offered indemnity for the victims. Again, in 1870, the President of the United States proposed, in the way of an indemnity, that power should be given him to suspend all laws authorizing the transportation of merchandise across the territory of the United States to Canada and further, if necessary, to forbid vessels of the Dominion of Canada from entering the waters of the United States. This was asked for on account of the action of the Canadians toward our fishermen but was never exercised by the United States.

The suspension of treaties, in 1798, at the time of the quasi-war referred to above with France, is another case. At this time the United States annulled its treaties with France and directed the seizure of all French vessels in certain portions of the world.

The withdrawal of privileges to aliens has been exercised at times by the United States, as in the passage of the alien act of 1798. This withdrawal is now rarely exercised, but still remains within the power of states in times of peace.

133. **Pacific Blockade.**—As to pacific blockade there are now a number of cases of this species of reprisal or application of force. The legal position of pacific blockade is still unsettled, as the attitude of the blockaders toward vessels of states not concerned has varied with almost every pacific blockade, and the pacific blockade itself has always been applied by the stronger naval power against the weaker one. The alternative of war has generally not been accepted by the weaker power on account of its weakness and the hopelessness of its success.

The increasing tendency to use the powerful argument of the pacific blockade to coerce a nation, as a step short of war, is somewhat due to the varying combinations of the great powers of Europe, with a view to keeping matters quiet in any event in fear of general European war. It is an anomaly in international law, there being no war and consequently no belligerents and no neutrals. It is, on the whole, considered illegal to have a blockade apply to a third or non-concerned powers

where there is no war, and yet such a blockade will not be fully effective if the vessels and goods of these powers are allowed to enter freely and if the blockade is confined alone to the vessels of the blockading and blockaded countries.

Each case properly depends upon its own merits and above all whether it will be worth while for any third or outside powers to interfere. In the so-called pacific blockade in Formosa by the French against the Chinese, which involved a capture of vessels other than Chinese and French, Great Britain took the position that it was not proper and would not be recognized by her unless regular war was declared against China. But in the late blockade of Crete by the European powers, of which she was one, the right of search was exercised by the blockaders upon the so-called neutral vessels, and they were prohibited to land cargo destined for the Greek troops in the interior.

De Martens says as to the legality of pacific blockade that it is admissible but not logical, while Perels, a German authority, speaks decidedly of it as coming clearly under the head of reprisals and as an evil less than war. The last statement is probably the one that will make it acceptable alone, and it will probably be treated in the future as a blockade with war powers, but confined to the parties concerned and a localized and a definitely bound area of operations.

Two instances not generally mentioned in the text-books may be profitably discussed as late examples of this means of reprisal.

One is the blockade of Zanzibar, in 1888, by Great Britain, Germany, Italy, and Portugal, and was specifically directed against the slave-trade, which the authorities of Zanzibar were unable or unwilling to stop. As this action was against a specific evil, recognized as such by the civilized world, no international complications were involved.

The pacific blockade of Crete commenced March 21, 1897. The naval forces of Great Britain, Austria-Hungary, France,

Germany, Italy, and Russia put the island of Crete in a state of blockade on that date at 8 A. M. The blockade was to be general for all ships under the Greek flag. The ships of the six great powers or what may, for the locality, be called neutral powers were allowed to enter into the ports occupied by the blockading powers and to land their cargoes, provided they were not intended for the Greek troops in the interior. The merchant ships of the neutral and blockading powers were to be visited by the vessels of war of the international fleet.

This, though infringing the rights of neutrals, was less radical than the first definite pacific blockade of the French at Vera Cruz, in 1838, where the vessels of the third powers were captured and confiscated.

The United States declared with respect to this blockade, and has taken the position as a general one, that it does "not acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of states not parties to the controversy or discriminate against the commerce of neutral nations."

In regard to the blockade of Venezuelan ports in 1902 by Germany and Great Britain, this enunciation of the position of the United States was repeated.

The blockade of the Venezuelan ports was stated to be a warlike blockade, and a notice was published to that effect on December 20, 1902, for the information of neutrals.

Moore says that it may be observed that the United States did not take the ground that there could not be such a thing as a pacific blockade, for it stated that it could not acquiesce "in any extension" of the doctrine of pacific blockade so as to affect "the rights of states not parties to the controversy."

It can thus be seen that without admitting the pacific blockade to be a legal means of restraint or reprisal short of war, the tendency of writers is to favor its existence in a manner not to involve the third powers or to antagonize their interests. Localized as it should be, in its fields of operation, it is far

better than actual war, especially a European war, which would be likely to be a widely spread calamity.

The Institute of International Law, in 1887, adopted the following rules as expressing their judgment as to the proper law upon the matter. They read as follows:

"The establishment of a blockade without war cannot be considered as permissible under international law except under the following conditions:

"1. Ships under a foreign flag can enter freely notwithstanding the blockade.

"2. The pacific blockade must be officially declared and notified and maintained by a sufficient force.

"3. The ships of the blockaded power which do not respect such a blockade may be sequestered. When the blockade has ceased they must be restored to their owners with their cargoes but without indemnity on any ground."[1]

TOPICS AND REFERENCES

1. Measures of Constraint Short of War in General—
   Hershey's "Essentials," chap. XXII, 343. Stockton's "Manual," 148–152. Oppenheim, 2d ed., vol. II, chap. II.

2. Suspension of Diplomatic Relations—
   Moore's "Digest," vol. VII, 103, 105. H. Taylor, "International Law," par. 433. Oppenheim, 2d ed., vol. II, 129.

3. Retorsions—
   Hall, "International Law," 6th ed., 360. Oppenheim, 2d ed., 36–38. Davis, "International Law," 3d ed., 263, 264. Halleck, Baker's ed., 4th, vol. I, 503–4.

4. Reprisals—
   Phillimore, "International Law," 3d ed., vol. II, 18–44. Moore's "Digest," vol. VII, 119–135. Lawrence's "Principles of International Law," 4th ed., 334–344.

5. Pacific Blockade—
   Davis, "International Law," 3d ed., 267, 269. Moore's "Digest," vol. VII, 135–142. Oppenheim, 2d ed., 48–53.

[1] Westlake, 2d ed., vol. II, pp. 16 and 17.

PART IV

WAR-RELATIONS OF BELLIGERENTS

CHAPTER XVII

GENERAL QUESTIONS AS TO WAR. OUTBREAK OF WAR. ARMED FORCES OF THE STATE

134. General Questions as to War.—In Doctor Francis Lieber's code for the instructions for the government of armies of the United States in the field will be found the following definition of public war, which remains, to my belief, the best definition extant.

"Public war is a state of armed hostilities between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy and suffer, advance and retrograde together, in peace and in war.

"The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

"Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[1]

[1] Lieber's "Instructions," etc., found in Appendix A, Davis, "Int. Law."

To this may be added the following: that "the general object of war is to procure the complete submission of the enemy at the earliest possible period with the least expenditure of life and property."[1]

The cause of war may be, in general, defined as the result of a conflict of wills between two or more states or governments. War, it has been well said, is a political fact rather than a legal right and is a high exercise of the sovereignty of the state and an essential right inherent in such sovereignty.[2]

War changes the relations of all states. The relations of the contending parties, who become known as the belligerents, are at once directly affected by this change from a normal to an abnormal state of affairs, and indirectly the relations of the states which take no part in the war become changed toward the belligerents as they now assume the position of neutrals.

In the eyes of international law all wars are just, in so far as the belligerent rights of the parties are concerned. That is to say, third states or neutrals are not permitted to hold that one of the parties is wrong and hence not entitled to the rights of war.[3]

There is an important distinction between war upon the land and that upon the sea, and a growing distinction still further between maritime and land warfare and that known as aerial warfare. These differences are not only due to the difference of the theatre of action but also to the instruments of warfare and the methods of combat. In addition, there is the difference in the judicial application bearing upon one as distinguished from the other and the codes of laws pertaining to each. A close discussion of these differences with the accompanying codes of law will be found in future chapters.

135. Outbreak of War.—The most recent and definite contribution to this subject is found in the Convention III of

[1] "Laws and Usages of War at Sea," Stockton, p. 5.
[2] Hershey's "Essentials," p. 349.
[3] Snow's "Int. Law," ed. by Stockton, 2d ed., p. 76.

the second Hague conference relative to the commencement of hostilities. This has been ratified by the United States and signed by almost all of the nations composing the second Hague conference.

Article I of this convention contains the following words: "The contracting powers recognize that hostilities between them must not commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war."

Article II continues: "The state of war should be notified to the neutral powers without delay and shall not take effect in regard to them until after the receipt of a notification, which may even be made by telegraph. Nevertheless, neutral powers cannot plead the absence of notification if it be established beyond doubt that they were in fact aware of the state of war."

The period of time between the declaration of war and the commencement of hostilities is left by this convention undetermined. "The use of a declaration does not, of course," as Hall says, "exclude surprise, but it at least provides that notice shall be served an infinitesimal space of time before a blow is struck."[1]

An amendment was proposed by the Dutch delegation at The Hague providing that hostilities should not commence until the lapse of twenty-four hours from the time of the definite declaration of war. This was rejected, but if adopted might have important consequences with respect to possible changes of position of naval forces and military transports with resulting grave effects in the early stages of a maritime campaign. Italy, since the adoption of The Hague convention in 1911, allowed no period of time after the ultimatum was delivered to Turkey, but commenced hostilities strictly without delay. The declarations of war and the recognition of its existence was very much complicated in the present European

[1] Hall, "Int. Law," 6th ed., p. 378.

war by the vast area of the war and the number of states engaged and the alliances formed by circumstances. It is too early to discuss this matter intelligently.

The convention just referred to applies, of course, only to the signers of the convention but it may be said to be established with respect to all wars between states. In cases of civil war no declaration or ultimatum is used, but an act by which belligerency is recognized either by the titular government or external powers converts it into war with a more or less definite date for its commencement and conclusion. The government against which the insurrection or rebellion is directed, should, especially if the rebel forces have a real government at their head, recognize the state of war as a matter of humanity.

In regard to armed interventions which become war, Westlake says that "what has been said about the commencement of war will not in general apply to those armed contests which arise out of the intervention of a state in the internal dissensions of another state. Such interventions are usually undertaken by stronger powers in the affairs of weaker ones or by a coalition in the affairs of a single power and are, therefore, usually successful for the time, although the resentment they cause may aid in producing a reaction later. Consequently, if the party intervened against is not in possession of the government, it will probably be put down without a state of war having existed between the two powers, although the laws of war ought to be and probably will have been observed in the fighting. There will have been no declaration of war nor any occasion for one. If, on the other hand, the party intervened against is in possession of the government, as Napoleon was in possession of that of France in 1815 and the Constitutionalists of that of Spain in 1823, there will still be no declaration of war, because the interveners, not recognizing the actual government as legitimate, will not admit that their quarrel with it is a quarrel with the state which it claims to represent. Here also, therefore, there will not be a state of war with the usual

abrogation or suspension of treaties as its effect, and yet the struggle may be such that at its close some new arrangements between the *de facto* belligerents may be desirable. Thus, in 1815 the allies did not declare war, and they allowed the representatives of Louis XVIII to sign on behalf of France their manifesto of 13th March against Napoleon and on 9th June the final act of the congress of Vienna, while *de facto* hostilities were onward between them and the actual government of that country. The struggle was closed by the treaty of 20th November, 1815, which was not nominally one of peace, but in Article 10 of which 'the hostilities' are mentioned; and that treaty was described as one of peace in the protocol and declaration of Aix-la-Chapelle, 15th November, 1818. Similarly the French invasion of Spain in 1823 produced no technical state of war and was followed by a convention, 5th January, 1824, about the maritime prizes taken."[1]

The commencement of war affects very seriously other states than those engaged in hostilities. They become neutrals, keeping friendly relations with both belligerents but having restricted intercourse so as to be impartial parties so far as the contest is concerned. The rules of international law create certain rights and conditions to neutral states which only exist in a state of war. These limitations and duties begin at once with the existence of war, and hence the immediate knowledge of the declaration or commencement of war is a matter of importance to neutrals. This knowledge must be made public, as the subjects also of a state are affected with their government in the changed relations resulting from war.

The status of enemy merchant ships at the outbreak of hostilities will be discussed under the head of maritime warfare. This discussion will include the question of the days of grace, so-called, as a reasonable period to allow a belligerent merchant vessel to load and depart from the port of an enemy. The allowance of the days of grace under current opinion is rather a favor than an obligation.

[1] Westlake, "Int. Law," 2d ed., vol. 2, pp. 28–29.

136. **Armed Forces of the State.**—The armed forces of the state in a comprehensive sense consist of its army and navy.

The expression "army" not only includes its standing army, or regular military service, but its militia, reserves, and corps of volunteers. According to The Hague convention of 1907 they must meet the following conditions:

1. That of being commanded by a person responsible for his subordinates.

2. That of having a distinctive emblem fixed and recognizable at a distance.

3. That of carrying arms openly; and

4. That of conducting their operations in accordance with the laws and customs of war.

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

The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with the previous article, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

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

The non-combatants referred to above are of many kinds, such as telegraph operators, couriers, aeronauts, surgeons, chaplains, nurses, teamsters, sutlers, civilian attachés of the staff of the commander-in-chief, servants, etc.

In addition to the armed forces of the state duly constituted for land warfare, the following are recognized as armed forces of the state.

(1) The officers and men of the navy, naval reserve, naval militia, and their auxiliaries.

(2) The officers and men of all other armed vessels cruising against the enemy under lawful authority.[1]

The use of auxiliary, subsidized, or privately owned vessels regularly incorporated in the naval forces of a country is in accord with general opinion and practice in time of war.

TOPICS AND REFERENCES

1. General Questions as to War—

   Oppenheim, 2d ed., vol. II, 59–121. Hershey's "Essentials," 349–354. Moore's "Digest," vol. VII, par. 1100–5.

2. Outbreak of War—

   Oppenheim, 2d ed., vol. II, 121–144. Wheaton, 8th ed., part IV, chap. I, and Dana's notes, nos. 156–8. Halleck, Baker's 4th ed., chap. XVII, 574, etc.

3. Armed Forces of the State—

   Higgins, "Peace Conference, Convention IV, Belligerents," 219–221. Stockton's "Laws and Usages of War at Sea." Oppenheim, 2d ed., vol. II, 94–106.

[1] Stockton's "Laws and Usages of War," p. 9.

CHAPTER XVIII

EFFECT OF WAR UPON INDIVIDUALS. EFFECT OF WAR AS TO PROPERTY

137. Effect of War upon Combatants and Non-combatants. —Doctor Lieber, in the instructions prepared by him for the government of armies of the United States in the field, which are known in the United States army as General Orders No. 100 and which orders were reissued without modification for the government of the armies of the United States during the war with Spain, says in Article 21: "The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war.

"Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

"Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

"The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties.

Protection was, and still is with uncivilized people, the exception.

"In modern regular wars of the Europeans and their descendants in other portions of the globe protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions. The effect of mobilization in modern times being to disarrange ordinary means of travel and transport, all aliens must submit to this fact and to its inconveniences as results of the inconvenience of war.

"Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives." [1]

"On the outbreak of war," says Higgins, "intercourse between the citizens of our state and those of the enemy must cease; diplomatic agents and consuls will be withdrawn; some treaties are at once annulled, others suspended, while those regulating the conduct of hostilities come into force. Subjects of the belligerents travelling or resident in the enemy country will probably be allowed to continue their residence unmolested so long as they do nothing hostile to the state, or they may be permitted to return by a neutral route unless they are state officials, officers or members of the armed forces of the nation, though in case of military necessity even private citizens may be expelled on short notice, as has been done in several of the wars of the past half century." [2]

In a broad sense the citizens or subjects of a belligerent state are divided into combatants and non-combatants.

Combatants are persons included in the armed forces of the

[1] Davis, "Elements of Int. Law," 3d ed., pp. 508–9.
[2] Higgins, "War and the Private Citizen," p. 28.

belligerent states who are bearing arms for warlike purposes. They may be killed or wounded in fight and if captured may be held as prisoners of war until exchanged or the war ceases. Their nationality makes no difference as to their status or treatment unless they are subjects or citizens of the state against which they are fighting or deserters from the armed forces of the same state. In such cases they are liable to execution as traitors or deserters if captured instead of being held as prisoners of war. Otherwise they are entitled to all of the rights of war under the rules prescribed as in international law and conventions.

If they are neutrals in the ranks of belligerents they receive the same treatment as individuals of the enemy state. They are entitled neither to immunities nor to special severities. It is true that their own state may have the right, seldom exercised, of punishing them for a breach of neutrality law, but so far as the enemy state is concerned they are in all respects lawful combatants.

Non-combatants are those individuals belonging to the belligerent states not bearing arms but engaged in peaceful pursuits. They are, when not concerned in hostile movements or in the violations of the rules of war, free from military attack or imprisonment. They are, however, exposed to all of the personal inconveniences and injuries which may arise incidentally from military or naval operations, such as an attack or bombardment of a defended place, firing upon ships carrying passengers, or any belligerent actions toward the railways of and used by an army and similar acts of war.

The services of non-combatant inhabitants of an occupied territory may be required and used by the occupying forces if they are not of such a nature as to involve them directly in military operations against their own country. In regard to this, Article 52 of the laws and customs of war on land, Hague Convention No. IV, says that "neither requisitions 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 imply for the population any obligation to take 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.

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

Other matters that involve non-combatants in case of occupied territory will be discussed later.

There are certain non-combatants who from their prestige, high position, and great importance to the enemy can be captured and retained as prisoners of war. These include the reigning monarch and members of his family, also the chief ruler of a country, the chief officers of the enemy government, and any other persons whose capture for evident reasons may be of great value to the belligerent.

A belligerent state is not obliged to permit the nationals of an enemy to remain in his territory although this is frequently done. It can be considered that by the rules of international law such nationals, if not permitted to remain, must have a reasonable time for withdrawal. This does not apply to the subjects of an enemy who are in the military service of the enemy, as active or reserve officers or men who may be detained as prisoners of war. As to the treatment of subjects or citizens of the enemy who are not in the military services, the practice as to their expulsion varies even in modern times. When large numbers of the nationals of an enemy are in the territory of other belligerents and from the necessary military movement cannot be received by their own country, it is not unreasonable, if considered wise, to intern them in a chosen section of the country in which they have been domiciled.

Oppenheim says: "Thus, during the Crimean War Russian subjects in Great Britain and France were allowed to remain there, as were likewise Russians in Japan and Japanese in

Russia during the Russo-Japanese War and Turks in Italy during the Turco-Italian War. On the other hand, France expelled all Germans during the Franco-German War in 1870; the former South African republics expelled most British subjects when war broke out in 1899; Russia, although during the Russo-Japanese War she allowed Japanese subjects to remain in other parts of her territory, expelled them from her provinces in the Far East; and in May, 1912, eight months after the outbreak of the Turco-Italian War, Turkey decreed the expulsion of all Italians, certain classes excepted. In case a belligerent allows the residence of enemy subjects on his territory, he can, of course, give the permission under certain conditions only, such as an oath to abstain from all hostile acts, or a promise not to leave a certain region, and the like. And it must be especially observed that an enemy subject who is allowed to stay in the country after the outbreak of war must not, in case the forces of his home state militarily occupy the part of the country inhabited by him, join these forces or assist them in any way. If, nevertheless, he does so, he is liable to be punished for treason by the local sovereign after the withdrawal of the enemy forces."[1]

Bynkershoek and British and American writers and a few only of the continental school follow the rule that all intercourse and commercial trading is automatically closed between the nationals of the opposing belligerents unless specially permitted between the forces of the respective countries, in accordance with the laws of war or by special license from the governments of the respective states.

The difference between the two schools is one mainly as to the normal condition of affairs at the outbreak of war, one school maintaining a normal cessation of intercourse with right to issue special licenses as to trade, while the other considers the normal state to be of free intercourse with complete rights as to prohibition, etc.[2]

[1] Oppenheim, 2d ed., vol. II, pp. 131, 132.
[2] Oppenheim, 2d ed., vol. II, p. 135.

"There are some persons of the non-combatant class who possess the character of an enemy to a degree, so as to affect their property in cases in which it is involved.

"They are:

"1. Persons residing in an enemy country though not subjects of it.

"'These,' as Lawrence says, 'are enemies to one belligerent in so far as they are identified with the other.' That is to say, any property they possess in connection with their residence is enemy property in case it is exposed to maritime capture, or in case the territory in which they reside is a place of warlike operations and actual hostilities. The fact that the person is a subject of the country of the invaders would not exempt his property or himself from disabilities or from use if needed by a belligerent for military purposes.

"2. Persons living in places in the military occupation of the enemy.

"People in this class enrich the occupying enemy by contributing, though unwillingly, to his warlike resources. If the enemy is dispossessed they lose their enemy taint and become in all respects subjects of their own states. During our Civil War the courts held that all places in secure possession of the Southern Confederacy were enemy territory and the property there enemy property so far as warlike capture was concerned and without regard to the question of individual loyalty."[1]

138. **Effect of War as to Property.**—All property belonging to the enemy state in the territory of the opposing belligerent becomes the property of that belligerent at once and, if of a warlike nature, is not only subject to possession at once but also to retention or destruction. If not of a warlike nature or of the nature of resources useful for the current needs, such as foodstuffs, such property can be used but is not subject to wanton destruction. A familiar historical example of the violation of this rule was the destruction or partial destruction of the Capitol and other public buildings in Washington during

[1] Stockton's "Manual," pp. 181, 182.

the War of 1812 by the British forces. Even English writers of the present day do not condone this action, which was exceptional in the experience of modern wars. The excuse was offered by the British authorities at the time that it was in retaliation for the burning of the village of Newark, in Canada, by our forces; but it was established that this burning was an incident of the hostile operations there and not deliberate, and, besides, no complaint had been made to us nor reparation asked. It is reasonably well established that before retaliation can be exercised against an enemy proper reparation should be asked, which, if refused, then gives a right to exercise retaliation.

"Property belonging to a state or territory occupied by an enemy cannot be sold by the occupying belligerents. The property can be used or rented by the belligerent, but upon his departure he has neither the right to destroy it, if it be not of a military nature, nor to sell it. All such acquired titles are illegal and, of course, not recognized by the state to which they belong upon reoccupation.

"The seizure of money belonging to the enemy state is legitimate, except funds set apart for hospitals, schools, and for scientific or artistic objects. Taxes for local administrative purposes, such as roads, police, lighting towns, etc., are not legitimate objects of capture or confiscation. Timber can be cut and sold from state forests, but apart from the necessities of war, such as the necessity for fuel, etc., timber should not be cut so as to affect the future annual productiveness of the timbered lands. During the Franco-German War, for instance, the German authorities sold fifteen thousand oaks growing in the state forests in certain departments of France. After the war the French authorities seized those which had not already been removed. The purchasers appealed to the German Government, but the latter left it to the French courts, which annulled the sale as being wasteful and excessive."[1]

[1] Stockton's "Manual," pp. 182, 183.

Property belonging to individual citizens or subjects of the enemy state, though assuming the character of enemy property, is exempt from pillage, by which is meant open robbery by soldiery. This exemption by the modern laws of warfare extends even to capture of a place by assault.

While private property of the enemy on land is now free from direct seizure, still through contributions, requisitions, levies, etc., such property is liable to heavy exactions, other than the customary taxes, dues, and tolls imposed for the local benefit. The direct results of a march of an army, not to say hostilities in an enemy country, is most likely to bear hardly upon the property of non-combatants. Naturally, railway plants, telegraphs, telephones, and appliances generally for transmission of news or for transport, such as horses, carriages, automobiles, carts, and drays, are liable to be seized and used more or less exclusively for military purposes. This use can hardly be compensated by restoration and indemnities.[1]

Besides the possibility of the use of private property on land for hostile purposes, there is also the liability of direct destruction of anything approaching military resources in case devastation is ordered to prevent supplies being obtained by the opposing belligerent.

Merchant ships of a belligerent which happen to be in the ports of the enemy at the outbreak of war may be allowed to depart after a few days of grace.

Private property under an enemy flag at sea is still liable, with a few exceptions, to capture and confiscation by the laws of the United States, although we have by action of Congress expressed our desire to see this liability abolished by the universal assent of the maritime powers.

"There are some anomalies that would come within this subject, as when one belligerent assumes a protectorate over another state or country. In this case war does not necessarily

[1] Arts. 51, 52, 53, and 54 of Convention IV of Second Hague, Higgins, "Hague Conferences."

exist between the protected state and the other belligerent. A case in point was the position of the Ionian Islands in the Crimean War. This little republic, under the protectorate of Great Britain, still kept up its trade with Russia, and an Ionian vessel captured for trading with the enemy was released by the English courts on the ground that the Ionian Republic was not at war with Russia. Hall gives a good rule for such cases when he says that the *use* to which a country or place is put by the power which exercises *de facto* control determines the neutrality or belligerency of the territory." [1]

TOPICS AND REFERENCES

1. Effect of War upon Combatants and Non-combatants—

   Lieber, "Instructions for the Government of the Armies of the United States in the Field." Higgins, "The Hague Conferences." Halleck, vol. I, chaps. XV–XVI. Holland, "War on Land." Higgins, "War and the Private Citizen."

2. Effect of War as to Property—

   Baty, "International Law in South Africa." Benturch, "War and Property." Moore's "Digest," vol. VII, pars. 1106–8, etc. J. Brown Scott, "The Hague Conferences."

[1] Stockton's "Manual," p. 184.

CHAPTER XIX

LAWS OF WAR. LAWS OF LAND WARFARE

139. Laws of War in General.—By the laws of war we mean not only the conventional rules adopted specifically by most of the civilized nations of the world respecting warfare but also the customs and usages which are recognized as being part of the laws of nations, but which have not become in addition formulated treaty obligations among the various nations of the earth.

The early writers upon the laws of nations from the first treated of the laws of nations as applied to time of war as well as to the time of peace. As a matter of fact, more space and time were given to the period of war in early treatises not only because of the greater frequency of wars but also on account of inhumanities and suffering that resulted from wars in these earlier periods. The title of Grotius's great work was "The Law of War and Peace."

"The whole growth," says Oppenheim, "of the laws and usages of war is determined by three principles. There is, *first*, the principle that a belligerent should be justified in applying any amount and any kind of force which is necessary for the realization of the purpose of war; *secondly*, the principle of humanity at work, which says that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent; and, *thirdly* and lastly, there are at work the principles of chivalry, which arose in the Middle Ages and introduced a certain amount of fairness in offence and defence and a certain mutual respect."[1]

With respect to the laws of warfare, it may be said that

[1] Oppenheim, 2d ed., vol. II, pp. 78, 79.

though there is a differentiation between the laws of land and maritime warfare, to which will be added those of aerial warfare, there is, however, a great deal that is common and applicable to all of these methods of warfare. Not only is this the case as to the rules of warfare which are not matters of international convention but it is largely applicable to the rules which have become specifically international obligations by treaty. In examining the conventions adopted by The Hague conferences and the Geneva conventions, it will be found that The Hague conventions and declarations relative to the commencement of hostilities, automatic submarine contact mines, the prohibition of the discharge of projectiles and explosives from balloons, the use of asphyxiating gases, and in relation to expanding bullets are common to all methods of warfare, while the conventions in regard to the amelioration of the condition of the sick and wounded are applicable to all warfare as circumstances permit. In the Convention of The Hague No. IV, with respect to the laws and customs of war on land, of 1907, though drawn up specifically for land warfare, the preliminary general articles are applicable to all warfare, while the chapters which follow, so far as they treat of belligerents, prisoners of war, the sick and wounded, hostilities, spies, flags of truce, capitulations, armistices, and even military authority over the territory of the hostile state, are at times, in part or entirely, applicable to warfare generally. This is extended in case of naval forces acting as landing forces to an entire similarity to purely military or land forces under similar conditions. On the other hand, in fortified ports in which the defences and mines are controlled by the military forces, there are certain rules governing an attack by naval forces or the movements and stay of belligerent vessels in neutral ports which would be applicable to those in command of land forces.

140. **Modern Development of the Laws of War.**—The latter-day development of the laws of war has been mainly produced by the following international agreements and propositions:

1. The declaration of Paris of 1856.

2. The instructions for the government of the armies of the United States of America in the field, of 1863, by Doctor Lieber.

3. The Geneva convention of 1864 for the amelioration of the sick and wounded in warfare, amplified and improved by the Geneva convention of 1906.

4. The declaration of St. Petersburg of 1868.

5. The Brussels code of land warfare of 1874.

6. The Hague conventions for the codification of the laws of land warfare of 1899 and 1907.

7. The principles of the Geneva conventions applied to maritime warfare and adopted by The Hague conference of 1907.

8. The declaration of London of 1909.

These are the principal rules in regard to the laws of war, but they have been supplemented by various other conventions, declarations, and codes of more or less importance, which will be referred to in the treatment of the special subjects. Most of these have by common agreement or acceptance become conventional laws of war and do not admit opposing methods except, perhaps, in cases of retaliation.

In the preamble to the declaration of St. Petersburg of 1868 it is stated:

"That the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces 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."[1]

Referring to the first of the clauses quoted above from the preamble of the declaration of St. Petersburg, Westlake says:

[1] Higgins, "The Hague Conferences," pp. 5, 6.

"Since in a war between civilized states the object is to break down the resistance of the enemy government, measures not aimed at the military forces of that government, or the organization and wealth which support them, would exceed the object and be inhuman. And the advance of public opinion has even condemned all action in war the connection of which with the weakening of the enemy's military forces is not proximate. Slaughter of non-combatants or carrying them off as prisoners and the devastation of territory not necessary for covering the retreat of an army or for any other directly military purpose, but intended to create general terror or distress, may, indeed, help to break down resistance but are universally condemned."[1]

In further pursuance of this subject it may be well also to quote from The Hague Convention No. IV, concerning the laws and customs of war on land, which ends with the following paragraph:

"Until a more complete code of the laws of war can be issued, the high contracting parties think it expedient to declare that, in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilized nations from the laws of humanity and the requirements of the public conscience."[2]

141. Laws of War and the Private Citizen.—All of the above is true, especially when private citizens abstain by word and deed from taking part in hostilities. There are, however, some important exceptions, as when invasion should occur and during military occupation the private citizen suffers in many ways.

As Higgins says: "Men and squads of men not under strict discipline, not forming part of the army or of a levy *en masse*

[1] Westlake, "Int. Law," 2d ed., vol. II, p. 58.
[2] Higgins, "The Hague Conferences," pp. 209, 211.

at the approach of the invaders, who commit hostile acts with intermitting returns to their homes and vocations, divesting themselves of the character or appearance of soldiers, have no cause for complaint of an infringement of the laws of war if when they are caught they are denied belligerent rights and put to death."[1]

Private citizens have been granted exceptional treatment when as such they have assisted the army of defence of a besieged town. This was the case in the historic defence of Saragossa in Spain, in which the women assisted the gunners, and the defence of Plevna against the Russians in the Russo-Turkish War.

In regard to bombardment and the siege of fortified towns rules vary. No notice was given of the bombardment of Paris by the Germans, though a deliberate bombardment should be notified by the requirements of humanity. There is no obligation imposed either by the conventional rules or the unwritten laws of war in case of siege or bombardment to allow private citizens or women and children to leave a besieged town, even when a bombardment is about to begin.

Article 18 of General Orders No. 100 of the United States army (Lieber's Code) reads as follows: "When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender."[2] This should be eliminated from any code authorized by the United States.

Instances of this procedure have occurred in modern times, but generally more humane treatment prevails. During the Franco-German War the Germans insisted upon their war rights in cases of sieges almost invariably. Our forces before bombarding Santiago de Cuba, in the Spanish-American War, gave forty-eight hours' notice and allowed the exit of non-

[1] Higgins, "War and the Private Citizen," p. 42.
[2] Davis, "Elements of Int. Law," Appendix A, p. 508.

combatants. In the siege of Ladysmith, on the other hand, non-combatants were not allowed to leave and were dependent for their supplies upon the defenders of the town. They were allowed to be placed, however, in a camp outside of the zone of fire.

In the occupation of territory, as suggested in preceding pages, the private citizen suffers in so many ways as to his person and property that it can be truthfully said that the so-called exemption of private property from capture or seizure on land may be called almost nominal.

Holland says "that an invading army may, on the grounds of military necessity, devastate whole tracts of country, burning dwellings and clearing the district of supplies. In this case it is, however, the duty of the invader to make the best provision he can for the dispossessed population."[1]

Lieber's instructions of General Order No. 100 in Article 15 says that "military necessity allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communications and of all withholding of sustenance or means of life from the enemy." Sheridan's devastation of the Shenandoah Valley had for its palliation the end of the raids through the valley northward and the destruction of the granary of Lee's armies.

War brings at times martial law in the home territory such as in cases of civil war, of invasion, or in expectation thereof, by which the rights and privileges of the citizens and domiciled aliens of the home country are considerably curtailed. This is only to a limited extent a matter of international law but mainly and more especially of the municipal law of the territory placed under martial law. This state of affairs occurred in our Civil War and has occurred in British self-governing colonies at various times.

In regard to hostages in general Hall says: "Under a usage which has long become obligatory, it is forbidden to take their

[1] Holland, "Laws of War," pp. 13, 14.

[hostages'] lives except during an attempt to escape, and they must be treated in all respects as prisoners of war, except that escape may be guarded against by closer confinement."[1]

142. The Laws of War on Land. Belligerents.—The instrument which contains the laws and customs of war on land in the most authoritative manner is that adopted by the first Hague conference of 1899, as amended by the second conference of 1907. Quotations have already been made from some of the general articles which precede the regulations as codified. Practically all of the civilized states of the world, including the United States, have signed and ratified this convention, which is No. IV, and the reservations have been few, there being none made by the United States in the ratification made by the United States Senate on March 10, 1908. The provisions contained in the annexed regulations are only binding between the contracting parties and only if all the belligerents are parties to the convention. A belligerent state violating the provisions of the regulations shall, if the case demands it, be liable to make compensation. It shall also be responsible for all acts committed by persons forming part of its armed forces.

In addition to what has previously been quoted from the preamble of the convention, Article I of the convention requires that the contracting parties will issue to their armed land forces instructions which shall be in conformity with the regulations that are annexed to the convention, known as "Regulations respecting the Laws and Customs of War on Land."

The first section of the regulations treats of the subject of belligerents, and the first chapter of that section treats of the qualifications of belligerents. In the first article of the chapter it is stated that the laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps fulfilling conditions that are named. This inclusion of militia and volunteer corps with the regular armies of a state is a

[1] Hall, 6th ed., pp. 411, 412. Bluntschli, sec. 600.

recognition of the change which has occurred since the time when professional soldiers were alone considered to be entitled to fight for the state. As late as the Franco-German War of 1870, the Prussian commander-in-chief required that prisoners, in order to be considered as prisoners of war, were to prove that they were "called out and borne on the rolls of a military organized corps by a legal order personally addressed."[1]

The conditions required by this article are that the armed forces are to have at their head a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps either constitute the army or form part of it they are to be included under the denomination of army.[2]

Provision is made in Article 17 of the convention for an uprising of a mass of the population for the defence of their country or territory, as follows:

"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 as belligerents if they carry arms openly and respect the laws and customs of war."

A definition of the composition of the armed forces of the belligerents is further made in Article III of the convention under discussion by providing that it may consist of combatants and non-combatants, both, in case of capture, having a right to be treated as prisoners of war.

It is generally conceded that certain non-combatants either accompanying an army or elsewhere, from their position and importance, can be made prisoners of war. These are the ruler or monarch and members of the reigning family of the

[1] Hall, 6th ed., p. 513.

[2] Art. I, Convention IV; Higgins, "Hague Conferences," etc.

state, the chief officers of the enemy's government, and any person who for certain reasons may be specially or generally of importance to an enemy. There may also be included in the term non-combatants persons connected with the supply and transport services, guides, balloonists, agents, contractors, and others who assist in its movement, equipment, and maintenance.

By Article 9 of the Geneva convention of 1906 the personnel engaged exclusively in the collection, transport, and treatment of the wounded and sick, as well as in the administration of medical units and establishments, and the chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war. These provisions apply to the guard of the medical units and other establishments furnished with an authority in due form.

The use of savage or semibarbarous troops in modern warfare is subject in a general sense to the conditions required by the rules relating to lawful belligerents. This applies also as to guerilla, irregular, or other detached bodies of men.

During the Russo-Japanese War Admiral Alexieff issued an order offering special inducements to convicts from the Island of Sakhalin to enlist in the Russian army. Though this cannot be regarded as a positive violation of the law of nations, there is something peculiarly revolting to modern conceptions of humanity in the employment of criminals for purposes of warfare.[1]

143. **Prisoners of War.**—The instructions for the government of the armies of the United States by Doctor Francis Lieber and issued by the adjutant-general's office in 1863 as General Order No. 100, and previously referred to, may be said to be still in force in the United States army, and were again issued without modification for the government of the United States armies in 1898. They were issued originally for a civil war and do not fully represent either the most modern ideas

[1] Hershey, "Essentials," note, p. 375.

upon the subject of warfare or the complete state of a foreign war. As the United States has adopted the convention of the second Hague conference of 1907 as a solemn treaty, when the two regulations come in conflict it may be said that according to usage and law the latter regulations control.

The definition in the regulations of General Order No. 100 of prisoners is comprehensive and will be given as one pertaining at the present time. It reads as follows:

"A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

"All soldiers of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers in the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter are prisoners of war and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war."

Chapter II of The Hague convention on the laws and customs of war is devoted to the subject of prisoners of war and the various articles of the chapter will be given. They read as follows, commencing with Article 4:

"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 public property, arms, equipments, and any articles susceptible of military use, found in the possession of a prisoner at the time of his capture," says General Davis, "become the property of the capturing state. His private property is respected and secured to him by the usages of war."[1]

[1] Davis, "Elements of Int. Law," 3d ed., p. 314.

Article 5. "Prisoners of war may be interned at a town, fortress, camp, or any other locality, and are bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist."

Prisoners of war are generally sent to the country of the captor at a distance from the zone of military operations. Their confinement should consist only of such detention as will prevent their escape.

Formerly a more severe practice obtained. During the wars of the American and French Revolutions prisoners of war were often confined in numbers on board prison ships and were in common jails. At earlier periods they were treated with greater harshness by being sent to the galleys and kept there after the termination of war.[1] Among the earlier instruments providing for a more humane treatment of prisoners of war was the treaty between the United States and Prussia, in 1785, in which, in Article 24, will be found formulated the most humane stipulations of the times.

Article 6 of The Hague convention reads:

"The state may utilize the labor of prisoners of war, other than officers, according to their rank and capacities. Their tasks shall not be excessive and shall have nothing to do with the operations of the war.

"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 or, if there are no such tariffs in force, at rates proportional to the work executed.

"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 earnings of the prisoners shall go toward improving

[1] Hall, 6th ed., note, p. 403.

their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance."

Article 7. "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."

Article 8. "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 their previous flight." In regard to attempts to escape, General Davis, in his work on "International Law," says that "a prisoner of war in attempting to escape, does not commit a crime. It is his duty to escape if a favorable opportunity presents itself. It is equally the duty of his captor to prevent his escape, and he is justified in resorting to any measures, not punitive in character, that will best secure that end. If recaptured, his confinement may be made more rigorous than before." [1]

Article 9 of the Convention IV says:

"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."

Article 10. "Prisoners of war may be set at liberty on parole

[1] Davis, "Elements of Int. Law," 3d ed., p. 315.

if the laws of their country authorize it, and in such a case they are bound on their personal honor scrupulously to fulfil, both as regards their own government and the government by which they were made prisoners, the engagements they have contracted.

"In such cases, their own government is bound not to require of nor to accept from them any service incompatible with the parole given."

Article 11. "A prisoner of war cannot 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."

Article 12. "Any prisoner of war who is liberated on parole and recaptured bearing arms against the government to which 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."

The punishment that courts can award is not specified in the article just given, but the usages of international law permit the sentence of death by court martial.

Paroles are ordinarily received only from officers and, when necessary, are given by officers for the enlisted men of their commands. They are accepted from enlisted men only in exceptional cases. Paroles are given by officers to secure greater freedom of movement or to obtain special privileges while held by the enemy as prisoners of war.[1] As to the services of a paroled officer with respect to his own government, it is understood that he is debarred from active service in the field against the enemy but that he can perform administrative or other services beyond the area of active operations. During our Civil War paroled officers were permitted to be employed as instructors at the Naval Academy. The parole is terminated by exchange or by the end of the war.

Article 13 reads that:

[1] Davis, "Elements of Int. Law," 3d ed., p. 318.

"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."

In the article just given, mentioned among individuals who may fall into the hands of the belligerents may be military or naval attachés accompanying the forces in the field. As they have not enemy character, they cannot be placed in the status of prisoners of war; but, as General Davis says, "they may be detained by the belligerent into whose hands they fall if their release immediately after capture would lead to a disclosure of his plans or convey to the enemy any information as to his strength, positions, or movements." [1]

The exchange of prisoners of war is made in accordance with agreements between the respective belligerent governments or authorized officials. These agreements are generally termed *cartels*.

"As belligerents," as Hall says, "have a right to keep their prisoners till the end of the war, exchange is a purely voluntary arrangement made by each party for his own convenience; it may, therefore, be refused by either, but, if accepted, it must be evidently based on the principle that equal values be given and received. . . . But the principle of equality is not fully satisfied unless the prisoners handed over on one side are as efficient as those which are received from the other; if an officer is worth several privates, so also a disciplined soldier is worth more than a man destitute of training and a healthy man more than an invalid. A government, therefore, in proposing or carrying out an exchange is bound not to attempt to foist upon its enemy prisoners of lower value than those which it obtains from him.

"Some controversies have occurred which illustrate the bear-

[1] Davis, "Elements of Int. Law," 3d ed., p. 211.

ing of this rule. In 1777 an agreement for an exchange of prisoners was made between General Washington and Sir William Howe, in which it was merely stipulated that 'officers should be given for officers of equal rank, soldier for soldier, citizen for citizen.' When the agreement came to be carried out the Americans objected that a great proportion of those sent out by the English were not fit subjects of exchange when released and were made so by the severity of their treatment and confinement, and therefore a deduction should be made from the list to the extent of the number of non-effectives. Sir William Howe, while denying the alleged fact of severe treatment and referring the bad state of health of the prisoners to the sickness which is said to have prevailed in the American army at the time, fully granted that able men are not to be required by the party who, contrary to the laws of humanity, through design, or even neglect of reasonable and practicable care, shall have caused the debility of the prisoners he shall have to offer in exchange." [1]

Bureaus of information, relief societies, etc., are provided in The Hague convention in connection with prisoners of war, so that knowledge of their existence and state and measures for the alleviation of their hardships can be officially and privately taken. Provisions for allowances of money, for mail communication, and the exercise of their religion are also found in the articles upon these subjects extending in numbers from Article 14 to Article 20.

Article 20 reads that "after the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible." Holland says that "some delays must, of course, occur on account of (1) insufficiency of transport, (2) obvious risk in at once restoring to the vanquished power the troops of which it has been deprived, (3) some prisoners being under punishment for offences committed during their imprisonment." [2]

[1] Hall, 6th ed., pp. 408, 409.

[2] Holland, "Laws of War," p. 27.

144. Hostilities.—The obligations of belligerents with regard to the sick and wounded are governed by the Geneva convention of 1906, which will be found in Higgins, "Hague Conferences." It will be referred to in the text from time to time. The article in the convention of The Hague under discussion, referring to the subject of the sick and wounded, is Article 21 of Chapter III of Section I, treating of belligerents. Section II of the convention treats of hostilities, beginning with Article 22, which states in general terms that the right of belligerents to adopt means of injuring the enemy is not unlimited. The next article, 23, specifies matters that are prohibited, such as the employment of poisons, the killing or wounding of the surrendered, the declaration of no quarter, the use of arms causing unnecessary suffering, the improper use of a flag of truce, of the national flag, the uniform of the enemy or of the Geneva cross, and a wilful and unnecessary destruction of the enemy's property.

Under the above rule that article of General Order No. 100 which permits a commander to direct his troops to give no quarter, in great straits, when his own situation makes it impossible to cumber himself with prisoners seems to be either an impossible danger or one that can be avoided by the release or disarmament of the overpowered enemy. It should be considered as obsolete.

The last clause of Article 23, lettered *h*, has caused considerable discussion so far as its first paragraph is concerned. This reads that it is forbidden "to declare extinguished, suspended, or unenforceable in a court of law the rights and rights of action of the nationals of the adverse party." This, if a general principle, seems out of place here. Professor Holland, while admitting as possible that the paragraph is intended only for the guidance of an invading commander, adds that "if, as would rather appear, it is of general application, besides being quite out of place where it stands, it is so revolutionary of the doctrine which denies to an enemy any *persona standi*

in judicio, that, although contained in the ratification by the United States and the signature by Great Britain, it can hardly, till its policy has been seriously discussed, be treated as a rule of international law."[1]

The last paragraph of clause *h* reads that "a belligerent is likewise forbidden to compel the nationals of the adverse party to take part in the operations of war directed against their country, even when they have been in his service before the commencement of the war."

The next article states that ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered lawful.

Article 25 states that "the attack or bombardment by any means whatever of towns, villages, habitations, or buildings which are not defended is prohibited." In view of the possibility of the expiration of the declaration prohibiting the dropping of projectiles from the sky at the end of the next Hague conference without renewal, there will be a necessity for a closer definition of this prohibition. It reads now as a prohibition of any attack from the sky upon buildings of themselves undefended even within a town of itself defended with external fortifications. This reading has certainly not been followed out in recent wars.

Westlake, in referring to this article, points out that, in his belief, as this code only deals with war between civilized states it cannot be quoted against the attack or bombardment of a town or village of savages not having a government sufficient to be the proper object of hostilities. "Such an operation," he goes on to say, "may be an example of necessary punitive expeditions."[2]

Articles 26 and 27 of The Hague convention provide that the commander of an attacking force before commencing a bombardment, except in the case of an assault, should do all

[1] Holland, "Laws of War on Land," 1908, p. 44.
[2] Westlake, "Int. Law," 2d ed., p. 87.

that he can to warn the authorities and that all necessary steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, or charity, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged ought to indicate these places by some particular and visible signs, which should be notified previously to the besiegers.[1]

Article 28 prohibits the pillage of a town or place, even when taken by assault.

Pillage in a general sense can be defined as the forcible taking of private property without authority in an enemy's country or in a captured place. It has been seen and will be shown later that the laws of war on land give certain methods by which private property can be taken in war, under orders of the commander of a force. "If it be taken any other way," says General Davis, "such taking constitutes pillage and is punishable accordingly. There can be no higher test of discipline in a command than is shown by the manner in which the private property of an enemy is treated within its sphere of operations. If such property is respected, if acts of pillage are strictly repressed and severely punished, the discipline is good. If property and life are unsafe in its vicinity, if irregular seizures are permitted, if orchards and fields are devastated, discipline worthy of the name cannot be said to exist."[2]

145. Spies.—In The Hague convention under consideration a spy is defined as a person who, acting clandestinely or on false pretences, obtains or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Article 29 goes on to say: "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:

[1] Higgins, "Hague Conferences," p. 237.
[2] Davis, "Elements of Int. Law," 3d ed., p. 323.

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, individuals sent in balloons to deliver despatches and generally to maintain communications between the various parts of an army or a territory."

Article 30 reads that: "A spy taken in the act cannot be punished without previous trial." The trial will be by court martial, and the extreme penalty is death.

Article 31 states that "A spy, however, 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."[1]

"Service as a spy," says General Davis, "is voluntary and cannot be compelled. A state cannot require an individual in its military service to act as a spy. If it permits or authorizes a person in its military or naval service to act in that capacity, the fact of his being in such service will not screen him from punishment should he be apprehended by the enemy; nor will retaliation be justifiable on the part of the belligerent who so employs persons in his military service."[2]

146. **Flags of Truce.**—Articles 32, 33, and 34 of The Hague convention say that:

"A person is considered as the bearer of a flag of truce who is authorized by one of the belligerents to enter into communication with the other and who comes with 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.

"The commander to whom a bearer of a flag of truce is sent is not obliged to receive him in all circumstances.

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

[1] Higgins, "Hague Conferences," p. 239.
[2] Davis, "Elements of Int. Law," p. 321.

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

"The bearer of a flag of truce loses his right of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to instigate or commit an act of treachery."

147. **Capitulations.**—By capitulations is meant the agreements, with the accompanying details, between the commanding officers of opposing forces, by which a surrender is regulated either ashore or afloat. So far as capitulations are of a military nature alone, officers in command acting singly are regarded as competent to make them; but if they include political or other matters they require the ratification by the general government or the commander-in-chief of the operations in the field, if he is so authorized. If the commander of the forces receiving the surrender is limited in this manner in his authority, it is his duty to so notify the enemy. Article 35 of The Hague convention reads as follows:

"Capitulations agreed on between the contracting parties must be in accordance with the rules of military honor.

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

148. **Armistices.**—The articles bearing upon this subject are as follows:

"Article 36. 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 on by the terms of the armistice.

"Article 37. 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 38. An armistice must be notified officially and in good time to the competent authorities and the troops. Hos-

tilities are suspended immediately after the notification or at a fixed date.

"Article 39. It is for the contracting parties to settle in the clauses of the armistice what may be the relations on the theatre of war with and between the populations.

"Article 40. 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.

"Article 41. A violation of the terms of the armistice by private individuals acting on their own initiation only confers the right of demanding the punishment of the offenders and, if necessary, indemnity for the losses sustained."

General armistices include the entire area of military and naval operations. They are made, as a rule, by the governments concerned or by their authority as preludes to negotiations for peace. Being so comprehensive in character, general armistices are drawn up with considerable detail and stipulations. They are binding upon individuals and forces from the date of notification, but, as in case of naval operations this may be delayed, special arrangements being made in such cases in regard to the capture of prizes, etc.

Section III and Articles 42 to 56, inclusive, of The Hague convention relate to military authority over the territory of the hostile state and will be discussed later under the head of military occupation.

Section IV, including Articles 57 to 60, inclusive, which relates to the internment of belligerents and the care of the wounded in neutral countries, is discussed later, also under the head of relations between belligerents and neutrals.

149. Reprisals or Retaliation.—This subject was not treated upon by The Hague convention on the laws and customs of war on land. As Holland says: "The permissibility of such measures is a painful exception to the rule that a belligerent must observe the laws of war, even without reciprocity on the part of the enemy. Reprisals must be sparingly exercised,

and then not by way of vengeance but solely in order to prevent a repetition of the offence complained of." Holland also proposes rules upon the subject of reprisals or retaliation which, he says, are intended to represent prevalent authoritative opinion upon this subject, as to which no written rules have yet been adopted by international consent. They read as follows:

"Reprisals must be exercised only subject to the following restrictions:

"1. The offence in question must have been carefully inquired into.

"2. Redress for the wrong or punishment of the real offender must be unattainable.

"3. The reprisals must be authorized, unless under very special circumstances, by the commander-in-chief.

"4. They must not be disproportionate to the offence and must in no case be of a barbarous character." [1]

Retaliation or reprisals must not be confounded with the punishment of an offender for violation of the rules of war.

TOPICS AND REFERENCES

1. Laws of War in General—

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2. Modern Development of the Laws of War—

   Oppenheim, "International Law," 2d ed., vol. II, 78–83. Higgins, "Hague Conferences," 256–272. Moore's "Digest of International Law," vol. VII, 338–340.

3. War and the Private Citizen—

   Holland, "The Law of War on Land," 1908. Higgins, "War and the Private Citizen," 1912. Moore's "Digest of International Law," vol. VII, chaps. XXIII to XXVIII, inclusive.

[1] Holland, "Laws of War on Land," 1908, pp. 60, 61.

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5. Prisoners of War—

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6. Hostilities—

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8. Flags of Truce—

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9. Capitulations—

Twiss, "The Law of Nations," 353–5. Halleck, Baker's 4th ed., 1878, vol. II, 348, 349, 383. Woolsey, 6th ed., 255.

10. Armistices—

Westlake, "International Law," 2d ed., vol. II, 92, 93. Hall, 6th ed., 540–5. Davis, "Elements," 341.

11. Reprisals or Retaliations—

Davis, "Elements," 324–7. Oppenheim, 2d ed., vol. II, 305–317. Hall, "International Law," 6th ed., 411.

12. Hostages—

Spaight, "War Rights on Land," 465–470. Bluntschli, sec. 600. Westlake's "International Law," vol. II, 102. Oppenheim's "International Law," vol. II, 272–3.

CHAPTER XX

MARITIME WARFARE

150. Maritime War in General.—Maritime warfare differs from warfare on land not only in the area of its operations, the instruments of its warfare, and the methods of its fighting but also in many of its laws and usages. Although, as has been previously stated, the laws of land warfare apply in many instances, especially in their generalities, to those applicable to warfare upon the sea, still there are certain rules not only exclusively for sea warfare but in some few instances opposed to practices on land. Such are those applying to the use of false colors, the capture of private property afloat, and the dealing with neutral property.

The high seas, by which are meant technically all navigable waters outside of the territorial waters of the various states but including in war time as fighting zones the territorial limits of the belligerents, are the area of naval operations. It gives, hence, an international phase to sea warfare wanting on land. It brings also, as has been already suggested, into full play questions of neutral trade, such as the right of search, captures incident to the carriage of contraband articles, unneutral service, and violation of the blockade of seaports generally open to international trade.

The fact that maritime nations are more or less concerned in sea warfare compels the creation of national tribunals by the belligerents for the purpose of determining the legality of the capture of prizes as well as causing the enactment of prize laws and international conventions and codes bearing directly

upon such legal contentions. It is highly probable and desirable that international tribunals shall also be established to provide for final decisions in such matters of international disputes.

The writings of Admiral Mahan have shown most lucidly that the history of both ancient and modern times demonstrates the effect of sea power not only upon the current progress of the world and the course of events but in the shaping of the future for nations and peoples.

Ernest Nys well says that the control of the sea not only assures the free traverse of the world with access to the markets of the world but also places within the reach of the conqueror afloat the coasts of the enemy with the possibility of blockade, bombardment, or invasion.[1] There is also no exhibition of concentrated force and protection in the world equal to that contained in a fleet of armored vessels, to which are added its resources, its radius of action, and mobility.

The general and controlling object of maritime war, then, can be summed up to be essentially the control of the sea and the consequent exclusion of the enemy, the capture of ships and merchandise being only incident thereto.

151. Laws and Usages of War at Sea.—"The special objects in maritime warfare are the capture or destruction of the military and naval forces of the enemy, of his fortifications, arsenals, dry docks, and dock-yards, of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land; and to protect and defend the national territory, property, and sea-borne commerce."[2]

For the purposes of maritime war, besides the declaration of Paris, the following conventions adopted at the second Hague conference of 1907 and ratified by the United States

[1] Ernest Nys, "Le Droit International," 1912, vol. III, p. 16.
[2] Stockton, art. 2, "The Laws and Usages of War at Sea."

in 1908 are applicable: The convention relative to the laying of automatic submarine contact mines, the convention respecting bombardments by naval forces in time of war, the convention for the adaptation of the principles of the Geneva convention to maritime warfare, the convention relative to certain restrictions on the exercise of the "right of capture in maritime war," and, with the exception of two articles, the convention respecting the rights and duties of neutral powers in maritime wars.

In addition to these is the convention establishing an international prize-court, formulated at the second Hague conference, and the consequent declaration of London of 1909, both of which were ratified by the United States in 1912, the international prize-court having been modified by a protocol at the instance of the United States. The declaration of London, though not generally ratified, was signed and agreed upon by all of the delegates to the international naval conference held in London in 1908–9. This alone gives it great weight as being the enunciation of certain principles of international law with regard to maritime war and other matters likely to come before a prize-court. These conventions and declarations will be referred to in discussing questions of which they treat.

152. Attack and Capture of Public Vessels of the Enemy.— One of the objects of maritime war has been given as the capture or destruction of public armed and unarmed vessels of the enemy cruising under lawful authority.

In these times the vessels just enumerated would be of a multitude of types and of many origins. Besides the usual and regular vessels of the navy in existence at the outbreak of war, the entire revenue marine service of the United States is incorporated by law into the navy, the subsidized merchant liners also follow the same course, becoming either armed men-of-war or auxiliaries and to which would be added such other vessels that can be purchased or acquired as are ca-

pable of use as colliers, supply vessels, distilling ships, machine repair vessels, parent ships for torpedo vessels, submarine mine vessels, transports, hospital ships, etc.

After the outbreak of war all men-of-war and other vessels like those just mentioned of the enemy which are met by a man-of-war of the other belligerent on the high seas or within the territorial waters of either belligerents can at once be attacked after displaying the national ensign of the attacking vessel or fleet. Only a man-of-war can attack men-of-war, unless a country, like our own, not adherent to the declaration of Paris should create privateers and issue letters of marque. For the same reason as a non-adherent, privateers could be used against us in warfare.

A merchantman may be considered as having the right to repel an attack made by a vessel of war of the enemy.

"On March 27, 1913, Mr. Churchill, during a speech in the British House of Commons upon the navy estimates, announced that the admiralty proposed to encourage British ship owners to provide for the defence of their vessels in time of war by lending them guns, furnishing them with ammunition, and training gun crews for them, provided the ship owners would pay for the necessary structural alterations of their ships. The idea of Mr. Churchill was, apparently, not to arm merchant ships for aggressive action in the event of war but to enable the larger merchantmen to protect themselves. While the proposal has a different object in view from that contemplated in the creation of a volunteer fleet, and while it in no way resembles the practice of privateering, it is further evidence to show that the rôle that vessels originally built for commercial purposes have played in time of war has not yet become obsolete."[1]

When one or the other of the vessels engaged in action determines to yield or surrender, which circumstance is generally shown by hauling down the national ensign or by the exhibi-

[1] Fenwick, "Neutrality Laws of the United States," pp. 154, 155.

tion of the white flag of truce, firing must cease on the part of the victor and negotiations should follow by persons or signals. To continue an attack after knowledge of surrender, or to sink a vessel after submission, is a violation of the rules of civilized warfare, only permissible in cases of treachery or renewal of the action.

A public vessel becoming a prize of war is taken possession of by the captor, its officers and men become prisoners of war, and no legal proceedings are necessary as in the case of privately owned vessels. Non-combatants on board of an armed vessel and the personnel of a public unarmed vessel of the enemy are liable to detention as prisoners of war, excepting those who are exempt under the Geneva conventions.[1]

Public and private vessels of the enemy are exempt from capture if they are engaged solely in religious, scientific, or philanthropic missions. Cartel ships, which are vessels of the belligerents employed in the carriage by sea of exchanged or paroled prisoners to their own country are also free from capture, provided they do not engage in trade, carry unauthorized despatches, or engage in hostilities. Hospital ships are exempt from capture if they are not used for any military purposes. They are to be designated in accordance with the provisions of the Geneva convention as adapted to the principles of maritime warfare.[2]

The belligerents shall have, however, the right to control and search them, and they may detain them if the gravity of the circumstances require it. Any war-ship belonging to a belligerent may, however, demand the surrender of the wounded, sick, or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts and boats, whatever the nationality of such vessels.[3]

[1] Stockton, "Manual of Int. Law for Naval Officers," pp. 163, 164.
[2] Art. 5, Convention X of second Hague conference.
[3] Higgins, "Hague Conferences," Convention X, Art. 12, p. 369.

153. The Use of Torpedoes and Submarine Mines.—In using torpedoes in a naval action it is now required that they should be so constructed as to become harmless if they miss their mark. This applies also, of course, when such torpedoes are used from the shore in attacking the vessels of the enemy.

An indirect and comparatively modern method of attack upon vessels of war made either from shore or by vessels of the other belligerent is through floating contact mines, operated automatically or otherwise. The convention of the second Hague conference upon the subject which is numbered VIII arose from the experience of the Russo-Japanese War. Although such instrumentalities had been used during the American Civil War, they came more particularly into prominence during the operations in the vicinity of Port Arthur. Valuable vessels of war and great loss of life occurred from the use of these mines on both sides. As a result, the use of these mines became the subject of discussion in the second Hague conference, resulting in the convention just referred to and to which the United States became a party.

It is forbidden by this convention to lay or use anchored or unanchored automatic contact mines or torpedoes unless they are so constructed as to become harmless after they have either broken adrift or missed their target or, in case of floating mines, one hour at most after those who use them have lost control over them.

154. Conversion of Merchantmen into Vessels of War.—This is a matter of very considerable interest in maritime warfare, but which is left in an unsettled condition both by The Hague conferences and the London naval conference from the impossibility of agreement. The convention of the second Hague conference in regard to the conversion of merchant ships into war-ships is very vague and incomplete as to its main objects and is apparently more to secure the observance of the declaration of Paris in regard to privateering than for the regulation implied in its title. For this and other reasons the

United States did not become a signatory or ratifying power and has not acceded to its clauses, as it has not adhered to those of the declaration of Paris.

In the naval conference of London the question as to conversion on the high seas and that of reconversion afterward was the one which failed of agreement and which consequently remains open. But, besides this matter, the clause of the declaration of Paris which abolishes privateering, although agreed to by all the important states of the world except the United States, and by that country in practice, has begun to be discussed in an antagonistic manner. There are writers in Great Britain, France, and Germany who question the desirability of such abolition. It is not likely, however, that such abolition will ever be done away with, although it is possible that the practice of the conversion of merchantmen into vessels of war will be more freely practised and with less limitation in future maritime wars, even to an extent which may be construed into an evasion of the declaration of Paris. The policy of the British admiralty in favoring the arming of large merchant steamers for self-defence previously referred to is a step in that direction.

A case of this kind took place in the Franco-German War of 1870, when a royal Prussian decree was issued for the formation of a volunteer navy. German ship owners and sailors were called upon to place themselves and their ships at the disposal of the state. Volunteer ships were to be placed under naval discipline and officers and crew were to wear the uniform of the navy. A premium was offered for such enemy ships as should be destroyed or captured by volunteer ships, varying from fifty thousand thalers for an iron-plated frigate to ten thousand thalers for a screw steamship.[1]

The French Government protested against this decree and appealed to the British Government as a violation of the declaration of Paris abolishing privateering. The British Govern-

[1] Higgins, "War and the Private Citizen," p. 120.

ment of the day decided that it was not a direct violation of the clause referred to of the declaration of Paris. Hall, however, says upon this point that:

"Nevertheless, it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organized in the above manner would necessarily be always of a kind to prevent the two from being identical in all important respects." [1]

The Russian volunteer fleet formed in 1877 is engaged in merchant trade in peace time under the merchant flag, with the commander and at least one other officer of the imperial navy on board. During the Russo-Japanese War two of these vessels, the *Smolensk* and *Petersburg*, in July, 1904, passed through the Bosphorus and Dardanelles from the Black Sea flying the merchant flag. They subsequently passed through the Suez Canal under the same flag. When in the Red Sea they hoisted the ensign of the imperial navy and the *Petersburg* captured the P. & O. steamer *Malacca* for carrying contraband of war, sending her into Algiers with a prize crew. Ultimately, after strong protests from the British Government, these vessels were ordered to haul down the flag of the imperial navy and to cease to act as cruisers, and Russia agreed that all vessels captured by them should be restored.[2]

A conference and discussion held at the United States Naval War College in 1913 resulted in the following conclusions as to the conversion of merchant ships into ships of war in war time, which is the best assemblage of rules upon the subject at the present time:

1. A private ship converted into a ship of war cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

[1] Hall, 6th ed., pp. 520, etc.

[2] Hershey, "Int. Law and Diplomacy of the Russo-Japanese War," p. 151.

2. Private ships converted into ships of war must bear the external marks which distinguish the war-ships of their nationality.

3. The commander must be in the service of the state and duly commissioned by the competent authorities. His name must figure on the list of the officials of the fighting fleet.

4. The crew must be subject to military discipline.

5. Every private ship converted into a ship of war must observe in its operations the laws and customs of war.

6. A belligerent who converts a private ship into a ship of war must, as soon as possible, announce such conversion in the list of its ships of war.[1]

7. Conversion of a private ship into a ship of war is not to take place except in the waters of its own state or of an ally or in the waters occupied by one of these.

8. A vessel converted into a ship of war retains its character to the end of the war.

9. These provisions do not apply except between contracting powers and then only if all the belligerents are parties.[2]

155. Capture of Enemy's Merchantmen.—Among the objects of maritime war that have been previously given is that of the capture or destruction of the maritime commerce of the enemy. This objective is still in force throughout the maritime world, with the exception where treaty between countries provides otherwise. So far as the United States is concerned, such capture is sanctioned by the law of the land and has been practised in all warfare in its history. The treaty between the United States and Italy of February 26, 1871, however, exempts in case of war between the two nations the private property of their respective citizens and subjects from capture or seizure on the high seas except in case of carriage of contraband or violation of blockade. In 1866 the war between Austria and Germany and Austria and Italy was carried on to the end

[1] Art. 6, "Hague Convention Relative to the Conversion of Private Vessels into Public Vessels," Higgins, p. 309.

[2] Naval War College, "Int. Law Topics," 1913, pp. 153, 154.

without any capture of private property at sea. So far as the United States is concerned, by an enactment in 1899 no prize money or bounty is allowed for captures of any kind afloat during war.

The United States as a government has been the leading champion in favor of the adoption of the principle of the immunity from capture of private property at sea, excepting for the carriage of contraband and violation of blockade. In 1904 Congress of the United States adopted a resolution in its favor and propositions for the immunity were brought before the first and second Hague conferences by the American delegations. In the second Hague conference the proposition was put to vote, in which twenty-one states voted for, eleven against, one abstained, and eleven were absent.

It received the qualified support of Germany, but the opposition of France, Great Britain, Russia, Japan, Spain, and Portugal, with others of lesser rank as maritime powers. Hence the proposition having such strong opposition was considered as lost as an accepted principle and does not figure among the conventions of The Hague.

Although officially the United States, with a great number of its statesmen and publicists, has favored this exemption, such publicists and authorities as Wheaton, Kent, Dana, Halleck, Mahan, Hyde, Wilson, and others oppose it. In Europe there seems to be an equal division of advocates and opponents among the same class of men.

The arguments of the advocacy of immunity rest mainly upon considerations of humanity, progress, and commercial interests. Its advocates also urge that war is essentially or exclusively a relation between states and their armed forces, and, pointing out the analogy between land and maritime warfare, claim that immunity would tend to the limitation of war, while denying that one of the essential objects of modern warfare is the destruction of the enemy's commerce.[1]

[1] Hershey, "Essentials of Int. Law," pp. 441, 442.

In regard to these arguments it may be briefly stated that there are few operations of war in which the private individual is concerned, either afloat or ashore, with less inhumanity connected with them than the capture of private property at sea. In the first place, the growing number of exemptions which concern fishing and other small craft relieve the poorer owners in a way which has no parallel in land warfare; the duration of the time of the days of grace after the outbreak of war gives reasonable notification, while the inviolability of enemy goods under neutral flag and the exemption of officers and crew of the captured merchantmen from being made prisoners of war still further lessen the hardships and inconvenience of such capture. To which may be also added the exemption from capture of the only really private property on board, that belonging to the passengers, officers, and crew. The cargo and vessel has, on the other hand, a semipublic status from its contribution of customs dues and otherwise to the resources of the belligerent whose flag it carries.

It is further urged by those in favor of the continuance of this practice that it becomes a matter of patriotic duty and, it may be, even of self-preservation in the interests of a country as a belligerent to consider the war value of every seagoing steamship from the possibility of its use as a naval auxiliary, an army transport, or by conversion into a belligerent and hostile cruiser. In addition there must be borne in mind the pressure for peace resulting from the capture of an enemy's seaborne supplies and provisions, which may become a vital factor to insular countries or states which have become isolated by war and which require external supplies for their redundant population.

The narrowing of the effect of war upon the private individual, which runs throughout the whole subject, is further exemplified by the most recent practice of land war with the suffering and desolation that accompany the march of an army with its widely spread detachments. The elimination of the

private individual from the fortunes of war seems difficult when their countries are engaged in hostilities. This is especially and very closely the case in land warfare.[1]

156. Exemptions and Restrictions in Capture in Maritime Warfare.—Convention No. VII of the second Hague conference in regard to the treatment of enemy merchant vessels at the outbreak of hostilities, so far as days of grace are concerned, was not signed by the United States on the ground that it was an unsatisfactory compromise. Our own practice in the matters treated in this convention is much more liberal and, as a rule, we may be considered to be in accord with the principles stated that, at the outbreak of war, vessels should be allowed to depart at once or after a sufficient term of grace and to proceed without molestation to their destination.

"During the Spanish-American War we allowed by proclamation, issued April 26, 1898, Spanish merchantmen until May 21 for loading their cargoes and departing, and such cargoes were not to be captured on their voyage if it appeared from their papers that the cargoes were taken on board within the time allowed. Exception was made of vessels having on board military or naval officers of the enemy, contraband of war, or despatches to or from the Spanish Government. Generally the period of days of grace allowed for a stay or departure from port by other countries is very short."[2] In some cases it is refused unless granted reciprocally.

"Vessels employed exclusively in coast fisheries or small boats employed in local trade are exempt from capture, together with their appliances, rigging, tackle, and cargo. This exemption ceases as soon as they take any part whatever in hostilities." This article (3 of Convention XII of the second Hague conference) is binding upon the United States and was in accordance with the decision of the United States Supreme Court in the Spanish-American War.[3] In the last clause of

[1] Higgins, "War and the Private Citizen," pp. 66–70.
[2] Stockton, "Manual of Int. Law for Naval Officers," p. 167.
[3] Case of *El Paquete Habana*, Scott's "Cases."

this article, "the contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful character.

"The postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral or enemy ship at sea is inviolable. If the ship is detained, the correspondence is forwarded by the captors with the least possible delay.

"The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from the blockaded port.

"The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible." [1]

Articles 5, 6, 7, and 8 of the same convention state that when an enemy merchant ship is captured by a belligerent such of its crew as are nationals of a neutral state are not made prisoners of war.

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

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

The names of the persons retaining their liberty under the conditions laid down above are notified by the belligerent captor to the other belligerent. The latter is forbidden know-

[1] Higgins, "Hague Peace Conferences," p. 396.

ingly to employ the said persons. The provisions of these articles do not apply to ships taking part in hostilities.[1]

Hospital ships, as mentioned, if applied to military uses are not allowed exemption by the Geneva convention. A case of a violation of the restriction from hostile purposes and the consequent capture of the hospital ship was that of the *Orel* in the Russo-Japanese War.

"The *Aryol* or *Orel* was a hospital ship of the Russian Red Cross Society. She was fitted out and employed in accordance with the provisions of The Hague convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva convention of 1864. She was attached to the second Pacific Russian squadron and joined it at Tangier. She was captured by the Japanese man-of-war *Sadu Maru* during the naval engagement near Okino Shima, and taken into Miura Bay for condemnation. The case came before the prize-court of Sasebo, and the result is reported in the Japanese official *Gazette* of August 1, 1905.

"The *Aryol* was condemned as good prize on the following grounds: (1) She had communicated the orders of the commander-in-chief of the Russian Pacific second squadron to other vessels during her eastward voyage with this squadron; (2) she was carrying, by order of the commander-in-chief of the squadron, the master and three members of the crew of the British steamship *Oldhamia,* which had been captured by the *Oleg,* a war-ship of that squadron, with a view of taking them to Vladivostok, although they were in good health; (3) she had been instructed to purchase in Capetown, or its neighborhood, eleven thousand feet of conducting wire of good insulation; (4) when the Russian squadron was proceeding toward Tsushima Channel, she and another hospital ship, the *Kostroma,* navigated at the head of the squadron in the position usually occupied by reconnoitring ships." [2]

[1] Higgins, "Hague Conferences," pp. 397, 398.
[2] Higgins, "War and the Private Citizen," pp. 74, 75.

The condemnation of this vessel, the facts having been proven, was fully justified upon all of the points named. If for humanitarian or other reasons use is made of a hospital ship as a refuge for the passengers or crews of ships sunk by orders of a commander of a naval force, the hospital ship is liable to capture and condemnation as a lawful prize for violation of the rules of the Geneva convention.

In regard to the power given in Article XII of the Geneva convention, the purport of which was quoted in an earlier paragraph, it can be said to justify the contention of the United States in the matter of the *Deerhound*, which vessel, a yacht under the English flag, rescued Captain Semmes of the *Alabama* and declined to surrender him to the *Kearsarge*. Not only was he landed upon neutral soil but he took part in hostilities at a later date. The English delegates, while accepting this article at the second Hague conference, declared their understanding that it applied only to the case of combatants rescued during or after a naval engagement in which they have taken part.[1]

157. Enemy Character in Maritime Warfare.—In the declaration of Paris it is established that the neutral flag covers enemy's goods with the exception of contraband of war and that neutral goods, with the same exception, are not liable to capture under the flag of an enemy.

Besides this the following general rules were incorporated in the declaration of London for the determination of the character of a merchant vessel with its consequent liability to capture:

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

"The neutral or enemy character of goods found on board an enemy's vessel is determined by the neutral or enemy character of the owner.

"If the neutral character of goods found on board an enemy vessel is not proven they are presumed to be enemy goods.

[1] Higgins, "Hague Conferences," p. 389.

"The enemy character of goods on board an enemy vessel continues until they reach their destination, notwithstanding an intervening transfer after the opening of hostilities while the goods are being forwarded.

"If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of a present enemy owner, a legal right to recover the goods, they regain their neutral character."[1] The conditions referred to as the transfer of an enemy vessel to a neutral flag are found in the Articles 55 and 56 of the declaration of London, in Appendix IV of this book.

As to the tests of enemy character so far as the merchantman is concerned, that, on account of the divergent views, has been left open in the declaration of London. The Anglo-American school makes the enemy character in warfare at sea depend upon the commercial domicile of the owner, while the Franco-German systems apply the test of the individual nationality of the owner.

158. The Procedure of the Capture and Sending in of a Merchantman.—Before the capture of a merchant vessel of an enemy it is necessary to determine its nationality. If this is shown to be that of an enemy by the display of the colors, she is at once taken possession of upon her surrender after being brought to by signal or a summoning gun. If neither should be sufficient to cause the vessel to lie to or stop, a projectile is fired across her bows, and in case of continued flight or of resistance force can be used to compel her to stop or surrender.

In case no colors are shown, or any other colors than those of the enemy, the intercepting vessel proceeds to exercise the war right of visit and search. If the papers of the vessel show her to be an enemy, or carrying contraband of war, or engaged in the violation of a blockade or in unneutral service, the vessel should be seized; otherwise she should be released unless circumstances make necessary a further search and con-

[1] See Appendix IV, Declaration of London, Arts. 57, 58, 59, and 60.

sequent detention. If the vessel should be released, an entry in her log-book should be made to that effect by the boarding officer.

After a capture, under normal circumstances, the prize should be sent in for adjudication, unless otherwise directed, to the nearest suitable port within the territorial jurisdiction of the captor in which a prize-court exists.

The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of capture, and to this end her papers should be carefully sealed at the time of seizure and kept in the custody of the prize-master.

All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in, and, if circumstances permit, it is preferable that the officer making the search should act as prize-master. The title to property requiring adjudication as a prize changes only by the decision rendered by the prize-court; hence the national colors of the vessel seized remain her proper flag until such decision is rendered.[1]

159. Destruction of Enemy Vessels as Prizes.—As a rule, the captured enemy merchantman must not be destroyed but sent in as a prize to port for adjudication by a prize-court. In case of military or other necessity, these vessels may be destroyed or they may be retained for the immediate service of the government of the captor. In such cases they are to be surveyed, appraised, and inventoried and the results sent to the prize-court where proceedings are to be held.

The laws of the United States as given in Revised Statutes, Section 4624, allow the appropriation of a prize for the use of the United States without adjudication. The papers, etc., with an appraisal of the value of the vessel, are sent to a proper court for the action required as in case of a vessel sent in.

During the War of 1812 repeated instructions were sent out by the government directing the destruction of enemy prizes. "A single cruiser, if ever so successful," said the secretary of

[1] Stockton, "Manual of Int. Law for Naval Officers," pp. 173–5.

the navy, "can man but a few prizes, and every prize is a serious diminution of her force." The same practice, and for the same reason, existed during our Revolutionary War.

In the instructions to the United States blockading vessels and cruisers in the Spanish-American War, it was stated that "if there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize-crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize-court in order that a decree may be duly entered." Such destruction is also allowed by the Russian, French, and Japanese instructions.[1]

160. **Resistance to Search, Recapture, Ransom, and Safe Conduct.**—The most authoritative statement as to a resistance to search upon the part of an enemy merchantman as well as the part of a neutral merchant vessel is found in the declaration of London (see Appendix IV), in Article 63, and in the accompanying report made by the draughting committee of the London naval conference. The article states that "forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases the condemnation of the vessel. The cargo is also liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods."

The accompanying reports state that, in case the vessel summoned does not stop, the belligerent cruiser may employ force; and if the merchant vessel is damaged or sunk she has no right to complain as she has failed to comply with an obligation imposed upon her by the law of nations.[2]

The question of recapture of a prize is a matter of prize laws,

[1] Moore's "Digest," pp. 517, 518, etc.
[2] Miscellaneous Parl. Papers, no. 41909, par. 6364.

and by usage requires a firm possession of twenty-four hours. It is a legitimate act of war when done by the crew of the vessel or by her compatriots. The United States act of 1800, providing for salvage in case of recapture, was embodied in the act of June 30, 1864, and the United States Revised Statutes, Section 4652.

Sometimes, instead of being sent in as a prize, the master, as agent of the owner, repurchases his right by a ransom. Ransom bills were taken by Confederate cruisers subject to the recognition of the Southern Confederacy. This practice may be revived on account of the difficulty of furnishing prize-crews from the complement of a modern vessel of war and is better than destruction of prizes.

Safe conducts were issued during the Spanish-American War to the Spanish merchant vessels engaged in transporting Spanish prisoners from Santiago de Cuba to Spain by the United States consuls, under instruction of the Department of State.

161. Bombardments by Naval Forces in Time of War.— The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden by Convention IX of the second Hague conference. The anchorage of automatic submarine contact mines off the harbor does not render a place liable to such bombardment.

Military works, military or naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbor are not free from attack and destruction.

The commander of a naval force incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances. The prohibition to bombard the undefended town holds good, however, and the commander is required to take all due measures in order that the town may suffer as little harm as possible.

If the local authorities of an undefended port or town should decline to comply with requisitions for provisions or supplies

necessary for the immediate needs of the naval force and within the resources of the place, after due notice such place may be bombarded. This does not apply, however, to money contributions.[1]

In any bombardment all necessary steps should be taken to spare all public buildings such as mentioned in the rules for land warfare. These should be marked by visible signs, however.

Unless military exigencies render it impossible, the commander of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities. The giving over of a town to pillage is forbidden.

162. Submarine Cables in Time of War.—In Article 54 of the Convention IV upon the laws and customs of war on land it is stated that:

"Submarine cables connecting a territory occupied with a neutral territory shall not be seized or destroyed except in case of absolute necessity. They also must be restored and indemnities for them regulated at the peace."

As the above article is the only one dealing with submarine cables in force at present with the sanction of an international obligation, it may be well to quote from the United States Naval code, in Article 5, which has met with general approval by the writers upon the matter. It reads as follows:

"1. Submarine telegraphic cables between points in the territory of an enemy, or between the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

"2. Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

"3. Submarine telegraphic cables between two neutral countries shall be held inviolable and free from interruption."

During the Spanish-American War the following instructions

[1] Higgins, "Peace Conferences," pp. 346, 350.

were given by the British Government as to the use of telegraphic cables at that time in British territory:

"Belligerent war vessels should be prevented from using the telegraph for the purpose of sending in cipher or otherwise messages of which the object is to direct or influence warlike operations. A belligerent war vessel may, however, use the telegraph for messages which do not relate to proceedings of the belligerents or for messages which are not in cipher, narrating past operations and intended for general publication as news. Officers in command of belligerent war vessels should be informed that it is a condition of their being permitted to use the telegraph to guarantee and agree that they shall abstain from transmitting or procuring the transmission of any telegrams which concern the conduct of warlike operations. Vessels which merely carry despatches may be permitted the telegraph, and should not, except under special circumstances, be subjected to the same conditions as belligerent war vessels with respect to not using the cable. Consular officers have a right to free communication with their government, whether plain or in cipher."[1]

"There is no international law established as to submarine cables in time of war, except the vague Article 54 of Convention IV of The Hague conventions. In a study of this question it must be observed that the material of a submarine telegraphic cable is by the declaration of London classed as conditional contraband and is liable to seizure if found on the high seas or within the territorial jurisdiction of the belligerents if it is bound for an enemy destination or for his service. Unless it is strictly censored when laid between a neutral and belligerent, which is difficult, judging from the British instructions just quoted, it will undoubtedly be used for unneutral service. The importance of using a cable to carry vital despatches of the enemy and the equal importance of preventing the delivery of such despatches by the other belligerent renders it a proper

[1] Stockton, "Manual Int. Law for Naval Officers," pp. 176, 177.

warlike measure to cut the cable leading from a neutral to an enemy, if not completely censored in war time. The whole matter was well summed up after discussion at the United States Naval War College in the following terms:

"'Practice, general principles, and opinion alike support the position that a cable connecting one belligerent and a neutral territory and rendering unneutral service is liable to interruption by the other belligerent at any point outside of neutral jurisdiction. War will often make such interruption a reasonable necessity.'"[1]

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[1] "Naval War College Topics," etc., 1902, pp. 19, 20.

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CHAPTER XXI

AERIAL WARFARE. WIRELESS TELEGRAPH

163. Aerial Warfare in General.—By this term is included aerial warfare over the land and aerial warfare over the sea, or what has been termed "aerial land and aerial maritime warfare."[1]

The use of balloons in warfare dates back to the time of the French Revolution, in 1793, when, in accordance with a proposition of Monge, a company of aeronauts was formed and balloons were used to ascertain the movements and position of the enemy. The stationary balloons were used also in our Civil War, for similar observations. They were also used in the Franco-German War, and also in the Russo-Japanese War in the vicinity of Port Arthur, to an extent that led Admiral Alexieff to place balloonists in the class of spies. This led to their elimination from that class in the second Hague conference, which, however, prohibited the launching of explosives from balloons for a term of years. Since then the development of dirigible balloons and aeroplanes has superseded ordinary free and captive spherical balloons, and in the late wars between Turkey and Italy and Turkey and the Balkan nations aircraft was used to a considerable extent.

As the use of such aerial craft at great speed in Europe, and even in America, caused flights to extend over many countries and across territorial waters and arms of the sea, the question of aerial navigation in time of peace and war soon became an international one and has led to several international confer-

[1] Wilmot E. Ellis, "Aerial Land and Aerial Maritime Warfare," *A. J. I. L.*, 1914, no. 2, vol. VIII.

ences upon the subject and the discussion of its international phases by many writers and jurists.

The Institute of International Law at several of its meetings discussed the subject very fully and at first was adverse to aerial warfare; but as all military countries proceeded with competitive haste to develop their aerial instruments of warfare, the subject could not be dismissed so cavalierly, even by so august an assemblage. Hence at its Madrid meeting, in 1911, it was voted "that aerial war is permitted, but on the condition of not presenting greater dangers than land or sea war for the persons or properties of the peaceful population."[1] This limitation may be considered rather vague and dubious as to its prohibitory effect.

In the Turko-Italian War of 1911, the Italians used both airships and aeroplanes in the reconnoissance of Turkish-Arabian positions. The Turks, as a rule, succeeded in driving attacking aircraft to a considerable altitude by infantry fire, and it was reported that they obtained fairly good results with a specially mounted Krupp gun. They used no aircraft of their own. During the Balkan Wars, all of the belligerents used aeroplanes, manned mostly by foreign aviators. Artillery and infantry attack was employed to such good effect that it became exceedingly dangerous for aeroplanes to descend below four thousand feet. Bombs were occasionally dropped with decided moral effect on Turkish positions.

The first attack known on a naval vessel occurred in July, 1913, during the Mexican insurrection, when a French aviator in the service of the "Constitutionalists" attempted in Guaymas harbor to drop several bombs on a Federal gunboat. No damage was done on either side, and the aeroplane eventually escaped.[2]

The fact that dirigible balloons of a so-called battleship type,

[1] "Annuaire, Institute of Int. Law," no. 24, p. 346.

[2] Wilmot E. Ellis, "Aerial Land and Aerial Maritime Warfare," *A. J. I. L.*, 1914, vol. VIII, no. 2, p. 261.

carry a crew of fifteen men and are equipped with several machine guns, a radioapparatus, a bomb-throwing device, a searchlight, and over a ton of explosives shows probabilities of serious night work, while French aeroplanes, in turn, are to be armored so that they can fly low. These possibilities overcome physical limitations which were thought to be inherent to aerial warfare.[1]

164. **The Sovereignty of the Air.**—The question of the sovereignty of the air has been discussed very fully since the growth of the importance of aerial craft, and in a number of cases municipal laws have been formulated upon the subject both in respect to its peace and warlike phases. International conferences have not been successful as yet in a common agreement upon the subject. An international conference upon the subject of aerial navigation was held at Paris, in April, 1910, which adjourned without result after several months' deliberation, developing as it did such differences of opinion upon the question of the sovereignty of the state over the air as to make progress impossible.

In the meantime, various states have been enacting laws governing the movements of aircraft of their own and foreign states with reference to the aerial territory above their land territory, and without regard to questions of height or what may be called servitudes of innocent passage of air-ships. Mr. Blewett Lee quotes from the weekly edition of the London *Times* of August 1, 1913, the following item, which shows an extension of the conventional law upon the subject. It reads that:

"A Franco-German convention has been signed with a view to regulating air traffic between the two countries. Private aircraft will be at liberty to cross the frontiers save in districts of military importance. State aircraft may cross only on authorization of the other state. If a military aircraft is forced

[1] Wilmot E. Ellis, "Aerial Land and Aerial Maritime Warfare," *A. J. I. L.*, 1914, vol. VIII, no. 2, p. 261.

over the frontier by weather, it is to come down at once and report to the nearest military authority. In these circumstances extraterritorial advantages will be granted to the distressed aircraft, and it may not be detained." [1]

Local laws as to aerial navigation, but not touching upon the subject of the jurisdiction of the general government, have been enacted by the States of Connecticut and Massachusetts. It is left for the general government to determine whether robbery in the air partakes of the nature of piracy or not. From the discussion upon the subject of sovereignty of the air engaged in by many European and American writers, there can be found three (3) distinct views given as enunciated by them:

"1. That the air is free, reserving to subjacent states the right to adopt such measures as are necessary for municipal and private security." This is in substance the principle advocated by M. Fauchelle, adopted by the Institute of International Law in 1906 and 1911 and by the
ternational de l'Aviation in 1910.

"2. That the state is sovereign ove
air, but there is a right of innocent passa
Westlake's view, presented to the Inst
Law, in 1906, at Ghent.

"3. The state has exclusi
above its territory." This
Wilson, Professor Zitelmann
"Law of the Air," and Do
Sovereignty." [2]

The writer inclines to the s
fessor Westlake, which reco
league or the territorial juris
its territorial control, but t
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[1] Blewett Lee, *A. J. I. L.*, no. 3, vol. VII, p. 496.
[2] Roy E. Curtis, *A. J. I. L.*, vol. VIII, no. 2, p. 265.

plete freedom and permissible war operations, this extends in time of peace to the air above the high seas and above the territory of the national owner of the air craft and in war time to the superincumbent air of the enemy. It is considered by military authorities of the United States that the act of Congress in regard to military secrets provides now for the exercise of its jurisdiction in the air above military works and fortifications.

This matter of the sovereignty of the air, so jealously guarded by the great naval and military powers of Europe, can only be regulated in its international phases by international convention more or less general in extent.

165. Aerial Warfare as Affected by the Laws of War.— The second Hague conference readopted Declaration I, concerning the discharge of projectiles and explosives from balloons, by which "the contracting powers agree to prohibit for a period extending to the close of the third peace conference the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." [1] This declaration is, of course, only binding upon the contracting powers and only in case of a war between contracting belligerents. The declaration was signed by twenty-seven of the forty-four powers present, including the United States. The non-signatory powers include Germany, Spain, France, Italy, Japan, Mexico, Russia, and Sweden. Notwithstanding the progress of humanitarian methods, the development of aerial warfare will most probably prevent the renewal of this declaration after its expiration and allow its usage in most European wars at present.

In Article 24 of the laws of war on land as adopted by the second Hague conference it is forbidden to attack or bombard, by *any means whatever*, towns, villages, habitations, and buildings which are not defended. This may be construed to be equally applicable to naval or military attacks. It is unlimited in its duration of time, and this convention has been

[1] Higgins, "Peace Conferences," pp. 484–491.

signed by all the powers except China, Spain, and Nicara It can hardly be said to prevent an attack upon buildings defended of themselves, but located within the limits defended town.[1]

In the same convention in the second paragraph of Ar 29, on the subject of spies, it is provided that persons sei balloons to deliver despatches and generally to maintain munication between the various parts of an army or a terr are not to be considered as spies. As to the use of balloo obtain information such usage can properly be classed ar scouting operations, and the operators should not be cl as spies, whether soldiers or civilians, as they do not under the head of those persons who are acting clandest or on false pretences. If captured, such persons can be prisoners of war.[2] They are also in the same category as sons mentioned in Article 11 of the Convention X of the se Hague, who, when sick or wounded, shall be respected and tended by the captors.[3]

In Article No. 53 of Convention IV, in treating of the occupation of an enemy's country, it is stated that all appliances whether on land, at sea, or *in the air*, adapted for the transmission of news, or for the transport of persons or goods, apart from cases governed by maritime law, depots of arms, and, generally, all kinds of war material, may be seized, even though belonging to private persons, but they must be restored and indemnities for them regulated at the peace.

166. Wireless Telegraphy.—Wireless or radio-telegraphy has come into use and into warfare of late years as the Hertzian waves which it produces were only discovered in 1887. The present lack of control of the direction in which the waves may move differentiates the service from that of wire telegraphy and causes a weakness in transmitting and re-

[1] Higgins, "Hague Conferences," pp. 237 and 269, 270.
[2] Higgins, "Hague Conferences," p. 239.
[3] Higgins, "Hague Conferences," p. 369.

ceiving the Hertzian waves in that the information of military or naval matters can either be shared by those within reach and likewise interrupted or to an extent substituted. To this confusion is added a great diversity of systems in use, causing a need for governmental and international regulation. It is generally conceded that the right to legislate for wireless telegraphy is within the power and right of the state.

The following references are made to wireless telegraphy in the adopted conventions of The Hague and London naval conferences. In Convention IV, giving the laws and customs of war on land, in the part treating of military authority over the territory of the hostile state, it is stated that "all appliances, whether on land, at sea, or *in the air*, adapted for the transmission of news, or for the transport of persons or goods, apart from cases governed by maritime law, depots of arms, and, generally, all kinds of war material, may be seized, even though belonging to private persons; but they must be restored and indemnities for them regulated at the peace." [1]

Article 3 of Convention V of the second Hague Conference reads as follows:

"Belligerents are also forbidden—

"(*a*) To erect on the territory of a neutral a wireless-telegraphy station or any apparatus intended to serve as a means of communication with belligerent forces on land or sea.

"(*b*) To make any use of any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes and not previously opened for the service of public messages." [2]

This article is the result of the experience of the Russo-Japanese War. The Russians erected a wireless telegraphic station at Chifu on the Gulf of Pechili, on the opposite side of which Port Arthur, then under siege, was placed. By these means the forces of the garrison, though under a close siege by

[1] Higgins, "Hague Conferences," p. 251.
[2] Higgins, "Hague Peace Conferences," pp. 282, 291.

sea and land, were enabled to keep up communication their home government for military or other purposes.[1] trals, by Article 8 of the same convention, are not bound t bid or restrict this use on behalf of belligerents; but if th the restriction must be applied impartially.

In the declaration of London, under the head of contra it is declared in Article 24, Clause 7, that the following c treated as conditional contraband: "material for teleg wireless telegraphs, and telephones."[2]

In Article 45 of the declaration of London, the following ences would include wireless-telegraph service. It cal the condemnation of a neutral, as if the vessel carried c band for unneutral service, if a neutral vessel is on a v specially undertaken with a view to the transmission of i gence in the interest of the enemy. In Article 46 it is provided that a neutral vessel will be condemned, as if she were an enemy merchant vessel, if she is exclusively devoted at the time in the transmission of intelligence in the interest of the enemy.[3]

After a discussion upon wireless telegraphy at the United States Naval War College the following summary and conclusions were reached:

"From practice as shown in various states, from the opinion of the courts and of writers, from the votes of conferences, and from international agreements, it is evident that the state within whose jurisdiction a wireless-telegraph apparatus is or passes is and will be authorized to exercise a degree of control over its use. The responsibility resting upon such will be large."

The general conclusions reached are:

"(*a*) A belligerent may regulate or prohibit the use of wireless telegraph within the area of hostilities.

"(*b*) A neutral state should use reasonable care to prevent

[1] T. J. Lawrence, "War and Neutrality in the Far East," p. 218.
[2] See Appendix IV.
[3] See Appendix IV, and Higgins, "Hague Conferences," pp. 593–6.

within its jurisdiction the unneutral use of wireless telegraph.

"(*c*) Unneutral use of wireless telegraph on board a vessel makes the vessel liable to the penalty of capture by a belligerent or to confiscation or sequestration of the apparatus or of the vessel or of both by a neutral.

"(*d*) A vessel intentionally aiding a belligerent by the use of wireless telegraph is liable to penalty until the end of the war."[1]

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2. The Sovereignty of the Air—

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3. Aerial Warfare as Affected by the Laws of War—

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4. Wireless Tegraphy—

   United States Naval War College, "International Law Situations," 1907, 138–176. Moore's "Digest of International Law," vol. VII, 941. Hershey's "Essentials of International Law," 449, 451.

[1] "Int. Law Situations," Naval War College, 1907, pp. 175, 176.

CHAPTER XXII

MILITARY OCCUPATION. TERMINATION OF WAR. CONQUEST AND CESSION

167. The Meaning of Military Occupation.—In the fourth convention of the second Hague conference, treating of the laws and customs of war on land, the definition of military occupation is given, which may be considered as representing what is sanctioned by international law and held as binding upon the powers which are signatory to this convention.

It states that:

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

"The occupation applies only to the territories where such authority is established and can be exercised."

As to what is the sufficient establishment of the occupying military authority there may be a question; but the following quotations from leading authorities upon the matter may amplify and clarify this article to a sufficient degree:

"In trying to express more precisely the spirit of Article 42 of this convention," Westlake says, "we can scarcely do better than quote Hall, who says the just requirements of an invader 'might probably be satisfied, and at the same time sufficient freedom of action might be secured to the invaded nation, by considering that a territory is occupied as soon as local resistance to the actual presence of the enemy has ceased and continues to be occupied so long as the enemy's army is on the spot, or so long as it covers it, unless the operations of the national or an allied army or local insurrection have re-estab-

lished the public exercise of the legitimate sovereign authority.'"[1]

General George B. Davis, U. S. A., probably the best American authority upon the law of war, says more fully that "a portion of the territory of the enemy is, therefore, said to be occupied when the authority of the former government has been overthrown within its boundaries and it is held by a sufficient military force to prevent uprising, to protect life and property, and secure the prevalence of order throughout the occupied district. Occupation is thus seen to be a question of fact and can never be presumed; if a territory frees itself from the exercise of this authority, it ceases to be regarded as occupied.

"In accordance with the present view of occupation, therefore, no permanent change ensues in the national character or allegiance of the population of an occupied territory as a result of the mere fact of occupation. The invader maintains himself in such territory by force. The relation existing between the commanding general of the occupying force and the population is not that of allegiance but of constrained obedience, and it exists only so long as he is able to compel such obedience by force. The authority exercised by an invader is something entirely different from that exercised by the legitimate government and rests upon an entirely different basis. In most respects it is greater and more extensive than the latter and has no foundation in the consent of the governed.

"The legitimate government of the occupied territory is temporarily displaced and overthrown, the functions of its officers and agents are suspended, and the territory is ruled by martial law. The ordinary civil laws of the country continue to exist and the courts are permitted to administer them, but they do so at the pleasure of the commanding general of the occupying forces. No guarantees, constitutional or otherwise,

[1] Hall, 6th ed., p. 480, quoted by Westlake, "Int. Law," 2d ed., vol. II, pp. 94, etc.

are effective against his will, and his consent to their exis or execution may be withdrawn at any time. The occup is military, not civil, and the invader, in carrying on his ernment, is controlled by various considerations, among v from the necessities of the case, those of a military cha are likely to prevail."[1]

168. The Authority of the Military Occupant.—Artic of The Hague Convention IV says that:

"The authority of the legitimate power having act passed into the hands of the occupant, the latter shall ta steps in his power to re-establish and insure, as far as pos public order and safety, while respecting, unless absol prevented, the laws in force in the country."[2]

This authority for military government is the fact of the occupation. A proclamation or public notice to the inhabitants informing them of the extent of the occupation and the powers proposed to be exercised is customary but not necessary. Military government, whether administered by officers of the navy, or those of the army of the belligerent, or by civilians left in office, or by other civilians appointed by the military commander, is the government of and for all of the inhabitants, native or foreign. The local laws or ordinances may remain in force, and, in general, as a matter of convenience, should be subject, however, to their being in whole or in part suspended and others substituted at the discretion of the governing military authority.[3]

"Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force so far as they are compatible with the new

[1] Davis, "Int. Law," 3d ed., pp. 330, 331.
[2] Higgins, "Hague Conferences," p. 245.
[3] Stockton's "Manual," pp. 203, 204.

order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation."[1] In all cases the authority of the occupant must accord with the laws and usages of war.

169. **Limitations to the Military Authority of the Occupant.** —Since The Hague convention on the laws and customs of war the following limitations to the military authority of the occupant over the territory of the hostile state have been agreed upon by the signatories to this convention, to whom they now apply, the United States being among them:

"Article 44. Any compulsion on the population of occupied territory to furnish information about the army of the other belligerent or about his means of defence is forbidden.

"Article 45. Any compulsion on the population of occupied territory to take the oath to the hostile power is forbidden.

"Article 46. Family honor and rights, the lives of individuals and private property, as well as religious convictions and liberty of worship must be respected.

"Private property cannot be confiscated.

"Article 47. Pillage is formally prohibited.

"Article 48. 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 to which the legitimate government was bound.

"Article 49. If, besides the taxes referred to in the preceding article, the occupant levies other money contributions in the occupied territory, this can only be for military necessities or the administration of such territory.

[1] Order of President McKinley, July 18, 1898; Moore's "Digest," vol. VII, p. 262.

"Article 50. No general penalty, pecuniary or oth can be inflicted on the population on account of the act dividuals for which it cannot be regarded as collecti sponsible."

This is held by Holland not to prejudge the matte prisals and by Westlake not to prevent the payme ransom which an invader may require upon condition ing a place not yet occupied from the damage that w sult from a lawful operation of war.

"Article 51. No contribution shall be collected under a written order and on the responsibility of mander-in-chief.

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

"For every contribution a receipt shall be given to the payee."

"The receipt mentioned in this article," says Holland, "is intended as evidence that money, goods, or services have been exacted, but implies, in itself, no promise to pay on the part of the occupant. He does not even thereby bind his government, if victorious, to stipulate in the treaty of peace that the receipts shall be honored by the government of the territory which has been under occupation. A Swiss proposal making it obligatory to honor the receipts mentioned in this and the following articles, was indeed deliberately rejected at the first Hague conference."[1]

"Article 52. Neither requisitions 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 imply for the population any obligation to take part in military operations against their country.

"These requisitions and services shall only be demanded on

[1] Holland, "Laws of War," 1908, p. 55.

the authority of the commander in the locality occupied. Supplies in kind shall as far as possible be paid in ready money; if not, their receipt shall be acknowledged and the payment of the amount due shall be made as soon as possible."

"Requisitions in kind," says Holland, "may, of course, relate not only to provisions but also to horses, vehicles, clothing, tobacco, etc. The services here intended are such as would be rendered by drivers, blacksmiths, artisans and laborers of all kinds, as also by the occupiers of houses upon which troops are quartered. . . . Payment for supplies is even politic, as decreasing the chances of their being concealed." [1]

On this article Westlake says, in discussing the subject, that "the money, things, and services which invaders take from the inhabitants of the enemy territory are now classed as contributions when they are money, requisitions when they are things or services. . . . Contributions have been dealt with in Articles 48 to 51 of The Hague Convention IV, and the code now proceeds to deal with requisitions."

He then proceeds to make some general observations upon the subject of contributions and requisitions, the first being that the character of the laws of war, "as being always restrictive and never giving a positive sanction to violence, is plainly indicated in the articles in question. No right to levy contributions or make requisitions is declared by Articles 48 and 49 as hypothetical on the payment of the money being imposed, and Articles 50, 51, and 52 are expressly provisions of restraint."

"If we ask what at different times it has not been prohibited to take from the inhabitants of the enemy territory, the answer for the oldest time is that nothing was prohibited to be taken from them. Neither in antiquity nor under the doctrine of *courir sus* had the inhabitants of the enemy territory any rights against the invader. . . . But when the view prevailed that occupation was conquest, as soon as his inroad became an occupation he was placed in a new relation to the

[1] Holland, "Laws of War," p. 56.

inhabitants of the occupied territory. They would no
be properly regarded as his enemies but as his subjects, a
worst government that ever existed with the pretens
being civilized never dreamed of leaving the property, n
and persons of its subjects, not chargeable with active c
tion to it, to the arbitrary will of its military commande
Lastly there has come the modern doctrine that betwe
passive citizen and the enemy state war introduces a r
by virtue of which the former may be made to suffer wl
the purpose of the war it is 'necessary' or 'natural' for t
ter to inflict. Combine with this the fact that most nati
not consider themselves rich enough to conduct a campaign on enemy's territory without availing themselves of the resources of that territory, and the exaction of requisitions and contributions is justified in the measure in which the invader's own resources are deemed by him to be insufficient. In sum, requisitions and contributions have continued to be exacted, by force of tradition and circumstances, through a series of successive theoretical views, none of which has been capable of fixing a limit to them." [1]

"Hostages are sometimes seized," says Hall, "by way of precaution in order to guarantee the maintenance of order in occupied territory. . . . The seizure of hostages is less often used as a guarantee against insurrection than as a momentary expedient or as a protection against special dangers which, it is supposed, cannot otherwise be met. In such cases a belligerent is sometimes drawn by the convenience of intimidation into acts which are clearly in excess of his rights. In 1870 the Germans ordered that, 'railways having been frequently damaged, the trains shall be accompanied by well-known and respected persons inhabiting the towns or other localities in the neighborhood of the lines. These persons shall be placed upon the engine, so that it may be understood that in every accident caused by the hostility of the inhabitants their compatriots will

[1] Westlake, "Int. Law," 2d ed., vol. II, pp. 107–9.

be the first to suffer. . . .' The order was universally and justly reprobated on the ground that it violated the principle which denies to a belligerent any further power than that of keeping his hostage in confinement; and it is for governments to consider whether it is worth while to retain a right which can only be made effective by means of an illegal brutality which existing opinion refuses to condone." [1]

Article 53 of The Hague Convention IV reads that:

"An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the state which may be used for operations of war.

"All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or goods, apart from cases governed by maritime law, depots of arms, and, generally, all kinds of war material, may be seized, even though belonging to private persons, but they must be restored and indemnities for them regulated at the peace."

Article 54 reads that:

"Submarine cables connecting an occupied territory with a neutral one shall not be seized or destroyed except in case of absolute necessity. They also must be restored and the indemnities for them regulated at the peace."

This has also been discussed elsewhere.[2]

Article 55 goes on to say that:

"The occupying state shall regard itself as only administrator and usufructuary of the public buildings, immovables, forests, and agricultural undertakings belonging to the enemy state and situated in the occupied country. It must protect the capital of those properties and administer it according to the rules of usufruct (life tenancy)."

The rules of usufruct require that the right must be so used that its capital or substance receives no injury.

[1] Hall, "Int. Law," 6th ed., pp. 470, 471.

[2] See p. 351, ante.

Article 56 reads that:

"The property of communes and that of institutions dedicated to religious worship, charity, education, art, or science, even when belonging to the state, shall be treated in the same manner as private property.

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

Under property of communes or local bodies, T. E. Holland claims that town halls, waterworks, gas works or police stations may be included.[1]

In concluding this portion of Convention IV of the second Hague conference containing the limitations placed by it upon military authority over the territory of the hostile state, it may be well in regard to the points omitted or partially treated in the articles that have been given in the preceding paragraphs to quote once more from the main body of the convention preceding the regulations. It says that:

"Until a more complete code of the laws of war can be issued, the high contracting parties think it expedient to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." [2]

170. Termination of War.—War between civilized states almost always ends by the conclusion of a treaty of peace. Sometimes, however, the war fades away to an end by the inability or the want of desire to continue hostilities, and no treaty is made at the time, as in the war between Spain and France in 1720, the war between Spain and Chile in 1867, and

[1] T. E. Holland, "Laws of War," p. 59.
[2] Higgins, "Hague Peace Conferences," p. 211.

between France and Mexico in 1864–7; and at other times it also ends without treaty when the nationality or existence of one of the belligerents disappears, as in the case of the third partition of Poland or of the fall of the Southern Confederacy after the American Civil War of 1861–5.

"When either belligerent believes the object of the war to have been attained or is convinced that it is impossible of attainment, or when the military operations of either power have been so successful as to determine the fortune of war decisively in its favor, a general truce is agreed upon and negotiations are entered into with a view to the restoration of peace. There is no rule of positive obligation as to the manner in which such negotiations shall be established. The initiative may be taken by either belligerent, either directly with the hostile state or indirectly through a neutral power. A neutral state may tender its good offices to either belligerent, at any time during the continuance of hostilities. The purpose of the preliminary negotiations is to arrange for a meeting of duly accredited representatives charged with the preparation of a treaty of peace."[1]

"Since," says Oppenheim, "in the case of termination of war through simple cessation of hostilities no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the *status* which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived or the *status* which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of publicists correctly maintained that the *status* which exists at the time of cessation of hostilities becomes silently recognized through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance regarding enemy territory militarily occupied by a belligerent at the time hostilities cease.

[1] Davis, "Elements of Int. Law," pp. 342–3.

According to the correct opinion such territory can be annexed by the occupier, the adversary, through the cessation of hostilities, having dropped all rights he possessed over such territory. On the other hand, this termination of war through cessation of hostilities contains no decision regarding such claims of the parties as have not been settled by the actual position of affairs at the termination of hostilities, and it remains for the parties to settle them by special agreement or to let them stand over."[1]

This seems to the writer to be a sound view of the situation at the conclusion of a war without a treaty.

171. **Treaty of Peace.**—The normal way of terminating war is by a treaty of peace. In a general way it may be said that a state which possesses the right of making war has the right of making peace. If war has been carried on by an alliance with other states on either side it is unjustifiable, except in certain extreme cases, like that of self-preservation, for one state to make peace or to treat without mutual consent. So far as the state is concerned its proper representative is the government *de facto* duly recognized as such. For example, the head of a state who is a prisoner of war, even if he had the constitutional power, has not the actual competency to make peace; as Oppenheim says, "though he does not by becoming a prisoner of war lose his position, he nevertheless thereby loses the power of exercising the rights connected with his position."[2]

On the other hand, it is not considered necessary, as a rule, that the *de facto* government should by a referendum or otherwise be authorized to treat for peace, though Bismarck in the Franco-German War required that the existing government of the National Defence should be formally recognized by the French National Assembly as a preliminary to treating with it for peace. The Chilians at the almost general cessation of hostilities with Peru had much difficulty in finding a proper

[1] Oppenheim, 2d ed., vol. II, p. 324.
[2] Oppenheim, 2d ed., vol. II, p. 331.

government with which to treat for peace, and were accused of setting up one for the purpose.

Although belligerents are desirous and ready to bring a war to a conclusion, it may be that time is wanted before a treaty can be duly drawn up and signed. Under those circumstances, in place of a general armistice, there is established what is known as "preliminaries of peace," which is a compact in the nature of a treaty, but dealing only with what may be agreed upon as essential matters. This compact requires a ratification by the governments concerned though not necessarily requiring legislative action. The war between Austria, France, and Sardinia was ended by the preliminaries of Villafranca; the war between Austria and Prussia by the preliminaries of Nikolsburg, and the Franco-German War by the preliminaries of Versailles on February, 1871, followed by the definite treaty of peace of Frankfort on May 10, 1871. By the interference of neutral states, however, the preliminary agreements may be altered as in the Russo-Turkish War, when the preliminaries of San Stefano, in 1878, through the Berlin Congress, were made less favorable for Russia by the subsequent treaty of Berlin.

The treaty of peace should be in writing and drawn up with the utmost care. The fact that there is always a discontented party should require precision and clearness in the text of the treaty.

As Rayneval says, the victor should speak in the language of moderation; the defeated in that of dignity; if the latter is humiliated by facts, he ought not to be by words; no important matter of discussion should remain uncertain, no word ought to furnish any doubt as to interpretation.[1]

Treaties of peace are, as a rule, binding from the date of signature, at which time hostilities cease if no armistice is in effect. It may be, however, that the date upon which it goes

[1] J. M. Gerard de Rayneval, "Institutions de Droit de la Guerre," 2d ed., 1903, p. 285.

into effect may be named in the body of the treaty; this is apt to occur when hostilities extend to regions beyond immediate communication.

172. Effects of Treaties of Peace.—The chief effect of a treaty of peace is, of course, the re-establishment of peace conditions and intercourse between the belligerents and their nationals while otherwise all acts legitimate in war alone automatically cease to be so regarded. Diplomatic intercourse is again established and consular officers resume their functions.

Unless it is otherwise stipulated, the principle of *uti possidetis* comes into effect, which can be defined as the general principle that things acquired in war remain both as to title and possession as they stood when peace began. "Peace," says Wheaton, "gives a final and perfect title to capture without condemnation, and as it forbids all force it destroys all hope of recovery as much as if the captured vessel was carried *infra præsidia* and judicially condemned."[1]

Of course, exceptions to this rule may be named in the treaty of peace which would govern a naval or military commander, who is not obliged, however, to accept any information as to peace which is not duly authenticated by his own government.

In the treaty of Ghent, at the close of the War of 1812 between the United States and Great Britain, it was provided that hostilities should cease at the date of the ratification of the treaty and that prizes taken after that date were to be restored but also providing a time allowance for the news of the peace to reach the various parts of the world.

An American cruiser at the end of this war captured a British vessel before the period fixed for the cessation of hostilities and, in ignorance of the fact, it was recaptured at sea by a British vessel of war after the period fixed for the cessation of hostilities, but also without knowledge of the treaty of peace. It was judicially held under these circumstances that

[1] Dana's "Wheaton," pp. 719, 720.

the American capture was lawful but that the recapture was not legal.

It is not at all unusual that a treaty of peace brings in its train a number of other conventions for the purpose of performing the obligations prescribed in general terms in the treaty proper. Occupied territory has to be dealt with, fortifications evacuated, war indemnities paid, boundary lines redrawn, prisoners exchanged, etc. It is stated that after the treaty of peace had been signed concluding the Franco-German War of 1870–1 more than a hundred separate conventions were concluded for the purpose of carrying out the details of this treaty.

"In a general way," says Hall, "it revives all private rights and restores the remedies which have been suspended during the war. Contracts, for example, are revived between private persons if they are not of such a kind as to be necessarily put an end to by war and if their fulfilment has not been rendered impossible by such acts of a belligerent government as the confiscation of debts due by subjects to those of its enemy; the courts also are reopened for the enforcement of claims of every kind."[1]

173. **Conquest and Cession.**—"Conquest," says Hall, "consists in the appropriation of the property in, and of the sovereignty over, a part or the whole of the territory of a state and, when definitely accomplished, vests the whole rights of property and sovereignty over such territory in the conquering state."[2]

Conquest is distinguished from military occupation in that it is the completed and final status of the acquired territory recognized tacitly by inability to contest by the original owner. This status is shown by declared intention and ability of maintenance and should be made known by a decree of annexation.

"Title by conquest," says Lawrence, "differs from title by cession in that the transfer is not effected by treaty and from title by prescription in that there is a definite act or series of acts out of which the title arises. These acts are successful

[1] Hall, 6th ed., p. 557.

[2] Hall, 6th ed., p. 560.

military operations; but if a province conquered in a war is afterward made over to the victorious power by treaty, it is acquired by cession. Title by conquest arises only when no formal international document transfers the territory to its new possessor."[1]

"When territory changes hands by cession or conquest, the fact that allegiance is now based upon consent is usually recognized by the insertion of a clause in the treaty by which the conquest is completed or the cession accomplished, permitting such of the inhabitants as desire to retain their former citizenship to dispose of their property and return to the state of their original allegiance. Individuals who decline to take advantage of this permission and elect to remain in the ceded territory are presumed to consent to the change in allegiance which is involved in the conquest or cession. From the nature of the case, however, no formal guarantee of the allegiance of the population of territory thus transferred is either given or expected. It is proper to say, also, that while the inhabitants of conquered or ceded territory become vested with the rights of citizenship by the fact of conquest or cession, in so far as other states are concerned, their actual absorption into the body politic of the conquering state is a matter which is regulated not by international law but by the constitution and laws of the state to which their allegiance has been transferred by conquest or cession."[2]

In the cession of Alsace and Lorraine it was provided by the treaty of Frankfort, of 1871, that those who wished to retain their French nationality must emigrate, but they were allowed to retain the ownership of their real estate within the ceded territory. It may be considered to be a general rule that, whenever political jurisdiction is transferred over certain territory from one state to another, the existing and strictly municipal laws continue in force until changed by the new govern-

[1] Lawrence's "Principles," 4th ed., par. 77.
[2] Davis, "Int. Law," 3d ed., p. 346.

ment. This may be done gradually or at once. In some cases, like that of Louisiana, the laws based upon Roman law have been allowed to continue in a very large degree until the present time. Certainly it is more equitable to have such radical changes in legal institutions to occur gradually.

TOPICS AND REFERENCES

1. The Meaning of Military Occupation—

   Higgins, "The Hague Peace Conferences," sec. III, 245, etc. Holland, "Laws of War on Land," 52. G. B. Davis, "International Law," 3d ed., 327–331.

2. The Authority of the Military Occupant—

   Oppenheim, "International Law," 2d ed., vol. II, 210–225. Moore's "Digest of International Law," vol. VII, 257–269. Westlake, "International Law," 2d ed., vol. II, 95–101.

3. Limitations to the Military Authority of the Occupant—

   Higgins, "Hague Peace Conferences," 265–272. Hall, "International Law," 6th ed., 464–480. Hershey's "Essentials," 410–417.

4. Termination of War—

   Oppenheim, "International Law," 2d ed., vol. II, 322–7. Hall, "International Law," 6th ed., 553–571. Moore's "Digest of International Law," vol. VII, par. 1163.

5. Treaty of Peace—

   Oppenheim, "International Law," 2d ed., vol. II, 327–332. Hershey's "Essentials," 101, 176, 183. Hall, "International Law," 6th ed., 552–9.

6. Effects of a Treaty of Peace—

   Stockton's "Manual for Naval Officers," 208, 213. Davis, "International Law," 3d ed., 343–5. Westlake, "International Law," 2d ed., vol. II, 57.

7. Conquest and Cession—

   Moore's "Digest," vol. VII, par. 1156. Oppenheim, 2d ed., vol. II, 325. Hall, "International Law," 6th ed., 98, 118, 566.

PART V

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS

CHAPTER XXIII

NEUTRALITY AND ITS DEVELOPMENT. RIGHTS AND DUTIES OF NEUTRALS IN LAND WARFARE

174. The Creation of Neutral States by Commencement of War.—It has been seen in the previous pages of this book that, in general, international law, so far as it is concerned with the relations of states and peoples, may be separated into two great divisions, the first dealing with the time of peace and the second with a period of war.

The period of war, so far as states are concerned, is in its turn subdivided into two parts; the first concerning the relations between the opposing belligerent states, and the second treating of the relations between the opposing belligerents and the states remaining in peace, and which have become by the existence of war neutral parties to the conflict; of this last subdivision we now propose to treat.

No matter how much war is to be regretted and, if possible, avoided, it is recognized by international law as a legal method of procedure for the enforcement of rights and the redress of wrongs and also for the settlement of disputes in a great conflict of wills between states.

"The existence of war," says Westlake, "as between the belligerents imposes the duties of neutrality on third powers and their subjects and gives them what are called the rights of neutrals, but which are in truth only the limitations of its

duties, for no new right accrues to a neutral as such. But although the duties arise from the facts, it would be unjust to impose them without notification of the facts or something equivalent to them."[1]

This is provided in The Hague convention of 1907 in the Convention VI, relative to the commencement of hostilities in which it is stated in Article 2 that "the state of war should be notified to the neutral powers without delay and shall not take effect in regard to them until after the receipt of a notification, which may even be made by telegraph. Nevertheless, neutral powers cannot plead the absence of notification if it be established beyond doubt that they were in fact aware of the state of war."[2]

In the case of civil war which commences without a regular declaration of war, duties of neutrality are created similar to those existing in war between states for all of the powers not engaged in the hostilities. A recognition of the state of blockade duly proclaimed at once brings into play neutral duties and restrictions as well as the rights of belligerents.

175. The Status and Principles of Neutrality.—The status of strict neutrality in war may be described as a complete abstinence on the part of the neutral states from any participation in the war, coupled with absolute impartiality toward the opposing belligerent states in all other matters.

State neutrality which becomes incumbent on the part of those states not engaged in the war is not only a right but a duty. It is a duty performed voluntarily, except in the cases of the neutrality required by treaty from such permanently neutralized states as Switzerland, Belgium, and the Grand Duchy of Luxemburg.

Professor Holland, a leading British jurist, considers the obligations of a neutral state as being of three classes, involving respectively *abstention*, *prevention*, and *acquiescence*.

[1] Westlake, "Int. Law," 2d ed., vol. II, p. 30.
[2] Higgins, "Hague Conferences," p. 199.

"1. *Abstention* is of a negative character. It consists of restrictions upon the free action of the neutral state, by which it is, for instance, bound not to supply armed forces to a belligerent, not to grant passage to such forces, and not to sell him ships or munitions of war, even when the sale takes place in the ordinary course of getting rid of superfluous or obsolete equipment.

"2. *Prevention.* The second class of neutral obligations is of much wider scope than the first and gives rise to a greater number of debatable questions. It is positive in character, imposing on the neutral state duties of interference with the action of belligerents and of its own subjects.

"3. *Acquiescence.* The third head of neutral duty is of a negative character, obliging the neutral state to acquiesce in acts on the part of belligerents which, but for the existence of war, would be unlawful and ground for redress."[1]

What are called the general rights of neutral states, on the other hand, include those of a complete inviolability of territory, both land and water, from the warlike operations of the belligerents. This inviolability can be secured by them, if necessary, by force of arms.

Neutral states have also freedom of trade on land and sea with all states, including the belligerents, as in time of peace, except so far as the carriage of contraband, evasion of blockade, or unneutral service to the belligerents is concerned. In case of capture, for these offences, of their merchantmen on the high seas or in belligerent territorial waters neutral states have the right to require a fair trial before condemnation of the goods or vessel.

Neutral states have also the right to afford asylum to troops or vessels seeking it, provided they disarm and intern them until the end of the war. They have also the right to allow entrance of belligerent vessels of war under certain limitations into their ports, but they can also, if they choose, exclude them

[1] Holland, "Transactions of the British Academy," vol. II, p. 58.

altogether. These rights must be exercised impartially, under the same circumstances to the opposing belligerents alike.

Belligerent states on their part have the general rights to visit and search all neutral merchantmen and privately owned vessels upon the high seas or in belligerent waters. If found to be engaged in the carriage of contraband, evasion of blockade, or unneutral service, they have the right to capture and detain them and by legal process condemn them.

In a general sense, belligerent states have the obligations to respect the war rights of neutrals, especially as to their territory and trade.

176. The Development of the Law of Neutrality.—The first development of neutrality as a part of international law may be said to have begun in the sixteenth century so far as states are concerned. It is true that in the *Consolato del Mare* it was provided that neutral goods captured in vessels of the enemy must be restored, yet that was not a code of state law, and even that code provided for the confiscation of the goods of the enemy on board of neutral vessels in time of war.

In the seventeenth century Grotius in his famous treatise gives but an imperfect idea of neutrality. "It is," he states, "the duty of neutrals to do nothing which may strengthen those who are prosecuting an unjust cause or which may impede the movements of him who is carrying on a just war. . . . But if the cause is a doubtful one they must manifest an impartial attitude toward both sides, in permitting them to pass through the country, in supplying their troops with provisions, and in not relieving the besieged."[1]

The practice of neutrality in this century was as imperfect as the theory. In time of peace with both states Henry IV permitted regiments of the French army to serve with the Netherlands; an expedition of Scotch soldiers, numbering six thousand men, served under the command of the Marquis of Hamilton during the Thirty Years' War under Gustavus

[1] "De Jure Belli ac Pacis," vol. III, chap. XVII.

Adolphus in 1631; and in 1656 a treaty was concluded between England and Sweden by which it was "lawful for either of the contracting parties to raise soldiers and seamen by beat of drum within the kingdoms, countries, and cities of the other and to hire men-of-war and ships of burden."[1]

In the eighteenth century matters had, though slowly, progressed toward better neutrality. In 1759, when Admiral Boscawen chased a French squadron into the waters of Portugal and therein captured two vessels, the government of Portugal was obliged to demand reparation in order to avoid trouble with France. As the vessels were not required to be surrendered, France made this a ground for war with Portugal in 1762. The progress referred to was partly due to the text-writers of the day, such as Bynkershoek, Vattel, and Wolff. Public opinion which was maturing upon the subject was, however, almost entirely confined to the duty of states within their own jurisdiction and power with each other but not as to their subjects in relation to the belligerent states.

The practice of the eighteenth century, hence, was still imperfect. Both Holland and Piedmont furnished troops for the war of the Austrian succession, and England in the war for the American independence drew large bodies of mercenaries from neutral German states under treaty with their sovereigns. After the successful issue of our Revolutionary War and the attainment of our independence we at once began our most creditable policy of strict neutrality. In fact, the early history of the progress of neutrality was largely our own. In 1785 the United States made a treaty with Prussia that neither one nor the other of the two states would let for hire, or lend, or give any part of its naval or military forces to the enemy of the other to help it or to enable it to act offensively or defensively against the belligerent party to the treaty.

Shortly after this came the French Revolution, followed by the war between France and the European powers, and during

[1] Hall, "International Law," 6th ed., p. 575.

which, in 1793, President Washington issued a proclamation of neutrality which was followed by a second and more stringent one in 1794.

These proclamations were largely in consequence of the operations of the new French minister, M. Gênet, who upon landing at Charleston, S. C., began to grant commissions to Americans who fitted out privateers cruising against English merchantmen. Jefferson, then secretary of state, stated to M. Gênet that it was "the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits and the duty of a neutral nation to prohibit such as would injure one of the warring powers; that the granting military commissions within the United States by any other authority than their own is an infringement of their sovereignty and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their country."[1]

The government began at once active movements to prevent the further violation of the neutrality of the United States. Gideon Henfield, an American citizen serving on board a French privateer, was arrested to be tried for disturbing the peace of the United States and for violating the treaties of peace between the United States and the countries at war with France. The sale of prizes taken by the French privateers was interfered with, and rigorous instructions were issued by Hamilton, as secretary of the treasury, to the collectors of customs at the principal ports of the United States, transmitting rules which had been approved by the President, prohibiting the fitting out of privateers to cruise against friendly nations.

In July, 1793, the previously mentioned Gideon Henfield being indicted for enlisting on board a French privateer, the judges ruled the act to be a crime, but popular sentiment ran so high in favor of France that the jury promptly acquitted him. Governor Shelby, on his part, in Kentucky, refused to

[1] American State Papers, vol. I, p. 67.

prosecute American citizens engaged in the formation of military expeditions against New Orleans, then in possession of Spain. Finally, Washington, realizing that additional legislation was necessary to fulfil the obligation of neutrality and to complete the measures taken by his administration, reviewed his policy in his annual address to Congress in December, 1793, and called upon that body to enact the necessary legislation to give sufficient authority to the executive and judicial departments of the government.

As a result, the desired legislation was given in the act of June 5, 1794, embodying the rules issued by Hamilton to the collectors of customs and supplementing them by the recommendations contained in the President's message. This law was continued in force for a period equal to its original duration in 1797 and was made a permanent law on April 24, 1800.

In regard to this act Doctor Fenwick, in his work upon the neutrality laws of the United States, says:

"The scope of the act was not only more comprehensive than any of the previous temporary neutrality edicts issued by the nations of Europe earlier in the century, but it went considerably beyond what was considered the duty of a neutral nation. It was the first attempt ever made on the part of a neutral nation to pronounce definitely that certain acts would be considered by it a violation of neutrality and to incorporate those acts into its criminal code and enforce their observance in favor of any friendly prince or state without distinction. No higher tribute to the statesmanship of Washington and his advisers could be paid than that rendered by Mr. Canning in 1823, in a speech before the House of Commons against the repeal of the British foreign enlistment act of 1819. 'If I wished,' he said, 'for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson.'"[1]

In continuing the development of the law of neutrality by

[1] "Neutrality Laws of the United States," Fenwick, pp. 27, 28.

the United States we come to the period of the wars resulting from the efforts of the Spanish-American colonies for the attainment of their independence. This opened a new period in the neutrality history of the United States. The sympathies of the United States and its citizens naturally leaned to the side of the Spanish-American colonists. The government of the United States, consistent with its previous policy, maintained its policy and abstained as a government from any aid to these American revolting colonies, but difficulty was found in preventing individuals from taking up their cause and coming to their assistance by various military expeditions. President Jefferson in 1806 and President Madison in 1815 issued proclamations of neutrality warning all persons against any infraction of the neutrality laws of the United States. In 1816 President Madison recommended to Congress the expediency of further legislative action against the formation and sailing of military expeditions against countries with whom we were at peace.

The result was that after considerable opposition in Congress the act of March 3, 1817, was passed, principally covering the ground of insurgent colonies in addition to foreign states. This act with some amendments was later codified into a single act which is known as the act of April 20, 1818, and now represents the present law of the United States upon the matter of neutrality and is contained in the Revised Statutes of the United States, with a few verbal alterations and rearrangement, in Sections 5281 to 5291. This act was followed by and may be called the basis of the British foreign enlistment act of 1819. Both acts make it the duty of neutrals to prevent the fitting out and sailing of hostile cruisers or expeditions from their waters and also the enlistment of their citizens within their territory for foreign service in case of war.

Various matters have connected the United States with attempts of violation both of the law of neutrality and of international law and the municipal laws of the United States which

by contradistinction are known as neutrality laws. These matters relate to the various troubles on the Canadian and Mexican borders, to the Civil War of 1861–5, to the various Cuban insurrections, and to the Spanish-American War of 1898.

This sketch of the development of neutrality in the latter part of the eighteenth century and in the earlier part of the nineteenth century has been largely devoted to its development in the United States because the larger development in these times occurred in connection with our country and continent. Its later development, where not treated in the historical sketch of the development of international law, will be treated under the separate subjects involved. The wars in Europe since our Civil War that involved neutrality matters were principally the Napoleonic Wars, the Crimean War with the declaration of Paris at its end, the Franco-German War, the Chino-Japanese War, the Boer War, the Russo-Japanese War, and the recent Italo-Turkish War.

It may be well, however, to state here the last legislative order of the United States. The shipment of arms across the Mexican border has been a matter of constant and recent occurrence, and the complications arising therefrom exist to the time of the present writing. From this question arose the joint resolution of Congress of March 14, 1912. It provides that, "whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States and shall make proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President shall describe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress."

This joint resolution, the body of which has just been given, "empowers the President," says Doctor Fenwick, "to recognize the existence of conditions under which the act makes it unlawful to export any arms or munitions of war to the country

designated. It is a distinct advance over the joint resolution of 1898 (forbidding the export of coal in war time) not only in that it was framed to meet the neutral obligations of the United States but because it imposes a specific penalty upon offenders; and it thus takes its place as a permanent amendment to the neutrality act of 1818."[1]

In Great Britain the great advance of late in neutrality laws was the passage of what is known as "The Foreign Enlistment Act of 1870." This is a strengthening of the provisions of the previous foreign enlistment acts and is in advance of our neutrality law of 1818. It was the result of the experience of Great Britain during our Civil War and probably represents the most advanced law upon the outfit and sailing of cruisers and military expeditions in violation of neutral obligations on the part of any one nation. In the meantime, through The Hague convention and the declaration of London as well as the Geneva conventions for the sick and wounded, the international obligations of belligerent powers and the rights and duties of neutral powers in time of war have been to a great extent formulated by general treaty into conventional law, with corresponding advantages and diminution of controversy and complication. An explanation and discussion of these matters will be found in the pages that follow.

177. Neutral Rights and Duties in Land Warfare.—Many of the questions coming under this head have been treated in Convention No. V of the second Hague conference, which is entirely devoted to this heading. In addition, some subjects also pertinent to this grouping will be found in Convention No. IV on the laws of war on land of the same conference, as well as in the Geneva convention of 1906.

It was not intended by The Hague conference of 1907, in devoting their time to the formulation of a convention respecting "the rights and duties of neutral powers and persons in war on land," to settle all disputed points in the law of neu-

[1] Fenwick, "Neutrality Laws of the United States," p. 58.

trality but, as Higgins says, "to make a beginning in codification by converting into a written law such of the existing usages as regarded neutral powers and persons, as were of general acceptance." [1] This convention, which was ratified by the United States Senate on March 10, 1908, and is consequently binding upon the United States, may be said to afford not only a good basis for future action upon the subject which it treats but also to present well-accepted principles of international law.

The first article of the convention reads that:

"1. The territory of neutral power is inviolable."

Concerning this fundamental principle of neutrality, Professor Holland makes the comment that "the territory of a neutral state, so long as the state fulfils its duties as a neutral, must not be entered by troops of either belligerent, except for the purpose of asking to be interned therein." [2]

The second article reads:

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

This article is naturally a direct consequence of the first article.

The third article reads:

"3. Belligerents are also forbidden:

"(*a*) To install on the territory of a neutral power a radio-telegraphic station or any apparatus intended to serve as a means of communication with belligerent forces on land or at sea.

"(*b*) To make use of any installation of that character, established by them before the war on the territory of a neutral power and not previously open for forwarding public communications, for a purpose exclusively military."

The first clause of this article would, of course, prohibit action like that taken by Russia during the Russo-Japanese War in

[1] Higgins, "Hague Conferences," p. 290.
[2] Holland, "Laws of War on Land," p. 62.

the establishment of a wireless-telegraph station at Chifu, on Chinese territory, by which communication, as stated in a previous chapter, was kept up with Port Arthur during its siege.

Article 4 reads that:

"4. Corps of combatants cannot be formed nor recruiting offices opened on the territory of a neutral power in the interest of the belligerents."

In the case of the United States *v.* Kuzinski it was ruled that "to constitute the offence of enlisting here, it requires the consent of the party enlisting; and so, also, the hiring or retaining a person to go abroad with intent to be enlisted requires assent and intent on the part of the person hired or retained."[1]

Article 5 reads that:

"5. A neutral power ought not to allow in its territory any of the acts referred to in Articles 2 to 4."

It is not bound to punish acts in violation of neutrality unless such acts have been committed on its own territory.

A neutral state will not be expected to discharge duties beyond its power. In 1899 Luxemburg declared her inability to to perform the duties required like the above when such matters were before the first Hague conference.

Article 6 of the convention reads:

"6. A neutral power does not incur responsibility by the fact that persons cross the frontier singly in order to place themselves at the service of one of the belligerents."

Article 7 reads:

"7. A neutral power is not bound to prevent the exportation or the passage, in the interest of one or other of the belligerents, of arms, munitions, or, generally, of everything which could be useful for an army or fleet."

This is in accordance with the traditional policy of the United States. The joint resolution of Congress of 1912 applying to cases of domestic violence, not amounting to recognized war, was due to the constant insurrections in Mexico which

[1] Federal Cases, no. 15, 508.

made the frontier territory of the United States a base of essential supplies to insurgent forces.

Article 8 states that:

"8. A neutral power is not bound to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables or of wireless-telegraphy apparatus whether belonging to it, or to companies, or to private individuals."

Article 9 says that:

"9. Every restrictive or prohibitive measure taken by a neutral power in regard to the matters referred to in Articles 7 and 8 must be applied impartially by it to the belligerents.

"The neutral power shall see to the same obligation being observed by companies or private owners of telegraph or telephone cables or wireless-telegraphy apparatus."

Article 10 reads that:

"10. The fact of a neutral power repelling, even by force, attacks on its neutrality cannot be considered as a hostile act."

The second chapter of this convention concerns the internment of belligerents and the care of the wounded in neutral territory.

Article 11 reads that:

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

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

"It shall decide whether officers may be left at liberty on giving their parole not to leave the neutral territory without permission."

The neutral power, of course, has the right to establish the camps of internment even if they move them to more or less distant territory of the neutral from that in which they sought refuge. Professor Holland claims that if they enter neutral territory by undoubted error their immediate departure should be permitted. The most striking example of internment in

modern wars was the internment of a French force, consisting of over eighty thousand men, in the Franco-German War, who entered Swiss territory and were interned for the rest of the war, the French Government paying the expense incurred at its termination. A Federal force of Mexicans was interned by the United States in Texas, in 1914.

Article 12 goes on to say upon this subject that:

"12. In the absence of a special convention, the neutral power shall supply the interned with the food, clothing, and relief which the dictates of humanity prescribe.

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

Article 13 states that:

"13. A neutral power which receives prisoners of war who have escaped shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

"The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral power."

Articles 14 and 15 read that:

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

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

It will be noticed that the passage of the sick and wounded mentioned in Articles 14 and 15 is entirely optional with the neutral government. This privilege, if given, must, of course,

be given impartially to all belligerent states and, properly, should not be given to one belligerent without the consent of the other.

Its possible effect may be seen from circumstances that occurred during the Franco-German War of 1870. After the battle of Sedan, the German army was embarrassed by masses of wounded whom it was difficult to move into Germany by the ordinary open routes, while, at the same time, their support affected the commissariat in supplying the active forces. The German Government hence applied to Belgium for leave to transport the wounded by railway across Belgian territory to Germany. As a result of the strong protest of France, Belgium after consultation with England, refused the application. If Belgium had consented, the Germans could have increased their transport service very materially by devoting their railway service entirely to warlike purposes.[1]

Article 15 of this convention closes the chapter by stating that "the Geneva convention applies to the sick and wounded interned in neutral territory."

Article 16 of the next chapter states that:

"The nationals of a state which is not taking part in the war are considered to be neutrals."

Neutral persons residing in the territory of a belligerent are liable to suffer, with the other inhabitants of the country, the vicissitudes of war. They are liable to be removed from their homes or even from the country, either for military reasons or on suspicion of affiliation with the invading force of an enemy or general misconduct during the operations of war.

This article with the following Articles 17 and 18 were not accepted by Great Britain and were duly reserved upon the signing of the convention by that power.[2]

Articles 17 and 18 read that "a neutral cannot claim the benefit of his neutrality—

[1] Hall, 6th ed., pp. 595, 596.

[2] Higgins, "Hague Conferences," pp. 293, 294.

"(*a*) If he commits hostile acts against a belligerent;

"(*b*) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties."

In such a case the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent state could be for the same act.

"18. The following acts shall not be considered as committed in favor of one of the belligerents within the meaning of Article 17, letter (*b*).

"(*a*) The furnishing of supplies or the making of loans to one of the belligerents, provided that the person so furnishing or lending neither lives in the territory of the other party nor in territory in the occupation of that party and that the supplies do not come from these territories.

"(*b*) The rendering of services in matters of policy or civil administration."

The two following wishes (*vœux*) were embodied in the final act of The Hague conference of 1907 and are enumerated there as (2) and (3).

They read as follows:

"(2) The conference expresses the wish that, in case of war, the responsible authorities, civil as well as military, should make it their special duty to insure and safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations between the inhabitants of the belligerent states and neutral countries."

"(3) The conference expresses the wish that the powers should regulate by special treaties, the position, as regards military charges, of foreigners residing within their territories."

Of these *vœux* Westlake says: "The second of the above wishes is a very proper one and will be understood when it is remembered that several Spanish-American states, led by the great immigration into them to claim the children of immi-

grants as subjects by reason of their birth on the soil, have been engulfed in controversies with European powers who have considered that the principle of nationality by parentage ought to exempt such children from military service."[1]

The single Article 19 of Chapter IV of the Convention V under discussion treats of railway material, allowing as it does the free transfer of railway material except in cases of necessity.

178. **Proclamations and Declarations of Neutrality.**—While it is not a duty on the part of a neutral state to issue any proclamation or declaration of neutrality after the notification of the commencement of war, it has become customary to do so, especially when commercial interests are involved or the proximity of the hostile operations makes it advisable.

The practice of issuing such declarations or proclamations has several advantages: it calls the attention of the nationals of the state to the neutrality or corresponding municipal laws, to the obligations and penalties of citizens arising from the existence of a state of war; it is useful as a supplement to the neutrality laws in publishing the policy of the government toward the belligerents and in a maritime war giving the rules to be enforced as to the entry and use of its waters and ports by belligerent fleets and vessels. See Appendix V.

Proclamations of this sort have been issued by the Presidents of the United States from the earliest days in wars in which the country and its citizens were likely to come in contact. So far as the British Empire is concerned, it is not unusual for the governors of colonies likely to be involved to issue separate proclamations with especial reference to use of their ports by belligerent vessels of war.

In a civil war it is not unusual to combine with the proclamation of neutrality the recognition of a state of belligerency in the war; in fact, without such recognition there can be hardly an existence of a state of neutrality. Of course, there is no state of neutrality required or existing in international law be-

[1] Westlake, 2d ed., vol. II, p. 135.

tween a state and its insurgents when unrecognized. This, as we have seen can, however, be made a matter of neutrality laws or acts as municipal statutes.

TOPICS AND REFERENCES

1. The Creation of Neutral States by Commencement of War—

   Westlake, 2d ed., vol. I, 52–54; vol. II, 20–31. Higgins, "Hague Peace Conferences," 202–5. Oppenheim, "International Law," 2d ed., vol. II, 373–7.

2. The Status and Principles of Neutrality—

   Westlake, "International Law," 2d ed., vol. II, 190–8. Hall, "International Law," 6th ed., chap. III, 588, etc. Moore's "Digest of International Law," vol. VII, 860–871.

3. The Development of the Law of Neutrality—

   G. B. Davis, "International Law," 3d ed., 377–394. Westlake, "International Law," 2d ed., vol. II, 198–207. Woolsey, "International Law," 6th ed., 267–296.

4. Neutral Rights and Duties in Land Warfare—

   Higgins, "Hague Peace Conferences," 281–294. Oppenheim, 2d ed., 386–393, 397, 398, 409–416, 426–432. Holland, "Laws of War on Land," 62–68.

5. Proclamations and Declarations of Neutrality—

   Moore's "Digest of International Law," vol. VII, 1002–10. Fenwick, "Neutrality Laws of the United States," 1913, 5, 17, 25, 33, 42, 44–46, 53, 55–59, 145, etc. Oppenheim, 2d ed., vol. II, 374. Appendix V.

CHAPTER XXIV

RIGHTS AND OBLIGATIONS OF NEUTRALS AND BELLIGERENTS IN MARITIME WARFARE

179. The Inviolability of Neutral Territory and Waters.— The first article of Convention XIII of The Hague conference respecting the rights and duties of neutral powers in maritime war treats of the inviolability of neutral territory and waters in maritime war. It is in a sense a repetition of Article 1 of Convention V, relating to land warfare but emphasizing the water area of that territory. The articles that follow detail some of the possible violations. The first article reads as follows:

"Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality."

This is a sound general principle based upon the right of sovereignty, which is a fundamental right of a sovereign state and "includes the complete inviolability of its territory from belligerent operations." "If a violation of neutrality," says Higgins, "occurs, it is a neutral's duty to take steps to obtain redress, especially where the other belligerent is injuriously affected; but this is not definitely stated in the convention."[1]

Article 2 goes on to say:

"Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power constitutes a violation of neutrality and is strictly forbidden."

[1] Higgins, "Hague Conferences," p. 461.

The application of the general principle in the article just given follows logically and is recognized in theory and generally in practice, though there have been violations in practice in recent wars.

In the War of 1812 neutral territory was violated by the capture of the *Essex* and the privateer *General Armstrong* by a British naval force. In our Civil War neutral territory was violated by the capture of the *Florida* in Bahia, a Brazilian port, and of the *Chesapeake* in a port in Nova Scotia, by vessels of the United States, while as late as the Russo-Japanese War the capture of the partly dismantled destroyer *Ryeshitelni*, in the Chinese port of Chifu by Japanese destroyers is one of the most recent examples of violation of neutral territory.[1]

It is held by some writers, Hall among the number, that in case of hostilities in neutral waters, the neutral is freed from responsibility when the vessel attacked defends itself instead of relying entirely upon the protection of the neutral power. A decision to that effect was given by Louis Napoleon, then President of the French Republic, in 1852, in the case of the *General Armstrong*, attacked by a British fleet in the harbor of Fayal in 1814. This view and award cannot be considered as an accepted one at the present time. The circumstances of the case, with an attack impending for some little time and with the privateer practically under the guns of a battery of the neutral, justifies the claim made by the United States for reparation from the neutral.

In cases of hostilities in neutral waters the best ruling seems to the writer to be that, if a belligerent vessel is attacked in neutral waters and it has reason to believe that sufficient protection will be seasonably afforded by the neutral, it should not engage in hostilities; but that otherwise it has a right to defend itself.

If, on the contrary, a vessel captured in neutral territory was

[1] See *The Anna* (5 Rob. 375); *The Anne* (3 Wheaton, 435); *The Eliza Ann* (1 Dod, 244); and *The Florida* (101 U. S. 37).

the one to commence the attack she forfeits neutral intervention upon her behalf for restoration.[1]

Article 3 of this convention treats further upon this subject and says:

"When a ship has been captured in the territorial waters of a neutral power, such power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize-crew.

"If the prize is not within the jurisdiction of the neutral power, the captor government on the demand of that power must liberate the prize with its officers and crew."

This convention was signed by the United States and ratified by action of the Senate, April 17, 1908, with the understanding that the last clause of Article 3—which is the previous paragraph—implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.

In Article 3 of Convention XII of the second Hague conference, which has been ratified by the United States with an additional protocol, provides that judgments can be brought before the international prize-court in case of an enemy ship captured in the territorial waters of a neutral power, when that power has not made the capture the subject of a diplomatic claim.

The decision of the Supreme Court of the United States is thus overruled by these conventions as treaty law so far as the signatories are concerned, when it stated in the case of the *Sir William Peel* that "neither an enemy nor a neutral acting on the part of an enemy can demand restitution of captured property on the sole ground of capture in neutral waters."[2] It may be mentioned, however, that this opinion of the Supreme Court in this case was practically reversed by the award of

[1] Stockton, "Manual for Naval Officers," p. 226.

[2] Moore's "International Arbitrations," vol. IV, pp. 3935–48.

the mixed commission for the arbitration of certain claims of British subjects against the United States arising during the Civil War. The award of the commission was made upon the ground "that the capture within neutral waters of Mexico was absolutely illegal and void."

Proceeding with Convention XIII, we find in Article 4 that "it is provided that a prize-court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters." This is in accordance with the historical policy of the United States, established definitely from the attempts of M. Gênet to establish French prize-courts on American territory. The use of the word "*belligerent*" in this case allows the establishment of an international prize-court on neutral territory.

180. The Use of Neutral Waters as a Base of Naval Operations.—In Article 5 of the Convention XIII now under consideration it reads:

"Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries and, in particular, to erect wireless-telegraph stations or any apparatus intended to serve as a means of communication with the belligerent forces on land or sea."

The first part of this article embodies the principle of the first part of the second rule of the treaty of Washington of 1871, which is worded from the standpoint of the duty of a neutral state as follows:

"A neutral government is bound . . . secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other."

The possible uses of a port or waters of a neutral as a base of supplies and operations are given in fuller detail in many of the pertinent articles that follow in this convention.

Jomini gives the definition of a base of operations as a place from which an army draws its resources and reinforcements, from which it sets forth on an offensive expedition, and in which it finds a refuge at need.

The crucial test of a naval base in these days in a neutral country is not the frequency of resort, but the fulness of the necessary supplies and repairs attained and the length of stay permitted. In the days of the auxiliary steamers like the *Shenandoah,* a Confederate cruiser during the Civil War, a base like Melbourne gave to that ship the opportunity to make a campaign that extended to the extreme North Pacific Ocean and enabled a return from there to the home base of English waters without resort to any other port or to the facilities of any other base.[1]

During the Russo-Japanese War the governor of Malta issued a proclamation refusing hospitality to belligerent ships proceeding to the seat of war or engaged in the search for contraband.

The length of the stay of a belligerent cruiser is also a determining question as to the use of a port as a base or asylum, and it should not exceed the time for the urgent necessities, and if prolonged the vessel and its personnel should be interned.

181. Obligations of Neutrals as to Their Waters.—"The supply in any manner," says Article 6 of the XIII Convention of the second Hague conference, "directly or indirectly, by a neutral power to a belligerent power, of war-ships, ammunition, or war material of any kind is forbidden."

This would have prevented the sale of discarded arms by the United States Government to the French during the Franco-German War of 1870. Although this sale began before the outbreak of hostilities, its continuance afterward was unjustifiable.

During the Russo-Japanese War several merchant steamers of the North German Lloyd and of the Hamburg-American steamship lines were sold to the Russian Government and at once enrolled in the Russian navy as second-class cruisers. Hershey says of this that "in view of the close and intimate

[1] Stockton, "Manual for Naval Officers," pp. 223–5.

relations which subsist between these companies and the German Government, the sale and delivery of such vessels would seem to be impossible without the consent or connivance of that government, and it can hardly be contended that such consent or connivance could be given without a serious breach of obligation."[1] The readiness with which these vessels were converted into vessels of war shows the necessity of increased circumspection in such matters. Japan, however, made no protest as to this transaction.

Article 7 says that:

"A neutral power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet."

Article 8 reads that:

"A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations which has been adapted in whole or in part within the said jurisdiction to warlike use."

This article is substantially the first rule of the treaty of Washington in regard to the Confederate cruiser *Alabama* and others of the same nature. This has been referred to in previous pages. For the phrase "due diligence" the term "means at its disposal" has been substituted. It would seem both from the intent and wording of the above article that the construction or sale of any vessel which is adapted to a warlike use is forbidden to the neutral. By this article neither the sale of the German vessels just referred to nor the sale and delivery of a torpedo-boat for Japanese use by Americans in the same war

[1] Hershey, "The Russo-Japanese War," p. 110.

would be permissible, even if the latter goes as cargo instead of under its own propulsion.

Article 9 says: "A neutral power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions issued by it in regard to the admission into its ports, roadsteads or territorial waters of belligerent war-ships or of their prizes.

"Nevertheless, a neutral power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads."

In Article 10 it is stated that:

"The neutrality of a power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents"; while, in Article 11, "a neutral power may allow belligerent war-ships to employ its licensed pilots." This means, as generally understood, local pilots rather than coastal pilots or navigators.

Article 12 says that:

"In default of special provisions to the contrary in the laws of a neutral power, war-ships of the belligerent are forbidden to remain in the ports, roadsteads, or territorial waters of said power for more than twenty-four hours, except in the cases covered by the present convention."

This article is vague as it allows special provisions to the contrary to its main object, the limitation of a stay in a neutral port to twenty-four hours. It comes very near to allowing a belligerent to base his operations from neutral waters in violation of a previous article of the convention. It will have to be made a special provision, however, which should be published, to be applied impartially to all belligerents. War-ships in this case should include auxiliaries.

Articles 13 and 14 say that:

13. "If a power which has been informed of the outbreak of hostilities learns that a war-ship of a belligerent is in one of

its ports or roadsteads, or in its territorial waters it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local laws.

"A belligerent war-ship may not prolong its stay in a neutral port beyond the time permitted except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end."

14. "The regulations as to the length of time which such vessels may remain in neutral ports, roadsteads or waters do not apply to war-ships devoted exclusively to religious, scientific, or philanthropic purposes."

Article 15 says: "*In default of special provisions to the contrary* in the laws of a neutral power, the maximum number of war-ships belonging to a belligerent which may be in one of the ports or roadsteads of that power simultaneously shall be three."

Article 16. "When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

"The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

"A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary."

These rules are in accordance with accepted usage, and their utility was borne out largely by the experience of neutral powers during our Civil War. With the exception of Article 15 they have the merit of definiteness without the vagueness of preceding rules.

Article 17. "In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy and may not add in any

manner whatever to their fighting force. The local authorities of the neutral power shall decide what repairs are necessary, and these must be carried out with the least possible delay."

This rule is in accord with accepted usage and was the practical rule in force during the Russo-Japanese War in the various neutral ports in which the Russian vessels took refuge after the defeat of their fleet.

Article 18. "Belligerent war-ships may not make use of neutral ports, roadsteads, and territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews."

It will be observed by the United States neutrality proclamation of 1914, in Appendix V, that a certain accession is allowed, notwithstanding this article, to the crew of a visiting belligerent. The substance of the second rule of the treaty of Washington of 1871 is given here, the first half of it being contained in Article 5. This may be held as a vindication of the American contention shown in that treaty as to a proper neutrality.

Article 19. "Belligerent war-ships may only be revictualled in neutral ports or roadsteads to bring up their supplies to the peace standard.

"Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

"If, in accordance with the law of the neutral power, the ships are only supplied with coal twenty-four hours after their arrival, the permissible duration of their stay is extended by twenty-four hours."

"This article," says Higgins, "completely fails to satisfy the requirements of powers which set a standard of neutrality and desire strictly to maintain the rule that neutrals must abstain from rendering assistance to belligerents. . . . This

article has not been accepted by Great Britain and Japan."[1] In its working it is so uneven that it would be better to do away with the discrimination that the United States makes and allow the general filling of bunkers and tanks that are used habitually for the carriage of coal or oil, and when this should cause a decided aid which is not impartial or equal to both belligerents there should be a denial of the use of coaling ports entirely, as Great Britain did to the Russian fleet bound for warlike operations to Asiatic waters in the Russo-Turkish War.

Article 20. "Belligerent war-ships which have shipped fuel in a port belonging to a neutral power may not within the succeeding three months replenish their supply in a port of the same power."

Article 21. "A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize-crew."

Article 22. "A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

The following article—No. 23—was not accepted by the United States, Great Britain, and Japan and was reserved by them in signing and in its ratification. It reads:

"A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a prize-court. It may have the prize taken into another of its ports.

"If the prize is convoyed by a warship, the prize-crew may go on board the convoying ship.

[1] Higgins, "Hague Conferences," p. 477.

"If the prize is not under convoy, the prize-crew are left at liberty."

The refusal to allow the above aid to a belligerent as to prizes in war time is in accordance with the historical position of the United States as a neutral power and in accordance with British usages. It would enable a belligerent cruiser to carry on operations without the inconvenience of sending prizes to home ports.

Article 24 reads that:

"If, notwithstanding the notification of the neutral power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures.

"When a belligerent ship is detained by a neutral power, the officers and crew are likewise detained.

"The officers and crew so detained may be left in the ship or kept either in another vessel or on land and may be subjected to such measures of restriction as it may appear necessary to impose upon them. A sufficient number of men must, however, be always left on board for looking after the vessel.

"The officers may be left at liberty on giving their word not to quit the neutral territory without permission."

This treatment and the subsequent internment are similar in principle to that of land forces under similar circumstances.

Article 25 reads that:

"A neutral power is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions of the above articles occurring in its ports, roadsteads, or its waters."

By this article the incorporation of the three rules of the treaty of Washington into a great international act was completed by the second Hague conference. The words "to exer-

cise due diligence" in the treaty of Washington were replaced in the above article by the words "to exercise such vigilance as the means at its disposal permit."[1]

By Article 26 "the exercise of a neutral power of the rights laid down in the present convention can never be considered as an unfriendly act by either belligerent who has accepted the articles relating thereto."

This article and the general tenor of the convention should strengthen the action and duties of a weak neutral power. The convention is, however, far from perfect. There are too many provisions allowing varying action on the part of a neutral. There is also more stress laid upon the rights of neutrals than their obligations, and it is hoped that in a future Hague conference a revision will be made of this convention.

182. The Rights of Visit and Search.—This is a great and ancient war right of the belligerent powers exercised on the high seas toward neutrals and enemies. Co-existent with and growing out of the right of capture, it is essential to ascertain whether neutral vessels are really such or have made themselves subject to capture by the carriage of contraband, unneutral service, or violation of a blockade.

Chief Justice Marshall says upon this subject: "It (the right of search) has been truly denominated a right growing out of, and ancillary to, the greater right of capture. When this greater right may be legally exercised without search, the right of search can never rise or come into question."[2]

Sir William Scott (afterward Lord Stowell) also said in the famous case of the *Maria:*

"The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. . . . This right is so clear in principle, that no man can deny it who

[1] Higgins, "Hague Conferences," pp. 453, 480.
[2] C. J. Marshall, *The Nereide*, 1815 (9 Cranch, 388, 27).

admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The right is equally clear in practice; for the practice is uniform and universal upon the subject."[1]

As the right of visit and of capture is the right exercised only by a belligerent under direct national authority, it is consequently confined in its exercise to public vessels of war duly commissioned by the state. On the other hand, this right can only be exercised toward enemy vessels and neutral merchant or privately owned vessels.

"As a belligerent right it cannot be questioned, but it must be conducted with as much regard to the rights and safety of the vessel detained as is consistent with a thorough examination of the character and voyage. Any detention of the vessel beyond what is necessary is unlawful, as is also any transgression of the bounds within which the examination should be confined." [2]

This right should be exercised, as stated above, with due consideration and in conformity (when existing) with treaty provisions by the boarding vessel whose national colors should always be displayed at the time.

"The vessel is brought to by firing a gun with blank charge. If this is not sufficient to cause her to lie to, a shot is fired across her bows, and in case of flight or resistance force can be used to compel the vessel to surrender.

"The boarding vessel should then send one of its smaller boats alongside with an officer in charge wearing side-arms to conduct the search. Arms may be carried in the boat, but not upon the persons of the men. When the officer goes on board the vessel he may be accompanied by not more than two men, unarmed, and he should at first examine the vessel's papers to ascertain her nationality, the nature of her cargo, and the ports of departure and destination. If the papers

[1] Scott's "Cases," p. 858. [2] The *Anna Maria* (2 Wheaton, 327).

show contraband, an offence in respect of blockade, or enemy service the vessel should be seized; otherwise she should be released, unless suspicious circumstances justify a further search. If the vessel be released an entry in the log-book to that effect should be made by the boarding-officer."[1]

In searching a vessel it should be done in presence of the master of the vessel, no force being applied. If the master should not open locked places, or assist in the examination or search, sufficient cause is given for seizing the vessel as resisting search. In case of suspicious developments of sufficient gravity the vessel can be detained and sent into port for a more thorough examination. In case of innocence the vessel is entitled in such cases to indemnity for losses of time, etc.

By the declaration of London, forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases condemnation of the vessel. The cargo is liable to the same treatment as that given to the cargo of an enemy vessel. Goods belonging to the master of the vessel or its owner are treated as if they were enemy goods.[2] An attempt to escape is not considered as forcible resistance as the term is used in its literal sense. Force can be used to overcome either resistance or flight, but condemnation follows forcible resistance alone. An authority given privately owned vessels to carry arms for protection does not give it exemption from proper visit and search.

183. **Convoy.**—Articles 61 and 62 of the declaration of London, of which the United States is a signatory and ratifying power, treat the subject of convoy as follows:

"Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent war-ship, all information as to the character of the vessels and their cargoes, which could be obtained by search.

[1] Stockton, "Laws and Usages of War at Sea," art. 32.
[2] Declaration of London, Art. 63. See Appendix IV.

"If the commander of the belligerent war-ship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the war-ship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels."[1]

This exemption from search of neutral merchant vessels under convoy of a man-of-war of their own nationality was largely due to the efforts of the American delegation at the London naval conference and is in accordance with American contentions in the past.

If a neutral vessel seeks the convoy of enemy men-of-war her position, according to general ruling, becomes that of an enemy vessel from what may legitimately be considered as constructive resistance. By a treaty with Prussia of 1785, revived in 1828, and held to be still in force with Germany, if Germany and the United States are both neutrals or have a common enemy there is a mutual right of protection and convoy to each other's merchantmen.

184. Spoliation of Papers.—If a vessel presents fraudulent papers, conceals, alters, or destroys papers or is without the necessary papers she can be properly detained or seized. This is generally known as the spoliation of papers.

A discussion of this matter in the accompanying report to the declaration of London, drawn up by Doctor L. Renault, reads:

"It is perhaps useful to indicate certain cases in which the capture of a vessel would be justified, whatever be the ultimate decision of the prize-court. Notably, there is the case where some or all of the ship's papers have been thrown overboard,

[1] See declaration of London, Appendix IV.

suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers. There is in such a case an element which will justify any suspicion and afford an excuse for capturing the vessel, subject to the master's ability to account for his action before the prize-court. Even if the court should accept the explanation given and should not find any reason for condemnation, the parties interested cannot hope to recover compensation.

"An analogous case would be that in which there were found on board two sets of papers, or false or forged papers, if this irregularity were connected with circumstances calculated to contribute to the capture of the vessel."[1]

185. **Hostile Expeditions.**—The formation of hostile expeditions in neutral territory and their departure for warlike operations therefrom is a violation of the tenets of international law and, in most cases, of the municipal laws of states.

So far as international law is concerned the following rules are in force to the signatories of The Hague Conventions V and XIII of 1907. In Convention V it is stated, in Article 4, that "corps of combatants cannot be formed nor recruiting offices opened on the territory of a neutral power in the interests of belligerents." By Article 8 of Convention XIII we have also seen that "a neutral government is bound to employ the means at its disposal . . . to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations which has been adapted in whole or in part within the said jurisdiction to warlike use." This general restriction is supplemented by a previous prohibition in Article 5 of the same convention in which the belligerents are forbidden to use and, by analogy, neutrals prohibited from allowing the use by belligerents of neutral waters as a base of naval operations against their adversaries.

A hostile expedition in the sense under discussion can be defined in accordance with international law as one starting

[1] Declaration of London, accompanying report, Appendix IV.

from neutral territory with the present purpose of entering into hostilities; it should be under naval or military command, and it should be organized with a view to acts of war against a belligerent or a power at peace with the country from which it departs.

The last clause includes assistance in case of an insurrection or other form of domestic violence which has not attained a recognition of belligerency.

"It was decided in 1870, when a large number of French and Germans returned to their respective countries to enter military service that, so long as they travelled as individuals or not organized, they did not answer to the description of a hostile expedition, even if there were large consignments of arms and ammunition to the French Government on board of the same ship which carried the French flag." [1] The arms and ammunition in this case were not connected with the individual passengers referred to but carried in the way of ordinary commerce. It has been customary in all European wars to call home the reservists to serve with the armies of the belligerents mobilized upon a war footing. Of this phase of modern warfare the report accompanying the London naval conference speaks as follows: "Supposing the case is one of individuals who are natives of a continental European country and are settled in America; these individuals have military obligations toward their country of origin; they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. . . . It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral governments would not submit, to pick out of the passengers in a vessel, those who are bound to perform military service and are on their way to do so." [2] In the same way, individuals going singly to enlist in a belligerent cause do not constitute a hostile expedition.

[1] Stockton, "Manual of Int. Law," p. 228.
[2] Higgins, "Hague Conferences," p. 594.

From a municipal point of view we will quote the law of the United States upon this matter. Section 5286 of the United States Revised Statutes reads:

"Every person who within the territory or jurisdiction of the United States begins, or sets on foot, or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor," etc.

President Cleveland in his proclamation in regard to the Cuban insurrection, dated July 27, 1896, declared that in accordance with the judicial decision of the United States Supreme Court a military expedition under our neutrality laws consists of "any combination of persons organized in the United States for the purpose of proceeding to make war upon a foreign country with which the United States is at peace and provided with arms to be used for such purpose," and, furthermore, that the providing or preparing of the means for such military expedition or enterprise includes the furnishing or aiding in its transportation.

186. **Right of Angary.**—The right of angary, which literally means the right of transport, was formerly confined to purposes of that nature so far as neutrals were concerned. It was a practice of belligerents to use, by force if necessary, neutral merchant vessels and their crews for the purpose of transporting troops, ammunition, and provisions to certain destinations, paying freight, etc., in advance.

This ancient right has fallen into disuse and is to a growing extent supplanted by a modern right under the same name which comprises the right of belligerents to make use of or destroy, for the purpose of necessary offence and defence, neutral property on the high seas or the territories of either belligerent.

The objective of the right of angary, according to Oppen-

heim, "is such property of subjects of neutral states as retains its neutral character from its temporary position on belligerent territory and which, therefore, is not vested with enemy character." [1]

The United States Naval War Code of 1900 states that:

"If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise used for military purposes, but in such cases the owners of the neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed upon in advance with the owner or master of the vessel; due regard must be had for treaty stipulations upon these matters."[2]

It might be mentioned that in these times the right of angary as just expressed exists on land as well as at sea. An application of the right happened in 1871, during the Franco-German War. The German forces sunk some British vessels lying in the Seine River for the purpose of blocking the navigation of the river to the French gunboats. The German Government did not recompense the owners of the vessels at the time but afterward paid indemnities.

In Article 19 of Convention V of the second Hague conference the right of angary is provided for in the case of neutral railway material coming into the territory belonging to or occupied by a belligerent power. Adequate compensation is also required.

This subject needs further attention in future international conferences and could be taken up in connection with the third wish (*vœu*) of the final act of the second Hague conference, which reads as follows:

"The conference expresses the earnest desire that the powers should regulate by special treaties the situation, as regards military charges, of foreigners established in their territories."[3]

[1] Oppenheim, 2d ed., vol. II, p. 447.
[2] Stockton, "Laws and Usages of War at Sea," art. 6.
[3] Higgins, "Hague Conferences," p. 69.

TOPICS AND REFERENCES

1. The Inviolability of Neutral Territory and Waters—

   Westlake, "International Law," 2d ed., 233–5. Hall, "International Law," 6th ed., 594–8. Naval War College, "International Law Topics," etc., 1913, 11–53.

2. The Use of Neutral Waters as a Base of Naval Operations—

   Oppenheim, "International Law," 2d ed., vol. II, 400–5. Moore's "Digest of International Law," vol. VII, 934–950. Westlake, 2d ed., vol. II, 222.

3. Obligation of Neutrals as to Their Waters—

   Moore's "Digest of International Law," vol. VII, 885–908. Naval War College, "International Law Topics," 1911, 9–36. Davis, "International Law," 3d ed., 422–5, 434–440.

4. Rights of Visit and Search—

   Woolsey, 6th ed., 357–386. Hall, "International Law," 6th ed., chap. X. Oppenheim, 2d ed., vol. II, chap. VI.

5. Convoy—

   Naval War College, "International Law Topics," etc., 1911, 46–50. Westlake, 2d ed., vol. II, 300. Davis, "International Law," 3d ed., 488–491.

6. Spoliation of Papers—

   Moore's "Digest," vol. VII, 485–7. Hall, 6th ed., 736–8. Oppenheim, 2d ed., vol. II, 543–5.

7. Hostile Expeditions—

   Fenwick, "Neutrality Laws of the United States," 55–79. Oppenheim, 2d ed., vol. II, 400. Hall, "International Law," 6th ed., 602–6.

8. Right of Angary—

   Oppenheim, 2d ed., vol. II, 446–9, 385, 510. Westlake, 2d ed., vol. II, 134. Hall, 6th ed., 741–3.

CHAPTER XXV

BLOCKADE

187. Blockade—Its Extent and Effectiveness.—By blockade we mean maritime blockade and as a war operation alone. Blockade of an enemy's port in time of war is a belligerent right and may be still considered as a major naval operation. It must be established between legal belligerents. A sea blockade may be for purely military purposes, to mask or contain a naval force of the enemy and prevent it operating upon the high seas; or it may be purely commercial, for the purpose of the stoppage of all trade and commerce of the port and the export and import of commercial products and supplies as well as foodstuffs and munitions of war. A blockade duly established may of course combine in its aims both military and commercial purposes.

A maritime blockade exists not only before the entrances to a port but includes its approaches, its neighboring marginal waters, and the high seas near by. As, ordinarily, the port, its marginal waters, and the high seas are used by vessels of all nations, a sea blockade is one closely touching the trade and shipping of neutral nations; in fact, as a rule, those who are generally engaged in the evasion of blockade in vessels of any size are apt to be neutral subjects in neutral vessels and the questions concerning sea blockade are hence questions largely international in law and scope.[1]

The conditions of a blockade are treated in one phase or another by the first seven articles of the declaration of London, though amplifications also follow later.[2]

[1] Stockton, "Manual for Naval Officers," p. 235.
[2] Declaration of London, chap. I, Appendix IV.

It is provided, first, that a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy, which Article 18 amplifies by stating that the blockading forces must not bar access to neutral ports or coasts. Ports of a neutral and belligerent may easily be so placed geographically that without care a blockade may interfere with the entry to and trade of a neutral port; in fact, such proximity may compel a limitation in blockading operations affecting it in both area and efficiency. The neutral rights to innocent free trade and passage compels, in cases of this kind, such limitations. There is another reason for the ruling just given, and that is that a neutral port may be a port of departure and supplies of blockade-runners and yet within the zone of blockading operations. In this case too close supervision of such a port may be beyond belligerent rights and injurious to the commerce of the port. Such cases arose during the American Civil War which led to almost a Federal blockade of Nassau, in the Bahamas, and the Bermudas, and caused the denial of the use of Nassau to Federal cruisers.[1]

In accordance with the declaration of Paris, of 1856, "a blockade, to be binding, must be, first of all, effective; that is to say, it must be maintained by a force sufficient, really, to prevent access to the enemy coast-line." This is reiterated by the declaration of London. The declaration of Paris binds by accession or as original signatory almost all of the maritime states, while in the case of the United States it not only has accepted, in principle, the declaration of Paris but is, in fact actually bound by the declaration of London.[2]

The question of effectiveness is a serious one and much disputed; it has to be decided as a fact on the merits of each case by proper judicial authority, which at present is the national prize-courts of the captor—eventually, we hope, as a last resort, by the proposed international prize-court. At times the feeling prevails that the national prize-court of the captor is

[1] Declaration of London, Art. 2. [2] Declaration of London, Art. 3.

apt to consider a blockade effective if so declared by its national government.

At present, when a neutral desires to contest decisions of a belligerent prize-court in which it is interested, the matter is apt to be finally settled either by diplomatic discussions, by decisions of mixed commissions, or by temporary tribunals of The Hague.[1]

A blockade must be continuously maintained; if it is withdrawn or raised it must be re-established with the formalities of its original establishment. By usage, however, a blockade is not regarded as raised when in stress of weather the blockading forces are temporarily withdrawn. This is less likely to happen in these days of full-powered steamers. If a blockade is withdrawn or raised by the force of arms or the approach of a superior force it must, as just mentioned, be formally re-established in all its effectiveness.

A blockade must be impartially applied to the ships of all nations. The commander of a blockading force may, however, give permission to a neutral war vessel to enter and subsequently to leave a blockaded port. Although the senior officer of the blockading force must act impartially, as just stated, the accompanying report of the declaration of London states that, "nevertheless, the mere fact that he has let a war-ship pass does not oblige him to let pass all neutral war-ships which may desire to enter. It is a question of judgment. The presence of a neutral war-ship in a blockaded port may not have the same consequences at all stages of the blockade, and the blockading commander must be left free to judge whether he can be courteous without making any sacrifice of his military interests."[2]

This question has been at times a seriously disputed one. During the Spanish-American War of 1898 it was a source of

[1] James Brown Scott, "The Declaration of London," etc., *A. J. I. L.*, vol. VIII, no. 2, pp. 276–7.

[2] General report accompanying the declaration of London, p. 36, Parliamentary Papers, no. 4, 1909.

considerable irritation and friction at Manila by the assumption on the part of the German naval forces of a right to entry and stay within the blockading lines in Manila Bay. One of the best opinions upon the matter which was quoted authoritatively at that time is that of Ferguson, a Dutch authority. He says:

"During the continuance of the state of blockade, no vessels are allowed to enter or leave the blockaded place without special license or consent of the blockading authority. Public vessels or vessels of war of neutral powers are equally bound by the same obligation to respect the blockade. When the public vessel of a neutral state is allowed to have communication with a blockaded place, the neutral commanding officer is obliged to observe strict neutrality and to comply with the conditions under which such permission has been granted to cross the lines of the blockading belligerent. The impartiality which must be the prevailing feature of an effective blockade prohibits, except to public vessels, permission to enter the blockaded place to be given except in extreme cases of positive necessity. Diplomatic agents and consular officers of a neutral state are also allowed the amount of communication necessary for the fulfilment of their official duties."[1]

In case of distress, which must be verified by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.[2] The accompanying report to the declaration of London says that "it is needless to say that a blockading squadron which insisted on preventing a vessel in distress from passing might do so if she (it) afforded her the help which she needed."[3]

188. Declaration and Notification of Blockade.—A blockade, to be binding, must be duly declared and notified in accordance with the rules that follow. By the *declaration* of a blockade is

[1] Ferguson, 1884, vol. II, pp. 486, 487.
[2] Declaration of London, Art. 7, Appendix IV.
[3] Parliamentary Papers, no. 4, 1909, p. 38, Appendix IV.

meant the official statement by the competent authority, which may be the chief ruler of the blockading power or the commander of the squadron, that a blockade is or is about to be established under certain specified conditions. The *notification* is the action on the part of the competent authority in bringing the declaration of blockade to the knowledge of the neutral powers and certain other authorities.[1]

The declaration of blockade, whether made by the power concerned or by the naval authority acting in its name, should specify (1) the date when the blockade begins; (2) the geographical limits of the coast-line under blockade; and (3) the period within which neutral vessels may come out. The period just spoken of must be allowed and be reasonable in duration. If the operations of the blockading power, or of the naval authorities acting in its name do not tally with the first and second specifications, which, as numbered above, must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.[2]

The notification of the declaration of blockade is made (1) to neutral powers by the blockading power by means of a communication addressed to the governments direct or to their representatives accredited to it, and (2) to the local authorities of the blockaded port by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coast-line under blockade as soon as possible.[3]

It is the duty of the neutral governments when duly advised of the declaration of blockade to publish this intelligence especially to their seaports. The notification to the local authorities of the blockaded port places upon them the obligation of notifying the foreign consular officials within the district

[1] Declaration of London, Art. 8, and accompanying report, Appendix IV.

[2] Declaration of London, Arts. 9 and 10, Appendix IV.

[3] Declaration of London, Art. 11, and accompanying report, Appendix IV.

blockaded. In case of an extension of the blockaded area or of a re-establishment of a blockade, the rules as to notification and declaration must be again followed in each instance as well as those of notification in case of a voluntary raising of a blockade or any restriction in its area.

189. Liability to Capture for Breach of Blockade.—"The liability of a neutral vessel to capture for breach of blockade is contingent," says Article 14 of the declaration of London, "on her knowledge, actual or presumptive, of the blockade." "Failing proof to the contrary," the next article goes on to say, "knowledge of the blockade is presumed if the vessel left a neutral port subsequent to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time."

If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book and must state the day and hour and the geographical position of the vessel at the time.

"If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free."[1]

If the commander of the blockading forces has done all in his power to make the notification to the local authorities of the blockaded port but has failed, owing to the lack of good will and faith on the part of the local authorities, he cannot be forced to let vessels out.

"Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective."[2]

[1] Declaration of London, Art. 16, Appendix IV.
[2] Declaration of London, Art. 17, Appendix IV.

In the general report accompanying the declaration of London the following statement as to the area of operations, made by Admiral le Bris, the naval delegate from France to the conference, met with general approbation. He said that:

"When a government decides to undertake blockading operations against some part of the enemy coast, it details a certain number of war-ships to take part in the blockade and intrusts the command to an officer whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places and instructs each ship as to the part which she has to play and especially as to the zone which she is to watch. All the zones watched taken together, and so organized as to make the blockade effective, form the area of operations of the blockading force.

"The area of operations so constituted is intimately connected with the effectiveness of the blockade and also with the number of ships employed on it.

"Cases may occur in which a single ship will be enough to keep a blockade effective—for instance, at the entrance of a port or at the mouth of a river with a small estuary—so long as the circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider and extends further from the coast. It may, therefore, vary with circumstances and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured."[1]

By the American delegation it was declared that pursuit

[1] Report accompanying declaration of London; see Appendix IV, p. 550.

was considered continuous and not abandoned in the meaning of Article 25 as they understood it, even though it should be given up by one line or in one zone of pursuit of the blockading force to be resumed later by a vessel of the next line until the final pursuit is abandoned.

Whatever may be the final destination of a vessel or her cargo, she cannot be captured for a breach of blockade if, at the moment, she is on her way to a non-blockaded port. By the preceding paragraphs it could be seen if she were outside of the area of operations, even if bound to a blockaded port, she could not be captured. The doctrine of continuous voyages and the right to capture cargo bound for a blockaded port is thus given up by this and the preceding paragraphs by the United States, while, on the other hand, "the view upheld by certain powers that no vessel can be seized for breach of blockade until after a special notification of the existence of the blockade has been entered on her papers by an officer of the blockading squadron, has been also abandoned as no longer in harmony with the conditions and requirements of modern warfare."[1]

A vessel which has violated blockade outward or which has attempted to break blockade inward is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected. If a pursued vessel takes refuge, however, in a neutral port, the pursuit is suspended but not abandoned, and it can be resumed upon her departure from that port.[2]

The final article (No. 21) of the chapter on blockade of the declaration states that "a vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned unless it is proved that at the time of shipment of the goods the shipper neither knew nor could have known of the

[1] Hall, 6th ed., p. 714.

[2] Declaration of London, Art. 20, and accompanying report, Appendix IV.

intention to break the blockade." The vessel is condemned in all cases.

Doctor James Brown Scott, in reviewing this chapter on blockade of the declaration of London, says:

"The provisions of the chapter dealing with blockade seem to be reasonable in their terms and effects, fair to belligerents and neutrals, supposing that enemy ports are to be blockaded and neutrals prevented from trading with them as in times of peace, and so clear and precise, except perhaps in the matter of the area of pursuit and capture of blockade-runners, as to make the rights and duties alike of belligerents and neutrals certain and known in advance of hostilities. No serious or insurmountable objection to their acceptance has been stated."[1]

TOPICS AND REFERENCES

1. Blockade—Its Extent and Effectiveness—

   Scott's "Cases in International Law," 798, 817, 835, etc. Westlake, 2d ed., vol. II, 256–268. "Capture at Sea," by Earl Loreburn, 1913, chap. IV.

2. Declaration and Notification of Blockade—

   Stockton, "Manual for Naval Officers," 236–8. Ferguson, "International Law," 1884, 491–2. Hall, 6th ed., chap. VIII.

3. Liability to Capture for Breach of Blockade—

   Oppenheim, 2d ed., vol. II, 466–478. Moore's "Digest," vol. VII, 820–839. Wilson, chap. XXV.

[1] Scott, "Declaration of London," *A. J. I. L.*, vol. VIII, no. 2, p. 302.

CHAPTER XXVI

CONTRABAND OF WAR. CARRIAGE OF CONTRABAND

190. Definition and General Principles of Contraband.—Contraband of war may be defined as articles which are capable of use as an assistance to the enemy in carrying on war either on shore or afloat.

Contraband trade, or the carriage of contraband, is a trade with a belligerent with the intent to supply him with contraband of war. The prohibition of this trade with the attendant adjudging of the penalties is a belligerent right. This right can only be exercised upon the high seas and the territorial waters of the belligerents and in accordance with the rules and usages of international law.

In a general way the classification made by Grotius has been followed to the present time. His division of articles of trade or commerce was as follows:

"1st. Those articles that are useful solely for war purposes, such as arms, warlike ammunition, etc.

"2d. Those articles that cannot be used for war purposes, such as pictures, statuary, etc.

"3d. Those articles which can be used for warlike or peaceful purposes, such as money, provisions, etc."[1]

So far as they were not bound by treaty, belligerents, however, exercised their discretion in the matter of declaring what was and what was not contraband until the declaration of London was formulated, when the leading maritime powers of the world came to an agreement which, on the whole, is con-

[1] Grotius, III, chap. I, par. 5.

sidered a satisfactory advance as to the whole subject of contraband and its carriage. The divisions of Grotius are followed under the names of absolute contraband, conditional contraband, non-contraband, or the free list.

"The notion of contraband of war," says the accompanying report to the declaration, "connotes two elements: it concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends: if they are destined for a neutral government, no; if they are destined for an enemy government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law."[1]

191. Enumeration of Contraband and Non-Contraband Articles.—The declaration of London, in Article 22, enumerates articles which are absolute contraband when destined for an enemy government and reads as follows:

"Art. 22. The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband:

"(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

"(2) Projectiles, charges, and cartridges of all kinds and their distinctive component parts.

"(3) Powder and explosives specially prepared for use in war.

"(4) Gun-mountings, limber-boxes, limbers, military wagons, field forges, and their distinctive component parts.

"(5) Clothing and equipment of a distinctively military character.

"(6) All kinds of harness of a distinctively military character.

"(7) Saddle, draught, and pack animals suitable for use in war.

[1] Declaration of London, accompanying report, Appendix IV.

"(8) Articles of camp equipment and their distinctive component parts.

"(9) Armor-plates.

"(10) War-ships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

"(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea."

Article 23 provides for any inventions or discoveries which may happen in the future, but they must be, as the article reads, "exclusively used for war."

"Art. 23. Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

"Such notification must be addressed to the governments of other powers, or to their representatives accredited to the power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral powers."

In Article 24 are given articles known as conditional contraband, depending largely upon their destination, as specified in Article 33.

"Art. 24. The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:

"(1) Foodstuffs.

"(2) Forage and grain, suitable for feeding animals.

"(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

"(4) Gold and silver in coin or bullion; paper money.

"(5) Vehicles of all kinds available for use in war and their component parts.

"(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.

"(7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones.

"(8) Balloons and flying-machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying-machines.

"(9) Fuel; lubricants.

"(10) Powder and explosives not specially prepared for use in war.

"(11) Barbed wire and implements for fixing and cutting the same.

"(12) Horseshoes and shoeing materials.

"(13) Harness and saddlery.

"(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments."

"Foodstuffs include products necessary or useful for the alimentation of man, whether solid or liquid.

"Paper money only includes inconvertible paper money, *i. e.*, bank-notes which may or may not be legal tender. Bills of exchange and checks are excluded.

"Engines and boilers are included in the sixth enumeration.

"Railway material includes fixtures (such as rails, sleepers, turntables, parts of bridges) and rolling stock (such as locomotives, carriages, and trucks)."[1]

Article 25 follows the ruling of Article 23.

"Art. 25. Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23."

Article 26 explains itself:

"Art. 26. If a power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such inten-

[1] Declaration of London, accompanying report, Appendix IV.

tion shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23."

Article 27 gives the non-contraband or free list:

"Art. 27. Articles which are not susceptible of use in war may not be declared contraband of war."

This free list reads as follows:

"Art. 28. The following may not be declared contraband of war:

"(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries and yarns of the same.

"(2) Oil-seeds and nuts; copra.

"(3) Rubber, resins, gums, and lacs; hops.

"(4) Rawhides and horns, bones, and ivory.

"(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

"(6) Metallic ores.

"(7) Earths, clays, lime, chalk; stone, including marble, bricks, slates, and tiles.

"(8) Chinaware and glass.

"(9) Paper and paper-making materials.

"(10) Soap, paint, and colors, including articles exclusively used in their manufacture, and varnish.

"(11) Bleaching-powder, soda-ash, caustic soda, salt-cake, ammonia, sulphate of ammonia, and sulphate of copper.

"(12) Agricultural, mining, textile, and printing machinery.

"(13) Precious and semiprecious stones, pearls, mother-of-pearl, and coral.

"(14) Clocks and watches, other than chronometers.

"(15) Fashion and fancy goods.

"(16) Feathers of all kinds, hairs, and bristles.

"(17) Articles of household furniture and decoration; office furniture and requisites."

Great Britain has announced that the following articles on the free list (Article 28) shall be considered as conditional con-

traband: Copper, unwrought; lead, pig, sheet, or pipe; glycerine; ferrochrome; hæmatite iron ore; magnetic iron ore; rubber; hides and skins, raw or rough tanned (but not including dressed leather).

Of this Article 28 the accompanying report states that:

"To lessen the drawbacks of war as regards neutral trade it has been thought useful to draw up this so-called *free list*, but this does not mean, as has been explained above, that all articles outside it might be declared contraband of war.

"The *ores* here referred to are the product of mines from which metals are derived. . . .

"No. 16 refers to the hair of certain animals, such as pigs and wild boars.

"Carpets and mats come under household furniture."[1]

The American delegation in their report say of this list that it is of great benefit to the sea-borne foreign trade of all countries and especially to that of the United States, whose exports and imports would be greatly affected by any uncertainty regarding cotton, wool, silk, jute, rubber, hides, etc.

"Art. 29. Likewise the following may not be treated as contraband of war:

"(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

"(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage."

The articles enumerated in Article 29 are for the special reasons given excluded from treatment as contraband. Hospital ships are not referred to in this article. The word crew here includes all persons in the service of the vessel in general.[2]

[1] Declaration of London, accompanying report, Appendix IV.
[2] Declaration of London, accompanying report, Appendix IV.

192. Destination of Contraband and Consequent Judgment. —As to the destination of absolute contraband the declaration of London says in

"Art. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land."

It makes no difference in the cases coming under this article what the destination of the vessel may be, as the destination of the goods is the determining factor. This article establishes the principle of continuous voyages so far as absolute contraband is concerned. By continuous voyage is meant in this case that the progress of these goods to a final belligerent destination makes their voyage continuous, even if a transshipment occurs at a neutral port. The final and ultimate destination makes the trade in which absolutely contraband goods are carried a contraband trade and subjects them to capture and condemnation. It makes no difference whether the destination is territory belonging to or occupied by the enemy or for his armed military or naval forces, the penalty is the same.[1]

"Art. 31. Proof of the destination specified in Article 30 is complete in the following cases:

"(1) When the goods are documented for discharge in an enemy port or for delivery to the armed forces of the enemy.

"(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

"Art. 32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation."

These articles treat of the necessary proof as to the destina-

[1] Declaration of London, accompanying report, Appendix IV.

tion, which is more fully discussed in the report accompanying the declaration, which can be found in full in Appendix IV of this book.

"Art. 33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the goods can not in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4)."

The above article treats of the destination of conditional contraband, which differs from the rules of absolute contraband in two respects: (1) there is no question of destination for the enemy in general but of destination for the use of his armed forces or government departments, and (2) the doctrine of continuous voyage is excluded.

The articles of conditional contraband carried by neutral carriers are often bulky and are not always distinguishable as to final destination, and they would also be difficult to take from a vessel at sea which is not liable to capture.

"Art. 34. The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband."

The word *commerçant* in the French original is here translated *contractor*. It is referred to as "a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy government with articles of the kind in question."

This article has been the subject of much discussion in England and has been one of the great causes of the opposition to the ratification of the declaration by that country. By the French text of the declaration it was claimed by its opponents that the word *commerçant* applied to any merchant and not to a government contractor as defined in the accompanying report. In addition, as the article reads that an enemy destination is presumed "if the goods are consigned to a fortified place belonging to the enemy," and as most of the British seaports are fortified it was held by the English critics of the declaration that foodstuffs for the use of non-combatants would be prevented from reaching by this expression innocent destinations. It certainly was not the intention of the conference, as understood by the writer, a delegate from the United States, that these interpretations of the text were correct. The enemy's forces alone were contemplated as the destination. The accompanying report with its explanations as adopted also were considered by the writer an authoritative exposition of the declaration.

A further discussion as to the presumptions referred to in the article will be found in the accompanying report, in Appendix IV.

Articles 35 and 36 read as follows:

"Art. 35. Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

"The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

"Art. 36. Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred

to in Article 33, is liable to capture in cases where the enemy country has no seaboard."

Article 35 emphasizes the exclusion as a rule of the doctrine of continuous voyages from additional contraband. The pivot of contraband trade rests upon the ship's papers unless they are manifestly false. Article 36 gives, however, an exception in favor of the doctrine of continuous voyages when the only port of supply of an enemy country is a neutral port. This was the case of the Boer country and would be the case of Bolivia and Servia.

The extent of the liability of a contraband carrier is shown in Article 37.

"Art. 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination."

The limitation, so far as the taint is concerned, will be found in the next article.

"Art. 38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end."

193. The Penalty of Contraband Trade.—As a penalty for the carriage of contraband, the goods that are contraband are liable to condemnation. This statement, which is found in Article 39 of the declaration, is in accordance with accepted usage.

"It was universally admitted that in certain cases the condemnation of the contraband is not enough and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided that the contraband must bear a certain proportion to the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three quarters.

(2) How shall this proportion be reckoned? . . . If the standard of volume or weight is adopted, the master will ship innocent goods occupying space or of weight sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that, in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards."[1]

In the report of the American delegation to the secretary of state it is stated in regard to this penalty that "much relief is afforded to neutrals in respect to the penalty of carrying contraband. In the first place, the ship is not subject to confiscation unless more than half of the cargo is contraband, to be determined either by weight, volume, value, or freight value."

"Art. 41. If a vessel carrying contraband is released she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize-court and the custody of the ship and cargo during the proceedings."

It was considered that some deterrent should be prescribed for the carriage of contraband when it was not sufficient to condemn the vessel. The article just given accomplishes this purpose, which may be very serious as a penalty.

"Art. 42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation."

This is in accordance with usage and involves an additional punishment to the bearer of the contraband articles, who is the principal offender.

"Art. 43. If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband can not be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to

[1] See accompanying report, Appendix IV.

the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities or of the declaration of contraband, has had no opportunity of discharging the contraband.

"A vessel is deemed to be aware of the existence of a state of war or of a declaration of contraband if she left a neutral port subsequently to the notification to the power to which such port belongs of the outbreak of hostilities or of the declaration of contraband, provided such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities."

This gives an exception arising from the want of knowledge of hostilities which is more or less common in all similar cases involving neutrals.

"Art. 44. A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war-ship.

"The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

"The captor is at liberty to destroy the contraband that has been handed over to him under these conditions."

Of this article the report of the American delegates says:

"A rule was adopted that a ship seized for carrying contraband, although not itself liable to confiscation because the proportion of contraband was below one half, could be authorized to proceed according to circumstances if the captain was ready to deliver the contraband articles to the belligerent man-of-war. The captor in such a case has the option of destroying the contraband which is thus delivered to him. This procedure

is one of value, as it saves from capture and detention a neutral liner filled with passengers, mails, and valuable freight, which might have a small amount of contraband known or unknown to its captain and owner. This procedure is also in conformity with many treaties made by the United States, dating from 1783 to 1864. It avoids vexatious seizure of neutral vessels—bad enough in the times of small vessels, but intolerable with the great liners of to-day."[1]

There must be a trial and judgment of a prize-court of the captor having proper jurisdiction in regard to the goods involved whether destroyed or not.

This article finishes the chapter on contraband of the declaration of London and it may be considered in connection with the accompanying exposition a satisfactory treatment of the question. It may be said here that the accompanying report which was adopted with little amendment by the naval conference was prepared by the learned first delegate from France—M. Renault, and is worthy of its very distinguished author, who was on this occasion the official reporter of the draughting committee.

In closing this subject it must be borne in mind that the manufacture and trade of contraband is not illegal so far as neutrals are concerned, unless it takes the form of an accompaniment of a military or hostile expedition from a neutral port. The neutral may and often does warn his nationals of the penalty and results of such trade, but all such trade on the part of neutral citizens or subjects is at their own risk and cannot receive the protection of their state.

"In fact," as Richard Henry Dana says, "the right of the belligerent to prevent certain things getting into the military use of his enemy is the foundation of the law of contraband, and its limits are, as in most other cases, the practical results of the conflict between this belligerent right on the one hand

[1] Report of American delegation on contraband of war, London naval conference, Appendix IV.

and the right of the neutral to trade with the enemy on the other."[1]

194. Pre-emption.—The question of pre-emption is not dealt with by the declaration of London. By pre-emption we mean the forcible purchase of contraband articles by paying a price which is generally arrived at by taking the original cost of the goods, to which are added the expenses including the freight and a reasonable profit, reckoned as at least ten per cent. The British Admiralty Manual of 1888 (No. 84) reads that "the carriage of goods conditionally contraband and of such absolutely contraband goods as are in an unmanufactured state and are the produce of the country exporting them is usually followed only by the pre-emption of such goods by the British Government, which then pays freight to the vessel carrying the goods."

Pre-emption remains a possible operation in dealing with contraband and is, of course, a mitigation of the right of condemnation.

Hershey says: "In 1890 the Institute of International Law recognized the right of pre-emption in the case of articles *ancipitis usus*.

"Since pre-emption is a mitigation of the rule preventing confiscation as the penalty for the carriage of contraband, it is, of course, always open to belligerents to resort to in all cases when the goods are undoubtedly contraband."[2]

A process of pre-emption is allowed in the treaty between the United States and Prussia, which is regarded as still operative.[3]

[1] Dana's "Wheaton," 8th ed., note, 226.
[2] Hershey, "Essentials," footnote, p. 504.
[3] Treaty of U. S. and Prussia, 1799, Art. XIII.

TOPICS AND REFERENCES

1. Definition and General Principles of Contraband—

   Ferguson, vol. II, 462. G. B. Davis, 3d ed., chap. XIII. Oppenheim, 2d ed., vol. II, 480–1.

2. Enumeration of Contraband and Non-Contraband Articles—

   "Declaration of London," chap. II, see Appendix IV. Westlake, 2d ed., vol. II, 277–287. Hall, 6th ed., 651–663.

3. Destination of Contraband and Consequent Judgments—

   Naval War College, "International Law Topics," 1907, 115–122, 127–135. Earl Loreburn, "Capture at Sea," chap. V. Moore's "Digest," vol. VII, 695–7, and as to continuous voyages, 698–744.

4. The Penalty of Contraband Trade—

   Fenwick's "Neutrality Laws," 104–7, 158–9. Oppenheim, 2d ed., vol. II, 506–514. T. J. Lawrence, "Principles of International Law," 4th ed., pars. 253–9.

5. Pre-emption of Contraband Goods—

   Hall, 6th ed., 663–4, note. Twiss, sec. 146. Woolsey, 6th ed., sec. 197.

CHAPTER XXVII

UNNEUTRAL SERVICE

195. The Carriage of Persons and Despatches for the Enemy.—Again we find in the declaration of London the latest and best accepted treatment of the subject of unneutral service, which has been also called "hostile assistance," and the "analogues of contraband." Although the London naval conference adopted the term *l'assistance hostile* in French to cover the subject, the best translation and expression in English seems to be *unneutral service,* which may be said to finally give the term which is to be used in English. There is a seeming similarity between the service known as the carriage of contraband and that of unneutral service. The essential difference, however, is that the carriage of contraband refers to the trade in contraband articles or merchandise while unneutral service means the carriage of persons, by vessels, who are in service of the enemy or who by means of the vessel in which they are transported perform service lacking neutral character in the prosecution of the war. This service may not be directly hostile in its nature.

We will first discuss the subject of the carriage of persons for the enemy. In the action of the London naval conference unneutral service engaged in by neutral vessels has been divided in Article 45 of the declaration of London into two classes according to the gravity of the act of which the neutral vessel is accused.

In the first case, a neutral vessel will be condemned and in a general way receive the same treatment as a *neutral* vessel liable to the penalty accompanying the carriage of contraband, but the flag covers the goods that are carried on board.

In the second case, not only is a vessel liable to condemnation but it is considered and treated as an enemy merchant vessel if there is no doubt as to its guilt, as the acts of unneutral service performed are of greater gravity and of more direct and valuable service to the enemy. Hence the goods on board will be presumed to be enemy goods, and the vessel will be subject to destruction under the same conditions as an enemy merchant vessel. Article 45 of the declaration of London reads as follows:

"Art. 45. A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband—

"(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy or with a view to the transmission of intelligence in the interest of the enemy.

"(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

"In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

"The provisions of the present article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities or a neutral port subsequently to the notification of the outbreak of hostilities to the power to which such port belongs, provided that such notification was made in sufficient time."

The first class supposes passengers travelling as individuals but with a voyage specially undertaken for the purpose of aid-

ing the belligerent. It cannot be called a hostile or military expedition under the neutrality laws of the United States, for instance, because it lacks the organization of one and is unarmed and not bound to operate against a state hostile to the individuals on board. It is, however, transport service for the benefit of a belligerent.

Whether it would be considered a lawful prize by a hostile belligerent, if the passengers were exclusively reservists and the vessel chartered by an agent of the belligerent government, carrying the men for embodiment in the army of that country is probable. The interpretation of the accompanying letter to the declaration of London might lead us to hold the negative, though that letter apparently considers the matter from the point of a regular steamer carrying other passengers than reservists and bound for its usual destination.

The transmission of intelligence in the interest of the enemy on a voyage specially undertaken for the purpose would be treated in the same way as the carriage of passengers embodied in his armed force, says the accompanying report. (See Appendix IV.)

In commenting upon this Oppenheim says:

"The declaration of London does not mention the case of enemy despatches embodying intelligence found on board such a neutral vessel as may not herself be captured for such carriage. For instance: in the case of a mail-steamer pursuing her ordinary course and carrying a despatch of the enemy not in her mail-bags but separately, the vessel may not, according to Article 45, be seized. In this and similar cases may despatches be seized without the seizure of the vessel? It has been pointed out above that in a case of necessity, self-preservation would justify a belligerent in temporarily detaining such a liner for the purpose of preventing the intelligence from reaching the enemy. This certainly fits the case of a vessel transmitting oral intelligence. But if a vessel carried despatches, the necessity of detaining her ceases through the seizure of the

despatches themselves. The question as to whether, in such cases, the despatches may be seized without seizure of the vessel ought, therefore, in analogy with Article 47 of the declaration of London, to be answered in the affirmative."[1]

If the vessel has, as it is supposed in the two cases of Article 45, performed but a single service, no taint remains and she is not liable to capture after the completion of her single voyage. In case, from a want of knowledge, the capture of the vessel would not be valid, the persons on board who belong to the armed forces of the enemy may, nevertheless, be made prisoners of war by the belligerent. If the vessels in these cases are condemned for unneutral services, the goods belonging to the owner are also liable to condemnation.[2]

"Art. 46. A neutral vessel is liable to condemnation and, in a general way, to the same treatment as would be applicable to her if she were an enemy merchant vessel—

"(1) If she takes a direct part in the hostilities.

"(2) If she is under the orders or control of an agent placed on board by the enemy government.

"(3) If she is in the exclusive employment of the enemy government.

"(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

"In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation."

"The cases here contemplated are more serious than those in Article 45 and justify a severer treatment of the vessel.

"*First case.* The vessel takes a direct part in the hostilities. This may take different forms. It is needless to say that in an armed conflict, the vessel takes all the risks incident thereto. . . .[3]

[1] Oppenheim, 2d ed., vol. II, pp. 531, 532.
[2] See accompanying letter to declaration of London, Appendix IV.
[3] See case of Kowshing, Stockton, "Manual," etc., pp. 261–3.

"*Second case.* The vessel is under the orders or control of an agent placed on board by the enemy government. His presence marks the relation in which she stands to the enemy. . . .

"*Third case.* The whole vessel is chartered by the enemy government and is, therefore, entirely at its disposal; it can use her for different purposes more or less directly connected with the war during its existence, notably as a transport or auxiliary vessel—such as the position of colliers which accompany a belligerent fleet. . . .

"*Fourth case.* The vessel is at the time exclusively devoted to the carriage of enemy's troops or to the transmission of intelligence in the enemy's interest. . . . So long as such service lasts, the vessel is liable to capture, even if, at the moment when an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence."[1]

"Art. 47. Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel."

Since the formulating of the declaration of London two cases have occurred under this head. In January, 1912, during the Turko-Italian War the Italian gunboat *Volturno*, after having overhauled in the Red Sea the British steamer *Africa* going from Hadeida to Aden, took off and made prisoners of war Colonel Riza Bey and eleven other Turkish officers. Although the declaration of London is not yet ratified by Great Britain, that power did not protest against the seizure.[2]

The *Manouba*, a French steamer in the same war, plying between Marseilles and Tunis, was stopped in the same month by an Italian torpedo-boat destroyer, *Agordat*, in the Mediterranean, taken by her into Cagliari, and there twenty-nine

[1] Accompanying letter, declaration of London, Appendix IV.
[2] Oppenheim, vol. II, pp. 531, etc.

Turkish passengers, suspected of belonging to the Turkish army, were finally delivered to the Italian authorities. It was agreed between the two governments to refer the case to The Hague tribunal, which was done, and the tribunal on May 6, 1913, decided that the Italian naval authorities had sufficient reason to believe that the Ottoman subjects on board, or at least some of them, were enlisted men in the enemy's army, and hence they had the right to compel the surrender of these passengers to them.[1]

196. **Case of the "Trent."**—The case of the *Trent* approaches the conditions under the last article, though the character of the persons taken off was not military. The circumstances were as follows:

The *Trent*, an English mail-steamer making passage from Havana to St. Thomas, W. I., was stopped at sea by the U. S. S. *San Jacinto*, under the command of Captain Wilkes, and Messrs. Mason and Slidell, on their way as Confederate commissioners to France and England with their suite, were taken on board the *San Jacinto* and then transferred to Fort Warren, in Boston Harbor.

The *Trent* was then allowed to proceed on her voyage. Captain Wilkes reported that he had taken off these officials as contraband, as they were the embodiment of contraband despatches.

Great Britain demanded their surrender upon the grounds that they were civilians taken out of a neutral ship on the high seas engaged in an innocent voyage from one neutral port to another.

These persons were surrendered to Great Britain on the grounds that they were contraband of war, but that they could not be properly separated from the ship, which should have been captured and brought into port for trial by a prize-court.

On the whole it can be summed up:

1. That the commissioners could not be considered as con-

[1] *A. J. I. L.*, vol. VII, no. 3, pp. 634, etc.

traband of war, being neither military in their character nor engaged or embodied in the military service.

2. The fact that the port of origin and port of destination were both neutral was a presumption of the innocence of the vessel and her passengers.

3. From the discussions arising from this affair, it seems to be the consensus of opinion of authorities that "neutral states have a right to the use of the high seas for diplomatic communication with either belligerent as well as with each other . . . and that the diplomatic agent of an enemy state cannot be taken from a neutral vessel or on neutral territory."[1]

Captain Wilkes had the undoubted right to visit and search the *Trent*. If resistance to search had been made under present ruling the *Trent* would have been legally liable to capture. Furthermore, persons engaged in unneutral service or embodied in the military service of the enemy can be considered as analogous to contraband, as we have seen, and can be either taken out of the ship or under certain circumstances taken with the vessel for adjudication and condemnation.

It is interesting in this connection to relate the case of Henry Laurens, who was sent during our Revolutionary War upon a mission to Holland, with the authority of Congress, to secure the recognition of the independence of the revolted colonies and obtain a loan of money. He was seized on board of a Dutch packet, a neutral vessel, bound to a neutral port in Holland, he was conveyed as a prisoner, eventually, to the Tower in London, under a charge of treason, until the surrender at Yorktown, when he was exchanged for Cornwallis.[2]

Oppenheim makes the following statement, which is of an exceptional character.

"Quite different," he says, "from the case of seizure of such enemy persons and despatches as a vessel cannot carry without exposing itself to punishment is the case where a vessel has

[1] Hershey, "Essentials," etc., pp. 280, etc.
[2] Upton, "Law of Nations Affecting Commerce," pp. 360, 361.

such enemy persons and despatches on board as she is allowed to carry, but whom a belligerent believes it to be necessary in the interest of self-preservation to seize. Since necessity in the interest of self-preservation is, according to international law, an excuse for an illegal act, a belligerent may seize such persons and despatches, provided that such seizure is not merely desirable but absolutely necessary in the interest of self-preservation, as, for instance, in the case where an ambassador of the enemy on board a neutral vessel is on the way to submit to a neutral a draught treaty of alliance injurious to the other belligerent."[1]

This, of course, is an exigency which was not existing in the *Trent* affair.

197. The Opening to Neutrals of a Trade Closed in Peace.—Under a commentary on Article 46 of the declaration of London, previously mentioned, the accompanying report says that "it was proposed to treat as an enemy merchant vessel a neutral vessel making, at the time, and with the sanction of the enemy government, a voyage which she has only been permitted to make subsequent to the outbreak of hostilities or during the two preceding months. This rule would be enforced notably upon neutral merchant vessels admitted by a belligerent to a service reserved in time of peace to the national merchant marine of that belligerent, for instance, to the coasting trade. Several delegations formally rejected this proposal, so that the question thus raised remains an open one."[2]

The American delegation was one of those who formally rejected this proposition, which was a revival of the well-known rule of the war of 1756, by which Great Britain claimed the right to treat neutral vessels as enemy ships when they engaged in a colonial or other trade in time of war denied them in time of peace. Such a rule, if adopted, would have applied to our coasting trade, with its extension to the Hawaiian Islands and the Philippines, and to the "*cabotage*" of the French. The

[1] Oppenheim, 2d ed., vol. II, p. 532.
[2] Accompanying report, Appendix IV.

matter is left open now to such practice as the individual states should follow until it may be decided by an international prize-court. The matter was formally presented by the British delegation in a memorandum upon the subject. The German delegation presented a memorandum which contained an assertion that "a ship flying a neutral flag can, nevertheless, be treated as an enemy ship, if she is making at the time and with the sanction of the enemy government a voyage which she has only been permitted to make subsequently to the outbreak of hostilities or during the two preceding months."

Practically France, Russia, and Holland sided with the United States in opposition to this proposition, which was upheld by a minority only of the conference.

The advocacy of the rule of the war of 1756 has been revived of late by such modern English writers as Oppenheim, Higgins, Manning, and Phillimore, and originally by such early authorities as Sir William Scott, Mr. James Stephen, and seconded by some American authorities such as Chancellor Kent, Justice Story, General Halleck, and Admiral Mahan. On the other hand, Wharton, citing Lyman's "Diplomacy of the United States," says that:

"To permit one belligerent to shut out neutrals from a commerce not being in contraband of war or in evasion of blockade would impose upon neutrality burdens so intolerable as to make war on its part preferable to peace."

Hall, an English authority, says:

"The arguments which may be urged on behalf of the right of neutrals to seize every occasion of extending their general commerce do not seem susceptible of a ready answer. Neutrals are in no way privy to the reasons which may actuate a belligerent in throwing open a trade which he has previously been unwilling to share with them. They can be no more bound to inquire into his objects in offering it to them than they are bound to ask what it is proposed to do with the guns which are bought in their markets. The merchandise which they carry

is in itself innocent or is rendered so by being put into their ships; in the case of the coasting trade they take it to ports into which they can carry like merchandise brought from a neutral harbor, and the obstructing belligerent is unable to justify his prohibition by any military strength which it confers upon him."[1]

Higgins, in discussing the case in favor of the rule, closes with these remarks: "Every assistance given to a belligerent by neutral merchant ships tends to the lengthening of war, the increased suffering of the combatants and the civilian population, and the greater dislocation of the trade of the world. It is surely in accordance with the general principles of justice and equity and a logical deduction from admitted principles of the duties as a generally accepted international legal doctrine."[2]

198. Rescue of Shipwrecked Belligerents by Neutral Vessels.—The most pertinent article concerning this subject beyond the references made to hospital ships is Article 9 of The Hague convention of 1907 for the adaptation of the principles of the Geneva convention of 1906 to maritime war. It reads as follows:

"Belligerents may appeal to the charity of the commanders of neutral merchantmen, yachts, or boats to take on board and tend the sick and wounded.

"Vessels responding to this appeal, as also the vessels which have of their own accord rescued wounded, sick, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board; but, subject to any undertaking that may have been given to them, they may remain liable to capture for any violations of neutrality they may have committed."[3]

Article 12, which supplements the above rather vague article, reads as follows:

[1] Hall, 6th ed., pp. 634, 635.
[2] Higgins, "War and the Private Citizen," p. 192.
[3] Higgins, "Peace Conferences," Convention X, p. 367.

"Any war-ship belonging to a belligerent may demand the surrender of the wounded, sick, or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, and boats, whatever the nationality of such vessels."

This touches what is known as the *Deerhound* affair of June 19, 1864, which occurred during the American Civil War. Briefly, it may be stated as follows: Captain Semmes and some of the crew of the *Alabama*, after her fight with the *Kearsarge* off Cherbourg where she was sunk in combat, were picked up by request by the British yacht *Deerhound*, the owner of which claimed for the rescued the inviolability of the neutral flag, and, while dropping out of range of the *Kearsarge*, refused to surrender the shipwrecked and rescued belligerents on board, in which action they were sustained by the British Government.

The proposition above quoted in Article 12 was originally proposed by then Captain Mahan as an American delegate to The Hague conference of 1899 but not adopted.

Of this matter Higgins, an English writer, says:

"The solution of the difficulty provided by this article is, however, one which may be justified by practical considerations. Among those on board a hospital or merchant ship may be found the 'brain' of one of the belligerent navies, and military necessity might be appealed to as a justification for his removal. A belligerent would take the risk of complications with the neutral power. Moreover, the neutral captain might, from unforeseen circumstances, be unable to land the sick, wounded, or shipwrecked at a neutral port where they would be interned."[1]

The British delegation upon this article made the reservation that "His Majesty's Government understands Article 12 to apply only to the case of combatants rescued during or after a naval engagement in which they have taken part."

The case of the rescue of the officers and crew of the Russian

[1] Higgins, "Peace Conferences," p. 389.

ships *Variag* and *Korietz* in Chemulpo, Korea, is of interest in this connection. It is as follows: Japan severed her diplomatic relations with Russia on February 6, 1904, and was considered to be at war with Russia after that date.

On February 8, Admiral Urio, commanding a Japanese force, demanded that the Russian vessels above-mentioned should leave the harbor before noon of the 9th of February. During the forenoon of the 9th the Russian vessels started out and a short action occurred, after which these vessels returned and the *Variag* was abandoned and sunk and the *Korietz* blown up. Before this time, on the midnight of the 8th, the Japanese land forces which had been previously landed, were in effective possession of the town of Chemulpo. Boats from the neutral men-of-war in port after the fight rescued the personnel of the *Variag* and put them on board of the British cruiser *Talbot* and the Italian war vessel *Elba*. The crew from the *Korietz* left that vessel before she was blown up and took refuge on board the French vessel of war *Pascal*.

The Japanese admiral did not demand the surrender of the rescued Russians, but representatives of France, Great Britain, and Italy in Seoul conferred with the Japanese representative, and it was agreed that the rescued persons should be taken to Chinese ports with the understanding that they were not to serve again until the end of the war.

This action was in accordance with Convention X in Articles 13, 14, and 15.

In case shipwrecked belligerents are landed in neutral territory by their rescuers who are not men-of-war, it is proper to release them provided that they give their word not to serve again during that war. In this case it is understood that no belligerent man-of-war is in sight or has made a demand.

199. Destruction of Neutral Prizes.—This was one of the subjects concerning which an agreement was reached at the London naval conference. It was generally conceded at this

conference that in principle a neutral prize ought not to be destroyed but should be taken to a prize-court; but under the stress of necessity, military necessity bordering upon self-preservation, a vessel otherwise liable to be condemned might be destroyed, subject to indemnity in an unjustifiable case, and provided that the papers and the persons on board be properly cared for.

"Art. 48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture."[1]

This establishes the principle as to destruction.

"Art. 49. As an exception, a neutral vessel which has been captured by a belligerent war-ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time.

"Art. 50. Before the vessel is destroyed all persons on board must be placed in safety and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war-ship.

"Art. 51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.

"Art. 52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

[1] See Appendix IV, declaration of London.

"Art. 53. If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

"Art. 54. The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

"The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable."[1]

Article 50 of the laws and usages of war at sea, known as United States Naval War Code, makes no discrimination between the destruction of enemy and neutral merchant prizes when necessity requires it. This code was embodied in the instructions of the United States to the American delegation at London.

The question of the destruction of neutral prizes at sea occasioned very considerable discussion in England, to an extent arising from the destruction of the British ship *Knight-Commander* and some others during the Russo-Japanese War.

An English author in a book treating of the subject of the declaration of London sums up upon this particular question as follows:

"The articles of the declaration, though they are not as deterrent as might have been desired, are at least calculated to secure more respect for the neutral and to place a larger measure of responsibility on the belligerent than was witnessed in

[1] See Appendix IV, declaration of London.

the American Civil and the Russo-Japanese Wars. Of course there is no reason why Great Britain should depart from her present custom of not sinking neutral prizes, save in very exceptional circumstances; and our abundance of ports in every ocean makes it more feasible for our cruisers than for those of other nations to bring their prizes in for adjudication. We are thus enabled to gain by adding the captured vessels to our marine and confiscating their cargo; and with the new limitation on the right to destroy, our traders will be able to secure compensation in any case where their captured vessels would not have been liable to condemnation if they had been brought in for adjudication instead of being destroyed. The outcry against destruction of prizes is largely founded upon the fact that neutral vessels have been sunk by their captors which should not by the law of nations have been condemned at all. Now, the circumstances in which a neutral vessel is liable to condemnation are quite clearly laid down by the declaration and the obligation of the belligerent to pay full compensation to the neutral ship owner and cargo owner where a prize is sunk which is not legally liable to condemnation, and, lastly, the power which the neutral will have, if the declaration and the prize-court are ratified, of taking the question of the validity of the destruction to an international tribunal which will have no prejudice in favor of the belligerent, form together a combination of safeguards which should prevent outrages upon neutral commerce such as the Russo-Japanese War produced, and should make the right of sinking prizes in future wars exceptional in fact as well as in theory."[1]

[1] Norman Bentwich, "Declaration of London," p. 98.

TOPICS AND REFERENCES

1. The Carriage of Persons and Despatches for the Enemy—

   Hall, "International Law," 6th ed., 674–685. Moore's "Digest," vol. VII, 752–768. Higgins, "Peace Conferences," 593–7.

2. The Case of the *Trent*—

   Harris, "The *Trent* Affair." Dana, note 228 to Wheaton, 8th ed., 664. Atherley-Jones, "Commerce in War," 311–315.

3. The Opening to Neutrals of a Trade Closed in Peace—

   Higgins, "War and the Private Citizen," part V. Moore's "Digest," vol. VII, 1104–9. Hall, 6th ed., 631–2. Mahan, "Some Neglected Aspects of War," 191.

4. Rescue of Shipwrecked Belligerents by Neutral Vessels—

   Higgins, "Hague Conferences," Convention X, 367–389. Naval War College, "Topics," etc., 1904, 117–128. Oppenheim, 2d ed., vol. II, 252–262.

5. Destruction of Neutral Prizes—

   Hershey, "Essentials," 520–2. Naval War College, "International Law Situations," 1905, 62–76. T. J. Lawrence, "Principles," 4th ed., 191.

CHAPTER XXVIII

TRANSFER OF FLAG. ENEMY CHARACTER. PRIZE-COURTS

200. Transfer to a Neutral Flag.—The freedom of a neutral vessel from the capture to which an enemy merchant vessel is subject has led in the past to an evasion of capture by the transfer of an enemy vessel to the flag of a neutral state. Consequently, one of the duties of a belligerent cruiser is to ascertain whether such a transfer has been made and, if so, whether it has been legitimate or only for the purpose of evading a capture. Fortunately, this question was taken up by the London naval conference with a resultant agreement as to the treatment of the subject which seems to meet the occasions so far as possible when we consider the diversity of interests involved. The matter is found in the various articles in Chapter V of the declaration, the first of which is numbered 55 and reads as follows:

"Art. 55. The transfer of an enemy vessel to a neutral flag effected before the outbreak of hostilities is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its

effect is such that neither the control of nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

"Art. 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"Provided that there is an absolute presumption that a transfer is void—

"(1) If the transfer has been made during a voyage or in a blockaded port.

"(2) If a right to repurchase or recover the vessel is reserved to the vender.

"(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."

The American delegation to the London conference in their report to the secretary of state made a statement concerning this subject as follows:

"It has been decided that commerce in ships in time of war is, in general, not legitimate *unless it is bona fide commerce* and not undertaken to evade the consequences to which the ship would be liable if it retained the enemy flag. The burden of proof of validity of the transfer is placed on the vender. In all such cases commerce would be regarded as illegitimate when the transfer is made (1) in transitu or in a blockaded port, (2) with the right of repurchase or return, or (3) contrary to the laws of the flag which it bears.

"It would also be possible, and to some extent has been the practice, for ship owners anticipating war to make transfers just before the outbreak of war. Such transfers, when made with the view to evading the consequences of the war and not

as commercial transactions, are not regarded as legitimate, but the burden of proof rests upon the captor, except when the papers in regard to the transfer, which has been made within sixty days before the outbreak of war, are not on board. In this exceptional case the burden of proof of the validity of the transfer is placed on the vessel, as there is not sufficient evidence at hand in the ship's papers to enable the captor to release the ship.

"It would, however, be an undue interference with commerce if all sales or sales made a long time before the war were liable to be regarded as invalid. It is, therefore, decided that sales made more than thirty days before the war, even though made with the idea of evading the consequences of a war which might subsequently break out, would be valid unless there is some irregularity in the transfer itself, or unless it is not an actual transfer, evidence of which might be in the fact that the profits and control remain in the same hands as before the sale.

"There are thus established three periods under which transfer of flag is considered, (1) during war, when burden of proof of the validity of the transfer rests upon the vender; (2) a period of thirty days before the war, during which it is necessary for the captor to prove that the transfer is made to evade the consequences of war; and (3) the period prior to thirty days, when, regardless of whether or not the transfer is made to escape the consequences of war, it is necessary for the captor to establish that the transfer itself is irregular, or not in fact a transfer. It is also necessary that, in order to have advantages of these provisions, a vessel transferred within sixty days before the war shall have the papers relating to the sale on board.

"These provisions establish much more definite rules, where formerly there had been great diversity of practice among states, or even diversity in the same state at different periods. Commerce in ships is recognized as legitimate under such restrictions as seem necessary in order to safeguard belligerent rights."

201. **Enemy Character.**—The agreement of the London conference upon this subject, though an advance in dealing with the subject, is fragmentary and confined to four articles only. The first article under the head of enemy character is Article 57, which, with its qualifications, may be said to be a fundamental rule about which usage and code agree and which permits but little discussion. It reads:

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

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

Article 58 reads:

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner."

"Unlike ships, goods," says the accompanying report, "have no individuality of their own; their neutral or enemy character is made to depend upon the personal status of their owner. . . . But what is to determine the neutral or enemy character of the owner?"

The solution of this question by the conference was not attained, as opinions were equally divided between the determination of the matter by domicile of the owner and by that of his nationality.

This question of the determination of the enemy character of an individual will be again mentioned in the final chapter of this volume treating of open questions. It is an unsettled subject which to a large extent arranges itself upon the old lines of the Anglo-American as opposed to the continental system. Holland, Spain, and Japan agreed with the Anglo-American practice, while Austria-Hungary, Italy, Germany, and Russia sided with France that nationality was the determining factor.

Article 59 reads:

"In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods."

Article 60 is that:

"Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

"If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character."

These articles are traditional rules which are considered at the present time as approved usages.

202. The Sending in of Prizes for Their Adjudication.— When the belligerent captor determines that he has sufficient ground to retain a vessel for the violation of belligerent rights, the captured vessel is sent to a port where a prize-court sits for the purpose of adjudication. Articles 46, 47, and 48 of the Naval War Code found in the "Laws and Usages of War at Sea" give the procedure founded both on the laws and usages of the United States. They read as follows:

"Prizes should be sent in for adjudication, unless otherwise directed, to the nearest suitable port, within the territory of the United States, in which a prize-court may take action.

"The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure, and to this end her papers should be carefully sealed at the time of seizure, and kept in the custody of the prize-master.

"All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and, if circumstances permit, it is preferable that the officer making the search should act as prize-master."

As to the status of the prize before condemnation the opinion given in the discussion of the subject in the international

law situations at the Naval War College in 1907 seems to be sound. It states that:

"The principle that enemy goods and ships are liable to seizure being at present admitted, there can be little objection raised to placing the national flag of the capturing vessel over a seized vessel belonging to a belligerent. It does pass, if good prize, to the state of the captor upon capture. It is brought in for adjudication.

"In regard to a neutral vessel, the principle is quite otherwise. The neutral is only seized and held pending the decision of the prize-court."

In the latter case it is permissible to hoist the national flag of the captor at the fore and the national flag of the neutral vessel at the peak or the flagstaff at the stern.

In a decision made by the Supreme Court of the United States in 1902 it was stated that:

"Until condemnation, captors acquire no absolute right of property in a prize, though then the right attaches as of the time of the capture, and it is for the government to determine when the public interests require a different destination."[1]

203. Jurisdiction of National Prize Tribunals.—Articles 1 and 2 of Convention XII for the establishment of an international prize-court, which has been signed and ratified by the United States, read as follows:

"Art. 1. The validity of the capture of a merchant ship or its cargo is decided before a prize-court in accordance with the present convention when neutral or enemy property is involved.

"Art. 2. Jurisdiction in matters of prize is exercised in the first instance by the prize-courts of the belligerent captor."[2]

The succeeding articles provide for an appeal from the national prize-courts to the proposed international prize-court when established.

[1] U. S. *v.* Dewey (188 U. S. Supreme Court Reports, p. 254).

[2] See Appendix III, p. 520.

The additional protocol to this convention was made on the 19th of September, 1910, to meet the case of the United States and other countries where appeals from the highest national prize-courts (in our case the Supreme Court of the United States) are of doubtful constitutionality. This protocol is considered as forming an integral part of the convention and was ratified by the United States as such. The essential part of the additional protocol is found in the first two articles, which read as follows:

"Art. 1. The powers signatory or adhering to The Hague convention of October 18, 1907, relative to the establishment of an international court of prize, which are prevented by difficulties of a constitutional nature from accepting the said convention in its present form have the right to declare in the instrument of ratification or adherence that, in prize cases, the international court of prize can only be exercised against them in the form of an action in damages for the injury caused by the capture."

"Article 2. In the case of recourse to the international court of prize, in the form of an action for damages, Article 8 of the convention is not applicable: it is not for the court to pass upon the validity or nullity of the capture nor to reverse or affirm the decision of the national tribunals.

"If the capture is considered illegal, the court determines the amount of damages to be allowed, if any, to the claimants."[1]

In Article 4 of Convention XIII of the second Hague conference, duly accepted by the United States, it is provided that a prize-court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters. "This rule has," as Higgins says, "long been recognized as a rule of international law toward the establishment of which the action of the United States in 1793 contributed in a great degree."[2] The article of the same convention numbered 23, which allows prizes to

[1] See Appendix III, p. 521.
[2] Higgins, "Peace Conferences," pp. 447–463.

remain in neutral waters pending the decision of a belligerent prize-court, was not accepted by the United States.[1]

"The jurisdiction of prize-courts," says Lawrence, "extends over all captures made in war by their country's cruisers, over all captures made on land by a naval force acting alone or in conjunction with military forces, and over seizures made afloat by the joint operation of land and sea forces. It also includes all recaptures, ransoms, and ransom bills, and all incidental questions growing out of the circumstances of capture such as freights and damages. And when it was customary for states to make seizures afloat in anticipation of war, the cases that arose therefrom were taken before prize-courts. Speaking generally, we may lay down the proposition that the courts of neutrals have no jurisdiction over the captures of belligerents.

"But to this rule there are exceptions. Jurisdiction exists and can be exercised when the capture is made within the territorial limits of the neutral state, or when a vessel, originally equipped for war within neutral jurisdiction, or afterward made efficient by an augmentation of warlike force therein, takes a prize at sea and brings it within the waters of the injured neutral during the voyage in which the illegal equipment or augmentation took place. In both cases neutral sovereignty is violated by one belligerent, and in consequence the neutral is exposed to claims and remonstrances from the other. Jurisdiction is therefore conferred upon it for its own protection and in order that it may insist upon the restoration of the property unlawfully taken."[2]

By Section 5287 of the United States Revised Statutes jurisdiction is conferred upon the United States district courts over prizes taken illegally and improperly by vessels fitted out or augmented in force within the limits of the United States. Of this Fenwick says:

"In other words, where vessels have been fitted out and

[1] Higgins, "Peace Conferences," p. 452.
[2] T. J. Lawrence, "Principles," etc., 4th ed., par. 189.

armed, or have increased their force, in violation of the neutrality of the United States, the courts of the United States will intervene to effect a restitution of prize captured by such vessels, not because the capture is illegal as between captor and the former owner, but because the neutral state has the right to vindicate its own sovereignty by divesting possession of property acquired as the result of a violation of its sovereignty."[1]

Kent says that "the prize-court of an ally cannot condemn. Prize or no prize is a question belonging exclusively to the courts of the country of the captor."[2]

Secretary Bayard wrote in 1885 that "neutral passengers, in such a case (capture at sea of a passenger steamer), like neutral goods not contraband of war, found on board a belligerent vessel are exempt from the jurisdiction of any prize-court before which the vessel when captured might be taken. The captor would be under no obligation to transport either passengers or goods, being neutral, to any other port of debarkation than that where a competent prize-court may sit."[3]

204. International Prize-Court. The second Hague conference of 1907 formulated Convention XIII, which has been referred to for the purpose of establishing an international court of appeal from the national prize tribunals. "The objections to the present system of national prize-courts are that the captor is both judge and party in his own cause, with a natural leaning in favor of his own side, and that, though nominally administering international law, they are dominated by the laws of their own country. These considerations do not appear so striking in the case of captures from an enemy as when neutral property is concerned, and various proposals from the time of Hübner, a Danish publicist, in 1759, have been made for a reform in prize-court procedure."[4] This matter became a subject for discussion and formulating in the second

[1] Fenwick, "Neutrality Laws," p. 90.
[2] Kent, "Commentaries," 1031.
[3] Moore, "Digest of Int. Law," vol. VII, p. 590.
[4] Higgins, "Hague Conferences," pp. 431–2.

Hague convention, resulting in Convention XII for the establishment of an international prize-court, which has been, as previously mentioned, ratified by the United States.

This convention will be found, with the additional protocol incorporated in it by mutual consent, in the appendix of this work. Up to the present time it has been accepted and ratified only by the United States. The question of the composition of the court was a matter of much dispute both from the smaller states and from those states which were not in accord with continental views upon maritime international law. With the exception of Great Britain, the United States, and possibly Japan, out of the eight permanent judges the other permanent judges are from continental European states and presumably favoring that school of public law. The other seven judges which make up the fifteen required for the full bench are drawn by rotation and lot in accordance with a table and methods arranged for in the convention. Besides the doubtful legality of an appeal from the United States Supreme Court, there was a question of importance to the United States, Great Britain, and some other powers as to the laws and usages to be observed in the decisions of the court.

Article 7 provided that:

"If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself, or whose national is, a party to the proceedings, the court is governed by the provisions of said treaty.

"In the absence of such provisions the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity."[1]

The first clause just given brings into operation the various conventions of The Hague conference relating to subjects likely to be brought before an international prize-court.

The declaration of London gives a very illuminating and valuable code to meet the second clause, leaving a very few but

[1] Higgins, "Hague Conferences," pp. 410, 411.

nevertheless important matters to be left to the general principles of justice and equity. The additional protocol urged upon the signatories of the declaration of London by the United States has been incorporated in this convention as mentioned, the matter having been initiated in the wish (*vœu*) of the declaration of London. There is no doubt that the dual system of jurisprudence now embodied in the international prize convention entails disadvantages, but it is hoped notwithstanding that the convention and court will be put into operation, and defects and omissions can be remedied in the light of experience.

205. Compensation for Capture When Found Void.—The article of the declaration of London treating of this subject states as follows:

"If the capture of a vessel or of goods is not upheld by the prize-court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods."[1]

The accompanying report on this subject says:

"A cruiser has captured a neutral vessel on the ground, for example, of carriage of contraband or breach of blockade. The prize-court releases the vessel, declaring the capture to be void. This decision alone is evidently not enough to indemnify the parties interested for the loss incurred in consequence of the capture, and this loss may have been considerable, since the vessel has been during a period, which may often be a very long one, prevented from engaging in her ordinary trade. May these parties claim to be compensated for this injury? Reason requires that the affirmative answer should be given, if the injury has been undeserved, that is to say, if the capture was not brought about by some fault of the parties. It may, indeed, happen that there was good reason for the capture, because the master of the vessel searched did not produce evi-

[1] Declaration of London, Art. 64, Appendix IV.

dence which ought in the ordinary course to have been available, and which was only furnished at a later stage. In such a case it would be unjust that compensation should be awarded. On the other hand, if the cruiser has really been at fault, if the vessel has been captured when there were not good reasons for doing so, it is just that compensation should be granted. . . .

"For the sake of simplicity mention has only been made of the vessel, but what has been said applies of course to cargo captured and afterward released. Innocent goods on board a vessel which has been captured suffer, in the same way, all the inconvenience which attends the capture of the vessel; but if there was good cause for capturing the vessel, whether the capture has subsequently been held to be valid or not, the owners of the cargo have no right to compensation."[1]

"Prize-courts properly deny damages or costs where there has been probable cause for seizure. Probable cause exists where there are circumstances sufficient to warrant suspicion though not sufficient to warrant condemnation."[2]

"A captor may, under imperative circumstances, sell the captured property and subject the proceeds to the adjudication of a court of prize. The orders of the commander-in-chief not to weaken his force by detaching an officer and crew for the prize, or his own deliberate and honest judgment, exercised with reference to all the circumstances, that the public service does not permit him to make such detachment, will excuse the captor from sending in his prize for adjudication. But if no sufficient cause is shown to justify the sale, or if the captor has unreasonably neglected to bring the question of prize or no prize to an adjudication, the court may refuse to proceed to an adjudication and may award restitution, with or without damages, upon the ground of forfeiture of rights by the captor, although his seizure was originally lawful."[3]

[1] Report accompanying declaration of London, Appendix IV.
[2] The *Thompson* (3 Wall, p. 155).
[3] Jecker *v.* Montgomery (13 How., p. 498).

TOPICS AND REFERENCES

1. Transfer to a Neutral Flag—

   Declaration of London and accompanying report, Appendix IV. Moore's "Digest," vol. VII, 415–425. Naval War College, "International Law Topics," 1909, 123, etc.

2. Enemy Character—

   Naval War College, "International Law Topics," 1906, 22–24; 1910, 108, etc. Moore's "Digest," vol. VII, pars. 1189–94. Oppenheim, vol. II, 2d ed., 106–121.

3. The Sending in of Prizes for Adjudication—

   Hershey, "Essentials," etc., 13. Scott's "Cases," 899–933. Wilson, chap. XXVIII. Dana's "Wheaton," 2d ed., note 186; 450, etc.

4. Jurisdiction of National Prize Tribunals—

   Scott's "Cases," 701–5. Moore's "Digest," vol. VII, pars. 1232, etc. Phillimore, vol. III, par. 481.

5. The International Prize-Court—

   Higgins, "Hague Conferences," Convention XII, 407–444. Lawrence, "Principles," 4th ed., par. 192. George C. Butte, "The Protocol Additional," *A. J. I. L.*, vol. VI, no. 44, 799, etc.

6. Compensation for Capture When Found Void—

   Declaration of London and accompanying report, Appendix IV. Moore's "Digest," vol. VII, 593–8. Oppenheim, 2d ed., vol. II, 555, 557.

CHAPTER XXIX

OPEN AND UNSETTLED QUESTIONS IN MARITIME WARFARE

206. A General Discussion of Unsettled Questions in Maritime Warfare.—There are a number of questions that are discussed with respect to maritime warfare that may be considered open to discussion, so far as the principles are considered, and are hence more or less unsettled as to actual practice from a want of common agreement. If this agreement is lacking, practically each state is a law to itself in the policy pursued during a war. There may be, however, a common practice modified by treaty with one or more powers which is binding when the signatory parties are at war with each other; the treaty is not necessarily binding, and in most cases it is so stated in the treaty, if a signatory power is at war with a non-signatory power.

The declaration of Paris is generally and formally accepted, but the United States has not adhered to it as a signatory adherent, though it has followed it in principle in the wars that it has engaged in since its formulation. So far no power signatory to the declaration has been at war with the United States. From the tenets of international law, as well as from the declaration itself, any signatory power is absolved from carrying out the rules of the declaration of Paris in any war which it should engage in with the United States. It does not seem wise for the United States under the circumstances to delay any further in adhering to the declaration of Paris, in fact as well as in principle—its non-adherence serves no good

purpose and cannot, in view of the fact of the general adoption of the declaration, secure any advantage to the United States by its delay in the formal acceptance of the instrument itself. Privateering is a thing of the past for all the world, including the United States.

Another matter that may be mentioned in a general way is the question upon which we based our refusal to sign the declaration of Paris, namely, the immunity from capture in war of private property at sea. The practice of this capture is almost universal; it includes among those who exercise this belligerent right the United States itself except where it is otherwise held in accordance with treaty. The only war of late in which such capture was not made was that between Prussia and Austria, which included also Italy, in 1866. This abstention arose out of the declaration of Austria and Prussia at the outbreak of the war that enemy's ships and cargoes should not be captured so long as the enemy state granted a like indulgence.[1] The Prussian Government issued an ordinance in 1870 exempting French vessels from capture which was not reciprocated by France, and hence was not carried into effect by either belligerent.

The United States by treaty with Prussia, of September 10, 1785, and by treaty with Italy, of February 26, 1871, provided for the mutual exemption of privately owned vessels from capture in case of war. This subject of immunity was brought before the two Hague conferences by the United States, but without ultimate success. The best method in attaining such result will probably be by gradual increase of exemptions of certain classes of vessels.

Other matters, some of which will be discussed separately as questions unsettled as to principle and common practice are those of the duration of days of grace, etc., at the outbreak of war, that of domicile or nationality as a governing factor in the determination of the enemy character of ships and cargoes,

[1] Hall, "Int. Law," 6th ed., pp. 438, 439.

the conversion of merchantmen into ships of war on the high seas and neutral ports, the use of floating mines in war time on the high seas, the opening by belligerents to neutrals of trade closed in time of peace, the use of projectiles and explosives from balloons, and the use and status of submarine cables in war time.

207. Days of Grace at the Outbreak of War.—The convention (VI) of the Hague conference of 1907 treating upon this subject was so unsatisfactory to the American delegation that they declined to sign it, and consequently it was not submitted to the United States Senate for ratification. The reason given for this procedure was "based on the ground that the convention is an unsatisfactory compromise between those who believe in the existence of a right and those who refuse to recognize the legal validity of the custom which has grown up in recent years."[1]

The first article of this convention provides that "when a merchant ship of one of the belligerent powers is at the commencement of hostilities in an enemy port, it is *desirable* that it should be allowed to depart freely, either immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport, to its port of destination or such other port as shall be named by it.

"The same applies in the case of a ship which left its last port of departure before the commencement of the war and enters an enemy port in ignorance of hostilities."[2]

As this is only a pious wish, it does not require any action of favor or grace from any of the belligerents, and seizure in port of an enemy vessel can be made immediately upon the outbreak of war. The article is not as liberal as the practice has been in the past.

The policy of the United States in such matters was shown in the Spanish-American War in the rules laid down by the Presi-

[1] Higgins, "Hague Conferences," p. 307.
[2] Higgins, "Hague Conferences," p. 295.

dent in his proclamation of April 26, 1898, the fourth article of which reads as follows:

"Article 4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatches of or to the Spanish Government."[1]

This rule is an extremely liberal one and it is doubtful whether it would be generally accepted, especially in the case of states of Europe where quick mobilization maintains as a rule.

208. The Question of Domicile or Nationality as the Determining Factor in Maritime Capture.—This question shows the diverging views of what has been roughly stated as the views of the Anglo-American versus the continental schools or doctrine. It is a matter of regret that it was not decided by the declaration of London upon one basis or the other, but the London conference was evenly divided upon the subject, showing that it was no longer a question confined to the states holding the classification or doctrines just mentioned. Five of the powers represented favored the principle of domicile of the proprietor as the criterion of character of the goods found in an enemy vessel and five favored the nationality of the owner as deciding the matter. The former represented the old Anglo-American doctrine, the latter that of the continental states. So far as ships are concerned it was agreed that the flag determines the character of the vessel without regard to

[1] Moore's "Digest," vol. VII, p. 454.

the character of the individual owner, but as to the cargoes the above difference was developed.

"The Anglo-American system," says Westlake, "makes the enemy or neutral character of an individual, so far as it is important for the purpose of maritime capture, depend, not on his political nationality, but on his domicile in a peculiar sense known as trade domicile in war. At the same time it upholds the importance of the fact that a house of business is established in the enemy's country. Both these branches of the doctrine are defended on the ground that trade, whether industrial or commercial, is a source of wealth and therefore of strength to the country in which it is carried on, by the money spent there and the liability of the profits to taxation."[1]

"If a person of European or American blood has a trade domicile or a house of business in an Eastern country under the protection of his consul, that is considered as a trade domicile or a house of business in his own country."[2]

It may be said in behalf of the continental doctrine that the criterion of nationality is one of greater simplicity.

209. The Conversion of Merchantmen into Vessels of War upon the High Seas or in Neutral Waters.—This is a question left unsettled by The Hague conferences and also by the London naval conference. Convention VII of the second Hague conference on the general subject of the conversion of merchant ships into war-ships was not signed by the American delegation and hence not submitted to the United States Senate for ratification. This convention involved the declaration of Paris to such an extent that the American delegation, in view of the non-adherence on the part of the United States to that declaration, felt that they could not with propriety be a signatory to the convention. In the preamble the subject of the place of transfer is referred to as follows:

"As, however, the contracting powers having been unable to come to an agreement on the question whether the conver-

[1] Westlake, 2d ed., vol. II, p. 164. [2] Dana's "Wheaton," par. 333.

sion of a merchant ship into a war-ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement, etc."

In the London naval conference the same difficulty of agreement obtained. Great Britain, Spain, Holland, Japan, and the United States opposed conversion upon the high seas and favored the conversion only in the ports of the country of the belligerent or those under his military occupation. Germany, Russia, Austria-Hungary, Italy, and France considered it permissible upon the high seas.

A conversion of a merchantman in neutral ports or waters would be a violation of neutrality that had been, in effect, more than once condemned in past usages and rules and in the spirit if not the letter of the conventions of The Hague.

With the question of conversion was also involved that of subsequent reconversion to merchantmen from men-of-war. It was generally admitted that a captured enemy merchant vessel could at once be turned into a vessel of war upon the high seas. From this fact it was urged that the right of conversion should be extended upon the high seas to a belligerent so far as his own ships were concerned, especially when at a great distance from his home ports, which may also by war blockade be closed to him.

On the other hand, those against the conversion of merchant ships on the high seas expressed their willingness to relinquish the right to convert captured enemy merchantmen on the high seas and claimed that ships known to belong to regular mercantile lines might sail as innocent merchant vessels, then suddenly throw off their peaceful character on the high seas and search and perhaps capture neutral merchantmen while in their company. On the other hand, they might voyage from one neutral port to another, receiving the treatment of merchantmen, running in to avoid capture, remaining in port indefinitely, taking in frequent and unlimited supplies of all kinds, and then

suddenly assuming at sea the belligerent character with its consequent activities.

The Italian proposition for a compromise seems to hold out the best hopes of agreement. It is to the effect that conversion on the high seas should be limited only to ships which left their last neutral port of departure, or their last national port, before the commencement of hostilities.

In the meantime every country is free to do what it pleases in this matter on the high seas, but a conversion in a neutral port is manifestly a violation of neutrality which should be prohibited by the neutral state.

210. The Use of Floating Mines on the High Seas.—The Hague conference of 1907 left this subject in an unsatisfactory condition. There is nothing in the convention treating of the subject prohibiting the use and laying of mines on the high seas. The British delegation on signing the convention upon the subject made the reservation that, although the action was of a negative character, they considered the fact that a proceeding not under prohibition is not to be considered as recognized as being legally permissible.[1]

Higgins in treating of the subject said that "the officers and crew of a merchant ship which was converted into a mine layer on the high seas, after having enjoyed the security of neutral ports till she could safely sally forth to lay a mine-field on some parts of the ocean to be traversed by a portion of the enemy's fleet, would, if subsequently captured by one of the enemy's cruisers, incur the very probable risk of finding themselves dealt with as illegitimate combatants."[2] Recent experience shows that the probability would be an instant sinking of the mine layer, especially if caught in the act.

Since The Hague convention (VIII) which forbids the laying of automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial ship-

[1] Higgins, "War and the Private Citizen," p. 163.
[2] Higgins, "War and the Private Citizen," p. 164.

ping, and also restricts the nature of the mines used against the enemy, opinion has become more and more opposed to either blockading a port by mines or their general use in waters outside of those within the area of siege operations. Germany made a reservation as to this article and cannot be considered as bound by it.

By this Hague convention it is not only "forbidden to lay unanchored automatic contact mines, except where they are so constructed as to become harmless one hour at most after those who laid them have lost control of them," but:

"The belligerents undertake to provide, as far as possible, that these mines shall become harmless within a limited time, and should they cease to be under surveillance to notify the danger zones as soon as military exigencies permit by a notice to mariners which must be communicated to the governments through the diplomatic channels." [1]

The statement made by the Chinese delegation in regard to the mines used in the Russo-Japanese War is worthy of repetition:

"The Chinese Government is even to-day obliged to furnish vessels engaged in coastal navigation with special apparatus to raise and destroy floating mines which are found not only on the open sea but even in its territorial waters. In spite of the precautions which have been taken, a very considerable number of coasting vessels, fishing-boats, junks, and sampans have been lost with all hands, without the details of these disasters being known to the Western world. It is calculated from five to six hundred of our countrymen engaged in their peaceful occupations have there met a cruel death in consequence of these dangerous engines of war." [2]

The opening to neutrals of trade closed in peace has been discussed in a preceding chapter. As it has been left an open question, those powers favoring the revival of the rule of 1756

[1] Higgins, "Hague Conferences," p. 324.
[2] Higgins, "Hague Conferences," p. 329.

will, in all probability, capture neutral vessels engaged in a trade closed to them in peace and proceed to have them condemned as enemy vessels. If the international prize-court should be in existence the matter will doubtless be referred to it for decision in accordance with equity and justice. Otherwise there is no refuge but the universal agreement to exempt all mercantile shipping from capture; but even this is subject to the possibility of such action by neutral vessels being construed as unneutral service.

The launching of projectiles and explosives from balloons is prohibited until the end of the next Hague conference to the signatory powers which have accepted The Hague declaration upon the subject. But seventeen states refused to sign this declaration and retain the right to make use of this method of warfare against such places as are defended. Among these are Germany, France, Italy, Japan, Russia, Spain, Servia, Montenegro, and Rumania. Great Britain, Belgium, Austria-Hungary, and the United States are signatory states to the declaration, but are not bound in their action in case of war with non-signatory powers.

The question of the treatment of submarine cables in time of war has been discussed elsewhere. There has been no general convention upon the subject, but it is hoped that the rules adopted in the Naval War Code of 1900 may be followed in common practice.

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APPENDIXES

APPENDIX I

THE RECOGNITION OF BELLIGERENCY AND OF INDEPENDENCE

NOTES 15 AND 16 TO THE 8TH EDITION OF WHEATON'S "ELEMENTS OF INTERNATIONAL LAW," BY MR. RICHARD HENRY DANA, 1866

Recognition of Belligerency.—The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign state. The reason which requires and can alone justify this step by the government of another country is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, a recognition by a foreign state of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion and of censure upon the parent government. But the situation of a foreign state with reference to the contest and to the condition of affairs between the contending parties may be such as to justify this act. It is important, therefore, to determine what state of affairs and what relations of the foreign state justify the recognition.

It is certain that the state of things between the parent state and insurgents must amount, in fact, to a war, in the sense of international law; that is, powers and rights of war must be in actual exercise, otherwise the recognition is falsified, for the recognition is of a fact. The tests to determine the question are various and far more decisive where there is maritime war and commercial relations with foreigners. Among the tests are the existence of a *de facto* political organization of the insurgents, sufficient in character, population, and resources to constitute it, if left to itself, a state among the nations, reasonably capable of discharging the duties of a state; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent state as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce and of stopping and searching neutral vessels at sea.

If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity.

As to the relation of the foreign state to the contest, if it is solely on land, and the foreign state is not contiguous, it is difficult to imagine a call for the recognition. If, for instance, the United States should formally recognize belligerent rights in an insurgent community at the centre of Europe, with no seaports, it would require a hardly supposable necessity to make it else than a mere demonstration of moral support. But a case may arise where a foreign state must decide whether to hold the parent state responsible for acts done by the insurgents or to deal with the insurgents as a *de facto* government. (Mr. Canning to Lord Granville on the Greek War, June 22, 1826.) If the foreign state recognizes belligerency in the insurgents, it releases the parent state from responsibility for whatever may be done by the insurgents or not done by the parent state where the insurgent power extends. (Mr. Adams to Mr. Seward, June 11, 1861, "Diplomatic Correspondence," 105.) In a contest wholly upon land, a contiguous state may be obliged to make the decision whether or not to regard it as war; but, in practice, this has not been done by a general and prospective declaration but by actual treatment of cases as they arise. Where the insurgents and the parent state are maritime and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea, then the relations of the foreign state to this contest are far different. In such a state of things, the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct. If it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruisers of both sides may stop, search, and capture the foreign vessel; and that vessel must make no resistance and must submit to adjudication by a prize-court. If it is not a war, the cruisers of neither party can stop or search the foreign merchant vessel; and that vessel may resist all attempts in that direction, and the ships of war of the foreign state may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war, no such tribunal can be opened. If it is a war, the parent state may institute a blockade *jure gentium*, of the insurgent ports, which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents. If it is not a war, those cruisers are pirates and may be treated as such. If it is a war, the rules and risks respecting carrying contraband,

or despatches, or military persons come into play. If it is not a war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents, in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while, if it is not a war, they do not come into that category but into the category of piracy or of crimes by municipal law.

Now, all private citizens of a foreign state, and all its executive officers and judicial magistrates, look to the political department of their government to prescribe the rule of their conduct, in all their possible relations with the parties to the contest. This rule is prescribed in the best and most intelligible manner for all possible contingencies by the simple declaration that the contest is or is not to be treated as war. If the state of things requires the decision, it must be made by the political department of the government. It is not fit that cases should be left to be decided as they may arise, by private citizens or naval or judicial officers, at home or abroad, by sea or land. It is, therefore, the custom of nations for the political department of a foreign state to make a decision. It owes it to its own citizens, to the contending parties, and to the peace of the world, to make that decision seasonable. If it issues a formal declaration of belligerent rights prematurely, or in a contest with which it has no complexity, it is a gratuitous and unfriendly act. If the parent government complains of it, the complaint must be upon one of these grounds. To decide whether the recognition was uncalled-for and premature requires something more than a consideration of proximate facts and the overt and formal acts of the contending parties. The foreign state is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organization and preparations on each side; the probable extent of the conflict, by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant vessels, naval officers, and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is that the foreign state may protect itself by a seasonable decision, either upon a test case that arises, or by a general prospective decision; while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent state. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized status and the opportunity to employ commissioned cruisers at sea and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi-political recognition. On the other hand, the parent government is relieved from responsibility for acts done in the insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert, against neutral commerce, all the powers of a party to a maritime war.

This subject received a full discussion in the correspondence between Mr. Adams and Earl Russell, beginning April 7, and ending September 18, 1865. The principal contest was, whether the recognition by Great Britain of belligerent rights in the rebel States was "unprecedented and precipitate," as alleged by Mr. Adams. This belongs rather to history than to law; but the principles of international law applicable to the facts were adduced on each side. The rule Mr. Adams lays down is this: "Whenever an insurrection against the established government of a country takes place, the duty of governments, under obligations to maintain peace and friendship with it, appears to be, at first, to abstain carefully from any step that may have the smallest influence in affecting the result. Whenever facts occur of which it is necessary to take notice, either because they involve a necessity of protecting personal interests at home or avoiding an implication in the struggle, then it appears to be just and right to provide for the emergency by specific measures, precisely to the extent that may be required, but no further. It is, then, facts alone, and not appearances or presumptions, that justify action. But even these are not to be dealt with further than the occasion demands: a rigid neutrality in whatever may be done is, of course, understood. If, after the lapse of a reasonable period, there be little prospect of a termination of the struggle, especially if this be carried on upon the ocean, a recognition of the parties as belligerents appears to be justifiable; and at that time, so far as I can ascertain, such a step has never, in fact, been objected to." He contends that the recognition of belligerent rights in the American colonies, in their war of independence, by France and Holland, was not made generally and for all purposes but only to meet existing facts and not until the presence of American war vessels in their ports made a decision necessary; and that France and England, alike, seemed to consider that a recognition of belligerency was an unfriendly act, unless justified by necessity. He considers the belligerent rights of the South American provinces to have been recognized upon the same principles and refers to late civil wars in Europe, involving states more or less maritime, where no such recognition had been made. He contends that the recognition, in this instance, created all the naval power the rebellion possessed and was so influential upon its subsequent history that Great Britain and France are not entitled to the argument that the event justified their action. Earl Russell does not seem to differ from Mr. Adams on the general principles. He contends that the state of things upon which the government was required to act had no exact parallel and must be judged by itself. He protests that the overt and formal acts of the two parties to the war are not alone to be considered; and, referring to the extent of the territory, population, and resources of the rebellion; the existence of its completely organized state and general governments; its unequivocal determination to treat as war, by sea and land, any acts of authority which the United States, on the other hand, had equally determined to exert; the long antecedent history and preparations for this revolution; and the cer-

tainty of the magnitude and extent of the war and its rapid development whenever it should begin and that it would require the instant decision of maritime questions by neutral vessels of war and merchantmen alike—he argues that it was necessary for England to determine at once, upon facts and probabilities, whether she should permit the right of search and blockade as acts of war, and whether the letters of marque or public ships of the rebels, which might appear at once in many parts of the world, should be treated as pirates or as lawful belligerents. On this subject, see further Mr. Bennis's pamphlets on the "Recognition of Belligerency," Boston, 1865; letter of Mr. Harcourt ("Historicus"), *London Times*, March 22, 1865; Lord Lyons to Lord J. Russell, April 22, 1861; Mr. Bright's speech, March 13, 1865; Earl Russell's speech, March 23, 1865; proclamations of President Lincoln of 15th and 19th April, 1861, and of Jefferson Davis, 17th April, 1861, and Queen Victoria, 13th May, 1861.

As to the recognition of belligerency by France and Holland in the American Revolution, see the above correspondence between Mr. Adams and Earl Russell; the *Annual Register*, 1776, pp. 182, 183; 1779, p. 249; Martens's "Causes Célèbres," I, 113; Baron Van Zuylen to Mr. Pike, September 17, 1861, "U. S. Diplomatic Correspondence," 368.

Upon our claim for a recognition of our belligerency by Denmark during the war of the Revolution and the demand for compensation for Paul Jones's prizes surrendered by Denmark to England, see Sparks's "Diplomatic Correspondence," III, 121; Sparks's "Life of Franklin," VIII, 407–462; U. S. Laws, VI, 61; State Papers, III, 4; despatch of Mr. Wheaton to Mr. Upshur, November 10, 1843.

During the civil war between Spain and her South American colonies, the belligerency of the latter was recognized by the United States. U. S. *v.* Palmer, Wheaton's Rep., III, 610; *La Divina Pastora*, *ib.*, IV, 52; *La Santissima Trinidad*, *ib.*, VII, 337; *Nueva Anna*, *ib.*, VI, 193. So in the case of the civil war between Texas and Mexico. Mr. Forsyth to the Mexican minister, September 20, 1836; Opinions of Attorneys-General, 120, iii. As to the belligerent status of the Greeks during their war with Turkey, see Lord Russell's speech, May 6, 1861; Mr. Canning to Lord Granville, June 22, 1826; Stapleton's "Life of Canning," 476. Also, as to belligerent rights of the South American provinces, see the British cabinet decision of July 23, 1824, Canning's "Life," 399, *British Annual Register*, 1823, 146.—D.

Recognition of Independence.—It is an established general principle that each nation is to settle for itself the form in which it will live; and when that is settled, foreign nations recognize it. So, it is purely an internal matter whether a community, previously one, shall divide itself by force or by agreement and become two or more states. When that matter is settled, foreign nations recognize it as a fact. No questions can arise on either of these points when the parties to the change have agreed or acquiesced and the fact has passed into history. Doubts arise where a foreign state does some act, which, to a greater or less extent, recognizes

a new dynasty in a state, before the old dynasty has surrendered its claim or recognizes a new state created by rebellion before the parent government has acquiesced. It would be a wrong view and lead to false results, if we assumed that the foreign state is to recognize everything possible in the new state, once for all, or to recognize nothing. There are, in truth, stages and degrees of recognition. Where the purpose of the foreign state is just and friendly, it will go no further than its own necessities require. We have already seen (note 15 to sec. 19) that these necessities may require it to recognize belligerent rights in the insurgent government. Another stage in the contest may require it to treat with that government with reference to its *de facto* revenue and commercial regulations, and the rights of foreign subjects, in their persons or property, being within the territory under the control of that government, or for reparation for past and prevention of future wrongs. If the necessities of the foreign state require these acts to be done, the parent government has no cause of complaint. It is her misfortune that the insurrection has dimensions and power which exclude her authority for the time and compel foreign nations to deal with an intruding government that has authority *de facto*. The cardinal rule is, while they must not interfere to affect the contest, foreign nations may and must live and trade, notwithstanding the contest. The test is—did the necessities of the foreign state require the act, and did the act recognize no more than existed and than those necessities required? The acts referred to are special and casual and temporary, and are not inconsistent with a recognition of the fact that the contest is still undecided. But, if the foreign state makes a general treaty with the new state, substantially as with an independent nation, with terms looking to general and permanent relations, that act is a general recognition of independence. Whether this final step is justifiable depends upon the same tests: namely, the necessities of foreign states and the truth of the fact implied, that the state treated with was, at the time, in the condition *de facto* of an independent state. Where the necessities of the foreign state are spoken of, the term is to be understood in a liberal sense. It refers to a state of things when a just regard to the duties and rights of a government, in reference to the interests confided to it, requires its action. It is among the duties of a government to keep open to its subjects commercial intercourse with all practicable parts of the world, the privileges of travel and sojourning, and all the forms of intercourse beneficial to humanity, and to make arrangements for the protection of its citizens in these pursuits. To that end, among the frequent convulsions of states, it is often necessary for a foreign power to deal with the party in possession of a portion of the state. To wait till the question of right is determined would be to suspend no small part of the life of nations. The justification of special acts short of absolute and formal recognition of sovereign independence must depend upon the circumstances of each case, and little light can be thrown upon them by abstract statements further than have been already made. But, with reference to the final

recognition by a general treaty, or by the establishing of full diplomatic intercourse, a more positive rule can be laid down. The only test required is that the new state shall be, in fact, what the recognizing state assumes it to be; for it may be conceded, once for all, that it is among the necessities of nations to have treaties and diplomatic intercourse with existing states. The practice of nations furnishes the best definitions and limitations of the condition of things in the new state, which will justify such a recognition. It is not necessary that the parent state or deposed dynasty should have ceased from all efforts to regain its power. On the other hand, it is necessary that the contest should have been virtually decided.

It was nearly seventy years after the declaration of independence by the Netherlands that it was recognized by Spain, in the treaty of Münster of 1648; but, at various stages during that period, the Netherlands were dealt with as a sovereign state by all the powers of Europe except Austria. (Dumont, V, 507; VI, 429. Mackintosh's "Works," III, 444.) The new dynasty of Braganza was established over Portugal by a revolt against Spain in 1640 and was not acknowledged by Spain until the treaty of Lisbon of 1688; but the king of England made a general treaty with the king of Portugal, as a lawful sovereign, in 1641, on the ground of "his solicitude to preserve the tranquillity of his kingdoms and to secure the liberty of trade of his beloved subjects." (Dumont, VI, 238; VII, 238. Mackintosh's "Works," III, 446.) All the Continental powers treated with the Commonwealth as the English sovereignty, though the Stuarts were asserting their claim, which they afterward made good. And after the Revolution of 1688 and the establishment of the Orange dynasty, the refusal of France and Spain to recognize it, and their persistent recognition of the son of James II were resented by England as acts of hostility and led to her alliance with Holland and Germany against them. (Mackintosh's "Works," III, 446.)

As to the recognition of the independence of the North American province by France and Holland, see Phillimore's "International Law," III, sec. 15; Martens's "Causes Célèbres," I, 103, 466; Canning's "Speeches," V, 322; *British Annual Register*, 1776, 182; 1779, 249; Baron Van Zuylen to Mr. Pike, September 17, 1861, "U. S. Diplomatic Correspondence," 368; correspondence between Mr. Adams and Earl Russell, April to September, 1865. The reasons assigned by England and other powers for not recognizing the French Republic of 1792 were the unsettled state of France, and the character of the acts of the republic, and their alleged effect upon the internal affairs of neighboring nations; and the refusal of England to treat with Napoleon from 1808 to 1814 has been put upon special grounds and not upon his want of competency to act as a sovereign. Phillimore's "International Law," I, sec. 390; II, sec. 19; Canning's "Speeches," V, 323. The European powers recognized successively the revolutionary governments of Louis Philippe in 1830, of the republic in 1848, and of the empire in 1852. In the Greek War, Great Britain, France, and Russia, as early as 1827, made consular and commercial

arrangements with Greece, and recognized her independence formally in 1832. The independence of Belgium was recognized at once, in 1830, without the consent of Holland. (But these cases of Greece and Belgium are both instances of forcible intervention and not of mere recognition.)

The independence of the South American republics was recognized first by the United States, and tardily by England, but by both upon the ground that after long-recognized belligerency and the practically unobstructed exercise by them of sovereign powers, Spain, separated by an ocean, had abandoned actual efforts for their reduction and only clung to a nominal right. Canning's speech, February 4, 1825; Hansard, XII, 78; Mackintosh's speech, June 15, 1824; Mackintosh's "Works," III, 749; President Jackson's message, December 21, 1836. In 1818, Mr. Clay proposed in Congress a mission to the South American provinces to express the sympathy of the United States and with a view to enter into friendly relations with them at a future day. The proposition was rejected by a vote of 115 to 45, on the ground of the still unsettled state of the provinces and the continuance of actual war. At the next session of Congress, in November, 1818, President Monroe, in his annual message, referred to the condition of those provinces; to the probable mediation of the allied powers; and expressed his hope and belief that they would not intervene by force and his satisfaction with the course of neutrality adopted by the United States. In his message of December, 1819, he says that Buenos Ayres "still maintains unshaken the independence which it declared in 1816 and has enjoyed since 1810. Like success has attended Chile and the provinces north of La Plata, and likewise Venezuela." He speaks of the situation and resources of the provinces as giving them advantages very difficult for Spain, so distant a power, to overcome and adds: "The steadiness, consistency, and success with which they have pursued their object, as evinced more particularly by the undisputed sovereignty which Buenos Ayres has so long enjoyed, evidently give them a strong claim to the favorable consideration of other nations. These sentiments on the part of the United States have not been withheld from other powers with whom it is desirable to act in concert. Should it become manifest to the world that the efforts of Spain to subdue these provinces will be fruitless, it may be presumed that the Spanish Government itself will give up the contest. In producing such a determination, it cannot be doubted that the opinions of friendly powers who have taken no part in the controversy will have their merited influence." At the same time, the President recommended a revision of the laws for the preservation of neutrality, so as to give them greater effect. In his message of December, 1820, he refers to the continued success of the revolutionists, while "in no part of South America has Spain made any impression on the colonies"; and, expressing the hope that the change in the government of Spain will lead to the recognition of their independence by that power, adds: "To promote that result by friendly counsels with other powers, including Spain herself, has been the uniform policy of this gov-

ernment." In February, 1821, Mr. Clay again brought forward a resolution for acknowledging the independence of the provinces, which passed the House of Representatives but did not pass the Senate. In his second inaugural address, in March, 1821, Mr. Monroe renews expressions of hope that the change in the government of Spain will lead to a recognition but still advises neutrality. In his message of December, 1821, he says: "It has long been manifest that it would be impossible for Spain to reduce these colonies by force and, equally so, that no conditions short of their independence would be satisfactory to them." In January, 1822, in accordance with a recommendation of the President, a resolution for the acknowledgment of the independence of Mexico and the Spanish provinces of South America was adopted by Congress by a nearly unanimous vote, and diplomatic missions established, to which the President soon afterward made appointments. It was many years after this that their independence was acknowledged by Spain.

In Texas the declaration of independence was made in December, 1835, after a year of fighting. The decisive battle of San Jacinto was in April, 1836, which practically ended the war, and Mexico did not again invade Texas, though she still refused to acknowledge its independence. During the summer of 1836, Congress passed a resolution to the following effect: "That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information should be received that it had in successful operation a civil government capable of performing the duties and fulfilling the obligations of an independent power."

In December, 1836, President Jackson sent a special message, recommending delay in the recognition. He says: "The acknowledgments of a new state as independent and entitled to a place in the family of nations is at all times an act of great delicacy and responsibility; but more especially so when such state has forcibly separated itself from another, of which it had formed an integral part and which still claims dominion over it. A premature recognition under these circumstances, if not looked upon as a justifiable cause of war, is always liable to be regarded as a proof of an unfriendly spirit to one of the contending parties. All questions relative to the government of foreign nations have been treated by the United States as questions of fact only; and our predecessors have cautiously abstained from deciding upon them, until the clearest evidence was in their possession to enable them not only to decide correctly but to shield their decisions from every unworthy imputation. . . . In the contest between Spain and her revolted colonies we stood aloof and waited not only until the ability of the new states to protect themselves was fully established but until the danger of their being again subjugated had entirely passed away. Then, and not until then, they were recognized. Such was our course in regard to Mexico herself. The same policy was observed in all disputes arising out of the separation into distinct governments of those Spanish-American States which began or carried on the contest with the parent country, united under one form of government.

We acknowledged the separate independence of New Granada, of Venezuela, and of Ecuador only after their independent existence was no longer a subject of dispute or was actually acquiesced in by those with whom they had been previously united. It is true that, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Texas. The Mexican Republic, under another executive, is rallying its forces under a new leader and menacing a fresh invasion to recover its lost dominion. Upon the issue of this threatened invasion the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis could hardly be regarded as consistent with the prudent reserve with which we have heretofore held ourselves bound to treat all similar questions. . . . Prudence, therefore, seems to dictate that we should still stand aloof and maintain our present attitude, if not until Mexico itself or one of the great foreign powers shall recognize the independence of the new government, at least until the lapse of time or the course of events shall have proved, beyond cavil or dispute, the ability of the people of that country to maintain their separate sovereignty and to uphold the government established by them."

The attempt to invade Texas having been abandoned by Mexico, her independence was acknowledged by the United States in March, 1837, and by England and France, 1840.

Of this history Mr. Webster said in 1842, in his official letter to Mr. Thompson in answer to the complaints of Mexico: "It is true that the independence of Texas has not been recognized by Mexico. It is equally true that the independence of Mexico has only been recently recognized by Spain; but the United States, having acknowledged both the independence of Mexico, before Spain acknowledged it, and the independence of Texas, although Mexico has not yet acknowledged it, stands in the same relation toward both these governments. . . . No effort for the subjugation of Texas has been made by Mexico from the time of the battle of San Jacinto on the 4th April, 1836, to the commencement of the present year; and, during all this period, Texas has maintained an independent government, carried on commerce, made treaties with nations in both hemispheres, and kept aloof all attempts at invading her territory."

The action of the United States with reference to Hungary in 1849 has been a subject of some discussion. Hungary, although long a component part of the Austrian Empire, had been, for centuries before, an independent kingdom with its distinct history; and the Hungarians had still strong national feeling and a different language and very different institutions from those of Austria. In the general disturbance of 1848 the Hungarians established a government completely organized in all its

parts, with a large army, and successfully resisted the Austrian attempts to subjugate it. A civil war of such an origin presents a very different case from one originating in an insurrection of a portion of a single nation, where the insurgents act together for the first time and make an original experiment at forming themselves into a nationality. Such a movement as that of Hungary more rapidly and naturally takes form and consistency, or, rather, gives an independent direction to its ancient and never-abandoned form and consistency, and its chances for success are better. In the autumn of 1848, M. Kossuth, the chief of the insurrectionary movement, applied to Mr. Stiles, the United States chargé d'affaires at Vienna, to use his good offices with the Imperial Government, with a view to a cessation of hostilities. Mr. Stiles, without instructions from home, opened communication with the imperial government and was received by the imperial ministers, Princes Schwarzenberg and Windischgrätz, with respect and expressions of thanks for his friendly purpose. Some Hungarian agents came to the United States and urged upon the government the recognition of their independence and the making of a treaty of commerce. President Taylor declined all immediate action in that direction but sent Mr. Dudley Mann to Europe, with secret instructions "to obtain minute and reliable information in regard to Hungary in connection with the affairs of adjoining countries, the probable issue of the present revolutionary movements, and the chances he may have of forming commercial arrangements with that power favorable to the United States"; and in another sentence: "The object of the President is to obtain information in regard to Hungary and her resources and prospects, with a view to an early recognition of her independence and the formation of commercial relations with her."

On this duty Mr. Mann went to the neighborhood of the contending parties in 1849 but did not enter Hungary or hold any direct communication with her leaders and reported that he found the prospects of the revolution less promising than they had been, or had been believed to be, and advised against the recognition of independence. The intervention of Russia, with her vast military force, had overborne the until then successful movement. Mr. Mann, in compliance with his instructions, forbore to give publicity to his mission, and the nature of his instructions first became known by the communication made by President Taylor to the Senate of the United States, 28th March, 1850, after the Hungarian War was ended. M. Hülsemann, the Austrian chargé d'affaires at Washington, inquiring of Mr. Clayton, secretary of state, was told that "Mr. Mann's mission had no other object in view than to obtain reliable information as to the true state of affairs in Hungary by personal observation."

This was all that was done by the United States. The state of things in Hungary in 1849 would doubtless have justified any nation in recognizing the belligerency of Hungary, if her own relations with the parties to the contest had been such as to require such a declaration as a guide to her own official and private citizens and as a notice to both parties.

But as the United States had no such complication and no immediate cause to apprehend it, the government did no act in the nature of such a recognition; and the mission of Mr. Mann was secret and confidential and did not become known so as to have influenced the result.

M. Hülsemann, in a letter to Mr. Webster, secretary of state, of September 30, 1850, reopens the subject and complains of the mission as a past transaction, on the ground that it was a violation of the law of nations and unfriendly to Austria. He objects to the language used in the instructions, especially the characterizing of "the rebel chief Kossuth as an illustrious man," and of the terms in which the Austrian system and the intervention of Russia, the ally of Austria, are spoken of, as offensive to Austria; and adds that the publicity given to the instructions by the communication to the Senate requires the Austrian Government to make a formal protest against them.

Mr. Webster replied, by letter of December 21, 1850, that the United States regards a communication from one department of its government to another, as from the President to the Senate, as a domestic communication, of which ordinarily no foreign state has cognizance, and that great inconvenience would result from making such communications matter of diplomatic correspondence and discussion. Mr. Webster says: "The undersigned reasserts to M. Hülsemann and to the cabinet of Vienna, and in the presence of the world, that the steps taken by President Taylor, now protested against by the Austrian Government, were warranted by the law of nations and agreeable to the usages of civilized states." As to the language in which the confidential instructions to Mr. Mann were couched, Mr. Webster says they were confidential between the President and his agent, "in reference to which the United States cannot admit the slightest responsibility to the government of His Imperial Majesty. No state deserving the appellation of independent can permit the language in which it may instruct its own officers, in the discharge of their duties to itself, to be called in question, under any pretext, by a foreign power." He reminds M. Hülsemann that they were communicated to the Senate after the war was over and that Austria obtained its first knowledge of the instructions from that communication.

It would seem that the only objection to the course of the United States was that it showed a desire to be prompt in recognizing Hungary. This Mr. Webster admits. He says that the people of the United States have a deep interest in the movements made by a nation to regain its independence with institutions like our own, which we deem to be real blessings to a people, against the force of governments which are not only hostile to those institutions but affect to consider them as never having a lawful origin, not being derived from the consent of those holding thrones by divine right. Mr. Webster's position is that, in such a contest, governments hostile to popular institutions must expect to see demonstrations of sympathy and feeling by the people of a free country, and expressions of it may appear in confidential domestic communications of the govern-

ment itself; but such powers must be content if the government, in its relations with them during the contest, performs faithfully the duties enjoined upon it by international law, gives no public and official moral support to the insurrection, abstains from recognizing independence until it exists in fact, and executes faithfully the duties of neutrality in the contest, as regards all material aid. In reply to M. Hülsemann's complaint of the language of the President toward Russia, he reminds the writer that Russia has made no complaint. Mr. Webster's letter is, no doubt, a grave and skilful censure of Austria and of her system and relations to freedom and would have been open to the charge of being undiplomatic if the note of M. Hülsemann had not given Mr. Webster fair opportunity, if not provocation, to introduce the topics into his reply. Webster's "Works," VI, 488–506.

As a point in international law the transaction has little significance, as the United States undoubtedly did not act in the way of recognizing the independence or even belligerency of Hungary but confidentially and secretly took its own mode of making sure of its ground in being the earliest, consistently with international law, to recognize the independence of a nation with whose cause it sympathized. The episode belongs rather to history, as indicating the policy and feeling of the United States.

See note 41 on Intervention in Mexico.—D.

APPENDIX II

CONVENTION

For the Pacific Settlement of International Disputes

"Animated by the sincere desire to work for the maintenance of general peace;

"Resolved to promote by all the efforts in their power the friendly settlement of international disputes;

"Recognizing the solidarity uniting the members of the society of civilized nations;

"Desirous of extending the empire of law and of strengthening the appreciation of international justice;

"Convinced that the permanent institution of a Tribunal of Arbitration accessible to all, in the midst of independent Powers, will contribute effectively to this result;

"Having regard to the advantages attending the general and regular organization of the procedure of arbitration;

"Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an International Agreement the principles of equity and right on which are based the security of States and the welfare of peoples;

"Being desirous, with this object, of insuring the better working in practice of Commissions of Inquiry and Tribunals of Arbitration and of facilitating recourse to arbitration in cases which allow of a summary procedure;

"Have deemed it necessary to revise in certain particulars and to complete the work of the First Peace Conference for the pacific settlement of international disputes;

"The High Contracting Parties have resolved to conclude a new Convention for this purpose, and have appointed the following as their Plenipotentiaries:"

[Here follow the names of Plenipotentiaries.]

"Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

Part I—The Maintenance of General Peace

Article 1

"With a view to obviating as far as possible recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to insure the pacific settlement of international differences.

Part II—Good Offices and Mediation

Article 2

"In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

"Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers strangers to the dispute should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

"Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

"The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

Article 4

"The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

"The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

"Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice and never have binding force.

Article 7

"The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

"If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

Article 8

"The Contracting Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

"In case of a serious difference endangering peace, the States at vari-

ance choose respectively a Power to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

"For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

"In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

Part III—International Commissions of Inquiry

Article 9

"In disputes of an international nature involving neither honor nor vital interests and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

Article 10

"International Commissions of Inquiry are constituted by special agreement between the parties in dispute.

"The Inquiry Convention defines the facts to be examined; it determines the mode and time in which the Commission is to be formed and the extent of the powers of the Commissioners.

"It also determines, if there is need, where the Commission is to sit and whether it may remove to another place, the language the Commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

"If the parties consider it necessary to appoint Assessors, the Convention of Inquiry shall determine the mode of their selection and the extent of their powers.

Article 11

"If the Inquiry Convention has not determined where the Commission is to sit, it will sit at The Hague.

"The place of meeting, once fixed, cannot be altered by the Commission except with the assent of the parties.

"If the Inquiry Convention has not determined what languages are to be employed, the question shall be decided by the Commission.

ARTICLE 12

"Unless an undertaking is made to the contrary, Commissions of Inquiry shall be formed in the manner determined by Articles XLV and LVII of the present Convention.

ARTICLE 13

"Should one of the Commissioners or one of the Assessors, should there be any, either die, or resign, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

ARTICLE 14

"The parties are entitled to appoint special agents to attend the Commission of Inquiry, whose duty it is to represent them and to act as intermediaries between them and the Commission.

"They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the Commission.

ARTICLE 15

"The International Bureau of the Permanent Court of Arbitration acts as registry for the Commissions which sit at The Hague and shall place its offices and staff at the disposal of the Contracting Powers for the use of the Commission of Inquiry.

ARTICLE 16

"If the Commission meets elsewhere than at The Hague, it appoints a Secretary-General, whose office serves as registry.

"It is the function of the registry, under the control of the President, to make the necessary arrangements for the sittings of the Commission, the preparation of the Minutes, and, while the inquiry lasts, for the charge of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

ARTICLE 17

"In order to facilitate the constitution and working of Commissions of Inquiry, the Contracting Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.

ARTICLE 18

"The Commission shall settle the details of the procedure not covered by the special Inquiry Convention or the present Convention and shall arrange all the formalities required for dealing with the evidence.

ARTICLE 19

"On the inquiry both sides must be heard.

"At the dates fixed, each party communicates to the Commission and to the other party the statements of facts, if any, and, in all cases, the instruments, papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.

ARTICLE 20

"The Commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the State on whose territory it is proposed to hold the inquiry.

ARTICLE 21

"Every investigation and every examination of a locality must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ARTICLE 22

"The Commission is entitled to ask from either party for such explanations and information as it considers necessary.

ARTICLE 23

"The parties undertake to supply the Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

"They undertake to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the Commission.

"If the witnesses or experts are unable to appear before the Commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country.

ARTICLE 24

"For all notices to be served by the Commission in the territory of a third Contracting Power, the Commission shall apply direct to the Government of the said Power. The same rule applies in the case of steps being taken on the spot to procure evidence.

"The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow.

They cannot be rejected unless the Power in question considers they are calculated to impair its sovereign rights or its safety.

"The Commission will equally be always entitled to act through the Power on whose territory it sits.

ARTICLE 25

"The witnesses and experts are summoned on the request of the parties or by the Commission of its own motion and, in every case, through the Government of the State in whose territory they are.

"The witnesses are heard in succession and separately, in the presence of the agents and counsel, and in the order fixed by the Commission.

ARTICLE 26

"The examination of witnesses is conducted by the President.

"The members of the Commission may, however, put to each witness questions which they consider likely to throw light on and complete his evidence, or get information on any point concerning the witness within the limits of what is necessary in order to get at the truth.

"The agents and counsel of the parties may not interrupt the witness when he is making his statement nor put any direct question to him, but they may ask the President to put such additional questions to the witness as they think expedient.

ARTICLE 27

"The witness must give his evidence without being allowed to read any written draught. He may, however, be permitted by the President to consult notes or documents if the nature of the facts referred to necessitates their employment.

ARTICLE 28

"A Minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.

"When the whole of his statement has been read to the witness, he is asked to sign it.

ARTICLE 29

"The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the Commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

ARTICLE 30

"The Commission considers its decisions in private and the proceedings are secret.

"All questions are decided by a majority of the members of the Commission.

"If a member declines to vote, the fact must be recorded in the Minutes.

ARTICLE 31

"The sittings of the Commission are not public, nor the Minutes and documents connected with the inquiry published except in virtue of a decision of the Commission taken with the consent of the parties.

ARTICLE 32

"After the parties have presented all the explanations and evidence and the witnesses have all been heard, the President declares the inquiry terminated, and the Commission adjourns to deliberate and to draw up its Report.

ARTICLE 33

"The Report is signed by all the members of the Commission.

"If one of the members refuses to sign, the fact is mentioned; but the validity of the Report is not affected.

ARTICLE 34

"The Report of the Commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

"A copy of the Report is given to each party.

ARTICLE 35

"The Report of the Commission is limited to a statement of facts and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.

ARTICLE 36

"Each party pays its own expenses and an equal share of the expenses incurred by the Commission.

PART IV—INTERNATIONAL ARBITRATION

CHAPTER I—*The System of Arbitration*

ARTICLE 37

"International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law.

"Recourse to arbitration implies an engagement to submit in good faith to the Award.

ARTICLE 38

"In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

"Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

ARTICLE 39

"The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

"It may embrace any dispute or only disputes of a certain category.

ARTICLE 40

"Independently of general or private Treaties expressly stipulating recourse to arbitration as obligatory on the Contracting Powers, the said Powers reserve to themselves the right of concluding new Agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

CHAPTER II—*The Permanent Court of Arbitration*

ARTICLE 41

"With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the Contracting Powers undertake to maintain the Permanent Court of Arbitration, as established by the First Peace Conference, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 42

"The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

ARTICLE 43

"The Permanent Court sits at The Hague.

"An International Bureau serves as registry for the Court. It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business.

"The Contracting Powers undertake to communicate to the Bureau,

as soon as possible, a certified copy of any conditions of arbitration arrived at between them and of any Award concerning them delivered by a special Tribunal.

"They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the Awards given by the Court.

Article 44

"Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.

"The persons thus selected are inscribed, as members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.

"Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Contracting Powers.

"Two or more Powers may agree on the selection in common of one or more members.

"The same person can be selected by different Powers. The members of the Court are appointed for a term of six years. These appointments are renewable.

"Should a member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years.

Article 45

"When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference must be chosen from the general list of members of the Court.

"Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

"Each party appoints two Arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These Arbitrators together choose an Umpire.

"If the votes are equally divided, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

"If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

"If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire.

ARTICLE 46

"The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court, the text of their 'Compromis,'[1] and the names of the Arbitrators.

"The Bureau communicates without delay to each Arbitrator the 'Compromis' and the names of the other members of the Tribunal.

"The Tribunal assembles at the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

"The members of the Tribunal in the exercise of their duties and out of their own country enjoy diplomatic privileges and immunities.

ARTICLE 47

"The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.

"The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.

ARTICLE 48

"The Contracting Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

"Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court can only be regarded as friendly actions.

"In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

"The Bureau must at once inform the other Power of the declaration.

ARTICLE 49

"The Permanent Administrative Council, composed of the Diplomatic Representatives of the Contracting Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as President, is charged with the direction and control of the International Bureau.

"The Council settles its rules of procedure and all other necessary regulations.

"It decides all questions of administration which may arise with regard to the operations of the Court.

"It has entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau.

"It fixes the payments and salaries and controls the general expenditure.

[1] The preliminary Agreement in an international arbitration defining the point at issue and arranging the procedure to be followed.

"At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

"The Council communicates to the Contracting Powers without delay the regulations adopted by it. It furnishes them with an annual Report on the labors of the Court, the working of the administration, and the expenditure. The Report likewise contains a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article XLIII, paragraphs 3 and 4.

ARTICLE 50

"The expenses of the Bureau shall be borne by the Contracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

"The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion comes into force.

CHAPTER III—*Arbitration Procedure*

ARTICLE 51

"With a view to encouraging the development of arbitration, the Contracting Powers have agreed on the following rules, which are applicable to arbitration procedure unless other rules have been agreed on by the parties.

ARTICLE 52

"The Powers which have recourse to arbitration sign a 'Compromis' in which the subject of the dispute is clearly defined, the time allowed for appointing Arbitrators, the form, order, and time in which the communication referred to in Article LXIII must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

"The 'Compromis' likewise defines, if there is occasion, the manner of appointing Arbitrators, any special powers which may eventually belong to the Tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

ARTICLE 53

"The Permanent Court is competent to settle the 'Compromis,' if the parties are agreed to have recourse to it for the purpose.

"It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

"1. A dispute covered by a general Treaty of Arbitration concluded or renewed after the present Convention has come into force and provid-

ing for a 'Compromis' in all disputes and not either explicitly or implicitly excluding the settlement of the 'Compromis' from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

"2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the 'Compromis' should be settled in some other way.

ARTICLE 54

"In the cases contemplated in the preceding Article, the 'Compromis' shall be settled by a Commission consisting of five members selected in the manner arranged for in Article XLV, paragraphs 3 to 6.

"The fifth member is President of the Commission *ex officio*.

ARTICLE 55

"The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Convention.

"Failing the constitution of the Tribunal by direct agreement between the parties, the course referred to in Article XLV, paragraphs 3 to 6, is followed.

ARTICLE 56

"When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitration procedure is settled by him.

ARTICLE 57

"The Umpire is President of the Tribunal *ex officio*.

"When the Tribunal does not include an Umpire, it appoints its own President.

ARTICLE 58

"When the 'Compromis' is settled by a Commission, as contemplated in Article LIV, and in the absence of an agreement to the contrary, the Commission itself shall form the Arbitration Tribunal.

ARTICLE 59

"Should one of the Arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

ARTICLE 60

"The Tribunal sits at The Hague, unless some other place is selected by the parties.

"The Tribunal can only sit in the territory of a third Power with the latter's consent.

"The place of meeting once fixed cannot be altered by the Tribunal, except with the consent of the parties.

ARTICLE 61

"If the question as to what languages are to be used has not been settled by the 'Compromis,' it shall be decided by the Tribunal.

ARTICLE 62

"The parties are entitled to appoint special agents to attend the Tribunal to act as intermediaries between themselves and the Tribunal.

"They are further authorized to retain for the defence of their rights and interests before the Tribunal counsel or advocates appointed by themselves for this purpose.

"The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 63

"As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions.

"The pleadings consist in the communication by the respective agents to the members of the Tribunal and the opposite party of cases, counter cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the 'Compromis.'

"The time fixed by the 'Compromis' may be extended by mutual agreement by the parties, or by the Tribunal when the latter considers it necessary for the purpose of reaching a just decision.

"The discussions consist in the oral development before the Tribunal of the arguments of the parties.

ARTICLE 64

"A certified copy of every document produced by one party must be communicated to the other party.

ARTICLE 65

"Unless special circumstances arise, the Tribunal does not meet until the pleadings are closed.

ARTICLE 66

"The discussions are under the control of the President.

"They are only public if it be so decided by the Tribunal, with the assent of the parties.

"They are recorded in minutes drawn up by the Secretaries appointed by the President. These minutes are signed by the President and by one of the Secretaries and alone have an authentic character.

ARTICLE 67

"After the close of the pleadings, the Tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 68

"The Tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

"In this case, the Tribunal has the right to require the production of these papers or documents but is obliged to make them known to the opposite party.

ARTICLE 69

"The Tribunal can, besides, require from the agents of the parties the production of all papers and can demand all necessary explanations. In case of refusal the Tribunal takes note of it.

ARTICLE 70

"The agents and the counsel of the parties are authorized to present orally to the Tribunal all the arguments they may consider expedient in defence of their case.

ARTICLE 71

"They are entitled to raise objections and points. The decisions of the Tribunal on these points are final and cannot form the subject of any subsequent discussion.

ARTICLE 72

"The members of the Tribunal are entitled to put questions to the agents and counsel of the parties and to ask them for explanations on doubtful points.

"Neither the questions put nor the remarks made by members of the Tribunal in the course of the discussions can be regarded as an expression of opinion by the Tribunal in general or by its members in particular.

ARTICLE 73

"The Tribunal is authorized to declare its competence in interpreting the 'Compromis' as well as the other Treaties which may be invoked and in applying the principles of law.

ARTICLE 74

"The Tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 75

"The parties undertake to supply the Tribunal, as fully as they consider possible, with all the information required for deciding the case.

ARTICLE 76

"For all notices which the Tribunal has to serve in the territory of a third Contracting Power, the Tribunal shall apply direct to the Government of that Power. The same rule applies in the case of steps being taken to procure evidence on the spot.

"The requests for this purpose are to be executed as far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its own sovereign rights or its safety.

"The Court will equally be always entitled to act through the Power on whose territory it sits.

ARTICLE 77

"When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the President shall declare the discussion closed.

ARTICLE 78

"The Tribunal considers its decisions in private and the proceedings remain secret.

"All questions are decided by a majority of the members of the Tribunal.

ARTICLE 79

"The Award must give the reasons on which it is based. It contains the names of the Arbitrators; it is signed by the President and Registrar or by the Secretary acting as Registrar.

ARTICLE 80

"The Award is read out in public sitting, the agents and counsel of the parties being present or duly summoned to attend.

ARTICLE 81

"The Award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

ARTICLE 82

"Any dispute arising between the parties as to the interpretation and execution of the Award shall, in the absence of an Agreement to the contrary, be submitted to the Tribunal which pronounced it.

ARTICLE 83

"The parties can reserve in the 'Compromis' the right to demand the revision of the Award.

"In this case and unless there be an Agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the Award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the Award and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed.

"Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

"The 'Compromis' fixes the period within which the demand for revision must be made.

ARTICLE 84

"The Award is not binding except on the parties in dispute.

"When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the Award is equally binding on them.

ARTICLE 85

"Each party pays its own expenses and an equal share of the expenses of the Tribunal.

CHAPTER IV—*Arbitration by Summary Procedure*

ARTICLE 86

"With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the Contracting Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be

ARTICLE 87

"Each of the parties in dispute appoints an Arbitrator. The two Arbitrators thus selected choose an Umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the Umpire is determined by lot.

"The Umpire presides over the Tribunal, which gives its decisions by a majority of votes.

ARTICLE 88

"In the absence of any previous agreement the Tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

ARTICLE 89

"Each party is represented before the Tribunal by an agent, who serves as intermediary between the Tribunal and the Government who appointed him.

ARTICLE 90

"The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The Tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

PART V—FINAL PROVISIONS

ARTICLE 91

"The present Convention, duly ratified, shall replace, as between the Contracting Powers, the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899.

ARTICLE 92

"The present Convention shall be ratified as soon as possible.

"The ratifications shall be deposited at The Hague.

"The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the Representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

"The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland Government and accompanied by the instrument of ratification.

"A duly certified copy of the *procès-verbal*, relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph

and of the instruments of ratification shall be immediately sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to those Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall at the same time inform the Powers of the date on which it received the notification.

ARTICLE 93

"Non-Signatory Powers which have been invited to the Second Peace Conference may adhere to the present Convention.

"The Power which desires to adhere notifies its intention in writing to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

"This Government shall immediately forward to all the other Powers invited to the Second Peace Conference a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 94

"The conditions on which the Powers which have not been invited to the Second Peace Conference may adhere to the present Convention shall form the subject of a subsequent Agreement between the Contracting Powers.

ARTICLE 95

"The present Convention shall take effect, in the case of the Powers which were not a party to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

ARTICLE 96

"In the event of one of the Contracting Parties wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government, which shall immediately communicate a duly certified copy of the notification to all the other Powers informing them of the date on which it was received.

"The denunciation shall only have effect in regard to the notifying Power and one year after the notification has reached the Netherland Government.

ARTICLE 97

"A register kept by the Netherland Minister for Foreign Affairs shall give the date of the deposit of ratifications effected in virtue of Article XCII, paragraphs 3 and 4, as well as the date on which the notifications

of adhesion (Article XCIII, paragraph 2) or of denunciation (Article XCVI, paragraph 1) have been received.

"Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

"In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

"Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Contracting Powers."

[Here follow signatures.]

HANNEMA

And whereas the said Convention was signed by the Plenipotentiaries of the United States of America under reserve of the declaration made by them to the International Peace Conference at its session of October 16, 1907, as follows:

"Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions;"

And whereas the Senate of the United States, by its resolution of April 2, 1908 (two-thirds of the Senators present concurring therein), did advise and consent to the ratification of the said Convention with the following understanding and declarations, to wit:

"*Resolved further, as a part of this act of ratification,* That the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in article fifty-three of said convention to exclude the formulation of the 'compromis' by the permanent court, and hereby excludes from the competence of the permanent court the power to frame the 'compromis' required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the 'compromis' required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties unless such treaty shall expressly provide otherwise."

And whereas the said Convention has been duly ratified by the Government of the United States of America, by and with the advice and consent of the Senate thereof, and by the Governments of Germany, Austria-Hungary, Bolivia, China, Denmark, Mexico, the Netherlands, Russia,

Salvador, and Sweden, and the ratifications of the said Governments were, under the provisions of Article 92 of the said Convention, deposited by their respective plenipotentiaries with the Netherlands Government on November 27, 1909;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof, subject to the reserve made in the aforesaid declaration of the Plenipotentiaries of the United States and to the aforesaid understanding and declarations stated and made by the Senate of the United States in its resolution of April 2, 1908.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-eighth day of February in the year of our Lord one thousand nine hundred and ten,
[SEAL.] and of the Independence of the United States of America the one hundred and thirty-fourth.

WM. H. TAFT.

By the President:

P. C. KNOX,
Secretary of State.

APPENDIX III

1907

International Prize-Court Convention

Signed at The Hague October 18, 1907; *ratification advised by the Senate February* 15, 1911

The text of this convention is taken from the copy printed for the use of the Senate of the United States.

"Animated by the desire to settle in an equitable manner the differences which sometimes arise in the course of a naval war in connection with the decisions of National Prize-Courts;

"Considering that, if these Courts are to continue to exercise their functions in the manner determined by national legislation, it is desirable that in certain cases an appeal should be provided under conditions conciliating, as far as possible, the public and private interests involved in matters of prize;

"Whereas, moreover, the institution of an International Court, whose jurisdiction and procedure would be carefully defined, has seemed to be the best method of attaining this object;

"Convinced, finally, that in this manner the hardships consequent on naval war would be mitigated; that, in particular, good relations will be more easily maintained between belligerents and neutrals and peace better assured;

"Desirous of concluding a Convention to this effect, have appointed the following as their Plenipotentiaries:"

[For names of Plenipotentiaries see Final Act, supra.]

"Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:

Part I—*General Provisions*

Article I

"The validity of the capture of a merchant ship or its cargo is decided before a Prize-Court in accordance with the present Convention when neutral or enemy property is involved.

Article II

"Jurisdiction in matters of prize is exercised in the first instance by the Prize-Courts of the belligerent captor.

"The judgments of these Courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

Article III

"The judgments of National Prize-Courts may be brought before the International Prize-Court—

"1. When the judgment of the National Prize-Courts affects the property of a neutral Power or individual;

"2. When the judgment affects enemy property and relates to—

"(*a.*) Cargo on board a neutral ship;

"(*b.*) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

"(*c.*) A claim based upon the allegation that the seizure has been effected in violation either of the provisions of a Convention in force between the belligerent Powers or of an enactment issued by the belligerent captor.

"The appeal against the judgment of the National Court can be based on the ground that the judgment was wrong either in fact or in law.

Article IV

"An appeal may be brought—

"1. By a neutral Power, if the judgment of the National Tribunals injuriously affects its property or the property of its nationals (Article III (1)), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article III (2) (*b*));

"2. By a neutral individual, if the judgment of the National Court injuriously affects his property (Article III (1)), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court or may itself undertake the proceedings in his place;

"3. By an individual subject or citizen of an enemy Power, if the judgment of the National Court injuriously affects his property in the cases referred to in Article III (2), except that mentioned in paragraph (*b*).

Article V

"An appeal may also be brought, on the same conditions as in the preceding Article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the National Court. Persons so entitled may appeal separately to the extent of their interest.

"The same rule applies in the case of persons, belonging either to neutral States or to the enemy, who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.

ARTICLE VI

"When, in accordance with the above Article III, the International Court has jurisdiction, the National Courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

"If the National Courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

ARTICLE VII

"If a question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said Treaty.

"In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

"The above provisions apply equally to questions relating to the order and mode of proof.

"If, in accordance with Article III (2) (c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

"The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

ARTICLE VIII

"If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

"If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

"If the national Court pronounced the capture to be null, the Court can only be asked to decide as to the damages.

ARTICLE IX

"The Contracting Powers undertake to submit in good faith to the decisions of the International Prize-Court and to carry them out with the least possible delay.

PART II—*Constitution of the International Prize-Court*

ARTICLE X

"The International Prize-Court is composed of Judges and Deputy Judges, who will be appointed by the Contracting Powers and must all be jurists of known proficiency in questions of international maritime law and of the highest moral reputation.

"The appointment of these Judges and Deputy Judges shall be made within six months after the ratification of the present Convention.

ARTICLE XI

"The Judges and Deputy Judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899. Their appointments can be renewed.

"Should one of the Judges or Deputy Judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE XII

"The Judges of the International Prize-Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (Article XI, paragraph 1), and if they sit by rota (Article XV, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

"The Deputy Judges when acting are assimilated to the Judges. They rank, however, after them.

ARTICLE XIII

"The Judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

"Before taking their seats, the Judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

ARTICLE XIV

"The Court is composed of fifteen Judges; nine Judges constitute a quorum.

"A Judge who is absent or prevented from sitting is replaced by the Deputy Judge.

ARTICLE XV

"The Judges appointed by the following Contracting Powers, Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

"The Judges and Deputy Judges appointed by the other Contracting Powers sit by rota as shown in the Table annexed to the present Convention; their duties may be performed successively by the same person. The same Judge may be appointed by several of the said Powers.

Article XVI

"If a belligerent Power has, according to the rota, no Judge sitting in the Court, it may ask that the Judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the Judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the Judge appointed by the other belligerent.

Article XVII

"No Judge can sit who has been a party, in any way whatever, to the sentence pronounced by the National Courts or has taken part in the case as counsel or advocate for one of the parties.

"No Judge or Deputy Judge can, during his tenure of office, appear as agent or advocate before the International Prize-Court nor act for one of the parties in any capacity whatever.

Article XVIII

"The belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor but with no voice in the decision. A neutral Power which is a party to the proceedings or whose subject or citizen is a party has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

Article XIX

"The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority and, in case the votes are equal, by lot.

Article XX

"The Judges on the International Prize-Court are entitled to travelling allowances in accordance with the regulations in force in their own country and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem.

"These payments are included in the general expenses of the Court dealt with in Article XLVII and are paid through the International Bureau established by the Convention of the 29th July, 1899.

"The Judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

ARTICLE XXI

"The seat of the International Prize-Court is at The Hague, and it cannot, except in the case of *force majeure*, be transferred elsewhere without the consent of the belligerents.

ARTICLE XXII

"The Administrative Council fulfils, with regard to the International Prize-Court, the same functions as to the Permanent Court of Arbitration, but only Representatives of Contracting Powers will be members of it.

ARTICLE XXIII

"The International Bureau acts as registry to the International Prize-Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

"The Secretary-General of the International Bureau acts as Registrar.

"The necessary secretaries to assist the Registrar, translators, and shorthand writers are appointed and sworn in by the Court.

ARTICLE XXIV

"The Court determines which language it will itself use and what languages may be used before it, but the official language of the National Courts which have had cognizance of the case may always be used before the Court.

ARTICLE XXV

"Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE XXVI

"A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the Contracting States, or a lawyer practising before a similar Court, or, lastly, a professor of law at one of the higher teaching centres of those countries.

ARTICLE XXVII

"For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

"The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its sovereign rights or its safety. If the request is com-

plied with, the fees charged must only comprise the expenses actually incurred.

"The Court is equally entitled to act through the Power on whose territory it sits.

"Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

PART III—*Procedure in the International Prize-Court*

ARTICLE XXVIII

"An appeal to the International Prize-Court is entered by means of a written declaration made in the National Court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

"The period within which the appeal must be entered is fixed at 120 days, counting from the day the decision is delivered or notified (Article II, paragraph 2).

ARTICLE XXIX

"If the notice of appeal is entered in the National Court, this Court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

"If the notice of the appeal is sent to the International Bureau, the Bureau will immediately inform the National Court, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

"When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article IV, paragraph 2.

ARTICLE XXX

"In the case provided for in Article VI, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

ARTICLE XXXI

"If the appellant does not enter his appeal within the period laid down in Articles XXVIII or XXX, it shall be rejected without discussion.

"Provided that he can show that he was prevented from so doing by *force majeure*, and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

ARTICLE XXXII

"If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

ARTICLE XXXIII

"If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article XXIX, paragraph 3, the Government who has received notice of an appeal has not announced its decision, the Court will await, before dealing with the case, the expiration of the period laid down in Articles XXVIII or XXX.

ARTICLE XXXIV

"The procedure before the International Court includes two distinct parts; the written pleadings and oral discussions.

"The written pleadings consist of the deposit and exchange of cases, counter cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

"A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

ARTICLE XXXV

"After the close of the pleadings, a public sitting is held on a day fixed by the Court.

"At this sitting the parties state their view of the case both as to the law and as to the facts.

"The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties or on their own initiative, in order that supplementary evidence may be obtained.

ARTICLE XXXVI

"The International Court may order the supplementary evidence to be taken either in the manner provided by Article XXVII or before itself or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

"If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE XXXVII

"The parties are summoned to take part in all stages of the proceedings and receive certified copies of the Minutes.

ARTICLE XXXVIII

"The discussions are under the control of the President or Vice-President or, in case they are absent or cannot act, of the senior Judge present.

"The Judge appointed by a belligerent party cannot preside.

ARTICLE XXXIX

"The discussions take place in public, subject to the right of a Government who is a party to the case to demand that they be held in private.

"Minutes are taken of these discussions and signed by the President and Registrar, and these Minutes alone have an authentic character.

ARTICLE XL

"If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

ARTICLE XLI

"The Court officially notifies to the parties Decrees or decisions made in their absence.

ARTICLE XLII

"The Court takes into consideration in arriving at its decision all the facts, evidence, and oral statements.

ARTICLE XLIII

"The Court considers its decision in private and the proceedings are secret.

"All questions are decided by a majority of the Judges present. If the number of Judges is even and equally divided, the vote of the junior Judge in the order of precedence laid down in Article XII, paragraph 1, is not counted.

ARTICLE XLIV

"The judgment of the Court must give the reasons on which it is based. It contains the names of the Judges taking part in it, and also of the Assessors, if any; it is signed by the President and Registrar.

ARTICLE XLV

"The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

"When this communication has been made, the Court transmits to the National Prize-Court the record of the case, together with copies of the various decisions arrived at and of the Minutes of the proceedings.

ARTICLE XLVI

"Each party pays its own costs.

"The party against whom the Court decides bears, in addition, the costs of the trial, and also pays 1 per cent of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

"If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court for the purpose of guaranteeing eventual fulfilment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

ARTICLE XLVII

"The general expenses of the International Prize-Court are borne by the Contracting Powers in proportion to their share in the composition of the Court as laid down in Article XV and in the annexed Table. The appointment of Deputy Judges does not involve any contribution.

"The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

ARTICLE XLVIII

"When the Court is not sitting, the duties conferred upon it by Article XXXII, Article XXXIV, paragraphs 2 and 3, Article XXXV, paragraph 1, and Article XLVI, paragraph 3, are discharged by a delegation of three Judges appointed by the Court. This delegation decides by a majority of votes.

ARTICLE XLIX

"The Court itself draws up its own rules of procedure, which must be communicated to the Contracting Powers.

"It will meet to elaborate these rules within a year of the ratification of the present Convention.

ARTICLE L

"The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the Contracting Powers, which will consider together as to the measures to be taken.

PART IV—*Final Provisions*

ARTICLE LI

"The present Convention does not apply as of right except when the belligerent Powers are all parties to the Convention.

"It is further fully understood that an appeal to the International

Prize-Court can only be brought by a Contracting Power or the subject or citizen of a Contracting Power.

"In the cases mentioned in Article V the appeal is only admitted when both the owner and the person entitled to represent him are equally Contracting Powers or the subjects or citizens of Contracting Powers.

Article LII

"The present Convention shall be ratified and the ratifications shall be deposited at The Hague as soon as all the Powers mentioned in Article XV and in the Table annexed are in a position to do so.

"The deposit of the ratifications shall take place in any case on the 30th June, 1909, if the Powers which are ready to ratify furnish nine Judges and nine Deputy Judges to the Court, qualified to validly constitute a Court. If not, the deposit shall be postponed until this condition is fulfilled.

"A Minute of the deposit of ratifications shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to each of the Powers referred to in the first paragraph.

Article LIII

"The Powers referred to in Article XV and in the Table annexed are entitled to sign the present Convention up to the deposit of the ratifications contemplated in paragraph 2 of the preceding Article.

"After this deposit they can at any time adhere to it purely and simply. A Power wishing to adhere notifies its intention in writing to the Netherland Government, transmitting to it at the same time the act of adhesion, which shall be deposited in the archives of the said Government. The latter shall send, through the diplomatic channel, a certified copy of the notification and of the act of adhesion to all the Powers referred to in the preceding paragraph, informing them of the date on which it has received the notification.

Article LIV

"The present Convention shall come into force six months from the deposit of the ratifications contemplated in Article LII, paragraphs 1 and 2.

"The adhesions shall take effect sixty days after notification of such adhesion has been received by the Netherland Government or as soon as possible on the expiration of the period contemplated in the preceding paragraph.

"The International Court shall, however, have jurisdiction to deal with prize cases decided by the National Courts at any time after the deposit of the ratifications or of the receipt of the notification of the adhesions. In such cases the period fixed in Article XXVIII, paragraph 2, shall only be reckoned from the date when the Convention comes into force as regards a Power which has ratified or adhered.

Article LV

"The present Convention shall remain in force for twelve years from the time it comes into force, as determined by Article LIV, paragraph 1, even in the case of Powers which adhere subsequently.

"It shall be renewed tacitly from six years to six years unless denounced.

"Denunciation must be notified in writing, at least one year before the expiration of each of the periods mentioned in the two preceding paragraphs, to the Netherland Government, which will inform all the other Contracting Powers.

"Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in force in the case of the other Contracting Powers, provided that their participation in the appointment of Judges is sufficient to allow of the composition of the Court with nine Judges and nine Deputy Judges.

Article LVI

"In case the present Convention is not in operation as regards all the Powers referred to in Article XV and the annexed Table, the Administrative Council shall draw up a list on the lines of that Article and Table of the Judges and Deputy Judges through whom the Contracting Powers will share in the composition of the Court. The times allotted by the said Table to Judges who are summoned to sit in rota will be redistributed between the different years of the six-year period in such a way that, as far as possible, the number of the Judges of the Court in each year shall be the same. If the number of Deputy Judges is greater than that of the Judges, the number of the latter can be completed by Deputy Judges chosen by lot among those powers which do not nominate a Judge.

"The list drawn up in this way by the Administrative Council shall be notified to the Contracting Powers. It shall be revised when the number of these Powers is modified as the result of adhesions or denunciations.

"The change resulting from an adhesion is not made until the 1st January after the date on which the adhesion takes effect, unless the adhering Power is a belligerent Power, in which case it can ask to be at once represented in the Court, the provision of Article XVI being, moreover, applicable if necessary.

"When the total number of Judges is less than eleven, seven Judges form a quorum.

Article LVII

"Two years before the expiration of each period referred to in paragraphs 1 and 2 of Article LV any Contracting Power can demand a modification of the provisions of Article XV and of the annexed Table, relative to its participation in the composition of the Court. The demand shall be addressed to the Administrative Council, which will examine it and sub-

mit to all the Powers proposals as to the measures to be adopted. The Powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be at once, and at least one year and thirty days before the expiration of the said period of two years, communicated to the Power which made the demand.

"When necessary, the modifications adopted by the Powers shall come into force from the commencement of the fresh period.

"In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

"Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers designated in Article XV and in the Table annexed."

ANNEX TO ARTICLE XV

Distribution of Judges and Deputy Judges by Countries for each Year of the period of Six Years

	Judges.	Deputy Judges.	Judges.	Deputy Judges.
	First Year		*Fourth Year*	
1	Argentina	Paraguay.	Brazil	Guatemala.
2	Colombia	Bolivia.	China	Turkey.
3	Spain	Spain.	Spain	Portugal.
4	Greece	Rumania.	Peru	Honduras.
5	Norway	Sweden.	Rumania	Greece.
6	Netherlands	Belgium.	Sweden	Denmark.
7	Turkey	Persia.	Switzerland	Netherlands.
	Second Year		*Fifth Year*	
1	Argentina	Panama.	Belgium	Netherlands.
2	Spain	Spain.	Bulgaria	Montenegro.
3	Greece	Rumania.	Chile	Nicaragua.
4	Norway	Sweden.	Denmark	Norway.
5	Netherlands	Belgium.	Mexico	Cuba.
6	Turkey	Luxemburg.	Persia	China.
7	Uruguay	Costa Rica.	Portugal	Spain.
	Third Year		*Sixth Year*	
1	Brazil	Santo Domingo.	Belgium	Netherlands.
2	China	Turkey.	Chile	Salvador.
3	Spain	Portugal.	Denmark	Norway.
4	Netherlands	Switzerland.	Mexico	Ecuador.
5	Rumania	Greece.	Portugal	Spain.
6	Sweden	Denmark.	Servia	Bulgaria.
7	Venezuela	Haiti.	Siam	China.

"In Executive Session,
"Senate of the United States.

"*Resolved* (two thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the convention for an international prize-court signed at The Hague on the 18th day of

October, 1907, and at the same time to the ratification, as forming an integral part of the said convention, of the protocol thereto, signed at The Hague on the 19th day of September, 1910, and transmitted to the Senate by the President on the 2d day of February, 1911: *Provided*, That it is the understanding of the Senate and is a condition of its consent and advice that in the instrument of ratification the United States of America shall declare that in prize cases recourse to the International Court of Prize can only be exercised against it in the form of an action in damages for the injuries caused by the capture."

[*Translation*]

ADDITIONAL PROTOCOL TO THE CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL COURT OF PRIZE

"Germany, the United States of America, the Argentine Republic, Austria-Hungary, Chile, Denmark, Spain, France, Great Britain, Japan, Norway, the Netherlands, Sweden, powers signatory to The Hague Convention dated October 18, 1907, for the establishment of an international court of prize, considering that for some of these powers difficulties of a constitutional nature prevent the acceptance of the said convention, in its present form, have deemed it expedient to agree upon an additional protocol taking into account these difficulties without jeopardizing any legitimate interest and have, to that end, appointed as their plenipotentiaries, to wit:

. . . . . .

"Who, after depositing their full powers, found to be in good and due form, have agreed upon the following:

"ARTICLE 1. The powers signatory or adhering to The Hague Convention of October 18, 1907, relative to the establishment of an international court of prize, which are prevented by difficulties of a constitutional nature from accepting the said convention in its present form, have the right to declare in the instrument of ratification or adherence that in prize cases, wherefore their national courts have jurisdiction, recourse to the international court of prize can only be exercised against them in the form of an action in damages for the injury caused by the capture.

"ART. 2. In the case of recourse to the international court of prize, in the form of an action for damages, article 8 of the convention is not applicable; it is not for the court to pass upon the validity or the nullity of the capture, nor to reverse or affirm the decision of the national tribunals.

"If the capture is considered illegal, the court determines the amount of damages to be allowed, if any, to the claimants.

"ART. 3. The conditions to which recourse to the international court of prize is subject by the convention are applicable to the action in damages.

"ART. 4. Under reserve of the provisions hereinafter stated the rules

of procedure established by the convention for recourse to the international court of prize shall be observed in the action in damages.

"ART. 5. In derogation of article 28, paragraph 1, of the convention, the suit for damages can only be brought before the international court of prize by means of a written declaration addressed to the International Bureau of the Permanent Court of Arbitration; the case may even be brought before the bureau by telegram.

"ART. 6. In derogation of article 29 of the convention the international bureau shall notify directly, and if possible by telegram, the Government of the belligerent captor of the declaration of action brought before it.

"The Government of the belligerent captor, without considering whether the prescribed periods of time have been observed, shall, within seven days of the receipt of the notification, transmit to the international bureau the case, appending thereto a certified copy of the decision, if any, rendered by the national tribunal.

"ART. 7. In derogation of article 45, paragraph 2, of the convention the court rendering its decision and notifying it to the parties to the suit shall send directly to the Government of the belligerent captor the record of the case submitted to it, appending thereto a copy of the various intervening decisions as well as a copy of the minutes of the preliminary proceedings.

"ART. 8. The present additional protocol shall be considered as forming an integral part of and shall be ratified at the same time as the convention.

"If the declaration provided for in article 1 herein above is made in the instrument of the ratification, a certified copy thereof shall be inserted in the procès verbal of the deposit of ratifications referred to in article 52, paragraph 3, of the convention.

"ART. 9. Adherence to the convention is subordinated to adherence to the present additional protocol.

"In faith of which the plenipotentiaries have affixed their signatures to the present additional protocol."

APPENDIX IV

1909

International Naval Conference

Signed at London February 26, 1909; *ratification advised by the Senate April* 24, 1912

The text of this convention is taken from the copy printed for the use of the Senate of the United States.

[*Translation*]

DECLARATION CONCERNING THE LAWS OF NAVAL WARFARE

"His Majesty the German Emperor, King of Prussia; the President of the United States of America; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Majesty the Emperor of All the Russias.

"Having regard to the terms in which the British Government invited various Powers to meet in conference in order to arrive at an agreement as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize-Court;

"Recognizing all the advantages which an agreement as to the said rules would, in the unfortunate event of a naval war, present, both as regards peaceful commerce and as regards the belligerents and their diplomatic relations with neutral Governments;

"Having regard to the divergence often found in the methods by which it is sought to apply in practice the general principles of international law;

"Animated by the desire to insure henceforward a greater measure of uniformity in this respect;

"Hoping that a work so important to the common welfare will meet with general approval;

"Have appointed as their Plenipotentiaries, etc., etc.

PRELIMINARY PROVISION

"The Signatory Powers are agreed that the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law.

CHAPTER I—*Blockade in Time of War*

ARTICLE 1

"A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

ARTICLE 2

"In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

ARTICLE 3

"The question whether a blockade is effective is a question of fact.

ARTICLE 4

"A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.

ARTICLE 5

"A blockade must be applied impartially to the ships of all nations.

ARTICLE 6

"The Commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.

ARTICLE 7

"In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

ARTICLE 8

"A blockade, in order to be binding, must be declared in accordance with Article 9 and notified in accordance with Articles 11 and 16.

ARTICLE 9

"A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name

"It specifies—

"(1) The date when the blockade begins;
"(2) The geographical limits of the coast-line under blockade;
"(3) The period within which neutral vessels may come out.

ARTICLE 10

"If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void and a new declaration is necessary in order to make the blockade operative.

ARTICLE 11

"A declaration of blockade is notified—
"(1) To neutral Powers by the blockading Power by means of a communication addressed to the Government direct or to their representatives accredited to it;
"(2) To the local authorities by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coast-line under blockade as soon as possible.

ARTICLE 12

"The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended or where a blockade is re-established after having been raised.

ARTICLE 13

"The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.

ARTICLE 14

"The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

ARTICLE 15

"Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

ARTICLE 16

"If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book and must state the day and hour and the geographical position of the vessel at the time.

"If, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or if, in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

ARTICLE 17

"Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective.

ARTICLE 18

"The blockading forces must not bar access to neutral ports or coasts.

ARTICLE 19

"Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

ARTICLE 20

"A vessel which has broken blockade outwards or which has attempted to break blockade inwards is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

ARTICLE 21

"A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

CHAPTER II—*Contraband of War*

ARTICLE 22

"The following articles may, without notice,[1] be treated as contraband, under the name of absolute contraband:

"(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

"(2) Projectiles, charges, and cartridges of all kinds and their distinctive component parts.

"(3) Powder and explosives specially prepared for use in war.

"(4) Gun-mountings, limber-boxes, limbers, military wagons, field forges, and their distinctive component parts.

[1] In view of the difficulty of finding an exact equivalent in English for the expression "de plein droit," it has been decided to translate it by the words "without notice," which represent the meaning attached to it by the draughtsman as appears from the General Report.

"(5) Clothing and equipment of a distinctively military character.

"(6) All kinds of harness of a distinctively military character.

"(7) Saddle, draught, and pack animals suitable for use in war.

"(8) Articles of camp equipment, and their distinctive component parts.

"(9) Armor-plates.

"(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

"(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

ARTICLE 23

"Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

"Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

ARTICLE 24

"The following articles, susceptible of use in war as well as for purposes of peace, may, without notice,[1] be treated as contraband of war, under the name of conditional contraband:

"(1) Foodstuffs.

"(2) Forage and grain, suitable for feeding animals

"(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

"(4) Gold and silver in coin or bullion; paper money.

"(5) Vehicles of all kinds available for use in war and their component parts.

"(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.

"(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.

"(8) Balloons and flying-machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying-machines.

"(9) Fuel; lubricants.

"(10) Powder and explosives not specially prepared for use in war.

"(11) Barbed wire and implements for fixing and cutting the same.

"(12) Horseshoes and shoeing materials.

"(13) Harness and saddlery.

"(14) Field-Glasses, telescopes, chronometers, and all kinds of nautical instruments.

[1] See note on Article 22.

ARTICLE 25

"Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ARTICLE 26

"If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ARTICLE 27

"Articles which are not susceptible of use in war may not be declared contraband of war.

ARTICLE 28

"The following may not be declared contraband of war:

"(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

"(2) Oil-seeds and nuts; copra.

"(3) Rubber, resins, gums, and lacs; hops.

"(4) Rawhides and horns, bones and ivory.

"(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

"(6) Metallic ores.

"(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.

"(8) Chinaware and glass.

"(9) Paper and paper-making materials.

"(10) Soap, paint, and colors, including articles exclusively used in their manufacture, and varnish.

"(11) Bleaching-powder, soda-ash, caustic soda, salt-cake, ammonia, sulphate of ammonia, and sulphate of copper.

"(12) Agricultural, mining, textile, and printing machinery.

"(13) Precious and semiprecious stones, pearls, mother-of-pearl, and coral.

"(14) Clocks and watches, other than chronometers.

"(15) Fashion and fancy goods.

"(16) Feathers of all kinds, hairs, and bristles.

"(17) Articles of household furniture and decoration; office furniture and requisites.

ARTICLE 29

"Likewise the following may not be treated as contraband of war:

"(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned if their destination is that specified in Article 30.

"(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

ARTICLE 30

"Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

ARTICLE 31

"Proof of the destination specified in Article 30 is complete in the following cases:

"(1) When the goods are documented for discharge in an enemy port or for delivery to the armed forces of the enemy.

"(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

ARTICLE 32

"Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

ARTICLE 33

"Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot, in fact, be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

ARTICLE 34

"The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy or other

place serving as a base for the armed forces of the ememy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

"In cases where the above presumptions do not arise, the destination is presumed to be innocent.

"The presumptions set up by this Article may be rebutted.

ARTICLE 35

"Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

"The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

ARTICLE 36

"Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.

ARTICLE 37

"A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

ARTICLE 38

"A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is, in point of fact, at an end.

ARTICLE 39

"Contraband goods are liable to condemnation.

ARTICLE 40

"A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

ARTICLE 41

"If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize-court and the custody of the ship and cargo during the proceedings.

ARTICLE 42

"Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

ARTICLE 43

"If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities or of the declaration of contraband, has had no opportunity of discharging the contraband.

"A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

ARTICLE 44

"A vessel which has been stopped on the ground that she is carrying contraband and which is not liable to condemnation on account of the proportion of contraband on board may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war-ship.

"The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped and the master must give the captor duly certified copies of all relevant papers.

"The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

CHAPTER III—*Unneutral Service*

ARTICLE 45

"A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

"(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy or with a view to the transmission of intelligence in the interest of the enemy.

"(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or

more persons who, in the course of the voyage, directly assist the operations of the enemy.

"In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

"The provisions of the present Article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

ARTICLE 46

"A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

"(1) If she takes a direct part in the hostilities;

"(2) If she is under the orders or control of an agent placed on board by the enemy Government;

"(3) If she is in the exclusive employment of the enemy Government;

"(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

"In the cases covered by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation.

ARTICLE 47

"Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel.

CHAPTER IV—*Destruction of Neutral Prizes*

ARTICLE 48

"A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

ARTICLE 49

"As an exception, a neutral vessel which has been captured by a belligerent war-ship and which would be liable to condemnation may be destroyed if the observance of Article 48 would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time.

ARTICLE 50

"Before the vessel is destroyed all persons on board must be placed in safety and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war-ship.

ARTICLE 51

"A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

ARTICLE 52

"If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested in place of the restitution to which they would have been entitled.

ARTICLE 53

"If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

ARTICLE 54

"The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed and the formalities duly carried out, the master must be allowed to continue his voyage.

"The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

CHAPTER V—*Transfer to a Neutral Flag*

ARTICLE 55

"The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than

sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

ARTICLE 56

"The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"There, however, is an absolute presumption that a transfer is void:

"(1) If the transfer has been made during a voyage or in a blockaded port;

"(2) If a right to repurchase or recover the vessel is reserved to the vender;

"(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

CHAPTER VI—*Enemy Character*

ARTICLE 57

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

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

ARTICLE 58

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

ARTICLE 59

"In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

ARTICLE 60

"Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

"If, however, prior to the capture a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

Chapter VII—*Convoy*

Article 61

"Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent war-ship, all information as to the character of the vessels and their cargoes which could be obtained by search.

Article 62.

"If the commander of the belligerent war-ship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the war-ship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

Chapter VIII—*Resistance to Search*

Article 63

"Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

Chapter IX—*Compensation*

Article 64

"If the capture of a vessel or of goods is not upheld by the prize-court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

Final Provisions

Article 65

"The provisions of the present Declaration must be treated as a whole and cannot be separated.

ARTICLE 66

"The Signatory Powers undertake to insure the mutual observance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces and will take such measures as may be required in order to insure that it will be applied by their courts and, more particularly, by their prize-courts.

ARTICLE 67

"The present Declaration shall be ratified as soon as possible.

"The ratifications shall be deposited in London.

"The first deposit of ratifications shall be recorded in a Protocol signed by the Representatives of the Powers taking part therein and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

"The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government and accompanied by the instrument of ratification.

"A duly certified copy of the Protocol relating to the first deposit of ratifications and of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the Signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

ARTICLE 68

"The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the Protocol recording such deposit and, in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

ARTICLE 69

"In the event of one of the Signatory Powers wishing to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

"Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers.

"It will only operate in respect of the denouncing Power.

ARTICLE 70

"The Powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have

adopted and therefore express the hope that the Powers which were not represented there will accede to the present Declaration. They request the British Government to invite them to do so.

"A Power which desires to accede shall notify its intention in writing to the British Government and transmit simultaneously the act of accession, which will be deposited in the archives of the said Government.

"The said Government shall forthwith transmit to all the other Powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession takes effect sixty days after such date.

"In respect of all matters concerning this Declaration, acceding Powers shall be on the same footing as the Signatory Powers.

ARTICLE 71

"The present Declaration, which bears the date of the 26th February, 1909, may be signed in London up till the 30th June, 1909, by the Plenipotentiaries of the Powers represented at the Naval Conference.

"In faith whereof the Plenipotentiaries have signed the present Declaration and have thereto affixed their seals.

"Done at London, the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference."

(Here follow the signatures.)

List of signatures appended to the Declaration of February 26, 1909, *up to March* 20, 1909[1]

For Germany:
KRIEGE.
For the United States of America:
C. H. STOCKTON.
GEORGE GRAFTON WILSON.
For Austria-Hungary:
C. DUMBA.
For France:
L. RENAULT.
For Great Britain:
DESART.
For the Netherlands:
J. A. ROELL.
L. H. RUYSSENAERS.

[1] Notification subsequently given of the signatures of the declaration: Spain, Italy, Russia, Japan.

No. 18

General Report Presented to the Naval Conference on Behalf of Its Draughting Committee[1]

[*Translation*][2]

"On the 27th February, 1908, the British Government addressed a circular to various powers inviting them to meet at a conference with the object of reaching an agreement as to the definition of the generally recognized principles of international law in the sense of article 7, paragraph 2, of the convention signed at The Hague on the 18th October, 1907, for the establishment of an international prize-court. This agreement appeared necessary to the British Government on account of certain divergences of view which had become apparent at the second peace conference in connection with the settlement of various important questions of international maritime law in time of war. The existence of these divergent views might, it seemed, render difficult the acceptance of the international prize-court, as the power of this court would be the more extended in proportion as the rules to be applied by it were more uncertain.

"The British Government suggested that the following questions might form the programme of the proposed conference and invited the powers to express their views regarding them in preparatory memoranda:

"'(*a*) Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with regard to compensation where vessels have been seized but have been found, in fact, only to be carrying innocent cargo.

"'(*b*) Blockade, including the questions as to the locality where seizure can be effected and the notice that is necessary before a ship can be seized.

"'(*c*) The doctrine of continuous voyage in respect both of contraband and of blockade.

"'(*d*) The legality of the destruction of neutral vessels prior to their condemnation by a prize-court.

"'(*e*) The rules as to neutral ships or persons rendering "unneutral service" ("assistance hostile").

"'(*f*) The legality of the conversion of a merchant vessel into a war-ship on the high seas.

"'(*g*) The rules as to the transfer of merchant vessels from a belligerent to a neutral flag during or in contemplation of hostilities.

[1] This committee consists of Messrs. Kriege (Germany), Wilson (United States of America), Dumba (Austria-Hungary), Estrada (Spain), Renault (France), Reporter, Hurst (Great Britain), Ricci-Busatti (Italy), Sakamoto (Japan), Ruyssenaers (Netherlands), Baron Taube (Russia).

[2] For the original French text of the report, see Parliamentary Paper "Miscellaneous No. 5 (1909)," p. 344.

"'(*h*) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.'

"The invitations were accepted, and the conference met on the 4th December last. The British Government had been so good as to assist its deliberations by presenting a collection of papers which quickly became known among us by the name of the Red Book, and which, after a short introduction, contains a 'statement of the views expressed by the powers in their memoranda and observations intended to serve as a basis for the deliberations of the conference.' These are the 'bases of discussion' which served as a starting-point for the examination of the chief questions of existing international maritime law. The conference could not but express its gratitude for this valuable preparatory work, which was of great assistance to it. It made it possible to observe, in the first place, that the divergences in the practices and doctrines of the different countries were perhaps less wide than was generally believed, that the essential ideas were often the same in all countries, and that the methods of application alone varied with traditions or prejudices, with permanent or accidental interests. It was therefore possible to extract a common element which it could be agreed to recommend for uniform application. This is the end to which the efforts of the different delegations tended, and they vied with one another in their zeal in the search for the grounds of a common understanding. Their efforts were strenuous, as is shown by the prolonged discussions of the conference, the grand committee, and the examining committees and by the numerous proposals which were presented. Sailors, diplomatists, and jurists cordially co-operated in a work the description of which, rather than a final estimate of its essential value, is the object of this report, as our impartiality might naturally be suspected.

"The body of rules contained in the declaration, which is the result of the deliberations of the naval conference and which is to be entitled 'Declaration Concerning the Laws of Naval War,' answers well to the desire expressed by the British Government in its invitation of February, 1908. The questions in the programme are all settled except two, with regard to which explanations will be given later. The solutions have been extracted from the various views or practices which prevail and represent what may be called the media sententia. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately but as a whole; otherwise there is a risk of the most serious misunderstandings. In fact, if one or more isolated rules are examined either from the belligerent or the neutral point of view, the reader may find that the interests with which he is especially concerned are jeopardized by the adoption of these rules. But they have another side. The work is one of compromise and mutual concessions. Is it, as a whole, a good one?

"We confidently hope that those who study it seriously will answer that it is. The declaration puts uniformity and certainty in the place of

the diversity and obscurity from which international relations have too long suffered. The conference has tried to reconcile in an equitable and practical way the rights of belligerents with those of neutral commerce; it consists of powers whose conditions, from the political, economic, and geographical points of view, vary considerably. There is, therefore, reason to suppose that the rules on which these powers have agreed to take sufficient account of the different interests involved, and hence may be accepted without objection by all the others.

"The preamble of the declaration summarizes the general ideas just set forth.

"'Having regard to the terms in which the British Government invited various powers to meet in conference in order to arrive at an agreement as to what are the generally recognized rules of international law within the meaning of article 7 of the convention of the 18th October, 1907, relative to the establishment of an international prize-court.

"'Recognizing all the advantages which an agreement as to the said rules would present in the unfortunate event of a naval war, both as regards peaceful commerce and as regards the belligerents and their diplomatic relations with neutral governments.

"'Having regard to the divergence often found in the methods by which it is sought to apply in practice the general principles of international law.

"'Animated by the desire to insure henceforward a greater measure of uniformity in this respect.

"'Hoping that a work so important to the common welfare will meet with general approval.'

"What is the scope of application of the rules thus laid down? They must be observed in the relations between the signatory parties, since those parties acknowledge them as principles of recognized international law and, besides, expressly bind themselves to secure the benefit of them for one another. The signatory powers who are or will be parties to the convention establishing the international prize-court will have, besides, an opportunity of having these rules applied to disputes in which they are concerned, whether the court regards them as generally recognized rules, or takes account of the pledge given to observe them. It is moreover to be hoped that these rules will before long be accepted by the majority of States, who will recognize the advantage of substituting exact provisions for more or less indefinite usages which tend to give rise to controversy.

"It has been said above that two points in the programme of the conference were not decided.

"(1) The programme mentions under head (*f*): The legality of the conversion of a merchant vessel into a war-ship on the high seas. The conflicting views on this subject which became apparent at the conference of The Hague in 1907 have recurred at the present conference. It may be concluded, both from the statements in the memoranda and from the discussion, that there is no generally accepted rule on this point, nor do

there appear to be any precedents which can be adduced. Though the two opposite opinions were defended with great warmth, a lively desire for an understanding was expressed on all sides; everybody was at least agreed that it would be a great advantage to put an end to uncertainty. Serious efforts were made to do justice to the interests espoused by both sides, but these unfortunately failed. A subsidiary question dependent on the previous one, on which, at one moment, it appeared possible to come to an agreement, is that of reconversion. According to one proposal it was to be laid down that 'merchant vessels converted into war-ships cannot be reconverted into merchant vessels during the whole course of the war.' The rule was absolute and made no distinction as regards the place where reconversion could be effected; it was dictated by the idea that such conversion would always have disadvantages, would be productive of surprises, and lead to actual frauds. As unanimity in favor of this proposal was not forthcoming, a subsidiary one was brought forward, viz, 'The conversion of a war-ship into a merchant vessel on the high seas is forbidden during the war.' The case had in view was that a war-ship (generally a recently converted merchant vessel) doffing its character so as to be able freely to revictual or refit in a neutral port without being bound by the restrictions imposed on war-ships. Will not the position of the neutral State between two belligerents be delicate, and will not such State expose itself to reproach whether it treats the newly converted ship as a merchant vessel or as a war-ship? Agreement might perhaps have been reached on this proposal, but it seemed very difficult to deal with this secondary aspect of a question which there was no hope of settling as a whole. This was the decisive reason for the rejection of all proposals.

"The question of conversion on the high seas and that of reconversion therefore remain open.

"2. Under head (*h*) the British programme mentions the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property. This question was subjected to a searching examination by a special committee, which had to acknowledge the uncertainty of actual practice; it was proposed to put an end to this by the following provisions:

"'The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of no nationality or of double nationality (i. e., both neutral and enemy), by his domicile in a neutral or enemy country; provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral country.'

"Unanimity not being forthcoming, these provisions remained without effect.

"We now reach the explanation of the declaration itself, on which we shall try, by summarizing the reports already approved by the conference, to give an exact and uncontroversial commentary; this, when it has be-

come an official commentary by receiving the approval of the conference, may serve as a guide to the different authorities—administrative, military, and judicial—who may be called on to apply it.

Preliminary Provision

"The signatory powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

"This provision dominates all the rules which follow. Its spirit has been indicated in the general remarks to be found at the beginning of this report. The purpose of the conference has, above all, been to note, to define, and, where needful, to complete what might be considered as customary law.

Chapter I—Blockade in Time of War

"Blockade is here regarded solely as an operation of war, and there is no intention of touching in any way on what is called 'pacific' blockade.

"'Article 1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.'

"Blockade, as an operation of war, can be directed by a belligerent only against his adversary. This very simple rule is laid down at the start, but its full scope is apparent only when it is read in connection with article 18.

"'Art. 2. In accordance with the declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast-line.'

"The first condition necessary to render a blockade binding is that it should be effective. There has been universal agreement on this subject for a long time. As for the definition of an effective blockade, we thought that we had only to adopt the one to be found in the declaration of Paris of the 16th April, 1856, which, conventionally, binds a great number of States and is in fact accepted by the rest.

"'Art. 3. The question whether a blockade is effective is a question of fact.'

"It is easily to be understood that difficulties often arise on the question whether a blockade is effective or not; opposing interests are at stake. The blockading belligerent wishes to economize his efforts, and neutrals desire their trade to be as little hampered as possible. Diplomatic protests have sometimes been made on this subject. The point may be a delicate one, because no absolute rule can be laid down as to the number and position of the blockading ships. All depends on matters of fact and geographical conditions. In one case a single ship will suffice to blockade a port as effectively as possible, whereas in another a whole fleet may not be enough really to prevent access to one or more ports declared to be blockaded. It is therefore essentially a question of fact, to be de-

cided on the merits of each case and not according to a formula drawn up beforehand. Who shall decide it? The judicial authority. This will be, in the first place, the national tribunal which is called on to pronounce as to the validity of the prize and which the vessel captured for breach of blockade can ask to declare the capture void, because the blockade, not being effective, was not binding. This resort has always existed; it may not always have given satisfaction to the powers concerned, because they may have thought that the national tribunal was rather naturally led to consider effective the blockade declared to be so by its government. But when the international prize-court convention comes into force there will be an absolutely impartial tribunal, to which neutrals may apply, and which will decide whether, in a given case, the blockade was effective or not. The possibility of this resort, besides allowing certain injustices to be redressed, will most likely have a preventive effect, in that a government will take care to establish its blockades in such a way that their effect cannot be annulled by decisions which would inflict on it a heavy loss. The full scope of article 3 is thus seen when it is understood that the question with which it deals must be settled by a court. The foregoing explanation is inserted in the report at the request of the committee, in order to remove all possibility of misunderstanding.

"'ART. 4. A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.'

"It is not enough for a blockade to be established; it must be maintained. If it is raised it may be re-established, but this requires the observance of the same formalities as though it were established for the first time. By tradition, a blockade is not regarded as raised when it is in consequence of stress of weather that the blockading forces are temporarily withdrawn. This is laid down in article 4. It must be considered limitative in the sense that stress of weather is the only form of compulsion which can be alleged. If the blockading forces were withdrawn for any other reason, the blockade would be regarded as raised, and, if it were resumed, articles 12 (last rule) and 13 would apply.

"'ART. 5. A blockade must be applied impartially to the ships of all nations.'

"Blockade, as an operation of lawful warfare, must be respected by neutrals in so far as it really remains an operation of war which has the object of interrupting all commercial relations with the blockaded port. It may not be made the means of allowing a belligerent to favor the vessels of certain nations by letting them pass. This is the point of article 5.

"'ART. 6. The commander of a blockading force may give permission to a war-ship to enter, and subsequently to leave, a blockaded port.'

"Does the prohibition which applies to all merchant vessels apply also to war-ships? No definite reply can be given. The commander of the blockading forces may think it useful to cut off all communication with the blockaded place and refuse access to neutral war-ships; no rule is imposed on him. If he lets them in, it is as a matter of courtesy. If a

rule has been drawn up merely to lay down this, it is in order that it may not be claimed that a blockade has ceased to be effective on account of leave granted to such and such neutral war-ships.

"The blockading commander must act impartially, as stated in article 5. Nevertheless, the mere fact that he has let a war-ship pass does not oblige him to let pass all neutral war-ships which may come. It is question of judgment. The presence of a neutral war-ship in a blockaded port may not have the same consequences at all stages of the blockade, and the commander must be left free to judge whether he can be courteous without making any sacrifice of his military interests.

"'ART. 7. In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade, and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.'

"Distress can explain the entrance of a neutral vessel into a blockaded place, for instance, if she is in want of food or water or needs immediate repairs. As soon as her distress is acknowledged by an authority of the blockading force, she may cross the line of blockade; it is not a favor which she has to ask of the humanity or courtesy of the blockading authority. The latter may deny the state of distress, but when once it is proved to exist the consequence follows of itself. The vessel which has thus entered the blockaded port will not be obliged to remain there for the whole duration of the blockade; she may leave as soon as she is fit to do so, when she has obtained the food or water which she needs, or when she has been repaired. But the leave granted to her must not be made an excuse for commercial transactions; therefore she is forbidden to discharge or ship any cargo.

"It is needless to say that a blockading squadron which insisted on preventing a vessel in distress from passing might do so if she afforded her the help which she needed.

"'ART. 8. A blockade, in order to be binding, must be declared in accordance with article 9 and notified in accordance with articles 11 and 16.'

"Independently of the condition prescribed by the declaration of Paris that it must be effective, a blockade, to be binding, must be declared and notified. Article 8 confines itself to laying down the principle which is applied by the following articles.

"To remove all possibility of misunderstanding it is enough to define clearly the meaning of these two expressions, which will frequently be used. The declaration of blockade is the act of the competent authority (a government or commander of a squadron) stating that a blockade is, or is about to be, established under conditions to be specified. (Art. 9.) The notification is the fact of bringing the declaration of blockade to the knowledge of the neutral powers or of certain authorities (art. 11).

"These two things—declaration and notification—will in most cases be done previously to the enforcement of the rules of blockade, that is

to say, to the real prohibition of passage. Nevertheless, as we shall see later, it is sometimes possible for passage to be forbidden by the very fact of the blockade which is brought to the knowledge of a vessel approaching a blockaded port by means of a notification which is special, whereas the notification which has just been defined, and which is spoken of in article 11, is of a general character.

"'ART. 9. A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name.

"'It specifies—

"'(1) The date when the blockade begins.

"'(2) The geographical limits of the coast-line under blockade.

"'(3) The period within which neutral vessels may come out.'

"The declaration of blockade in most cases emanates from the belligerent government itself. That government may have left the commander of its naval forces free himself to declare a blockade according to the circumstances. There will not, perhaps, be as much reason as formerly to give this discretion, because of the ease and rapidity of communication. This, being merely an internal question, matters little.

"The declaration of blockade must specify certain points which it is in the interest of neutrals to know, in order to be aware of the extent of their obligations. The moment from which it is forbidden to communicate with the blockaded place must be exactly known. It is important, as affecting the obligations both of the blockading power and of neutrals, that there should be no uncertainty as to the places really blockaded. Finally, the custom has long been established of allowing neutral vessels which are in the blockaded port to leave it. This custom is here confirmed, in the sense that the blockading power must allow a period within which vessels may leave; the length of this period is not fixed, because it clearly depends on very varying circumstances, but it is understood that the period should be reasonable.

"'ART. 10. If the operations of the blockading power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.'

"The object of this article is to insure the observance of article 9. Supposing the declaration of blockade contains statements which do not tally with the actual facts; it states that the blockade began, or will begin, on such a day, whereas, in fact, it only began several days later. Its geographical limits are inaccurately given; they are wider than those within which the blockading forces are operating. What shall be the sanction? The nullity of the declaration of blockade, which prevents it from being operative. If, then, in such a case, a neutral vessel is captured for breach of blockade, she can refer to the nullity of the declaration of blockade as a plea for the nullity of the capture; if her plea is rejected by the national tribunal, she can appeal to the international court.

"To avoid misunderstandings, the significance of this provision must be noticed. The declaration states that the blockade begins on the 1st of February; it really only begins on the 8th. It is needless to say that the declaration had no effect from the 1st to the 8th, because at that time there was no blockade at all; the declaration states a fact but does not take the place of one. The rule goes further: The declaration shall not even be operative from the 8th onward; it is definitely void, and another must be made.

"There is no question here of cases where article 9 is disregarded by neglect to allow neutral vessels in the blockaded port time to leave it. The sanction could not be the same. There is no reason to annul the declaration as regards neutral vessels wishing to enter the blockaded port. A special sanction is needed in that case, and it is provided by article 16, paragraph 2.

"'ART. 11. A declaration of blockade is notified—

"'(1) To neutral powers, by the blockading power by means of a communication addressed to the governments direct or to their representatives accredited to it.

"'(2) To the local authorities by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coast-line under blockade as soon as possible.'

"A declaration of blockade is not valid unless notified. The observance of a rule can only be required by those who have the opportunity of knowing it.

"Two notifications must be made:

"1. The first is addressed to neutral powers by the belligerent power, which communicates it to the governments themselves or to their representatives accredited to it. The communication to the governments will in most cases be made through the diplomatic agents; it might happen that a belligerent had no diplomatic relations with a neutral country; it will then address itself, ordinarily by telegraph, directly to the government of that country. It is the duty of the neutral governments advised of the declaration of blockade to take the necessary measures to despatch the news to the different parts of their territory, especially their ports.

"2. The second notification is made by the commander of the blockading force to the local authorities. These must inform, as soon as possible, the foreign consuls residing at the blockaded place or on the blockaded coast-line. These authorities would be responsible for the neglect of this obligation. Neutrals might suffer loss from the fact of not having been informed of the blockade in sufficient time.

"'ART. 12. The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.'

"Supposing a blockade is extended beyond its original limits, as regards the new part, it is a new blockade and, in consequence, the rules as to declaration and notification must be applied to it. The same is true

in cases where a blockade is re-established after having been raised; the fact that a blockade has already existed in the same locality must not be taken into account.

"'ART. 13. The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by article 11.'

"It is indispensable to know of the establishment of a blockade; it would at least be useful for the public to be told of its raising, since it puts an end to the restrictions imposed on the relations of neutrals with the blockaded port. It has therefore been thought fit to ask the power which raises a blockade to make known the fact in the form in which it has notified the establishment of the blockade. (Art. 11.) Only it must be observed that the sanction could not be the same in the two cases. To insure the notification of the declaration of blockade there is a direct and adequate sanction; an unnotified blockade is not binding. In the case of the raising there can be no parallel to this. The public will really gain by the raising, even without being told of it officially. The blockading power which did not notify the raising would expose itself to diplomatic remonstrances on the ground of the non-fulfilment of an international duty. This non-fulfilment will have more or less serious consequences, according to circumstances. Sometimes the raising of the blockade will really have become known at once, and official notification would add nothing to this effective publicity.

"It is needless to add that only the voluntary raising of a blockade is here in question; if the blockading force has been driven off by the arrival of enemy forces, it cannot be held bound to make known its defeat, which its adversary will undertake to do without delay. Instead of raising a blockade, a belligerent may confine himself to restricting it; he only blockades one port instead of two. As regards the port which ceases to be included in the blockade, it is a case of voluntary raising, and consequently the same rule applies.

"'ART. 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.'

"For a vessel to be liable to capture for breach of blockade, the first condition is that she must be aware of the blockade, because it is not just to punish some one for breaking a rule which he does not know. Nevertheless, there are circumstances in which, even in the absence of proof of actual knowledge, knowledge may be presumed, the right of rebutting this presumption being always reserved to the party concerned. (Art. 15.)

"'ART. 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time.'

"A vessel has left a neutral port subsequently to the notification of the blockade made to the powers to which the port belongs. Was this

notification made in sufficient time; that is to say, so as to reach the port in question, where it had to be published by the port authorities? That is a question of fact to be examined. If it is settled affirmatively, it is natural to suppose that the vessel was aware of the blockade at the time of her departure. This presumption is not, however, absolute, and the right to adduce proof to the contrary is reserved. It is for the incriminated vessel to furnish it by showing that circumstances existed which explain her ignorance.

"'ART. 16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book, and must state the day and hour and the geographical position of the vessel at the time.

"'If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.'

"A vessel is supposed to be approaching a blockaded port without its being possible to tell whether she knows or is presumed to know of the existence of the blockade; no notification in the sense of article 11 has reached her. In that case a special notification is necessary in order that the vessel may be duly informed of the fact of the blockade. This notification is made to the vessel herself by an officer of one of the war-ships of the blockading force, and is entered on the vessel's log-book. It may be made to the vessels of a convoyed fleet by a neutral war-ship through the commander of the convoy, who acknowledges receipt of it and takes the necessary measures to have the notification entered on the log-book of each vessel. The entry notes the time and place where it is made and the names of the blockaded places. The vessel is prevented from passing, and the blockade is thus made binding for her, though not previously notified; this adverb is therefore omitted in article 8. It cannot be admitted that a merchant vessel should claim to disregard a real blockade, and to break it for the sole reason that she was not personally aware of it. But, though she may be prevented from passing, she may only be captured when she tries to break blockade after receiving the notification. This special notification is seen to play a very small part, and must not be confused with the special notification absolutely insisted on by the practice of certain navies.

"What has just been said refers to the vessel coming in. The vessel leaving the blockaded port must also be considered. If a regular notification of the blockade has been made to the local authorities (art. 11 (2)), the position is simple: the vessel is, or is presumed to be, aware of the blockade, and is therefore liable to capture in case she has not kept to the period for leaving allowed by the blockading power. But it may happen that no declaration of blockade has been notified to the local au-

thorities, or that that declaration has contained no mention of the period allowed for leaving, in spite of the rule prescribed by article 9 (3). The sanction of the blockading power's offence is that the vessel must be allowed to go free. It is a strong sanction, which corresponds exactly with the nature of the offence committed, and will be the best means of preventing its commission.

"It is needless to say that this provision only concerns vessels to which the period allowed for leaving would have been of use—that is to say, neutral vessels which were in the port at the time when the blockade was established; it has nothing to do with vessels which are in the port after having broken blockade.

"The commander of the blockading squadron may always repair his omission or mistake, make a notification of the blockade to the local authorities, or complete that which he has already made.

"As is seen from these explanations, the most ordinary case is assumed —that in which the absence of notification implies negligence on the part of the commander of the blockading forces. The situation is clearly altogether changed if the commander has done all in his power to make the notification but has been prevented from doing so by lack of goodwill on the part of the local authorities, who have intercepted all communications from outside. In that case he cannot be forced to let pass vessels which wish to leave, and which, in the absence of the prescribed notification and of presumptive knowledge of the blockade, are in a position similar to that contemplated in article 16, paragraph 1.

"'ART. 17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective.'

"The other condition of the liability of a vessel to capture is that she should be found within the area of operations of the war-ships detailed to make the blockade effective; it is not enough that she should be on her way to the blockaded port.

"As for what constitutes the area of operations, an explanation has been given which has been universally accepted and is quoted here as furnishing the best commentary on the rule laid down by article 17:

"'When a government decides to undertake blockading operations against some part of the enemy coast it details a certain number of war-ships to take part in the blockade and intrusts the command to an officer whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places and instructs each ship as to the part which she has to play and especially as to the zone which she is to watch. All the zones watched taken together, and so organized as to make the blockade effective, form the area of operations of the blockading naval force.

"'The area of operations so constituted is intimately connected with the effectiveness of the blockade and also with the number of ships employed on it.

"'Cases may occur in which a single ship will be enough to keep a blockade effective—for instance, at the entrance of a port or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider and extends farther from the coast. It may therefore vary with circumstances and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

"'It does not seem possible to fix the limits of the area of operations in definite figures any more than to fix beforehand and definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might perhaps be done at the time of making the declaration.

"'It is clear that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defence. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

"'The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail which are, perhaps, making for the blockaded ports but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations joined with that of effectiveness, as we have tried to define it —that is to say, including the zone of operations of the blockading forces —allows the belligerent effectively to exercise the right of blockade, which he admittedly possesses, and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly incur by approaching points to which access is forbidden by the belligerent.'

"'ART. 18. The blockading forces must not bar access to neutral ports or coasts.'

"This rule has been thought necessary the better to protect the commercial interests of neutral countries; it completes article 1, according to which a blockade must not extend beyond the ports and coasts of the enemy, which implies that, as it is an operation of war, it must not be directed against a neutral port, in spite of the importance to a belligerent of the part played by that neutral port in supplying his adversary.

"'ART. 19. Whatever may be the ulterior destination of a vessel or

of her cargo, she cannot be captured for breach of blockade if, at the moment, she is on her way to a non-blockaded port.'

"It is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough to justify the capture, for breach of blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port.

"'ART. 20. A vessel which has broken blockade outward, or which has attempted to break blockade inward, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned or if the blockade is raised, her capture can no longer be effected.'

"A vessel has left the blockaded port or has tried to enter it. Shall she remain indefinitely liable to capture? To reply by an absolute affirmative would be to go too far. This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; it would not be enough for her to be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is one of fact; it is not enough that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended but not abandoned. Capture is no longer possible when the blockade has been raised.

"'ART. 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.'

"The vessel is condemned in all cases. The cargo is also condemned on principle, but the interested party is allowed to oppose a plea of good faith; that is to say, to prove that when the goods were shipped the shipper did not know and could not have known of the intention to break the blockade.

CHAPTER II—CONTRABAND OF WAR

"This chapter is one of the most, if not the most, important of the declaration. It deals with a matter which has sometimes given rise to serious disputes between belligerents and neutrals. Therefore regulations to establish exactly the rights and duties of each have often been urgently called for. Peaceful trade may be grateful for the precision with which a subject of the highest importance to its interests is now for the first time treated.

"The notion of contraband of war connotes two elements: It concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends; if they are destined for a neutral government, no; if they are

destined for an enemy government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law.

"Articles 22 and 24 enumerate the articles which may be contraband of war and which are so, in fact, when they have a certain destination laid down in articles 30 and 33. The traditional distinction between absolute and conditional contraband is maintained. Articles 22 and 30 refer to the former, and articles 24 and 33 to the latter.

"'ART. 22. The following articles may, without notice,[1] be treated as contraband of war, under the name of absolute contraband:

"'(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

"'(2) Projectiles, charges, and cartridges of all kinds and their distinctive component parts.

"'(3) Powder and explosives specially prepared for use in war.

"'(4) Gun-mountings, limber-boxes, limbers, military wagons, field forges, and their distinctive component parts.

"'(5) Clothing and equipment of a distinctively military character.

"'(6) All kinds of harness of a distinctively military character.

"'(7) Saddle, draught, and pack animals suitable for use in war.

"'(8) Articles of camp equipment and their distinctive component parts.

"'(9) Armor-plates.

"'(10) War-ships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

"'(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.'

"This list is that drawn up at the second peace conference by the committee charged with the special study of the question of contraband. It was the result of mutual concessions, and it has not seemed wise to reopen the discussion on this subject for the purpose either of cutting out or of adding articles.

"The words 'de plein droit' (without notice) imply that the provision becomes operative by the mere fact of the war and that no declaration by the belligerents is necessary. Trade is already warned in time of peace.

"'ART. 23. Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

"'Such notification must be addressed to the governments of other

[1] In view of the difficulty of finding an exact equivalent in English for the expression "de plein droit," it has been decided to translate it by the words "without notice," which represent the meaning attached to it by the draughtsman of the present General Report.

powers or to their representatives accredited to the power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral powers.'

"Certain discoveries or inventions might make the list in article 22 insufficient. An addition may be made to it on condition that it concerns articles exclusively used for war. This addition must be notified to the other powers, which will take the necessary measures to inform their subjects of it. In theory the notification may be made in time of peace or of war. The former case will doubtless rarely occur, because a state which made such a notification might be suspected of meditating a war; it would, nevertheless, have the advantage of informing trade beforehand. There was no reason for making it impossible.

"The right given to a power to make an addition to the list by a mere declaration has been thought too wide. It should be noticed that this right does not involve the dangers supposed. In the first place, it is understood that the declaration is only operative for the power which makes it, in the sense that the article added will only be contraband for it, as a belligerent; other states may, of course, also make a similar declaration. The addition may only refer to articles exclusively used for war; at present it would be hard to mention any such articles which are not included in the list. The future is left free. If a power claimed to add to the list of absolute contraband articles not exclusively used for war, it might expose itself to diplomatic remonstrances, because it would be disregarding an accepted rule. Besides, there would be an eventual resort to the international prize-court. Suppose that the court holds that the article mentioned in the declaration of absolute contraband is wrongly placed there because it is not exclusively used for war, but that it might have been included in a declaration of conditional contraband. Confiscation may then be justified if the capture was made in the conditions laid down for this kind of contraband (arts. 33–35) which differ from those enforced for absolute contraband (art. 30).

"It had been suggested that, in the interest of neutral trade, a period should lapse between the notification and its enforcement. But that would be very damaging to the belligerent, whose object is precisely to protect himself, since, during that period, the trade in articles which he thinks dangerous would be free and the effect of his measure a failure. Account has been taken, in another form, of the considerations of equity which have been adduced. (See art. 43.)

"'ART. 24. The following articles, susceptible of use in war as well as for purposes of peace, may, without notice,[1] be treated as contraband of war, under the name of conditional contraband:

"'(1) Foodstuffs.

"'(2) Forage and grain, suitable for feeding animals.

"'(3) Clothing, fabrics for clothing, and boots and shoes suitable for use in war.

[1] See note to art. 22.

"'(4) Gold and silver in coin or bullion; paper money.

"'(5) Vehicles of all kinds available for use in war and their component parts.

"'(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.

"'(7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones.

"'(8) Balloons and flying-machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying-machines.

"'(9) Fuel; lubricants.

"'(10) Powder and explosives not specially prepared for use in war.

"'(11) Barbed wire and implements for fixing and cutting the same.

"'(12) Horseshoes and shoeing materials.

"'(13) Harness and saddlery.

"'(14) Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.'

"On the expression 'de plein droit' (without notice) the same remark must be made as with regard to article 22. The articles enumerated are only conditional contraband if they have the destination specified in article 33.

"Foodstuffs include products necessary or useful for sustaining man, whether solid or liquid.

"Paper money only includes inconvertible paper money, i. e., banknotes which may or not be legal tender. Bills of exchange and checks are excluded.

"Engines and boilers are included in (6).

"Railway material includes fixtures (such as rails, sleepers, turntables, parts of bridges) and rolling-stock (such as locomotives, carriages, and trucks).

"'ART. 25. Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of article 23.'

"This provision corresponds, as regards conditional contraband, to that in article 23 as regards absolute contraband.

"'ART. 26. If a power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of article 23.'

"A belligerent may not wish to use the right to treat as contraband of war all the articles included in the above lists. It may suit him to add to conditional contraband an article included in absolute contraband or to declare free, so far as he is concerned, the trade in some article included in one class or the other. It is desirable that he should make known his

intention on this subject, and he will probably do so in order to have the credit of the measure. If he does not do so, but confines himself to giving instructions to his cruisers, the vessels searched will be agreeably surprised if the searcher does not reproach them with carrying what they themselves consider contraband. Nothing can prevent a power from making such a declaration in time of peace. See what is said as regards article 23.

"'ART. 27. Articles which are not susceptible of use in war may not be declared contraband of war.'

"The existence of a so-called free list (art. 28) makes it useful thus to put on record that articles which cannot be used for purposes of war may not be declared contraband of war. It might have been thought that articles not included in that list might at least be declared conditional contraband.

"'ART. 28. The following may not be declared contraband of war:

"'(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries and yarns of the same.

"'(2) Oil-seeds and nuts; copra.

"'(3) Rubber, resins, gums, and lacs; hops.

"'(4) Rawhides, horns, bones, and ivory.

"'(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

"'(6) Metallic ores.

"'(7) Earths, clays, lime, chalk; stone, including marble, bricks, slates, and tiles.

"'(8) Chinaware and glass.

"'(9) Paper and paper-making materials.

"'(10) Soap, paint, and colors, including articles exclusively used in their manufacture, and varnish.

"'(11) Bleaching-powder, soda-ash, caustic soda, salt-cake, ammonia, sulphate of ammonia, and sulphate of copper.

"'(12) Agricultural, mining, textile, and printing machinery.

"'(13) Precious and semiprecious stones, pearls, mother-of-pearl, and coral.

"'(14) Clocks and watches, other than chronometers.

"'(15) Fashion and fancy goods.

"'(16) Feathers of all kinds, hairs, and bristles.

"'(17) Articles of household furniture and decoration; office furniture and requisites.'

"To lessen the drawbacks of war as regards neutral trade it has been thought useful to draw up this so-called free list, but this does not mean, as has been explained above, that all articles outside it might be declared contraband of war.

"The ores here referred to are the product of mines from which metals are derived.

"There was a demand that dyestuffs should be included in (10), but this seemed too general, for there are materials from which colors are

derived, such as coal, which also have other uses. Products only used for making colors enjoy the exemption.

"'Articles de Paris,' an expression the meaning of which is universally understood, come under (15).

"(16) refers to the hair of certain animals, such as pigs and wild boars.

"Carpets and mats come under household furniture and ornaments (17).

"'ART. 29. Likewise the following may not be treated as contraband of war:

"'(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in article 30.

"'(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.'

"The articles enumerated in article 29 are also excluded from treatment as contraband, but for reasons different from those which have led to the inclusion of the list in article 28.

"Motives of humanity have exempted articles exclusively used to aid the sick and wounded, which, of course, include drugs and different medicines. This does not refer to hospital ships, which enjoy special immunity under the convention of The Hague of the 18th October, 1907, but to ordinary merchant vessels, whose cargo includes articles of the kind mentioned. The cruiser has, however, the right, in case of urgent necessity, to requisition such articles for the needs of her crew or of the fleet to which she belongs, but they can only be requisitioned on payment of compensation. It must, however, be observed that this right of requisition may not be exercised in all cases. The articles in question must have the destination specified in article 30—that is to say, an enemy destination. Otherwise, the ordinary law regains its sway; a belligerent could not have the right of requisition as regards neutral vessels on the high seas.

"Articles intended for the use of the vessel, which might in themselves and by their nature be contraband of war, may not be so treated; for instance, arms intended for the defence of the vessel against pirates or for making signals. The same is true of articles intended for the use of the crew and passengers during the voyage; the crew here includes all persons in the service of the vessel in general.

"*Destination of Contraband.*—As has been said, the second element in the notion of contraband is destination. Great difficulties have arisen on this subject, which find expression in the theory of continuous voyage, so often attacked or adduced without a clear comprehension of its exact meaning. Cases must simply be considered on their merits so as to see how they can be settled without unnecessarily annoying neutrals or sacrificing the legitimate rights of belligerents.

"In order to effect a compromise between conflicting theories and practices, absolute and conditional contraband have been differently treated in this connection.

"Articles 30 to 32 refer to absolute, and articles 33 to 36 to conditional, contraband.

"'ART. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.'

"The articles included in the list in article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by article 30. The journey made by the goods is regarded as a whole.

"'ART. 31. Proof of the destination specified in article 30 is complete in the following cases:

"'(1) When the goods are documented for discharge in an enemy port or for delivery to the armed forces of the enemy.

"'(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.'

"As has been said, the obligation of proving that the contraband goods really have the destination specified in article 30 rests with the captor. In certain cases proof of the destination specified in article 31 is conclusive; that is to say, the proof may not be rebutted.

"*First Case.*—The goods are documented for discharge in an enemy port; that is to say, according to the ship's papers referring to those goods, they are to be discharged there. In this case there is a real admission of enemy destination on the part of the interested parties themselves.

"*Second Case.*—The vessel is to touch at enemy ports only, or she is to touch at an enemy port before reaching the neutral port for which the goods are documented, so that although these goods, according to the papers referring to them, are to be discharged in a neutral port, the vessel carrying them is to touch at an enemy port before reaching that neutral port. They will be liable to capture, and the possibility of proving that their neutral destination is real and in accordance with the intentions of the parties interested is not admitted. The fact that before reaching that destination the vessel will touch at an enemy port would occasion too great a risk for the belligerent whose cruiser searches the vessel. Even without assuming that there is intentional fraud, there might be a strong temptation for the master of the merchant vessel to discharge the contraband, for which he would get a good price, and for the local authorities to requisition the goods.

"The same case arises where the vessel, before reaching the neutral port, is to join the armed forces of the enemy.

"For the sake of simplicity, the provision only speaks of an enemy port, but it is understood that a port occupied by the enemy must be regarded as an enemy port, as follows from the general rule in article 30.

"'ART. 32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.'

"The papers therefore are conclusive proof of the course of the vessel, unless she is encountered in circumstances which show that their statements are not to be trusted. See also the explanations given as regards article 35.

"'ART. 33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the goods cannot, in fact, be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under article 24 (4).'

"The rules for conditional contraband differ from those laid down for absolute contraband in two respects: (1) There is no question of destination for the enemy in general but of destination for the use of his armed forces or government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first and article 35 to the second principle.

"The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If from the circumstances the peaceful purpose is clear, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, as, for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no room for doubt. But what is the solution when the articles are destined for the civil government departments of the enemy state? It may be money sent to a government department for use in the payment of its official salaries or rails sent to a department of public works. In these cases there is enemy destination which renders the goods liable in the first place to capture and in the second to condemnation. The reasons for this are at once legal and practical. The state is one, although it necessarily acts through different departments. If a civil department may freely receive foodstuffs or money, that department is not the only gainer but the entire state, including its military administration, gains also, since the general resources of the state are thereby increased. Further, the receipts of a civil department may be considered of greater use to the military administration and directly assigned to the latter. Money or foodstuffs really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the departments of the enemy state is assimilated to that for its armed forces.

"It is the departments of the state which are dependent on the central power that are in question and not all the departments which may exist in the enemy state; local and municipal bodies, for instance, are not included, and articles destined for their use would not be contraband.

"War may be waged in such circumstances that destination for the use of a civil department cannot be suspect, and consequently cannot make goods contraband. For instance, there is a war in Europe, and the colonies of the belligerent countries are not in fact affected by it. Foodstuffs or other articles in the list of conditional contraband destined for the use of the civil government of a colony would not be held to be contraband of war, because the considerations adduced above do not apply to their case; the resources of the civil government cannot be drawn on for the needs of the war. Gold, silver, or paper money are exceptions, because a sum of money can easily be sent from one end of the world to the other.

"'ART. 34. The destination referred to in article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

"'In cases where the above presumptions do not arise, the destination is presumed to be innocent.

"'The presumptions set up by this article may be rebutted.'

"Contraband articles will not usually be directly addressed to the military authorities or to the government departments of the enemy state. Their true destination will be more or less concealed, and the captor must prove it in order to justify their capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom, or place for which, the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy government with articles of the kind in question. It may be a fortified place belonging to the enemy or a place used as a base, whether of operations or of supply, for the armed forces of the enemy.

"This general presumption may not be applied to the merchant vessel herself on her way to a fortified place, though she may in herself be conditional contraband, but only if her destination for the use of the armed forces or government departments of the enemy state is directly proved.

"In the absence of the above presumptions, the destination is presumed to be innocent. That is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

"Finally, all the presumptions thus set up in the interest of the captor or against him may be rebutted. The national tribunals, in the first place, and, in the second, the international court, will exercise their judgment.

"'ART. 35. Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

"'The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.'

"As has been said above, the doctrine of continuous voyage is excluded for conditional contraband, which is only liable to capture when it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they can no longer be contraband, and no examination will be made as to whether they are to be forwarded to the enemy by sea or land from that neutral port. It is here that the case of absolute contraband is essentially different.

"The ship's papers furnish complete proof as to the voyage on which the vessel is engaged and as to the place where the cargo is to be discharged; but this would not be so if the vessel were encountered clearly out of the course which she should follow according to her papers and unable to give adequate reasons to justify such deviation.

"This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed and unable to justify such deviation. The ship's papers are then in contradiction with the true facts and lose all value as evidence; the cruiser will be free to decide according to the merits of the case. In the same way, a search of the vessel may reveal facts which irrefutably prove that her destination, or the place where the goods are to be discharged, is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not according to his judgment. To resume, the ship's papers are proof, unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

"It does not follow that because a single entry in the ship's papers is shown to be false their evidence loses its value as a whole. The entries which cannot be proved false retain their value.

"'ART. 36. Notwithstanding the provisions of article 35, conditional contraband, if shown to have the destination referred to in article 33, is liable to capture in cases where the enemy country has no seaboard.'

"The case contemplated is certainly rare but has nevertheless arisen in recent wars. In the case of absolute contraband, there is no difficulty, since destination for the enemy may always be proved, whatever the route

by which the goods are sent. (Art. 30.) For conditional contraband the case is different, and an exception must be made to the general rule laid down in article 35, paragraph 1, so as to allow the captor to prove that the suspected goods really have the special destination referred to in article 33 without the possibility of being confronted by the objection that they were to be discharged in a neutral port.

"'Art. 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.'

"The vessel may be captured for contraband during the whole of her voyage, provided that she is in waters where an act of war is lawful. The fact that she intends to touch at a port of call before reaching the enemy destination does not prevent capture, provided that destination in her particular case is proved in conformity with the rules laid down in articles 30 to 32 for absolute, and in articles 33 to 35 for conditional, contraband, subject to the exception provided for in article 36.

"'Art. 38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.'

"A vessel is liable to capture for carrying contraband, but not for having done so.

"'Art. 39. Contraband goods are liable to condemnation.'

"This presents no difficulty.

"'Art. 40. A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.'

"It was universally admitted that in certain cases the condemnation of the contraband is not enough and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided that the contraband must bear a certain proportion to the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods, occupying space, or of weight, sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that, in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, the condemnation of the vessel may be said to be justified when

the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.

"'ART. 41. If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize-court and the custody of the ship and cargo during the proceedings.'

"It is not just that, on the one hand, the carriage of more than a certain proportion of contraband should involve the condemnation of the vessel, while if the contraband forms less than this proportion, it alone is confiscated. This often involves no loss for the master, the freight of this contraband having been paid in advance. Does this not encourage trade in contraband, and ought not a certain penalty to be imposed for the carriage of a proportion of contraband less than that required to entail condemnation? A kind of fine was proposed which should bear a relation to the value of the contraband articles. Objections of various sorts were brought forward against this proposal, although the principle of the infliction of some kind of pecuniary loss for the carriage of contraband seemed justified. The same object was attained in another way by providing that the costs and expenses incurred by the captor in respect of the proceedings in the national prize-court and of the custody of the vessel and of her cargo during the proceedings are to be paid by the vessel. The expenses of the custody of the vessel include in this case the keep of the captured vessel's crew. It should be added that the loss to a vessel by being taken to a prize port and kept there is the most serious deterrent as regards the carriage of contraband.

"'ART. 42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.'

"The owner of the contraband is punished in the first place by the condemnation of his contraband property; and in the second by that of the goods, even if innocent, which he may possess on board the same vessel.

"'ART. 43. If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

"'A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the power to which such port belongs of the outbreak of hostilities, or of the declaration of contraband, provided such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.'

"This provision is intended to spare neutrals who might in fact be

carrying contraband, but against whom no charge could be made. This may arise in two cases: The first is that in which they are unaware of the outbreak of hostilities; the second is that in which, though aware of this, they do not know of the declaration of contraband made by a belligerent, in accordance with articles 23 and 25, which is, as it happens, the one applicable to the whole or a part of the cargo. It would be unjust to capture the ship and condemn the contraband; on the other hand, the cruiser cannot be obligated to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need. These opposing interests are reconciled by making condemnation conditional on the payment of compensation. (See the convention of the 18th October, 1907, on the rules for enemy merchant vessels on the outbreak of hostilities, which expresses a similar idea.)

"'ART. 44. A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war-ship.

"'The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

"'The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.'

"A neutral vessel is stopped for carrying contraband. She is not liable to condemnation, because the contraband does not reach the proportion specified in article 40. She can, nevertheless, be taken to a prize port for judgment to be passed on the contraband. This right of the captor appears too wide in certain cases, if the importance of the contraband, possibly slight (for instance, a case of guns or revolvers), is compared with the heavy loss incurred by the vessel by being thus turned out of her course and detained during the time taken up by the proceedings. The question has, therefore, been asked whether the right of the neutral vessel to continue her voyage might not be admitted if the contraband articles were handed over to the captor, who, on his part, might only refuse to receive them for sufficient reasons, for instance, the rough state of the sea, which would make transshipment difficult or impossible, well-founded suspicions as to the amount of contraband which the merchant vessel is really carrying, the difficulty of stowing the articles on board the war-ship, etc. This proposal did not gain sufficient support. It was alleged to be impossible to impose such an obligation on the cruiser, for which this handing over of goods would almost always have drawbacks. If, by chance, it has none, the cruiser will not refuse it because she herself will gain by not being turned out of her course by having to take the vessel to a port. The idea of an obligation having thus been excluded, it was decided to provide for the voluntary handing over the contraband, which, it is hoped, will be carried out whenever possible, to the great advantage of both

parties. The formalities provided for are very simple and need no explanation.

"There must be a judgment of a prize-court as regards the goods thus handed over. For this purpose the captor must be furnished with the necessary papers. It may be supposed that there might be doubt as to the character of certain articles which cruiser claims as contraband; the master of the merchant vessel contests this claim, but prefers to deliver them up so as to be at liberty to continue his voyage. This is merely a capture which has to be confirmed by the prize-court.

"The contraband delivered up by the merchant vessel may hamper the cruiser, which must be left free to destroy it at the moment of handing over or later.

Chapter III—Unneutral Service

"In a general way, it may be said that the merchant vessel which violates neutrality, whether by carrying contraband of war or by breaking blockade, affords aid to the enemy, and it is on this ground that the belligerent whom she injures by her acts is justified in inflicting on her certain losses. But there are cases where such unneutral service bears a particularly distinctive character, and for such cases it has been thought necessary to make special provision. They have been divided into two classes according to the gravity of the act of which the neutral vessel is accused.

"In the cases included in the first class (art. 45), the vessel is condemned and receives the treatment of a vessel subject to condemnation for carrying contraband. This means that the vessel does not lose her neutral character and has a full claim to the rights enjoyed by neutral vessels; for instance, she may not be destroyed by the captor except under the conditions laid down for neutral vessels (arts. 48 et seq.); the rule that the flag covers the goods applies to goods she carries on board.

"In the more serious cases which belong to the second class (art. 46), the vessel is again condemned; but further, she is treated not only as a vessel subject to condemnation for carrying contraband, but as an enemy merchant vessel, which treatment entails certain consequences. The rules governing the destruction of neutral prizes do not apply to the vessel, and as she has become an enemy vessel, it is no longer the second but the third rule of the declaration of Paris which is applicable. The goods on board will be presumed to be enemy goods; neutrals will have the right to claim their property on establishing their neutrality. (Art. 59.) It would, however, be going too far to say that the original neutral character of the vessel is completely lost, so that she should be treated as though she had always been an enemy vessel. The vessel may plead that the allegation made against her has no foundation in fact, that the act of which she is accused has not the character of unneutral service. She has, therefore, the right of appeal to the international court in virtue of the provisions which protect neutral property.

"'Art. 45. A neutral vessel will be condemned and will, in a general

way. receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

"'(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy or with a view to the transmission of intelligence in the interest of the enemy.

"'(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

"'In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

"'The provisions of the present article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities or a neutral port subsequently to the notification of the outbreak of hostilities to the power to which such port belongs, provided that such notification was made in sufficient time.'

"The first case supposes passengers travelling as individuals; the case of a military detachment is dealt with hereafter. The case is that of individuals embodied in the armed military or naval forces of the enemy. There was some doubt as to the meaning of this word. Does it include those individuals only who are summoned to serve in virtue of the law of their country and who have really joined the corps to which they are to belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental European country and are settled in America; these individuals have military obligations toward their country of origin; they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. Shall they be considered as embodied in the sense of the provision which we are discussing? If we judged by the municipal law of certain countries we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with practical necessity and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral governments would not unwillingly submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so.

"The transmission of intelligence in the interest of the enemy is to be treated in the same way as the carriage of passengers embodied in his armed force. The reference to a vessel especially undertaking a voyage is intended to show that her usual service is not meant. She has been turned

from her course; she has touched at a port which she does not ordinarily visit in order to embark the passengers in question. She need not be exclusively devoted to the service of the enemy; that case would come into the second class. (Art. 56 (4).)

"In the two cases just mentioned the vessel has performed but a single service; she has been employed to carry certain people or to transmit certain intelligence; she is not continuously in the service of the enemy. In consequence, she may be captured during the voyage on which she is performing the service which she has to render. Once that voyage is finished, all is over, in the sense that she may not be captured for having rendered the service in question. The principle is the same as that recognized in the case of contraband. (Art. 38.)

"The second case also falls under two heads.

"There is, first, the carriage of a military detachment of the enemy, or that of one or more persons who during the voyage directly assist his operations, for instance, by signalling. If these people are soldiers or sailors in uniform there is no difficulty, the vessel is clearly liable for condemnation. If they are soldiers or sailors in mufti, who might be mistaken for ordinary passengers, knowledge on the part of the master or owner is required, the charterer being assimilated to the latter. The rule is the same in the case of persons directly assisting the enemy during the voyage.

"In these cases, if the vessel is condemned for unneutral service, the goods belonging to her owner are also liable to condemnation.

"These provisions assume that the state of war was known to the vessel engaged in the operations specified; such knowledge is the reason and justification of her condemnation. The position is altogether different when the vessel is unaware of the outbreak of hostilities, so that she undertakes the service in ordinary circumstances. She may have learned of the outbreak of hostilities while at sea but have had no chance of landing the persons whom she was carrying. Condemnation would then be unjust, and the equitable rule adopted is in accordance with the provisions already accepted in other matters. If a vessel has left an enemy port subsequently to the outbreak of hostilities, or a neutral port after that outbreak has been notified to the power to whom such port belongs, her knowledge of the existence of a state of war will be presumed.

"The question here is merely one of preventing the condemnation of the vessel. The persons found on board her who belong to the armed forces of the enemy may be made prisoners of war by the cruiser.

"'ART. 46. A neutral vessel is liable to condemnation and, in a general way, to the same treatment as would be applicable to her if she were an enemy merchant vessel:

"'(1) If she takes a direct part in the hostilities;

"'(2) If she is under the orders or control of an agent placed on board by the enemy government;

"'(3) If she is in the exclusive employment of the enemy government;

"'(4) If she is exclusively engaged at the time either in the transport

of enemy troops or in the transmission of intelligence in the interest of the enemy.

"'In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.'

"The cases here contemplated are more serious than those in article 45, which justifies the severer treatment inflicted on the vessel as explained above.

"*First Case.*—The vessel takes a direct part in the hostilities. This may take different forms. It is needless to say that, in an armed conflict, the vessel takes all the risks incidental thereto. We suppose her to have fallen into the power of the enemy whom she was fighting, and who is entitled to treat her as an enemy merchant vessel.

"*Second Case.*—The vessel is under the orders or control of an agent placed on board by the enemy government. His presence marks the relation in which she stands to the enemy. In other circumstances the vessel may also have relations with the enemy, but to be subject to condemnation she must come under the third head.

"*Third Case.*—The whole vessel is chartered by the enemy government, and is therefore entirely at its disposal; it can use her for different purposes more or less directly connected with the war, notably, as a transport; such is the position of colliers which accompany a belligerent fleet. There will often be a charter party between the belligerent government and the owner or master of the vessel, but all that is required is proof, and the fact that the whole vessel has, in fact, been chartered is enough, in whatever way it may be established.

"*Fourth Case.*—The vessel is at the time exclusively devoted to the carriage of enemy troops or to the transmission of intelligence in the enemy's interest. The case is different from those dealt with by article 45, and the question is one of a service to which the ship is permanently devoted. The decision accordingly is that, so long as such service lasts, the vessel is liable to capture, even if, at the moment when an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence.

"As in the cases in article 45, and for the same reasons, goods found on board belonging to the owner of the vessel are also liable to condemnation.

"It was proposed to treat as an enemy merchant vessel a neutral vessel making, at the time, and with the sanction of the enemy government, a voyage which she has only been permitted to make subsequently to the outbreak of hostilities or during the two preceding months. This rule would be enforced notably on neutral merchant vessels admitted by a belligerent to a service reserved in time of peace to the national marine of that belligerent—for instance, to the coasting trade. Several delegations formally rejected this proposal, so that the question thus raised remains an open one.

"'ART. 47. Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel.'

"Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel when she is searched. If the vessel is subject to condemnation, the cruiser will capture her and take her to one of her own ports with the persons on board. Clearly the soldiers or sailors of the enemy state will not be set free but will be treated as prisoners of war. Perhaps the case will not be one for the capture of the ship—for instance, because the master was unaware of the status of an individual who had come on board as an ordinary passenger. Must the soldier or soldiers on board the vessel be set free? That does not appear admissible. The belligerent cruiser cannot be compelled to set free active enemies who are physically in her power and are more dangerous than this or that contraband article. She must naturally proceed with great discretion and must act on her own responsibility in requiring the surrender of these individuals, but the right to do so is hers; it has therefore been thought necessary to explain the point.

Chapter IV—Destruction of Neutral Prizes

"The destruction of neutral prizes was a subject comprised in the programme of the second peace conference, and on that occasion no settlement was reached. It reappeared in the programme of the present conference, and this time agreement has been found possible. Such a result, which bears witness to the sincere desire of all parties to arrive at an understanding, is a matter for congratulation. It has been shown once more that conflicting hard-and-fast rules do not always correspond to things as they are, and that if there be readiness to descend to particulars and to arrive at the precise way in which the rules have been applied, it will often be found that the actual practice is very much the same, although the doctrines professed appear to be entirely in conflict. To enable two parties to agree, it is first of all necessary that they should understand each other, and this frequently is not the case. Thus it has been found that those who declared for the right to destroy neutral prizes never claimed to use this right wantonly or at every opportunity but only by way of exception; while, on the other hand, those who maintained the principle that destruction is forbidden admitted that the principle must give way in certain exceptional cases. It therefore became a question of reaching an understanding with regard to those exceptional cases to which, according to both views, the right to destroy should be confined. But this was not all; there was need for some guarantee against abuse in the exercise of this right; the possibility of arbitrary action in determining these exceptional cases must be limited by throwing some real responsibility upon the captor. It was at this stage that a new idea was introduced into the discussion, thanks to which it was possible to arrive at an agreement. The possibility of intervention by a court of justice will make the captor reflect before he acts and, at the same time, secure reparation in cases where there was no reason for the destruction.

"Such is the general spirit of the provisions of this chapter.

"'Art. 48. A neutral vessel which has been captured may not be de-

stroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the prize.'

"The general principle is very simple. A neutral vessel which has been seized may not be destroyed by the captor; so much may be admitted by every one, whatever view is taken as to the effect produced by the capture. The vessel must be taken into a port for the determination there as to the validity of the prize. A prize-crew will be put on board or not, according to circumstances.

"'ART. 49. As an exception, a neutral vessel which has been captured by a belligerent war-ship, and which would be liable to condemnation, may be destroyed if the observance of article 48 would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time.'

"The first condition necessary to justify the destruction of the captured vessel is that she should be liable to condemnation upon the facts of the case. If the captor cannot even hope to obtain the condemnation of the vessel, how can he lay claim to the right to destroy her?

"The second condition is that the observance of the general principle would involve danger to the safety of the war-ship or to the success of the operations in which she is engaged at the time. This is what was finally agreed upon after various solutions had been tried. It was understood that the phrase compromettre la securité was synonymous with mettre en danger le navire and might be translated into English by: Involve danger. It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. For a danger which did not exist at the actual moment of the capture may have appeared some time afterward.

"'ART. 50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war-ship.'

"This provision lays down the precautions to be taken in the interests of the persons on board and of the administration of justice.

"'ART. 51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity, of the nature contemplated in article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.'

"This claim gives a guarantee against the arbitrary destruction of prizes by throwing a real responsibility upon the captor who has carried out the destruction. The result is that before any decision is given respecting the validity of the prize, the captor must prove that the situation he was in was really one which fell under the head of the exceptional cases con-

templated. This must be proved in proceedings to which the neutral is a party, and if the latter is not satisfied with the decision of the national prize-court he may take his case to the international court. Proof to the above effect is, therefore, a condition precedent which the captor must fulfil. If he fails to do this, he must compensate the parties interested in the vessel and the cargo, and the question whether the capture was valid or not will not be gone into. In this way a real sanction is provided in respect of the obligation not to destroy a prize except in particular cases, the sanction taking the form of a fine inflicted on the captor. If, on the other hand, this proof is given, the prize procedure follows the usual course; if the prize is declared valid, no compensation is due; if it is declared void, the parties interested have a right to be compensated. Resort to the international court can only be made after the decision of the prize-court has been given on the whole matter and not immediately after the preliminary question has been decided.

"'ART. 52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

"'ART. 53. If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.'

"Supposing a vessel which has been destroyed carried neutral goods not liable to condemnation: the owner of such goods has, in every case, a right to compensation; that is, without there being occasion to distinguish between cases where the destruction was or was not justified. This is equitable and a further guarantee against arbitrary destruction.

"'ART. 54. The captor has the right to demand the handing over or to proceed himself to the destruction of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed and the formalities duly carried out, the master must be allowed to continue his voyage.

"'The provisions of articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.'

"A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in article 40. The captain may put a prize-crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of article 44, agree to the handing over of the contraband if offered by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to hand over the contraband and the cruiser is not in a position to take the vessel into a national port. Is the cruiser obliged to

let the neutral vessel go with the contraband on board? To require this seemed going too far, at least in certain exceptional circumstances. These circumstances are, in fact, the same as would have justified the destruction of the vessel, had she been liable to condemnation. In such a case, the cruiser may demand the handing over or proceed to the destruction of the goods liable to condemnation. The reasons for which the right to destroy the vessel has been recognized may justify the destruction of the contraband goods, the more so as the considerations of humanity which can be adduced against the destruction of a vessel do not in this case apply. Against arbitrary demands by the cruiser there are the same guarantees as those which made it possible to recognize the right to destroy the vessel. The captor must, as a preliminary, prove that he was really faced by the exceptional circumstances specified; failing this, he is condemned to pay the value of the goods handed over or destroyed, and the question whether they were contraband or not will not be gone into.

"The article prescribes certain formalities which are necessary to establish the facts of the case and to enable the prize-court to adjudicate.

"Of course, when once the goods have been handed over or destroyed and the formalities carried out, the vessel which has been stopped must be left free to continue her voyage.

Chapter V—Transfer to a Neutral Flag

"An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is immune. It can therefore be readily understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or merely in order to shield the vessel from the risks to which she would have been exposed had she retained her former nationality. This question naturally arises when the transfer has taken place a comparatively short time before the moment at which the ship is searched, whether the actual date be before or after the outbreak of hostilities. The answer will be different according as the question is looked at from the point of view of commercial or belligerent interests. Fortunately, rules have been agreed upon which conciliate both these interests as far as possible and which, at the same time, tell belligerents and neutral commerce what their position is.

"'Art. 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"'Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the

countries concerned, and if its effect is such that neither the control of, nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.'

"The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary requirements of the law have been fulfilled. It is upon the captor, if he wishes to have the transfer annulled, that the onus lies of proving that its object was to evade the consequences entailed by the war in prospect. There is one case which is treated as suspicious, that, namely, in which the bill of sale is not on board when the ship has changed her nationality less than sixty days before the outbreak of hostilities. The presumption of validity which has been set up by the first paragraph in favor of the vessel is then replaced by a presumption in favor of the captor. It is presumed that the transfer is void, but the presumption may be rebutted. With a view to such rebuttal, proof may be given that the transfer was not effected in order to evade the consequences of the war; it is unnecessary to add that the ordinary requirements of the law must have been fulfilled.

"It was thought desirable to give to commerce a guarantee that the right of treating a transfer as void on the ground that it was effected in order to evade the consequences of war should not extend too far, and should not cover too long a period. Consequently, if the transfer has been effected more than thirty days before the outbreak of hostilities, it cannot be impeached on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show that it is genuine and final. These conditions are as follows: The transfer must be unconditional, complete, and in conformity with the laws of the countries concerned, and its effect must be such that both the control of, and the profits earned by, the vessel pass into other hands. When once these conditions are proved to exist, the captor is not allowed to set up the contention that the vender foresaw the war in which his country was about to be involved and wished by the sale to shield himself from the risks to which a state of war would have exposed him in respect of the vessels he was transferring. Even in this case, however, when a vessel is encountered by a cruiser and her bill of sale is not on board, she may be captured if a change of nationality has taken place less than sixty days before the outbreak of hostilities; that circumstance has made her suspect. But if before the prize-court the proof required by the second paragraph is adduced, she must be released, though she cannot claim compensation, inasmuch as there was good reason for capturing her.

"'ART. 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"'Provided that there is an absolute presumption that a transfer is void:

"'(1) If the transfer has been made during a voyage or in a blockaded port;

"'(2) If a right to repurchase or recover the vessel is reserved to the vender;

"'(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.'

"The rule respecting transfers made after the outbreak of hostilities is more simple. Such a transfer is only valid if it is proved that its object was not to evade the consequences to which an enemy vessel, as such, is exposed. The rule accepted in respect to transfers made before the outbreak of hostilities is inverted. In that case there is a presumption that the transfer is valid; in the present, that it is void—provided always that proof to the contrary may be given. For instance, it might be proved that the transfer had taken place by inheritance.

"Article 56 recites cases in which the presumption that the transfer is void is absolute, for reasons which can be readily understood. In the first case the connection between the transfer and the war risk run by the vessel is evident. In the second, the transferee is a mere man of straw, who is to be treated as owner during a dangerous period, after which the vender will recover possession of his vessel. Lastly, the third case might strictly be regarded as already provided for, since a vessel which lays claim to neutral nationality must naturally prove that she has a right to it.

"At one time provision was made in this article for the case of a vessel which was retained, after the transfer, in the trade in which she had previously been engaged. Such a circumstance is in the highest degree suspicious; the transfer has a fictitious appearance, inasmuch as nothing has changed in regard to the vessel's trade. This would apply, for instance, if a vessel were running on the same line before and after the transfer. It was, however, objected that to set up an absolute presumption would sometimes be too severe and that certain kinds of vessels, as, for example, tank-ships, could, on account of their build, engage only in a certain definite trade. To meet this objection the word "route" was then added, so that it would have been necessary that the vessel should be engaged in the same trade and on the same route; it was thought that in this way the above contention would have been satisfactorily met. However, the suppression of this case from the list being insisted on, it was agreed to eliminate it. Consequently, a transfer of this character now falls within the general rule; it is certainly presumed to be void, but the presumption may be rebutted.

Chapter VI—Enemy Character

"The rule in the declaration of Paris that 'the neutral flag covers enemy goods, with the exception of contraband of war' corresponds so closely with the advance of civilization and has taken so firm a hold on

the public mind that it is impossible, in the face of so extensive an application, to avoid seeing in that rule the embodiment of a principle of the common law of nations which can no longer be disputed. The determination of the neutral or enemy character of merchant vessels accordingly decides not only the question of the validity of their capture but also the fate of the non-contraband goods on board. A similar general observation may be made with reference to the neutral or enemy character of goods. No one thinks of contesting to-day the principle according to which 'neutral goods, with the exception of contraband of war, are not liable to capture on board an enemy ship.' It is, therefore, only in respect of goods found on board an enemy ship that the question whether they are neutral or enemy property arises.

"The determination of what constitutes neutral or enemy character thus appears as a development of the two principles laid down in 1856, or rather as a means of securing their just application in practice.

"The advantage of deducing from the practices of different countries some clear and simple rules on this subject may be said to need no demonstration. The uncertainty as to the risk of capture, if it does not put an end to trade, is at least the most serious of hinderances to its continuance. A trader ought to know the risks which he runs in putting his goods on board this or that ship, while the underwriter, if he does not know the extent of those risks, is obliged to charge war premiums, which are often either excessive or else inadequate.

"The rules which form this chapter are, unfortunately, incomplete. Certain important points had to be laid aside, as has been already observed in the introductory explanations and as will be further explained below.

"'ART. 57. Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

"'The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of this rule and is in no wise affected by it.'

"The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as distinguished from that of other movable property, and notably of the cargo. From more than one point of view ships may be said to possess an individuality; notably, they have a nationality, a national character. This attribute of nationality finds visible expression in the right to fly a flag. It has the effect of placing ships under the protection and control of the state to which they belong. It makes them amenable to the sovereignty and to the laws of that state and liable to requisition should the occasion arise. Here is the surest test of whether a vessel is really a unit in the merchant marine of a country, and here, therefore, the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test and to discard all considerations connected with the personal status of the owner.

"The text makes use of the words 'the flag which the vessel is entitled to fly'; that expression means, of course, the flag under which, whether she is actually flying it or not, the vessel is entitled to sail according to the municipal laws which govern that right.

"Article 57 safeguards the provisions respecting transfer to another flag, as to which it is sufficient to refer to articles 55 and 56; a vessel may very well have the right to fly a neutral flag, as far as the law of the country to which she claims to belong is concerned, but may be treated as an enemy vessel by a belligerent, because the transfer in virtue of which she has hoisted the neutral flag is annulled by article 55 or article 56.

"Lastly, the question was raised whether a vessel loses her neutral character when she is engaged in a trade which the enemy, prior to the war, reserved exclusively for his national vessel; but as has been observed above in connection with the subject of unneutral service, no agreement was reached, and the question remains an open one, as the second paragraph of article 57 is careful to explain.

"'ART. 58. The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.'

"Unlike ships, goods have no individuality of their own; their neutral or enemy character is made to depend upon the personal status of their owner. This opinion prevailed after an exhaustive study of different views, which inclined toward reliance on the country of origin of the goods, the status of the person at whose risk they are, of the consignee, or of the consignor. The test adopted in article 58 appears, moreover, to be in conformity with the terms of the declaration of Paris, as also with those of the convention of The Hague of the 18th October, 1907, relative to the establishment of an international prize-court, where the expression 'neutral or enemy property' is used. (Arts. 1, 3, 4, 8.)

"But it cannot be concealed that article 58 solves no more than a part of the problem, and that the easier part; it is the neutral or enemy character of the owner which determines the character of the goods, but what is to determine the neutral or enemy character of the owner? On this point nothing is said, because it was found impossible to arrive at an agreement. Opinions were divided between domicile and nationality; no useful purpose will be served by reproducing here the arguments adduced to support the two positions. It was hoped that a compromise might have been reached on the basis of a clause to the following effect:

"'The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of no nationality or of double nationality (i. e., both neutral and enemy), by his domicile in a neutral or enemy country;

"'Provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral or enemy country.'

"But there was no unanimity.

"'ART. 59. In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.'

"Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, which leaves to the claimant the right, but at the same time the onus, of proving his title.

"'ART. 60. Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

"'If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.'

"This provision contemplates the case where goods which were enemy property at the time of despatch have been the subject of a sale or transfer during the course of the voyage. The ease with which enemy goods might secure protection from the exercise of the right of capture by means of a sale which is made subject to a reconveyance of the property on arrival has always led to a refusal to recognize such transfers. The enemy character subsists.

"With regard to the moment from which goods must be considered to acquire and retain the enemy character of their owner, the text has been inspired by the same spirit of equity as governed the convention of The Hague, relative to the status of merchant vessels on the outbreak of hostilities, and by the same desire to protect mercantile operations undertaken in the security of a time of peace. It is only when the transfer takes place after the outbreak of hostilities that it is, so far as the loss of enemy character is concerned, inoperative until the arrival of the goods in question. The date which is taken into consideration here is that of the transfer, and not of the departure of the vessel. For, while the vessel which started before the war began, and remains, perhaps, unaware of the outbreak of hostilities, may enjoy on this account some degree of exemption, the goods may nevertheless possess enemy character; the enemy owner of these goods is in a position to be aware of the state of war, and it is for that very reason that he is likely to seek to evade its consequences.

"It was, however, thought right to add what is, if not a limitation, at least a complement agreed to be necessary. In a great number of countries an unpaid vender has, in the event of the bankruptcy of the buyer, a recognized legal right to recover the goods which have already become the property of the buyer but not yet reached him (stoppage in transitu). In such a case the sale is cancelled and, in consequence of the recovery, the vender obtains the goods again and is not deemed ever to have ceased to be the owner. This right gives to neutral commerce, in the case of a genuine bankruptcy, a protection too valuable to be sacrificed, and the second paragraph of article 60 is intended to preserve it.

Chapter VII—Convoy

"The practice of convoy has, in the past, occasionally given rise to grave difficulties and even to conflict. It is therefore satisfactory to be able to record the agreement which has been reached upon this subject.

"'Art. 61. Neutral vessels under national convoy are exempt from search. The commander of a convoy gives in writing, at the request of the commander of a belligerent war-ship, all information as to the character of the vessels and their cargoes which could be obtained by search.'

"The principle laid down is simple; a neutral vessel under the convoy of a war-ship of her own nationality is exempt from search. The reason for this rule is that the belligerent cruiser ought to be able to find in the assurances of the commander of the convoy as good a guarantee as would be afforded by the exercise of the right of search itself; in fact, she cannot call in question the assurances given by the official representative of a neutral government without displaying a lack of international courtesy. If neutral governments allow belligerents to search vessels sailing under their flag, it is because they do not wish to be responsible for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation is altered when a neutral government consents to undertake that responsibility; the right of search has no longer the same importance.

"But it follows from the explanation of the rule respecting convoy that the neutral government undertakes to afford the belligerents every guarantee that the vessels convoyed shall not take advantage of the protection accorded to them in order to do anything inconsistent with their neutrality, as, for example, to carry contraband, render unneutral service to the belligerent, or attempt to break blockade. There is need, therefore, that a genuine supervision should be exercised from the outset over the vessels which are to be convoyed; and that supervision must be continued throughout the voyage. The government must act with vigilance so as to prevent all abuse of the right of convoy, and must give to the officer who is put in command of a convoy precise instructions to this effect.

"A belligerent cruiser encounters a convoy; she communicates with the commander of the convoy, who must, at her request, give in writing all relevant information about the vessels under his protection. A written declaration is required, because it prevents all ambiguities and misunderstandings and because it pledges to a greater extent the responsibility of the commander. The object of such a declaration is to make search unnecessary by the mere fact of giving to the cruiser the information which the search itself would have supplied.

"'Art. 62. If the commander of the belligerent war-ship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed

to the officer of the war-ship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.'

"In the majority of cases the cruiser will be satisfied with the declaration which the commander of the convoy will have given to her, but she may have serious grounds for believing that the confidence of the commander has been abused, as, for example, that a ship under convoy of which the papers are apparently in order and exhibit nothing suspicious is, in fact, carrying contraband cleverly concealed. The cruiser may, in such a case, communicate her suspicions to the commander of the convoy and an investigation may be considered necessary. If so, it will be made by the commander of the convoy, since it is he alone who exercises authority over the vessels placed under his protection. It appeared, nevertheless, that much difficulty might often be avoided if the belligerent were allowed to be present at this investigation; otherwise he might still suspect, if not the good faith, at least the vigilance and perspicacity of the person who conducted the search. But it was not thought that an obligation to allow the officer of the cruiser to be present at the investigation should be imposed upon the commander of the convoy. He must act as he thinks best; if he agrees to the presence of an officer of the cruiser, it will be as an act of courtesy or good policy. He must in every case draw up a report of the investigation and give a copy to the officer of the cruiser.

"Differences of opinion may occur between the two officers, particularly in relation to conditional contraband. The character of a port to which a cargo of corn is destined may be disputed. Is it an ordinary commercial port, or is it a port which serves as a base of supply for the armed forces? The situation which arises out of the mere fact of the convoy must in such a case be respected. The officer of the cruiser can do no more than make his protest, and the difficulty must be settled through the diplomatic channel.

"The situation is altogether different if a vessel under convoy is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection was granted has not been fulfilled. Besides deceiving her own government, she has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel encountered in the ordinary way and searched by a belligerent cruiser. She cannot complain at being exposed to such rigorous treatment, since there is in her case an aggravation of the offence committed by a carrier of contraband.

Chapter VIII—Resistance to Search

"The subject treated in this chapter was not mentioned in the programme submitted by the British Government in February, 1908, but it is intimately connected with several of the questions in that programme and thus attracted the attention of the conference in the course of its

deliberations; and it was thought necessary to frame a rule upon it, the draughting of which presented little difficulty.

"A belligerent cruiser encounters a merchant vessel and summons her to stop in order that she may be searched. The vessel summoned does not stop but tries to avoid the search by flight. The cruiser may employ force to stop her, and the merchant vessel, if she is damaged or sunk, has no right to complain, seeing that she has failed to comply with an obligation imposed upon her by the law of nations.

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

"'ART. 63. Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.'

"The situation is different if forcible resistance is made to any legitimate action by the cruiser. The vessel commits an act of hostility and must from that moment be treated as an enemy vessel; she will therefore be subject to condemnation, although the search may not have shown that anything contrary to neutrality had been done. So far no difficulty seems to arise.

"What must be decided with regard to the cargo? The rule which appeared to be the best is that according to which the cargo will be treated like the cargo on board an enemy vessel. This assimilation involves the following consequences. A neutral vessel which has offered resistance becomes an enemy vessel and the goods on board are presumed to be enemy goods. Neutrals who are interested may claim their property, in accordance with article 3 of the declaration of Paris, but enemy goods will be condemned, since the rule that the flag covers the goods can not be adduced, because the captured vessel on board which they are found is considered to be an enemy vessel. It will be noticed that the right to claim the goods is open to all neutrals, even to those whose nationality is that of the captured vessel; it would seem to be an excess of severity to make such persons suffer for the action of the master. There is, however, an exception as regards the goods which belong to the owner of the

vessel; it seems natural that he should bear the consequences of the acts of his agent. His property on board the vessel is therefore treated as enemy goods. A fortiori the same rule applies to the goods belonging to the master.

Chapter IX—Compensation

This chapter is of very general application, inasmuch as the provisions which it contains are operative in all the numerous cases in which a cruiser may capture a vessel or goods.

"'Art. 64. If the capture of a vessel or of goods is not upheld by the prize-court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.'

"A cruiser has captured a neutral vessel on the ground, for example, of carriage of contraband or breach of blockade. The prize-court releases the vessel, declaring the capture to be void. This decision alone is evidently not enough to indemnify the parties interested for the loss incurred in consequence of the capture, and this loss may have been considerable, since the vessel has been during a period, which may often be a very long one, prevented from engaging in her ordinary trade. May these parties claim to be compensated for this injury? Reason requires that the affirmative answer should be given, if the injury has been undeserved—that is to say, if the capture was not brought about by some fault of the parties. It may, indeed, happen that there was good reason for the capture, because the master of the vessel searched did not produce evidence which ought in the ordinary course to have been available and which was only furnished at a later stage. In such a case it would be unjust that compensation should be awarded. On the other hand, if the cruiser has really been at fault, if the vessel has been captured when there were not good reasons for doing so, it is just that compensation should be granted.

"It may also happen that a vessel which has been captured and taken into a port is released by the action of the executive without the intervention of a prize-court. The existing practice, under such circumstances, is not uniform. In some countries the prize-court has no jurisdiction, unless there is a question of validating a capture, and cannot adjudicate on a claim for compensation based upon the ground that the capture would have been held unjustifiable; in other countries the prize-court would have jurisdiction to entertain a claim of this kind. On this point, therefore, there is a difference which is not altogether equitable, and it is desirable to lay down a rule which will produce the same result in all countries. It is reasonable that every capture effected without good reasons should give to the parties interested a right to compensation without its being necessary to draw any distinction between the cases in which the capture has or has not been followed by a decision of a prize-court; and this argument is all the more forcible when the capture may have so little justification that the vessel is released by the action of the executive. A

provision in general terms has therefore been adopted, which is capable of covering all cases of capture.

"It should be observed that in the text no reference is made to the question whether the national tribunals are competent to adjudicate on a claim for compensation. In cases where proceedings are taken against the property captured no doubt upon this point can be entertained. In the course of the proceedings taken to determine the validity of a capture the parties interested have the opportunity of making good their right to compensation, and if the national tribunal does not give them satisfaction they can apply to the international prize-court. If, on the other hand, the action of the belligerent has been confined to the capture it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation; and if so, what are those tribunals? The international court has not, according to the convention of The Hague, any jurisdiction in such a case. From an international point of view the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered or on the absence of any tribunal having jurisdiction to entertain it.

"The question was raised as to whether it was necessary to draw a distinction between the direct and the indirect losses suffered by vessel or goods. The best course appeared to be to leave the prize-court free to estimate the amount of compensation due, which will vary according to the circumstances and cannot be laid down in advance in rules going into minute details.

"For the sake of simplicity mention has only been made of the vessel, but what has been said applies, of course, to cargo captured and afterward released. Innocent goods on board a vessel which has been captured suffer, in the same way, all the inconvenience which attends the capture of the vessel; but if there was good cause for capturing the vessel whether the capture has subsequently been held to be valid or not, the owners of the cargo have no right to compensation.

"It is perhaps useful to indicate certain cases in which the capture of a vessel would be justified, whatever might be the ultimate decision of the prize-court. Notably, there is the case where some or all of the ship's papers have been thrown overboard, suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers. There is in such a case an element which will justify any suspicion and afford an excuse for capturing the vessel, subject to the master's ability to account for his action before the prize-court. Even if the court should accept the explanation given and should not find any reason for condemnation, the parties interested cannot hope to recover compensation.

"An analogous case would be that in which there were found on board two sets of papers, or false or forged papers, if this irregularity were connected with circumstances calculated to contribute to the capture of the vessel.

"It appeared sufficient that these cases in which there would be a reasonable excuse for the capture should be mentioned in the present report and should not be made the object of express provisions, since otherwise the mention of these two particular cases might have led to the supposition that they were the only cases in which a capture could be justified.

"Such, then, are the principles of international law to which the naval conference has sought to give recognition as being fitted to regulate in practice the intercourse of nations on certain important questions in regard to which precise rules have hitherto been wanting. The conference has thus taken up the work of codification begun by the declaration of Paris of 1856. It has worked in the same spirit as the second peace conference, and, taking advantage of the labors accomplished at The Hague, it has been able to solve some of the problems which, owing to the lack of time, that conference was compelled to leave unsolved. Let us hope that it may be possible to say that those who have drawn up the declaration of London of 1909 are not altogether unworthy of their predecessors of 1856 and 1907.

Final Provisions

These provisions have reference to various questions relating to the effect of the declaration, its ratification, its coming into force, its denunciation, and the accession of unrepresented powers.

"'Art. 65. The provisions of the present declaration must be treated as a whole and cannot be separated.'

"This article is of great importance and is in conformity with that which was adopted in the declaration of Paris.

"The rules contained in the present declaration relate to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the delegations. Concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory, and a legitimate expectation would be falsified if one power might make reservations on a rule to which another power attached particular importance.

"'Art. 66. The signatory powers undertake to insure the mutual observance of the rules contained in the present declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize-courts.'

"According to the engagement resulting from this article, the declaration applies to the relations between the signatory powers when the belligerents are likewise parties to the declaration.

"It will be the duty of each power to take the measures necessary to insure the observance of the declaration. These measures may vary in

different countries and may or may not involve the intervention of the legislature. The matter is one of national legal requirements.

"It should be observed that neutral powers also may find themselves in a position of having to give instructions to their authorities, notably to the commanders of convoys, as previously explained.

"'ART. 67. The present declaration shall be ratified as soon as possible.

"'The ratifications shall be deposited in London.

"'The first deposit of ratifications shall be recorded in a protocol signed by the representatives of the powers taking part therein and by His Britannic Majesty's principal secretary of state for foreign affairs.

"'The subsequent deposits of ratification shall be made by means of a written notification addressed to the British Government and accompanied by the instrument of ratification.

"'A duly certified copy of the protocol relating to the first deposit of ratifications and of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the signatory powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.'

"This provision, of a purely formal character, needs no explanation. The wording adopted at The Hague by the second peace conference has been borrowed.

"'ART. 68. The present declaration shall take effect, in the case of the powers which were parties to the first deposit of ratifications, sixty days after the date of the protocol recording such deposit and, in the case of the powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

"'ART. 69. In the event of one of the signatory powers wishing to denounce the present declaration, such denunciation can only be made to take effect at the end of a period of twelve years beginning sixty days after the first deposit of ratifications, and after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

"'Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other powers.

"'It will only operate in respect of the denouncing power.'

"It follows implicitly from article 69 that the declaration is of indefinite duration. The periods after which denunciation is allowed have been fixed on the analogy of the convention for the establishment of an international prize-court.

"'ART. 70. The powers represented at the London naval conference attach particular importance to the general recognition of the rules which they have adopted and therefore express the hope that the powers which

were not represented there will accede to the present declaration. They request the British Government to invite them to do so.

"'A power which desires to accede shall notify its intention in writing to the British Government and transmit simultaneously the act of accession, which will be deposited in the archives of the said Government.

"'The said Government shall forthwith transmit to all the other powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession takes effect sixty days after such date.

"'In respect of all matters concerning this declaration, acceding powers shall be on the same footing as the signatory powers.'

"The declaration of Paris also contained an invitation to the powers which were not represented to accede to the declaration. The official invitation in this case, instead of being made individually by each of the powers represented at the conference, may more conveniently be made by Great Britain acting in the name of all the powers.

"The procedure for accession is very simple. The fact that the acceding powers are placed on the same footing in every respect as the signatory powers, of course involves compliance by the former with article 65. A power can accede only to the whole, but not merely to a part, of the declaration.

"'ART. 71. The present declaration, which bears the date of the 26th February, 1909, may be signed in London up till the 30th June, 1909, by the plenipotentiaries of the powers represented at the naval conference.'

"As at The Hague, account has been taken of the situation of certain powers the representatives of which may not be in a position to sign the declaration at once, but which desire, nevertheless, to be considered as signatory, and not as acceding, powers.

"It is scarcely necessary to say that the plenipotentiaries of the powers referred to in article 71 are not necessarily those who were, as such, delegates at the naval conference.

"'In faith whereof the plenipotentiaries have signed the present declaration and have thereto affixed their seals.

"'Done at London the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government, and of which duly certified copies shall be sent through the diplomatic channel to the powers represented at the naval conference.'"

[*Translation*]

FINAL PROTOCOL OF THE LONDON NAVAL CONFERENCE

"The London Naval Conference, called together by His Britannic Majesty's Government, assembled at the foreign office on the 4th December, 1908, with the object of laying down the generally recognized prin-

ciples of international law in accordance with Article 7 of the convention signed at The Hague on the 18th October, 1907, for the establishment of an international prize-court."

The powers enumerated in the Conference took part in this assembly.

"In a series of meetings held from December 4, 1908, to February 26, 1909, the Conference decreed with a view to its submission to the signature of its Plenipotentiaries *the Declaration regarding the law of maritime war*, the text of which is annexed to the present Protocol.

"Moreover, the following wish has been adopted by the Delegates of the Powers which have signed or which have expressed the intention of signing The Hague Convention dated October 18, 1907, for the establishment of an International Prize-Court:

"'The delegates of the powers represented at the naval conference which have signed or expressed the intention of signing the convention of The Hague of the 18th October, 1907, for the establishment of an international prize-court, having regard to the difficulties of a constitutional nature which, in some States, stand in the way of the ratification of that convention in its present form, agree to call the attention of their respective Governments to the advantage of concluding an arrangement under which such States would have the power, at the time of depositing their ratifications, to add thereto a reservation to the effect that resort to the international prize-court in respect of decisions of their national tribunals shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said convention, either to individuals or to their governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the powers signatory of that convention.'

"In faith whereof the plenipotentiaries and the delegates representing those plenipotentiaries who have already left London have signed the present protocol.

"Done at London the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall be deposited in the archives of the British Government and of which duly certified copies shall be sent through the diplomatic channel to the powers represented at the naval conference."

APPENDIX V

NEUTRALITY—GERMANY AND GREAT BRITAIN

A Proclamation

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

Whereas a state of war unhappily exists between Germany and Great Britain; And Whereas the United States is on terms of friendship and amity with the contending powers and with the persons inhabiting their several dominions;

And Whereas there are citizens of the United States residing within the territories or dominions of each of the said belligerents and carrying on commerce, trade, or other business or pursuits therein;

And Whereas there are subjects of each of the said belligerents residing within the territory or jurisdiction of the United States and carrying on commerce, trade, or other business or pursuits therein;

And Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, in order to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from any violation of the same, do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March, A. D. 1909, commonly known as the "Penal Code of the United States," the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the

service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

"8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

"9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

"10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

"11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents."

And I do hereby further declare and proclaim that any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of a belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observation upon the ships of war or privateers or merchant vessels of a belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this government to observe; and to the end that the hazard and inconvenience of such

apprehended practices may be avoided, I further proclaim and declare that from and after the sixth day of August instant, and during the continuance of the present hostilities, no ship of war or privateer of any belligerent shall be permitted to make use of any port, harbor, roadstead, or waters subject to the jurisdiction of the United States from which a vessel of an opposing belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States. If any ship of war or privateer of a belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in any of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship of an opposing belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of an opposing belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship of war or privateer of a belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of an opposing belligerent. But if there be several vessels of opposing belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the opposing belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship of war or privateer of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam-power, then with half the quantity of coal which she would be entitled to receive, if dependent upon

steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the government to which she belongs.

And I do further declare and proclaim that the statutes and the treaties of the United States and the law of nations alike require that no person, within the territory and jurisdiction of the United States, shall take part, directly or indirectly, in the said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

And I do hereby enjoin all citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes or treaties or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent cannot lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the government of the United States against the consequences of their misconduct.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fifth day of August in the year of our Lord one thousand nine hundred and fourteen and of the
[SEAL] independence of the United States of America the one hundred and thirty-ninth.

WOODROW WILSON.

By the President:

WILLIAM JENNINGS BRYAN,
Secretary of State.

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