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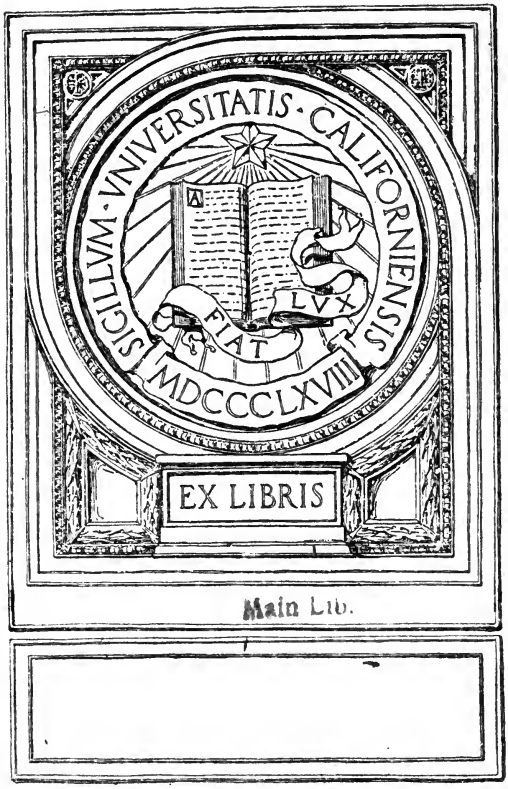

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TWO STUDIES IN INTERNATIONAL LAW

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By

COLEMAN PHILLIPSON, M.A.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

Quain Prizeman in Comparative Law at University College, London

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DEDICATED

TO

SIR JOHN MACDONELL, C.B., M.A., LL.D.,

MASTER OF THE SUPREME COURT, AND QUAIN

PROFESSOR OF COMPARATIVE LAW,

UNIVERSITY OF LONDON.

PREFACE.

THE two following essays, dealing with important questions of international law, were written at the suggestion of Sir John Macdonell, whose hints have been to me of inestimable value.

The aim of the writer has been to examine these questions not from an isolated standpoint but from a comparative point of view. There is no doubt that investigation by the comparative method, supplemented by historical treatment, is most fruitful in all branches of study, but nowhere is it more helpful, more richly suggestive, more self-corrective than in matters of jurisprudence.

The nations of the world are more or less alike in their strivings, their hopes, their aspirations. In so far as States differ in their national circumstances and necessities will they be regulated by their private municipal law ; in so far as they are alike, in so far as they possess common interests which bring them together, will they necessarily be subject to the rules of public international law. And so by international law is understood a body of rules and principles governing the relationships of independent States, and possessing a legal

character. Its sanction, no doubt, exercises less force than that of municipal law; but to infer from this that the established rules of international law do not confer distinct rights and impose corresponding obligations is to jump to an erroneous and harmful conclusion. The fact that disputes and controversies have waged round certain points which this or that State has asserted to be universally binding, or has repudiated—the fact that some particular part is not yet accepted by all, or is of doubtful authority, does not surely invalidate the whole. International law, like every other science or regulative body of doctrine, is a living organism, and as such is inevitably subject to an evolutional process. Yesterday, in the sphere of physical science, we had nothing better than conflicting tentative hypotheses, to-day we have more accommodating theories, to-morrow we hope to attain to exact scientific law.

And so in the case of public international law. With the extension of rapid communication, with the promotion of wider commercial relationships between the various States of the world, with the increasing social, scientific, and literary intercourse, fuller understanding and sympathy between them, the law of nations will more effectively develop and gradually adjust itself to meet the necessities of a fuller knowledge and satisfy the moral consciousness of mankind in

accordance with the truest conception of the just and the fair.

Striking manifestations of the desire for a more intimate *rapprochement* between the nations have already been observed. At the Hague Conference of 1899 twenty-six independent States were represented; at the 1907 Conference delegates were sent by forty-four States. And though every Power was animated by a sense of its own sovereignty and independence, yet the fact of their assembling in order to arrive at some definite principles of international practice implied a full recognition that their sovereignty was only relative, their independence really interdependence, and that a body of harmonised, universally accepted principles regarded as law alone possessed absolute sovereignty. There may be some individuals who will express dissatisfaction with the actual concrete result of these conferences; such discontented ones would look for instantaneous creation rather than steady growth. Nevertheless, the future historian when dealing with the present decade will certainly regard it as an epoch of remarkable significance in the modern history of the world.

C. PHILLIPSON.

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ANALYTICAL CONTENTS.

THE INFLUENCE OF INTERNATIONAL ARBITRATION ON THE DEVELOPMENT OF INTERNATIONAL LAW.

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I.

ARBITRATION SCHEMES.

Relation of new conceptions of life to those of law.

THE question of international arbitration has occupied a prominent place in the discussions and schemes of modern times. Though there is a tendency, in many respects, to cling to the old order of things, yet the inevitable recognition of a new environment, of changed and ever-changing circumstances in general, material as well as spiritual, the recognition of the complexity of life and ideals, forces on the modern age the necessity of adopting, to a large extent, a new order and amended systems. The principle that might is right may not be quite dead, even in its cruder applications; but in reference to individuals, it has largely been supplanted by the conception of sympathy and brotherhood, and in reference to States by strivings towards fairness and justice. Disputes between individuals are now settled by the rules of municipal law; disputes between States are now more frequently settled by means other than war: by calling in the established rules of international law, by diplomatic arrangements, by the mediation of other States, by arbitration. As for the latter,

arbitrators in giving their decisions have, where possible, applied the established principles of the law of nations; and in other cases have formulated modified or new principles, which, being accepted by States, have furnished a new contribution to international law. In recent times there have been many important triumphs of arbitration; but, contrary to a wide circle of opinion, the principle is by no means new, for schemes have long ago been propounded, and applications of some form or other of arbitral procedure have been made as early as the Greek age. It will be of interest to give a brief outline of such schemes, the importance of which lies as much in their relation to the conception of international law, as in the widespread idealistic efforts to substitute for war more amicable means of adjusting differences.

No arbitration in Asia.

In Asiatic or Egyptian history, there was no inter-State arbitration; the Oriental ideals of life and religion, the mystic philosophic theories, and the conception of an all-governing fate were not conducive thereto.

Arbitration in Greece.

In ancient Greece, with her far-seeing polity, her active public life, we find numerous instances of some kind of interstatal or intermunicipal arbitration. In her private law, arbitration was a recognised branch of procedure. The different functions of the judge and of the arbitrator were emphasised by Aristotle: "The arbitrator looks to what is fair,

the judge to what is law."[1] The Amphictyonic Council, an ecclesiastical body, acted as a diplomatic assembly on certain occasions; they laid down principles of international law, and settled disputes between one city and another, *e.g.*, between Athens and Delos (343 B.C.), between Thebes and Sparta (380 B.C.); and other cases are recorded as early as 600 and 606 B.C. Differences were also referred to a town or to an individual. Thus Sparta arbitrated between Athens and Megara as to the possession of Salamis, Periander settled the dispute as to Sigeum between Athens and Mitylene, and Themistocles between Corinth and Corcyra as to Leucadia. Indeed, Thucydides insisted on the moral necessity of the proceeding: "It is not lawful to attack beforehand, as a wrongdoer, one who is willing to refer the cause to an arbitral tribunal."[2]

The Amphictyonic Council.

Arbitration was foreign to Rome's policy of

Arbitration foreign to Rome's policy.

[1] ὁ γὰρ διαιτητὴς τὸ ἐπιεικὲς ὁρᾷ, ὁ δὲ δικαστὴς τὸν νόμον (Rhet. i. 13, 19).

[2] I. 85. In the speech of Archidamus: καὶ πρὸς τοὺς Ἀθηναίους πέμπετε μὲν περὶ τῆς Ποτειδαίας, πέμπετε δὲ περὶ ὧν οἱ ξύμμαχοί φασιν ἀδικεῖσθαι, ἄλλως τε καὶ ἑτοίμων ὄντων αὐτῶν δίκας δοῦναι. ἐπὶ δὲ τον διδόντα οὐ πρότερον νόμιμον ὡς ἐπ᾽ ἀδικοῦντα ἰέναι. (And now send to the Athenians and remonstrate with them about Potidaea first, and also about the other wrongs of which your allies complain. They say they are willing to have the matter tried; and against one who offers to submit to justice you must not proceed as against a criminal until his cause has been heard.)

pacification — *debellare superbos.* A certain amount of impartiality, at least, is essential; but this was not a characteristic of the Romans. In 445 B.C., the Republic acted as arbitrator between Ardea and Aricia as to a piece of disputed land, and took possession of it herself.[1] Three centuries later a similar thing took place in the case of Neapolis and Nola. As the boasted "arbiter of the universe," Rome was not fitted to arbitrate at all. The institution of the *fetiales* and that of the *recuperatores* scarcely approached arbitration in any real sense.

Few arbitrations in the Middle Ages.

In the Middle Ages there were very few cases of arbitration. It was an age of conflict—the new reformed religion against the old, the vassal against his lord, party against party, city against city. On some occasions the popes acted as mediators; *e.g.*, Innocent III. between King John and his barons, Leo X. between Maximilian and the Doge of Venice, Boniface VIII. between Edward I. and Philippe le Bel.

Sully's scheme 1603.

In more modern times Henry IV. of France was the first ruler to conceive a scheme of a permanent court of arbitration. His minister Sully drew it up in 1603 under the King's direction.[2] Europe was to be divided into fifteen States, whose differences were to be

[1] *Cf.* Cicero's disapproval of this conduct, *De Officiis*, I. x.

[2] "Memoirs," liv. 30. (The disputed authenticity is of minor consequence here.)

referred to a permanent council. The object of *le grand dessein* was, however, subordinated to political considerations, and came to nothing.

Shortly after Grotius published his "De Jure Belli et Pacis," in which he emphasised that nations ought to be compelled to bring their disputes before congresses held by Christian Powers, which should be enabled to exact obedience—"imo et rationes ineantur cogendi partes, ut æquis legibus pacem accipiant."[1] Grotius, 1625.

In 1693 Leibnitz dealt with the theme, and twenty years later the Abbé St. Pierre prepared a scheme in his "Projet de Paix Perpétuelle" for settling disputes between States by the establishment of a General League of Christendom. This work stimulated others, though it failed in its real object itself. "It was madness in its author to be wise," said Rousseau, "when the majority of people were fools." Leibnitz, 1693. Abbé St. Pierre, 1713.

Jeremy Bentham in 1789 proposed the constitution of a general diet, or congress, to which two representatives should be sent from each State; and its decisions were to be enforced by putting under the ban of Europe a recalcitrant State. Bentham, 1789.

A little later Kant proposed, in his "Essay on Perpetual Peace" (1796),[2] the abolition of armies and national debts and the federation of the States, but makes no mention of a tribunal. Kant, 1796.

[1] II., c. 33, s. 8.

[2] "Zum ewigen Frieden. Ein philosophischer Entwurf."

Somewhat similar suggestions to that of Bentham were put forward by Penn, Franklin, and the Scotch jurist Sir James Dalrymple.

Society of Friends in New York, 1816.

In 1816 the Society of Friends in New York demanded the adoption of arbitration in international differences. The movement in the United States now became very strong. Peace societies were formed in England and America. In 1835 the American Peace Association presented a petition to the Senate of Massachusetts for the purpose of organising a "standing court of nations." Similar petitions were presented in Maine and Vermont; but it was then thought that such schemes were premature.

Cobden's motion, 1849.

In England Cobden advocated the adoption of arbitration; but his motion in the House of Commons was opposed and defeated by Lord Palmerston (1849). Four years later the United States Senate agreed to insert in future treaties a special clause providing for arbitration in case of any disagreement arising out of such treaties, the arbitrators to be distinguished jurists not occupied with politics.

Approximations to arbitral tribunal.

The International Commission of the Mouths of the Danube, constituted by the Congress of Paris (1856), furnished a good example of the united action of the Powers dealing with delicate questions. The United States Supreme Court was regarded by many enthusiasts as more or less analogous to a standing international tribunal;

and a still nearer approach to such a tribunal was seen in the Federal Court of Switzerland, settling disputes quickly and peacefully arising between the various cantons, which are different not only in their origin and customs, but to a large extent in their legal systems. Calvo states[1] that the very existence of the Swiss Federal Court is a demonstration that the conception of a permanent tribunal for settling interstatal disputes is not a mere chimera, but is reasonable and practicable. But, in this connection, one might refuse to admit that the difficulties involved in any effort to bring about a judicial organisation of the European States are no greater than those in the case of the Swiss cantons. A later approximation is found in the case of the international courts in Egypt due to the opening of the Suez Canal. They have adjudicated with success between the subjects of some twenty different nationalities.

Mr. Henry Richard's motion, 1873.

In 1873 Mr. Henry Richard, following Cobden's suggestion, introduced a motion into the House of Commons proposing arbitration clauses in treaties, and also urged the adoption of the same line of action by foreign States, in order to secure an organised uniform system. Mr. Richard's opinion was backed by a majority of the House, which thus expressed its altered and more favourable attitude towards the

[1] "Droit International Public," III., p. 477.

movement.[1] Similar motions were carried on the Continent, *e.g.*, in Italy, in Holland, in Belgium.

Associations formed.

A fresh impetus was given to the project. Various associations were formed, and the question of international arbitration held a prominent place in their programmes. In 1873 were founded the Institute of International Law, which met at Ghent the same year, and the "Association for the Reform and Codification of the Law of Nations," which first met at Geneva the year after.[2] In 1888 was formed "The Permanent Parliamentary Committee in favour of Arbitration and Peace,"[3] with a permanent office at Berne, and met the following year in Paris.

Compromise clauses in treaties.

An important aspect of all these plans is the tendency to conclude general arbitration treaties between nations; that is, not merely arbitration on certain specified differences, but on all controversies, present or future, relative to certain subjects, *e.g.*, navigation or commerce. Since 1862 compromise clauses (*clauses compromissoires*) were agreed to between Great Britain on the one hand, and Italy, Greece, Portugal, Mexico, Uruguay respectively on the other; between Belgium on the one hand, and Italy, Greece, Sweden,

[1] "Malgré les objections de M. Gladstone, la motion fut votée. La reine, par déférence pour le parlement, y fit une répouse évasive et ironique" (Bonfils, *op. cit.* p. 548).

[2] In 1895 the name was altered to "The International Law Association."

[3] Or "The International Parliamentary Union."

Norway, and Denmark respectively on the other; between France and Korea; between Italy and Montenegro; between Austria-Hungary and Siam; between Spain and Sweden and Norway; between Denmark and Venezuela; and several other cases.[1] Further examples of this kind are the conventions of the Postal Union of 1874 and 1891, and for the international transport of goods by rail of 1890.[2]

The treaty of peace signed at Guadalupe-Hidalgo (1848), between the United States and Mexico, established the principle of permanent arbitration as to the differences of any kind that might arise between the two States. This was the first treaty of its kind in modern history. Other States soon entered into treaties of general arbitration, *e.g.*, Belgium with Hawaii (1862) and Siam (1868), with Venezuela (1884), with Ecuador (1887); Switzerland with San Salvador and Ecuador (1888); Spain with Honduras and Colombia (1894). The greater States did not show the same eagerness to bind themselves. In 1882, owing to a sympathetic message of President Garfield, the Swiss Government offered to enter into a permanent arbitration treaty with the

[1] "Encyclopædia Britannica" (new volumes), *sub voce* "International Arbitration."

[2] *Cf.* the full treatment by M. Pradier-Fodéré (*op. cit.* VI., p. 356 *et seq.*) of the desirability and efficacy of compromise clauses, and also his reply to the various objections advanced (p. 371 *et seq.*)

United States, but the plan fell through owing to the death of the chief American negotiator. At the Inter-American Congress, 1889—1890, a treaty was signed to secure compulsory arbitration for the whole of the American continent, but it was not ratified. Shortly after a treaty was arranged between Great Britain and the United States to provide for the settling by arbitration of all differences which diplomacy should fail to adjust; but it was not ratified, probably because the conditions proved too elaborate. In 1894 Holland and Portugal, by art. 7 of their commercial treaty, agreed to settle all disputes not concerning their independence or autonomy. The first half of last century saw several attempts to establish a standing arbitration tribunal; and at the very close of the century the Hague Peace Conference attained a great practical result. A permanent international court of arbitration was established; and art. 16 of the Hague Convention provides for the adjustment of international differences of a legal character in general, and in particular of differences concerning the interpretation or application of international treaties. Several States at once concluded treaties of this nature. Thus Great Britain in 1903 and 1904 entered into such arbitration agreements with France, Spain, Italy, Germany, Sweden, Norway, Portugal, and Austria-Hungary; Denmark and Holland (1904) agreed to refer all

The Hague Convention and general arbitration treaties.

differences without exception to an arbitration tribunal. Indeed, since the signing of the Anglo-French treaty in October, 1903, over forty similar treaties have been signed and ratified; and this number is exclusive of the eleven signed by Mr. Hay, the United States late Secretary of State, for, owing to a disagreement between the President and the Senate, they were not ratified.

II.

MODERN CONCEPTION OF ARBITRAL PROCEDURE AND ITS RELATION TO THE CONCEPTION OF LAW.

BEFORE dealing with the principal cases of arbitration and their effect, direct or indirect, on the development of international law, it will be well to say a few words on the modern conception of this procedure, its relation to the conception of law in general, and the somewhat modified forms that have been used.

International arbitration, in the words of the Hague Convention, is "the determination of controversies between States by judges of their own choice upon the basis of respect for law"[1]; in a wider sense it includes inquiries conducted in a judicial manner by representatives of the States in question. In some respects the international procedure resembles, in others differs from, the civil form. An international arbitrator may be a sovereign, and he may delegate his office; but a private arbitrator cannot do so

Relation of private to international arbitration.

[1] Art. 15 of sect. iv.: "L'arbitrage international a pour objet le règlement de litiges entre les États par des juges de leur choix, et sur la base du respect du droit."

without express authority. In private arbitration the decision may be enforced by the court; but in international arbitration the sanction is not strictly a legal one, for the obligation to abide by the decision rests on the good faith and honour of the parties, on the force of public opinion, and on their original voluntary submission in the preliminary treaty.[1] Both kinds are alike in that awards may be set aside for excess of jurisdiction, for doubtful or meaningless expression of the sentence, or for wrongful conduct or wilful misdirection of the arbitrator.[2] M. Bluntschli further points out that the international arbitrator must give his award according to the rules of international law. Here there is a great difficulty. One cannot always say for certain what rules are universally accepted as established; and then there may be certain other principles which, some jurists may think, ought to be embodied in international law, and which are not yet part of it. An arbitrator may find that his award involves a principle which he knows is not yet law, but which he regards as just and equitable under the circumstances in question and under all like circumstances, and

When awards may be set aside.

[1] See further on this point *infra*, pp. 24—25.

[2] Compare the list of twelve reasons given by Dr. von Bulmerincq (in Holtzendorff's *Handbuch des Völkerrechts*, IV., p. 43) and regarded by him as sufficient to vitiate an award. But the grounds given can be readily classified under those suggested above.

therefore which he considers a rule fitting to be absorbed into, and consistent with the spirit of, the recognised body of law. It is submitted that such a decision ought not to be repudiated, for it would furnish an additional rule which, being generally accepted, acted on, or acquiesced in, would become part of the law of nations. In point of fact, this is exactly what has happened in many cases during the last century, as the subsequent examination of the arbitration instances will show.[1] Indeed, only one award was rejected, and not unjustly, for it went beyond the terms of the reference. In order to be valid, an award must be in accordance with the terms of the submission. Hence it will be void as to things which were not submitted, and as to a stranger. Secondly, and following from this condition, it must not go to a time beyond the submission. Thirdly, it should confer some advantage wherever possible, and not be merely negative. Lastly, it should be clear, reasonable, possible, final, and mutual.

Essential qualities of an award.

An examination of the large number of arbitrations in the last hundred years shows

[1] Pufendorf suggests that in such cases the "law of nature" ought to be called in as a guide. "Caeterum illud manifestum est, uti qui inter cives jus dicit, regulariter sequitur leges civiles, quibus litigantes sunt subjecti, ita qui pronunciaturus est inter eos, qui communes leges civiles non agnoscunt, jus naturale pro norma habebit" ("De Jure Naturae et Gentium," *op. cit.* p. 65).

that three somewhat different forms of procedure were employed: arbitration by mixed commission, for which Great Britain and the United States have manifested a special partiality; federal arbitration, used in the German States or in the Swiss cantons; arbitration in the strict sense, used by France chiefly.

Forms of arbitral procedure.

An early example of arbitration by mixed commission is found at the end of the thirteenth century. It sat at Paris to indemnify merchants of various nations for damages caused by a French admiral in English waters.[1] Similarly, two mixed Anglo-Dutch commissions sat after the treaty of peace of April 5th, 1654, to consider the claims of merchants suffering from the war. The mixed Anglo-American commission of 1794 sat in pursuance of the Jay treaty and considered most important questions.

Mixed commission.

It is often difficult to differentiate precisely between diplomatic mixed commissions and arbitral mixed commissions;[2] but the diplomatic form tends to become, in course of time, rather

Diplomatic mixed commissions and arbitral mixed commissions.

[1] Hall, "International Law," p. 142.

[2] *Cf.* Pradier-Fodéré (*op. cit.* VI., p. 312 *et seq.*), who describes arbitral mixed commissions as having "une sorte de caractère *semi-judiciaire.*" Frontier commissions may, according to circumstances, partake of the nature of the one kind or of the other. "Il est entendu qu'il ne faut pas confondre les commissions mixtes de *délimitation* et celles qui sont chargées de statuer sur des contestations au sujet des frontières. . . ." (p. 314).

of a mixed nature, diplomatic *plus* arbitral; *e.g.*, the frontier commissions as to the river St. Croix, the islands of the Bay of Fundy, the north-eastern frontier, the frontier of the great North American lakes. A decision of the former kind has the appearance of a judgment, though its function is more frequently limited to determine certain facts sought or to apply a previous arrangement, *e.g.*, to trace out a boundary in accordance with the terms of a treaty without interpreting the latter; but a solution of points of law may also be involved. An arbitral mixed commission is bound more directly to decide as to a question which may be embodied in a judicial formula, and which decision may take the form of a rule of law. The chief disadvantage of a mixed commission lies in the suspicion of partiality and prejudged and predetermined conclusions, especially where the arbitrator additionally appointed to act as umpire belongs to one of the parties to the dispute; *e.g.*, the Commission of London, 1794—1804, in which the fifth representative, Trumbull, was American; the Commission of London, 1853—1855, in which Mr. Bates, the third commissioner, was English.

Arbitration in the strict sense, *e.g.*, by a sovereign.

Arbitration in the strict sense, as by a sovereign, has both good and bad qualities. In his sovereign and independent capacity the arbitrator can more freely pronounce his sentence. At the same time he would not care to lay himself or his

ruling open to criticism, and so his award would very rarely be accompanied by a statement of the grounds or principles upon which it was based. Many important questions of law have been involved in some of the cases of arbitration by sovereigns; thus, the legal effects of military occupation in the dispute which arose between Great Britain and the United States as to the interpretation of art. 1 of the Treaty of Ghent (December 24th, 1814), when Alexander I. of Russia arbitrated; limits of the power of an arbitrator as to disputed territory in the north-eastern frontier case, the decision of William I. of Holland being rightly repudiated, because he disregarded the terms of the reference; the question of blockade in the Portendic affair (1843), the award of Frederic William IV. of Prussia not being supported by stated reasons or principles; the effects of declaration of war in regard to the responsibility of a belligerent towards his adversary in the arbitration by Queen Victoria between France and Mexico (1844); the effect of declaration of war as to confiscation, William III. of Holland arbitrating between France and Spain (1852); the responsibility of a neutral State for belligerent hostilities in its territorial waters, in the *General Armstrong* case, Louis Napoleon arbitrating between the United States and Portugal (1852). Some of these awards have been severely criticised, but, nevertheless, they all have

Arbitrations by sovereigns and their influence on international law.

important bearings on the progress of international law.

Development of the conception of arbitration.

There has been a gradual development in the conception of arbitration in general, and of its procedure in particular. The successive stages in its progress synchronise with the conclusion of great wars; the greater assertion of freedom and decline of autocratic institutions conduce to a more general acceptance of arbitration; the place of this procedure in international relationships and its influence on the law of nations have mainly been secured through the efforts of the Anglo-Saxon race, with its political far-sightedness, practical skill, and constant devotion to free institutions. With the coming of the Renaissance and its revolutionary spirit the tendency arose of substituting jurists of prominence for sovereigns and popes in the work of arbitration. The pope's position as judge or arbitrator falls with the decline of his position as ultimate sovereign. But the appeal to jurists is largely due, again, to the example set by Great Britain and America. In their early days the American States were involved in boundary disputes, which furnished opportunities to the organising genius of the race. Washington himself took part in the adjustment of the Virginia frontier line. Both in England and in the United States (and but little on the Continent) private arbitration had long been resorted to; and thus the

Influence of the Anglo-Saxon race.

transition was rendered all the more easy through a ready analogy. The progress has been from mediation and diplomacy to a greater or lesser combination of arbitration and diplomacy, and then to pure, *i.e.* judicial, arbitration. The system, of course, has not yet been perfected; but there are clearly understood usages, and attempts to stereotype these at present would prove disastrous. The subject-matter is constantly growing, the relationships between States are always being modified and made more complicated, and so elasticity in arbitral procedure is obviously indispensable to its very vitality and growth.

How arbitration may advance the interests of law.

To be a powerful instrument in the establishment of law, arbitration must exercise a certain independence and fearlessness, and, if necessary, a bold initiative in the laying down of principles, not necessarily to subvert accepted rules, but to add to them and amend them as occasion demands. Arbitrators should ask themselves, as Kant would do in the case of moral law, whether they would fairly and conscientiously wish that the principles embodied in their awards should become universal law. The already-expressed opinions of jurists may aid them considerably, and yet at times may hinder them. In the first half of the nineteenth century arbitrators followed rather than guided the opinions of writers. The work of Grotius,

Vattel, and Bynkershoek, though much of it is excellent now and will long continue to hold good, exercised too great authority over them. To follow slavishly the opinions of others is not necessarily to derive the greatest benefit from them. In the latter part, however, of the century there are clear signs of independent thought on the part of arbitrators. Only if delivered with strict impartiality, with deliberate judgment, and after thorough investigation will decisions and awards be able to command general respect, and help on the growth of law, even if they have not always proved effective enough to prevent wars.

Essential basis of arbitration judicial.

The question of arbitration is perhaps of greater consequence in the world's affairs from the standpoint of the jurist than from that of the peace idealist.[1] With the perfection of arbitral procedure the political or diplomatic character will disappear, and the purely judicial spirit will prevail. As M. Renault truly says, "J'ose croire et affirmer que l'arbitrage international ne se développera sérieusement qu'en quittant d'une manière absolue le domaine politique et diplomatique où il a été longtemps

[1] *Cf.* Seneca's distinction between the peace-maker as *arbitrator* in the strict sense of the term, and the peace-maker as *judge;* in the case of the latter, "illum formula includit, et certos, quos non excedat, terminos ponit. . . ." (*De Beneficiis*, Bk. III. c. 7, s. 5).

confiné pour rester pleinement dans le domaine judiciaire où il ne fait qu'entrer. C'est à cette seule condition qu'il inspirera confiance aux Gouvernements et aux peuples, qu'il offrira des garanties surtout aux petits Etats, trop souvent exposés à être victimes de considérations politiques."[1] The great advantage of the Hague tribunal is that it will do much to foster such a judicial spirit. Under such circumstances an arbitral decision will be as binding as the verdict of a municipal court, at least if the arbitration treaty does not stipulate the contrary.[2] The absence of a positive sanction has had no disastrous effect. Awards have often been accepted by powerful States in the face of injustice, real or imagined—for example, the *Alabama* decision. Voluntarily to conclude an arbitration treaty carries with itself a contractual obligation. At the Conference of London, 1871, it was declared a principle of international law that no Power can release itself from or modify the terms of a treaty; and, as Sir Robert Phillimore says, "the sentence is binding upon

Sanction of arbitration.

[1] "Recueil des Arbitrages Internationaux." By A. de Lapradelle et N. Politis (Paris, 1905), Vol. I. p. x. (Preface by M. Renault).

[2] ". . . Il est certain que leur décision prononcée dans les limites du compromis et du pouvoir qui leur a été conféré oblige les États contendants par les mêmes raisons et aux mêmes conditions que les traités" (Pradier-Fodéré, *op. cit.* VI., p. 428).

the parties whose own act has created the jurisdiction over them."[1] Notwithstanding the severe criticism passed by some Continental writers on arbitral procedure and its efficacy in the past, it will now be seen more in detail what important contributions to the body of international law have thereby been made in the nineteenth century.

[1] III. p. 5.

III.

THE CHIEF ARBITRATIONS OF THE NINETEENTH CENTURY AND THEIR INFLUENCE ON INTERNATIONAL LAW.

THE above, it is hoped, has briefly shown the mutual action and reaction in general of arbitration and international law. It remains to be seen in what more specific matters the former has influenced the latter.

Value of historical study of arbitrations.

The historical study of arbitrations is of the greatest value. In this way one may see how international disputes have been settled by them, what methods were adopted, what applications made, and what principles inferred, how these impressed the nations in dispute, and how they were regarded by other States. Thus certain clearly defined conceptions are formed, and are gradually associated with the idea of international law.

Difficult to state exactly the number of cases.

It is difficult to state the number of cases that have been decided. Some writers include proceedings, such as mixed diplomatic commissions, which others exclude; and others, again—*e.g.*, several French writers—are inclined to disregard all but arbitrations in the strict sense.

Professor Bassett Moore[1] enumerates 136 cases in the last century, of which the United States is considered to have been a party to fifty-three. M. La Fontaine[2] gives 177 instances from the Jay treaty (1794) to the close of the nineteenth century; and he assigns seventy to Great Britain, fifty-six to the United States, twenty-six to France, nine to Italy, four to Russia, and not a single case to Germany. Dr. Darby[3] mentions 471 cases; but, in his laudable enthusiasm, he has included a very large number which merely indicate amicable inter-State arrangements, and which cannot be regarded as arbitrations.

Most important cases.

The most important cases are the north-eastern frontier dispute, the *General Armstrong* case, the *Alabama* claims, the Behring Sea dispute, the Venezuela and the Alaska boundaries. These cases and others to be mentioned below deal with a large variety of questions relating to the definition of boundaries, territorial waters, the rights and duties of neutrals in general, and in particular the responsibility of a neutral Government for hostilities committed in its territory by a belligerent, the exercise of the right of seizure of vessels and confiscation of cargoes, the effects of declara-

Matters dealt with by the cases.

[1] "History of International Arbitrations to which the United States has been a Party," 6 vols. (Washington, 1898).

[2] "Pasicrisie Internationale" (Bruxelles, 1902); and "Revue de Droit International" (1902).

[3] "International Tribunals" (London, 1904).

tion of war, contraband, slavery, the force of *res adjudicata*, and other matters.

The Jay treaty, 1794, marks an epoch in the history of arbitration. It is the source, direct or indirect, of the series of arbitrations from that date to 1831. The proceedings by mixed Anglo-American commission in reference to art. 7 of the treaty influenced subsequent procedure, which henceforth tended to become more judicial and less diplomatic. Some of the points ably discussed relate to the claims of British and American subjects respectively in regard to merchant ships captured during the war, contraband of war, restoration of slaves, competence of the arbitral tribunal to determine its own jurisdiction, the enemy character of private property, the responsibility of a neutral State for a belligerent's operations within its territory, the international effect of a case tried by a prize court. It is to be noted that the United States soon made an effort to apply the principles of the Jay treaty in its relations with other States. In 1802 a commission arbitrated on the claims of the United States against Spain for depredations committed during the preceding war; and its decision was afterwards confirmed by an agreement which resulted in the cession of Florida (1819) as against the sum of five million dollars due by Spain as compensation to American citizens. A somewhat similar agreement was made with France

Jay treaty, 1794.

(1813) for the cession of Louisiana, the United States meeting the claims of its own subjects against France.

Mode of interpreting treaties.

The method of interpreting treaties and the juridical effects of military occupation were involved in the dispute between Great Britain and the United States as to art. 1 of the Treaty of Ghent (1814). The decision of Alexander I. of Russia adopted the grammatical sense of the phraseology, and hence it cannot be followed as a precedent. A literal interpretation is obviously unsound should it conflict with the intention, for "les paroles ne sont destinées qu'à exprimer les pensées ; . . . les termes ne sont rien sans l'intention qui doit les dicter."[1] Further, the difficult question of *occupatio bellica* was involved. For a long time it was considered as destroying sovereignty; but since the Treaty of Utrecht it is generally held to constitute merely a suspension of its active exercise.

Military occupation—its effect.

Arbitrator not to go beyond the submission.

In the north-eastern frontier dispute between Great Britain and the United States William I. of Holland was the arbitrator. His decision was repudiated (1831), because, the two parties having submitted different lines, he suggested a third, and thus went beyond the submission. The dispute, however, was amicably settled by the Webster-Ashburton treaty (1842).

France, in taking punitive measures against

[1] Vattel, "Droit des Gens," II., c. xvii., §§ 273, 274.

certain Moorish tribes on the west coast of Africa, blockaded the coast of Portendic, but failed to give notification to the owners of British vessels trading there in gum, etc. The claim for compensation was submitted to the King of Prussia, who decided (1843) that the blockade caused losses to the British traders, and that France was bound to make these losses good. This important award, involving the questions of commercial liberty and blockade, would have been of greater value had it been fortified by means of governing principles.

Notification of blockade.

In the dispute between France and Mexico as to whether indemnity was due on the one hand to Mexico for the capture of Mexican ships of war after the fall of Fort Ulloa, and on the other hand to French subjects who had been expelled the country, Queen Victoria, acting as arbitrator (1844), dismissed the claims of both parties, since "the acts of both countries were justified by the state of war existing between them." France was not satisfied with the award; and in the French Chamber M. Lacrosse said: "Tout ce qu'on pouvait accorder sans compromettre des intérêts respectables, c'était de laisser la fixation de ces indemnités à une commission mixte départagée, au besoin, par une tierce puissance. Mais le principe même des indemnités est mis en arbitrage, et c'est trop."[1]

Acts justified by state of war.

[1] Lapradelle and Politis, *op. cit.* I., p. 559.

Exigencies of war and closure of ports.

The Argentine Republic during its war with Uruguay (1845) gave a fortnight's notice as to the closure of its ports to all ships which had touched at Monte Video. Six British vessels were thus refused admittance to Buenos Ayres. The British Government complained of the shortness of the notice, and demanded compensation in respect to these vessels. The President of Chile decided that the exigencies of war justified the measures on the part of the Argentine.

The *General Armstrong* case.

A neutral's responsibility.

The question of a neutral's responsibility formed the subject of the *General Armstrong* case. During the war between Great Britain and the United States in 1814 the *General Armstrong*, an American privateer, fired upon British boats which had just entered the port of Fayal, in Portuguese territory, but was soon cannonaded in return and destroyed within the limits of the port. The United States claimed indemnity from Portugal for a breach of neutrality through not interfering when the British squadron opened fire. In 1851 the matter was referred to Louis Napoleon, then President of the French Republic. In his award (1852) he recognised the principle that a neutral power must indemnify a belligerent who suffers a loss within the neutral jurisdiction through the action of the adversary, if the neutral takes no steps to prevent it. But Portugal was absolved

from blame, since the appeal to her local authorities was made too late, and also as the governor had not sufficient force to be able to interfere with effect.

The Pacifico affair. Injury to foreign subjects.

In the Pacifico affair, which was ultimately compromised by the appointment of a mixed commission (1850), damages were awarded to Pacifico, a native of Gibraltar, and hence a British subject, who had suffered at the hands of a mob in Athens. Pacifico appealed to the British authorities, and not to the Greek courts. The English Foreign Secretary defended the appointment of commissioners by alleging that the Greek courts would probably not mete out justice at that time. Sir Robert Phillimore, however, thinks the evidence of this was "not of that overwhelming character which alone could warrant an exception from the well-known and valuable rule of international law upon questions of this description,"[1] viz., that application for redress must first be made to the local tribunals.

Mixed Commission of London.

In the mixed Commission of London, 1853—1885, to adjust differences between Great Britain and the United States, the umpire appointed was of one of the parties. In such cases he is intended to act as a judge, but in reality he is only an additional representative. The various claims and counter-claims related to the "Florida

[1] "International Law," II., 41.

Bonds " dispute, the MacLeod case, and, more particularly, the famous case of the *Creole*.[1] Interesting opinions were expressed on the extent of sovereignty and its conditions, the coincidence of a State's jurisdiction and the extent of its territory, slavery in reference to the law of nations, the effect of treaties which are contrary to the law of nations.

The MacLeod case.

Public and private responsibility.

The essential point of the MacLeod case is the acknowledgment by the American Secretary of State that "the Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction authorised and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilised States, to be holden personally responsible in the ordinary tribunals of law for their participation in it."

The *Creole* case.

Jurisdiction over the internal order of a merchant vessel when in a foreign port.

The *Creole* was an American vessel which was seized, on its way from Richmond to New Orleans, by the slaves on board; the master was murdered, and the crew compelled to sail her to Nassau (1841). The ringleaders were then put under arrest by the British governor there, but, considering their accomplices as mere passengers, he allowed them to land freely, in spite of the

[1] "Le conflit était fort intéressant, car il soulevait la question des pouvoirs respectifs des autorités du port et du capitaine" (A. Mérignhac, *op. cit.*, p. 56).

protests of the American consul. The United States demanded their surrender, but England replied that the moment they landed on British territory they became free men. The commission failed to agree, and, the reference being made to Mr. Bates, an English jurist, he decided that the English authorities had no right over slaves found on board an American vessel, the officers of which ought to have been protected in the exercise of the duties imposed upon them by the laws of their own country. Thus the principle here laid down is that the internal order and regulation of a merchant vessel in a foreign port are not subject to the municipal law of such port.

The brig *Macedonian*.

Seizure of private property on land.

In the Chile-Peru war in 1821 a large sum of money, the produce of goods landed by the American brig *Macedonian*, was seized by Chile on Peruvian territory. The claim of the United States for the recovery of that sum was upheld by the King of the Belgians (1863), who further awarded interest from the date of the formal demand (1841) to the time when arbitration was agreed on. This decision confirmed the rule that private property, whether belonging to an enemy or to a neutral, is not seizable on land.[1]

[1] "L'arbitre affirmait, dans sa décision, que la propriété privée n'est pas saisissable sur terre, qu'elle appartienne à des neutres on à des ennemis; et que, d'autre part, le gouvernement des Etats-Unis ne pouvait réclamer que dans la mesure des intérêts de ses nationaux" (Mérignhac, *op. cit.*, p. 58).

Further instances of arbitration relating to unlawful arrests and seizures are the case of the H.M.S. *Forte*, the King of Belgium arbitrating between Great Britain and Brazil;[1] the *Butterfield* claim (1890); the *Costa Rica* packet (1897). Carpenter, the master of this whaling-vessel and a British subject, seized and sold the cargo of a Dutch craft, which had drifted from its moorings, and was carried to Buru, no one being then on board. Carpenter was taken to Macassar for trial, and proved that the wrongful appropriation, if any, occurred on the high seas, more than three miles from land. The court, therefore, had no jurisdiction in the case, and he was set free. Being now unable to take advantage of the whaling season, he sold the packet at a loss, and claimed damages from the Netherlands, which he obtained by the award of Russia, acting as arbitrator.

The *Costa Rica* Packet (1897).

Delagoa Bay case (1875).

Occupation and title.

The Delagoa Bay case (1875) is important as illustrating the kind of occupation which confers a title. From 1823 to 1875 there was a dispute between England and Portugal as to some territory at Delagoa Bay. The former claimed it under a cession by native chiefs in 1823, the latter on the ground, amongst others, of continuous occupation. The controversy was referred

[1] Ronard de Card, *op. cit.*, p. 59, says that the result was "pacifique très remarquable dans un débat où les susceptibilités anglaises étaient fortement excitées."

to the French Government, which held that the interruption of occupation in 1823 was not sufficient to oust a title supported by occasional exercise of sovereignty through a period of nearly three centuries, and adjudged the territory to Portugal.

The subject of neutrality received more elaborate treatment in the *Alabama* case[1] (1872), one of the most important instances of arbitration in modern times, both intrinsically and for the fact that it invested the principle of arbitration itself with great authority. The rules drawn up refer to the exercise of "due diligence" by a neutral to prevent the arming or equipping on its territory of vessels to be used against a belligerent, the use of neutral ports as bases of operations, the renewal of supplies, the enlistment of men, etc.

The *Alabama* case (1872).

Very briefly, the facts are as follows: During the American civil war, 1862, the United States notified to the British Government that a vessel was built in England to order of the insurgents for warlike purposes. This vessel, afterwards called the *Alabama*, left Liverpool unarmed, but at the Azores received guns and ammunition from three other vessels coming from England,

[1] As to the Geneva Conference, Marqués de Olivart says: ". . . será el fallo del tribunal de Ginebra modelo y ejemplo de los demás que le sucedan y la *primera causa célebre* del derecho internacional en el pasado siglo" (*op. cit.*, III., 22).

and plundered United States merchantmen. On the conclusion of the war the United States claimed damages from Great Britain for the losses suffered. After several years' negotiation, the Treaty of Washington was entered into May 8th, 1871, with a view to arbitration, and it was agreed that Great Britain, the United States, Brazil, Italy, and Switzerland should each name an arbitrator.[1] The treaty contained three rules, henceforth known as the "Three Rules of Washington," to be binding upon the five arbitrators, viz. :—

The "Three Rules of Washington."

"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 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,

[1] "Le débat, qui ne devait être, en réalité, que juridique, devint rapidement politique . . . et l'on alla jusqu'à prétendre que l'interprétation du traité de Washington était d'un intérêt absolument secondaire" (Pradier-Fodéré, *op. cit.*, VI., p. 355).

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 waters, and as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties."

In reference to these rules, Great Britain claimed that her consent to their being binding on the arbitrators did not imply that they were established rules of international law at the date of the *Alabama* case.[1] The treaty contains further the stipulation that the parties "agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them."

The claims of the United States were twofold: (a) for direct damage caused by the Confederate cruisers and (b) for "indirect losses" due to the prolongation of the war, the transfer to the British flag of most of the American shipping,

[1] *Cf.* the different view of M. Mérignhac (*op. cit.*, p. 75): "La plupart des juristes qui se sont occupés de la question, s'accordent à reconnaître qu'elles ne sont que l'expression des devoirs qui incombent aux neutres, suivant la justice et la raison; et que, loin d'être introductives d'un droit nouveau, elles ont été au contraire usitées, dans leurs traits essentiels, par les puissances maritimes, du jour où le droit a remplacé l'arbitraire et le bon plaisir." *Cf.* further the fine study by M. Calvo, in *Revue de Droit International*, 1874, p. 488, *et seq.*

etc. The accusations of "veiled hostility" and "insincere neutrality" were also made. On the assembly of the court at Geneva it announced that "the indirect claims did not constitute, upon the principles of international law applicable to such cases, a good foundation for an award or computation of damages between nations." The American representative thereupon withdrew that claim, and on the other points the award was in favour of the United States. [1]

It is to be noted that the arbitrators' interpretation of "due diligence" has often been adversely criticised, and other opinions expressed by them were not accepted by Great Britain. According to the Geneva court, the due diligence of a neutral must be in proportion to the risks to which either belligerent may be exposed from a failure to fulfil the obligations of neutrality. If this were admitted, very oppressive obligations might be laid on neutrals. It is difficult, indeed, to see how "due diligence" in international law can have a different significance

[1] For the full award *vide* Moore; or Phillimore, III., § 151; or Wharton, III., § 420 A. M. Bonfils (*op. cit.*, p. 540), speaking of Great Britain's conduct, which he says was "entièrement correcte," in the acceptance of the award, adds: "Le monde fut étonné d'une modération, à laquelle Albion ne l'a point accoutumé." And Calvo observes (*op. cit.*, III., 449): "Il est bon de faire observer que la seule voix dissidente était celle de l'arbitre choisi par la reine d'Angleterre" [viz., Sir Alexander Cockburn].

from what it has in municipal law. Thus Great Britain and the United States were not of one mind in interpreting the three rules, and hence could not agree as to the stipulated communication to the other maritime Powers. Under these circumstances, the "Three Rules of Washington" cannot be regarded as international law; but still they led to the general recognition of the principle that it is the duty of a neutral to prevent its subjects from building and fitting out to order of the belligerents vessels destined for warlike operations.[1]

Effect of the "Three Rules."

Another arbitral award of great importance is found in the Behring Sea case (1893). In 1886 there was a dispute between Great Britain and the United States owing to the seizure of British Columbian vessels which had hunted seals in the Behring Sea outside the American

The Behring Sea case (1893).

[1] The Institute of International Law at its meeting at the Hague, 1875, adopted a body of seven rules emanating from the Three Rules of Washington. *Vide* "Annuaire de l'Institut de Droit International," I. (1877), p. 139. Calvo ("Dictionnaire de Droit International," I., 249) thus comments on the necessity to exercise *due diligence*: "Quand un gouvernement a eu connaissance du fait duquel un dommage a résulté, et n'a pas déployé la diligence, suffisante pour le prévenir ou pour en arrêter les conséquences, soit à l'aide des moyens à sa disposition, soit avec ceux qu'il pouvait demander au pouvoir législatif, l'Etat est responsable pour négligence volontaire de diligence. Dans ce cas le degré de responsabilité a pour base le plus ou le moins de facilités qu'il avait de prévoir, le fait, le plus ou moins de précautions qu'il était à même de prendre pour l'empêcher."

territorial belt, and which had infringed regulations made by the United States relative to seal-fishing in that sea. The arbitrators, of whom Great Britain and the United States had each named two, and the President of the French Republic, the King of Italy, the King of Norway and Sweden one each, pronounced in favour of Great Britain on all the points submitted. A close time was appointed for sealing, pelagic sealing was forbidden within sixty miles of the Pribyloff Islands, and the use of firearms was forbidden in the Behring Sea. The United States invited the other maritime Powers to accept the rules made; but so far only Italy has agreed.

The Venezuelan boundary.

The British Venezuelan boundary dispute dates back to 1841, and was settled only in 1899. The award, which assigned no grounds, secured for Great Britain, speaking generally, the territory over which Dutch influence and commerce had extended, though a line was drawn across the Burima so as to secure for Venezuela the south shore of the Orinoco to its mouth.

It may be added that in more recent times, owing to the improved means of communication, and consequently the greater facilities to ensure continuity of occupation, there has been a marked tendency to demand more solid grounds of a title when resting on occupation.[1]

[1] *Cf.* the declaration adopted at the Berlin Conference, 1885.

A consideration of the above cases alone and of their results is sufficient to convince even an opponent of arbitration of the great benefits conferred and the permanent additions to international law effected thereby. From the point of view of the competence of arbitral tribunals, the arbitrations of last century may be thus classified :— Classification of arbitrations.

(1) Those dealing with differences arising between States in their sovereign capacities :—
   (a) Boundary disputes on land ;
   (b) Fisheries.

(2) Those dealing with matters in which one State makes a claim really on behalf of its subjects, but ostensibly in its sovereign capacity, against another State, on account of certain wrongful acts or omissions :—
   (a) Breaches of neutrality ;
   (b) Unlawful seizures ;
   (c) Violation of rights of person of foreign subjects.[1]

Another classification is suggested as follows : cases of boundaries, possession of territory, seizure of vessels or confiscation of cargoes, violent or arbitrary acts against foreigners,

[1] This classification is a modified form of that suggested by M. Kamarowsky ("Le Tribunal International" (French translation from the Russian) (1887)).

rights of navigation, fishery rights, and matters of accounts.[1]

Lord Alverstone, in an address delivered in 1895, thus classed the principal matters which lend themselves to arbitration: (1) cases of boundary, (2) cases of damages for an admitted wrongful act, and (3) cases of dispute involving questions of legal right.

And, again, Lord Russell of Killowen, in his address to the American Bar Association in 1896, made a threefold classification of arbitrable disputes :—

(1) Where the right in dispute is determinable by ascertaining the facts ;

(2) Where, the facts being ascertained, the right in question depends on the application of international law ;

(3) Where the dispute is determinable on a give-and-take principle.

[1] Rouard de Card, "Destinées de l'Arbitrage International" (Paris, 1892), p. 208. Dr. Bulmerincq (in Holtzendorff's *Handbuch*, IV., 45, *et seq.*) thus classifies the arbitration cases that have occurred: 1. Ueber staatliches Eigenthum. 2. Ueber Staatsgrenzen. 3. Ueber Ausübung der Amtsgewalt staatlicher Autoritäten gegen Angehörige anderer Staaten. 4. Ueber Tödtung der Angehörigen anderer Staaten. 5. Ueber Beschlagnahme fremder Güter und Schiffe. 6. Ueber Verletzung und Nichtbeachtung der Pflichten der Neutralität. 7. Ueber Folgen einer nicht notificirten Blocade. 8. Ueber Interpretation eines internationalen Vertrages. 9. Ueber Rechtsverhältnisse zwischen einer halbsouveränen Macht und einer Compagnie.

Limits of arbitration.

All these classifications are, from the very nature of the circumstances, more or less approximate, and may be enlarged with the progress of international relationship. All matters whatever *may*, of course, be arbitrated upon if the parties to the dispute consent to do so; but the more important question is, What matters *ought* to be arbitrated upon? The above classifications suggest some answer to this question. There is a general consensus of opinion amongst jurists and publicists that there must inevitably be some limitation. For example, all exclude questions of independence or autonomy; some exclude "vital interests," questions of "national honour" and of "territorial integrity." Thus President Polk refused arbitration as to the Oregon boundary dispute between Great Britain and the United States, but finally submitted the question to the Emperor of Germany, who gave his award (1872) in favour of the United States. The expressions "national honour" and "vital interests" are ambiguous and elastic. The various States may not concur as to when the one is "outraged," and the other interfered with. Again, at one time, owing to national excitement, the "national honour" may be deemed to have been outraged, whilst on another more peaceable occasion the same offence might not be regarded as amounting to an "outrage." Indeed, the great difficulty in international affairs is to discriminate between a

Arbitrable disputes and the Hague Convention.

State's *rights* and its *interests*. Art. 16 of the Hague Convention recognises all these difficulties, and, excluding political matters from the sphere of arbitration, lays down that this procedure is applicable to differences of a judicial character in general, and in especial differences regarding the interpretation or application of international treaties.[1] There is as yet no compulsory arbitration of any kind, but various schemes have been suggested for constituting a standing arbitral tribunal, and for making it compulsory to go to arbitration in regard to certain matters,[2] *e.g.*, according to Baron de Staal's suggestion at the Hague Peace Conference, May 18th, 1899, disputes relating to pecuniary damages suffered by a State in consequence of the unlawful or negligent action of another State, such as disputes relating to the interpretation of postal, telegraph, and railway conventions, of conventions relating to the navigation of international rivers, literary and artistic property, industrial and proprietary rights, and various other matters.

At the present time arbitration is one of the most widely discussed topics. It is being considered at the present session of the Hague

[1] "Dans les questions d'ordre juridique et en premier lieu dans les questions d'interprétation ou d'application des conventions internationales. . . ."

[2] See the note, *infra*, on The Second Hague Conference and Arbitration.

Conference. States have been showing greater eagerness to conclude general arbitration treaties and a willingness to resort to the Hague international court. The decade since 1895 has certainly not been free from wars, but during the same period there have been about a hundred settlements by arbitration, of which many have been very important, and others have been of the most difficult and delicate nature, *e.g.*, the boundary dispute between Chile and the Argentine Republic, the British-Venezuelan boundary dispute, the Alaska boundary controversy, and the North Sea affair. The latter was really an instance of arbitration, though it was adjusted by a commission of inquiry.

Recent examples of arbitration.

The Alaska boundary dispute (1903), between Great Britain and the United States, was decided by a commission of somewhat unusual constitution. It consisted of "six impartial jurists of repute who should consider judicially the questions submitted to them,"[1] chosen equally by the British sovereign and the President of the United States. The decision was not unanimous, the two Canadian commissioners dissenting, but its validity was not thereby affected. The greatest difficulty in these proceedings was found

Alaska boundary (1903).

[1] The criticism of this expression, as applied by the United States, recalls the strictures of Sir Henry Maine as to the constitution of international courts of arbitration generally. *Cf.* his "International Law," lect. xii.

in the construction by the United States of the phrase "impartial jurists of repute."

Cases referred to the Hague court.

Since the establishment of the Hague court, in 1901, several controversies have been referred to it, and its decisions have been loyally accepted, *e.g.* the "Pious Fund"[1] case, the Venezuela preferential payment dispute,[2] the Japanese house tax case, and the Muscat controversy between Great Britain and France.

"Pious Fund" case.

In the "Pious Fund" case, between the United States and Mexico, the court in giving its award stated the considerations of law and fact upon which the decision was based, and in this respect

[1] The arbitrators in the Pious Fund case were, for the United States, Sir E. Fry and Professor de Martens; for Mexico, Judge Guarnschelli, of Italy, and Judge Lohman, of Holland.

[2] In the Venezuela arbitration, the question submitted to the Hague Court was whether the debts due to the subjects of the blockading Powers had priority over those due to the peace Powers. By the award, delivered on February 27th, 1903, it was maintained that the blockading Powers, Great Britain, Germany, and Italy, were entitled to preferential treatment in the payment of such indemnities as Venezuela had, owing to the blockade, been obliged to pay.

M. Gaché, who has made an exhaustive study of this case, draws attention to several points of importance involved: "Cette étude nous a paru intéressante parce qu'elle nous permettra de faire l'application de diverses théories de droit international, comme celle du droit de protection, des nationaux à l'étranger et celle du blocus maritime, de préciser la véritable portée contemporaine de la doctrine de Monroe, et de mettre en jeu le fonctionnement des commissions mixtes internationales et de la cour d'arbitrage de la Haye" (*op. cit.*, pp. 1—2).

established an important precedent. It is to be noted that in this statement the court asserted the principle of *res adjudicata*, a private law doctrine thus being applied in an international dispute.

Res adjudicata.

A similar influence of private law exerted through the medium of arbitration is seen in the Venezuela preferential payment question, in which the doctrine of a lien obtained by a vigilant creditor on his debtor's goods is virtually adopted.

Prospects of arbitration.

The future development of arbitration depends on the recognition by each State that its desires and claims are not necessarily just ones; that even to suffer some possible disadvantage, real or imaginary, as a result of an arbitral award, is not so disastrous as having recourse to an all-destructive war; that international affairs will best prosper when clear rules and principles are amicably laid down and universally accepted as law, and not treated as merely elastic maxims of subtle diplomacy, and when these principles are applied in an impartial manner by a tribunal acting in a judicial spirit, and its decisions, if properly arrived at, accepted loyally. And so the gradual but sure growth of a body of principles, calculated to adjust and regulate the relationships between States, points to the time when the employment of violent methods to exact justice will give way to the universal sovereignty of law, as Mirabeau says: "Le Droit sera un jour le Souverain du Monde."

THE RIGHTS OF NEUTRALS AND BELLIGERENTS AS TO SUBMARINE CABLES, WIRELESS TELEGRAPHY, AND INTERCEPTING OF INFORMATION IN TIME OF WAR.

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THE RIGHTS OF NEUTRALS AND BELLIGERENTS AS TO SUBMARINE CABLES, WIRELESS TELEGRAPHY, AND INTERCEPTING OF INFORMATION IN TIME OF WAR.

Relations of States.

THE modern age is pre-eminently characterised by complexity of life, by manifold relationships existing between States no less than between the individuals themselves constituting those States. At no time was Aristotle's dictum as to man's "political" condition truer than it is to-day. And just as the members of a State, regarded as a unity, are manifestly interdependent, so the States of the world, regarded as a unity, are inevitably related to each other. Hence recognised rules and principles are necessary in both cases for preserving harmony and furthering the interests of mankind. And if war between two States is a departure from their normal condition, there are still rules and principles which, it is held, have been firmly established, which apply to nations at war with each other, and which they are bound to accept.

Law and usage.

In the recent Russo-Japanese war, for example, many Russian practices were pointed out to have

been contrary to international law, at least to previous usage. But where usage merges into law is a very difficult question. Indeed, some writers have held that international usages can never become *law* in the strict sense of the word, in consequence of the absence of a sovereign authority to enforce those usages. They say the principles underlying them can at best amount only to a body of international ethics; and, as Sir Henry Maine has so often pointed out, in the political development of a nation its ethics precede its legal system. A good deal of the controversy as to the force and significance of international law is due to an ambiguous use of the term *law*; some jurists use it exclusively in the strict sense of *nomos*, others in the wider sense of *themis*. If the latter be accepted, then it is not necessary to insist on the existence of some specific supreme authority, for common usage and mutual consent are, or should be, of sufficient force to regulate the conduct of international affairs; and when mutual consent to rules and principles is given by States in the most solemn and formal manner, the resulting treaties have virtually all the significance of law as between those signatory States at least.

Recent growth of international law.

Much has been done in recent years towards the establishment of rules of international law, and the unification and harmonising of the conflicting claims of States. An epoch in this legal

history is marked by the Hague Conference, a very important consequence of which is the indication of future possibilities in the growth of the law of nations as well as a taking stock of already existing principles and usages and an examination of their bearing on modern requirements. The tendency of modern nations is to settle their disputes by amicable agreement at conferences instead of immediately resorting to war, the terrors of which, largely due to modern inventions, act as a great incentive to more peaceful methods. The establishment of the arbitration court at the Hague is of the utmost importance. The Institute of International Law has done most useful work, especially in regard to the preparation of matters for discussion at the Hague conferences, though, its members not being strictly official representatives of their States, the work of the Institute is in some quarters not countenanced. The heads of States fear to commit themselves too readily in this way. A conference was held in February, 1905, at Brussels for the purpose of doing something towards a unification of maritime law. There were representatives from most of the European States, and from the United States of America, but the British Government declined to take part in an official conference on the subject. And only just now has a meeting been held at Brussels of the Interparliamentary Union, which

Influence of conferences.

proceeded to examine an arbitration treaty; and at the proposed London conference to be held next July[1] delegates from all parts of the world will attend to transact business preparatory to the Hague meeting. For every war brings forward certain questions which, sooner or later, will have to be considered in official conferences, and some definite international understanding thereon arrived at. The war between Japan and Russia raised various problems, of which one of the most interesting and difficult was the question as to the rights and duties of belligerent and neutral States in reference to submarine cables and wireless telegraphy.

Fresh wars and fresh questions.

No established laws as to submarine cables in war.[2]

The enormous multiplication of submarine cables, the important function they serve in international affairs and the world's commerce, and the uses they may be put to in case of war necessitate some convention relative to their employment or interference by neutrals and belligerents in time of war. The Paris Convention of 1884 refers only to times of peace, the freedom of belligerents with regard to the cables being specially reserved at the instance of Lord Lyons, who on behalf of the British Government made the following declaration: "Her Majesty's Government takes art. 15

[1] *I.e.*, July, 1906.

[2] But see *infra*, on the Second Hague Conference and Submarine Cables.

to mean that in time of war a belligerent who is signatory to the Convention will be free to act with respect to submarine cables as if the Convention did not exist." No precedent or universally accepted judicial decision is even to be found on the matter. Professor Fiore emphasises the importance of cables as instruments of war, *strumenti di guerra.*[1] Their great value in this respect has been often exemplified since 1870. In the armies of the chief European States, and especially in France, telegraphic employés are mobilised in time of war to effect a rapid despatch of war messages. The temptations of a belligerent to cut a cable that may be used by the enemy, or by means of which the enemy procures valuable information, will be exceedingly great; and, in the absence of special treaties or agreements on the subject, its power to resist such temptation will scarcely be strong enough in the stress and excitement of war, in spite of all the "pious wishes" of institutes and jurists. Indeed, even if treaties were made for protecting cables in war, it is doubtful whether they would operate as a sufficient sanction with a closely-pressed belligerent, for under such circumstances "he would break them and trust to settling with the injured neutral on the best terms obtainable."[2]

Cables as instruments of war.

[1] "Trattato di Diritto Internazionale Pubblico" (1882—1887), III., p. 167.

[2] *Times*, April 4th, 1904.

Hence there has been a reluctance on the part of many States to commit themselves to regulations, not only for this reason, but also because of their desire to have for guidance a sufficient accumulation of instances and illustrations of the use and treatment of cables during war.

The Institut de Droit International on cables.

In the meantime various suggestions have been made, notably by the Institut de Droit International, which at the Brussels session in 1902 prescribed the limits within which the liberty of action of belligerents may be legitimately exercised, especially laid stress on the inviolability of a cable connecting two neutral territories, and condemned the destruction of any cable whatever in the territorial seas of a neutral. This is the result so far reached, but it will be interesting to trace historically the suggestions, contentions, and schemes that have from time to time been advanced relative to the protection of submarine cables.

First suggestion as to protection of cables.

The successful completion of the first transatlantic cable took place in 1858, due mainly to the energies of American and British scientists and capitalists. In the very first official communication sent from the United States to London, August 5th, 1858, President Buchanan suggested the advisability of internationally protecting the cables. Their international character, determined rather by their territoriality than by the nationality of their proprietors, demands international protection.

In 1864 an attempt was made to procure the safeguarding of a certain cable in time of war. On May 16th of that year a treaty was signed by representatives of France, Brazil, Hayti, Italy, and Portugal in reference to a transatlantic cable which was proposed to be laid by a certain M. Balestrini. Art. 2 was couched to this effect: "The contracting parties engage not to cut or destroy, in the event of war, the cable submerged by M. Balestrini, and to recognise the neutrality of the telegraphic line." This clause was too vague to be of any practical service, and further, M. Balestrini failing to fulfil his engagements, the treaty never actually came into operation. The provisions, indeed, applied only to one particular cable, and even then the terms were too absolute, and could scarcely be capable of application. M. Renault[1] comments on the action of these diplomats as showing "une hardiesse un peu inconsciente," and a negligence to consult soldiers and sailors. Since 1864 there has been no attempt to conclude a treaty with similar objects; but various steps have been taken to ensure the protection of the cables as much as possible. The United States of America took the initiative. An international convention was proposed in 1869, and the suggestions were of a very comprehensive nature. Wanton destruction of cables in the open sea, it was thought, should be regarded as piracy; the sovereignty of

Balestrini cable (1864).

United States proposal (1869). Cable-cutting as piracy.

[1] "Revue de Droit International," XV., p. 18.

States on whose shores cables terminated should be affirmed; the convention should remain in force also in time of war—which in effect was a perpetual neutralisation of cables—and there was to be no restriction on the despatch of messages. Other distinctions were made which would in themselves have rendered the scheme impracticable. Most of the European States, however, consented to take part in the negotiations, but England and France, whose concurrence was indispensable, showed a decided reluctance; and with the commencement of the Franco-Prussian war the project entirely fell to the ground. Many cases of cable-cutting occurred during the war, and M. Rolin Jacquemyns, the well-known Belgian international jurist, urged the making of a treaty for their protection in time of peace at least. He insisted that regulations to apply to the open sea were as necessary as those concerning the territorial waters of States.

Treaty suggested for protection.

Conference of Telegraphic Union at Rome (1871)

In the following year a conference of the Telegraphic Union was held at Rome, where the Norwegian delegate proposed that a commission should be named for the establishment of some principles as to telegraphs in time of war. This proposal was rejected as transcending the authority of the Conference. Yet a more drastic proposal, in some respects, was made by the American representative, Mr. Cyrus Field. The destruction of lines or apparatus should be

prohibited, and innocent despatches should be allowed in time of war; but he was unable to suggest any method by which the innocence, from the standpoint of a belligerent, of private or apparently private communications could be guaranteed. The Conference, however, recognised the necessity of some understanding on the matter, and appointed the Italian Foreign Minister to convey its sense of such necessity to the various Powers. The Austro-Hungarian Government alone replied to his communication: "it would always be disposed to respect submarine telegraphic cables, or at least to confine itself to prevent an enemy making use of them, without in any case destroying them. Therefore it considered that an effectual means of guaranteeing their safety would be found in the institution of a commission, either of belligerents or neutrals, which should place them and keep them under sequestration." The Austrian suggestion was revived by members of subsequent conferences.

Proposal to regulate in time of war.

Sequestration suggested by Austria.

At the invitation of the Emperor of Russia, a conference was held at Brussels in 1874 for the discussion of a code of laws and usages of war. M. Veldel, the Danish delegate, proposed that landing-cables—*cables d'atterrissage*, that is, those connecting submarine cables to the land telegraphs—should be included under "land telegraphs," which by art. 6 were allowed to be seized by an occupying army, as a means for the prosecution

Brussels Conference on laws and usages of war (1874).

of war. But he withdrew his proposal, on the ground that his Government would later communicate with the other Governments on the subject. The chief result of the meeting was the emphatic recognition that the telegraph was an instrument effective in warfare and the consideration of acts admittedly contrary to international law, but which acts did not include the destruction of the telegraph.

Dr. Fischer's book; his "neutralisation" scheme (1876).

Two years later Dr. Fischer, an official in the German postal service, issued a book, "Die Telegraphie und das Völkerrecht," discussing the whole question of the protection of submarine cables in peace and war. He lays down three rules for their protection from the consequences of belligerent operations: firstly, to exclude the transmission, direct or indirect, of military despatches from or to the belligerents; secondly, to subject the transmission of despatches to a strict control with a view of guarding against abuses; and thirdly, to grant the belligerents the right to decree the occasional suspension of telegraphic communications from or to the enemy's territory by those cables lying in their sphere of jurisdiction.[1] To obtain these results two plans are

[1] "Es würde nöthig sein—

"(1) Die Beförderung aller dem Kriegszwecke unmittelbar oder mittelbar dienenden Depeschen von Kriegführenden oder an Kriegführende auszuschliessen;

"(2) Die Depeschen Beförderung einer strengen Controle zur Abwehr von Missbräuchen zu unterwerfen;

suggested. The belligerents themselves might undertake in common the management of those cables connecting their territories with those of neutrals, working by means of a commission consisting of equal numbers of officials from each of them. These measures would be in accordance with the example of the Telegraphic Union in time of peace. But Dr. Fischer himself recognises the difficulties involved in such a plan. It would be too much to expect representatives of two States to work together amicably and harmoniously when those States are at war with each other, indeed to allow enemies on their respective territories at all. Hence he prefers the second plan,—neutralisation: "Darum wäre es vorzuziehen, dass die Kriegführenden während der Dauer des Krieges die in ihren Gebieten landenden internationalen Kabel der Verwaltung durch Neutrale übergäben" (p. 58). Thus the administration might be in the hands of officials of two neutral States, selected by the belligerents. And such an arrangement, it is contended, would secure the safety of the cables, and guard against abuses during the continuance of hostilities: "So würden den Kriegsmächten ausreichende Bürgschaften für

"(3) Den Kriegführenden das Recht einzuräumen auf den ihrer Machtsphäre unterliegenden Kabeln die zeitweise Einstellung des Depeschenverkehrs von und nach dem feindlichen Gebiete zu verhängen" (p. 57).

unparteiische Handhabung des internationalen Dienstes und für gleichmässige gewissenhafte Ausschliessung jedes Missbrauches geboten werden."[1] This recalls the method suggested by Bornemann for the suppression of the right of visit: a neutral commission would visit the vessel and deliver a permit for transit. Even with the second plan, how would it be possible to effect the prevention of despatches seemingly innocent, but possibly conveying valuable military information couched in secret terms previously contrived? As M. Renault says, "Avec toute l'impartialité possible, on n'empêchera pas la transmission de dépêches très innocentes en apparence et donnant en langage convenu des renseignements précieux sur les opérations militaires. Quand les belligérants le soupçonneront, ils n'hésiteront pas à interrompre absolument le service."[2] Moreover, the word *neutralisation* should be avoided, because of its ambiguity, as was shown at a discussion of the Institute of International Law in reference to the Suez Canal. Buzzati[3] gives further examples which show the difficulties, indeed the utter impracticability, of Fischer's neutralisation scheme. For instance, if two States are at war, and a port

Insuperable difficulties of "neutralisation."

[1] *Ibid.*, p. 58.

[2] "Revue de Droit International," XII., p. 274.

[3] "L'Offesa e la Difesa nella Guerra" (Roma, 1888), pp. 293, 294.

of the one is besieged by the other, a cable connecting that port with the other State, is it likely that the military authorities would tolerate a vigilance commission or limit themselves merely to sealing up their end of the cable, and so making it possible for the enemy, in case of surrender, to further their operations and add to their successes? "La Spagna p. es. è in guerra con la Francia, e la flotta ed esercito francesi hanno assediato il porto di Barcellona. Fra Marsiglia e Barcellona esiste un cavo. A Marsiglia le autorità militari avranno già interrotto il filo telegrafico, senza però distruggere il cavo. Se il corpo d'armata spagnuolo stretto a Barcellona d'assedio e di blocco deve capitolare e cedere Barcellona al nemico, è supponible ch'egli si limiti a interrompere il cavo alla sua estremità o a consegnarlo alla commissione di vigilanza?"

Institut de Droit International at Paris (1878).

At a meeting of the Institute of International Law in Paris, 1878, M. Renault proposed the appointment of a committee to inquire into the methods of protecting cables in time of peace and of war. At the Brussels meeting in the following year the committee, consisting of M. Renault, of Paris, M. Bluntschli, of Heidelberg, M. Goos, of Copenhagen, M. Saripolos, of Athens, and Mr. Westlake, of London, presented its report.[1] The question of the protection of

[1] "Annuaire de l'Institut de Droit International," Vols. III., IV. Part I., p. 351.

cables in war, which of course involves the question of the rights and duties of neutrals and belligerents, was dealt with in the second part of the report. The committee discountenanced the various proposals that had previously been made as to neutralisation—"L'Institut écarta résolûment la chimère d'une neutralisation des cables sous-marins,"[1]—and devoted itself to a more thorough consideration of the different kinds of cables, and their liabilities and exemptions. They were classified according as they lie or terminate in neutral or belligerent territory, thus:

Classification of cables.

(1) Cables uniting two portions of the territory of the same belligerent;

(2) Cables between the two belligerents;

(3) Cables between a belligerent and a neutral;

(4) Cables between two neutrals.

The classification made by General Greely,[2] the head of the military telegraph department during the Spanish-American war, and based on American practice, is similar to the above; and

Classification by Dr. Scholz.

Dr. Scholz,[3] a recent writer on the subject, adopts practically the same division, but by two subdivisions extends it to six categories:

(1) Cables connecting only points of one of the belligerent States (*amikales Kabel*);

[1] "Journal de Droit International," XV., p. 20.

[2] Captain G. O. Squier, "Proceedings of the United States Naval Institute" (1900).

[3] F. Scholz, "Krieg und Seekabel" (Berlin, 1904).

(2) Those connecting the belligerent State with a neutral *(amikal-neutrales Kabel)*;
(3) Those connecting the belligerent with the enemy *(amikal-hostiles Kabel;)*
(4) Those connecting only points of the enemy *(hostiles Kabel)*;
(5) Those connecting enemy territory with neutral *(hostil-neutrales Kabel)*;
(6) Those connecting two points of a neutral or two neutral States *(interneutrales Kabel)*.

The chief advantage of this distinction is to be found in the terminology adopted, which is brief, precise, and immediately calls to mind the nature of the particular cable indicated, without the use of circuitous expressions or descriptions. Before dealing with the above classes individually it may be stated here that Dr. Scholz advances what he claims to be a new theory, namely that of the territoriality of the cable, the *Kabel-territorium*. He regards the cable as an accessory to the territory where it terminates, and is under the same sovereignty as the latter.: "Das Kabel hat in jeder Beziehung Landqualität. . . . Das Kabel steht in seiner ganzen Strecke unter der Souveränität des Landes, dem es nach seiner örtlichen Lage zugehört."[1] He compares it to a bridge: "eine Brücke unter dem Wasser"; and the intervening sea between the

Dr. Scholz's theory of *Kabel-territorium*.

[1] *Op. cit.*, p. 40.

two terminations does not introduce any modifying factor, for the telegraph takes no account of distances: "Das Meer, das dazwischen liegt, ist für die Telegraphie, welche Entfernungen nicht kennt, und folglich für den Verkehr überhaupt bedeutungslos."[1] He emphasises repeatedly the principle of sovereignty, no matter who may be the ultimate owners of the cables, according to their territoriality: "Das Kabel steht also tatsächlich unter der alleinigen Herrschaft des Uferstaates." The old doctrine, established by Bynkershoek,[2] and almost universally accepted, "terræ dominium finitur, ubi finitur armorum vis," this writer does not consider conclusive. The application of his "theory" assures the unity of maritime and terrestrial telegraphy, and, moreover, it absolutely excludes the right of capture in reference to cables, prizes applying only to private enemy property on sea, but not on land. But the theory betrays a certain weakness in its application to his fifth, and of course most important and most difficult, case, the *hostil-neutrales Kabel*, which is made the object of a *condominium*. But by virtue of what rule or principle does the author regard in their relationship the interests of the belligerent as predominating over those of the neutral? It is true, the action of a belligerent will depend

Based on the principle of sovereignty.

Weakness of Dr. Scholz's theory as applied to cables between neutrals and belligerents.

[1] P. 42.

[2] "De Dominio Maris," c. 2.

on the imperious necessities of war, but then such a precarious condition of things cannot logically be made the basis of a universal principle, determining the rights and duties of contending parties. Logical consistency is an indispensable characteristic of any sound theory; and how is it possible to secure harmony or consistency in the view of his remark that "wo neutrale und feindliche Interessen verbunden sind, ein Staat aber an sich berechtigt ist, diesen feindlichen Interessen entgegenzutreten, da steht die Rücksicht auf das neutrale Interesse nicht hinternd entgegen."[1]

The various cases that have presented themselves in practice may now be considered in order.

Cable between two portions of same belligerent's territory.

1. When the cable connects two portions of the territory of the same belligerent, *e.g.* England with Ireland, Italy with Sardinia, France with Algeria.

In this case the Institute at its Brussels meeting, 1879, considered that no measures were possible to ensure the continuance of telegraphic communication in time of war. The belligerent may, in its discretion, suspend the service, or make what restrictions it thinks desirable, or even destroy the cable, whether it is the property of the Government or of private owners. Such interference will depend simply on its municipal law. Art. 7 of the International Telegraphic Convention of St. Petersburg reserves this right

[1] P. 116.

absolutely to the respective Governments. "Les hautes parties contractantes se réservent la faculté d'arrêter la transmission de tout télégramme privé qui paraîtrait dangereux pour la sécurité de l'État ou qui serait contraire aux lois du pays, à l'ordre public ou aux bonnes moeurs." Similarly, the enemy may destroy such a cable—for by so doing it will very often derive the greatest advantage—either on the high seas or in the territorial waters of its adversary; because acts of war are legitimate both on the open sea and in territorial waters. Scholz applies his theory to show that, with regard to this *hostiles* cable, the belligerent may act with as much freedom as though he were on enemy territory. But here again this right is not an inference peculiar to the principle of *Kabelterritorium:* for the *Schiffstheorie* can lead, and indeed has, prior to the application of the more novel theory, already led, to a like conclusion. In the troubles of Brazil, 1893, the submarine cable lying in the Bay of Rio de Janeiro was broken by the Government as the revolutionary fleet entered the bay; the latter also cut the cable between Mangaratiba and Ilha Grande. Also, in the war of 1898, the Americans cut at Cienfuegos the cable along the coast of Cuba, between Havana and Santiago.

Cable between the two belligerents.

2. When the cable connects the territories of the two belligerents, *e.g.*, a cable between Florida and Havana.

Either belligerent is entitled to interrupt the communications, and there is no way to prevent his so doing. A State is under no obligation to maintain communication with its enemy; for the latter may abuse such communication to the serious injury of the former. An analogous case has been referred to by M. Renault in connection with the once projected Channel tunnel; the Governments of England and France expressly reserved to themselves the right to destroy the tunnel for purposes of defence. During the war of 1877 between Russia and Turkey, the cable connecting Constantinople and Odessa was cut by the Turks at the very commencement of the war. Similarly in 1882, in the war between Chili and Peru, several attempts were made to destroy the cables uniting their principal ports. In the Chino-Japanese war, 1894, there was a somewhat new departure; the proprietors of the cables undertook to maintain a strict neutrality, and gave their services to the two belligerents alike; and consequently neither of them attempted to damage the cables, the service continuing as regularly as in time of peace. And so in 1898, General Greely did not consider it necessary to cut the line between Havana and Key West; but the communications were subjected to a severe censorship at both extremities of the cable. The head office at Key West was occupied by the military authorities. Only telegrams in clear language

Practice in recent wars.

Treatment in Spanish-American war.

from or to Havana were allowed, if they had reference to private or commercial matters. The Governor-General of Cuba acted likewise, and so all messages underwent a double censorship. If the least suspicion were aroused as to the transmitter, or his purpose, the despatch was either refused or suppressed. By way of exception, and only as a mark of courtesy, telegrams in cipher, forwarded by diplomatic agents of neutral States, were admitted. Again, the offices of the six cables joining the United States with territories more distant from the scene of war were not actually occupied, but were placed under military control. The staff remained, but a written engagement was required to observe the rules that may be laid down by the general or his deputy. It was especially prohibited to receive or send messages from or for Spain, or to deal with certain matters considered prejudicial to military interests. If any doubt arose, the telegrams were sent to the military censor, who decided after examination. The stations of cables lying between the United States and a country in communication with the enemy were also militarily occupied, and messages subjected to censorship, with the exception of only those of Government officials and of neutral diplomatic agents. These measures of General Greely were afterwards embodied in an article in the naval war code of the United States (1900),—which, how-

Rule in U.S. Naval War Code (1900).

ever, was recalled in February, 1904. Art. 5, paragraph 1, of the code stated that "submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require." The Institute of International Law at its Brussels meeting in 1902 adopted the rule: "Le câble reliant les territoires de deux belligérants on deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre."[1]

Cable between two neutrals.

3. When the cable connects two neutral territories. There is no hesitation about the rule here; there is a unanimous agreement as to the inviolability of the cable, and even a momentary interference with it in any way by a belligerent is clearly unjustifiable. The rule of the Institute at the Brussels meeting in 1902 is stated briefly, "Le câble sous-marin reliant deux territoires neutres est inviolable"; and the United States Naval War Code used indentical terms in art. 5, section 3, "Submarine telegraph cables between two neutral territories shall be held inviolable and free from interruption." And so also Scholz, applying his principle of cable territoriality, infers that the "interneutrales Kabel" being accessory to the neutral territory

[1] "Annuaire de l'Institut," XIX. (1902), p. 331.

is also neutral, and hence to be respected by the belligerents as much as the actual territory itself of the neutral States.

Cable between belligerent and neutral.

4. When the cable connects the territory of a belligerent with that of a neutral.

Most difficult case.

This is at once seen to be the most difficult case.

According to the right of sovereignty recognised by the St. Petersburg Convention, a belligerent connected by a cable with a neutral has the right to restrict or suppress telegraphic intercourse with it, but the *other* belligerent, in the opinion of the committee of the Institute of International Law at the Brussels meeting in 1879, should respect it, as communication between neutrals and belligerents is permitted. If, however, he gets possession of that part of the adversary's territory containing the extremity of the cable, he would be entitled to destroy it, if necessary for his defence, in consequence of the rights accruing from occupation. But the rule as to freedom of communication between neutrals and belligerents is subject to important exceptions; for example, communicating with a blockaded port, and carriage of contraband, which may include despatches. The committee in the end agreed that no definite rule in this case could be formulated, for belligerents will be actuated by the necessities arising in warfare.

The St. Petersburg Convention

It has been said that the St. Petersburg Convention applies exclusively to land telegraphs,

and that the Paris Convention of 1884 has alone reference to submarine cables. But the practice in recent wars by no means justified this distinction; for the earlier convention in reality includes sea cables by tacitly assimilating them to land cables. This position will perhaps be made clearer by a brief examination of the rights and duties in general of belligerents and neutrals in regard to the land telegraph and sea cables.

really applies to submarine cables also.

What are the rights of belligerents on their own territory?

Rights of belligerents on their own territory.

Every independent State is supreme on its own territory. It may adopt what laws and institutions it pleases so long as they are not directly contrary to the general civilisation of the "family of States" to which it belongs, and are not injurious to the other members of that family. Under no conditions whatever can a State be deprived of the right of self-preservation, and in case of self-defence during hostilities all other interests are wholly subordinate to its own legitimate interests. Thus, in the absence of international conventions involving particular restrictions, a State has the right to control the telegraphic service on territory under its jurisdiction, to effect a discontinuance of all telegraphic communication, or to forbid the transmission of despatches of a certain nature. Of course, the lesser right is contained in the greater. And against such interference, assumed

to be necessary, the senders of messages, the owners of the lines, and other States involved can have no valid claim. Thus, in 1870, telegraphic communication between France and Germany was suppressed at the outbreak of the war, and was only resumed five years later. But a somewhat new condition of things was introduced by the Convention of 1875, relating to those States forming part of the Telegraphic Union. There is no special mention in any of the articles as to the telegraphic relationship of the various signatory States in time of war, but the terms are sufficiently comprehensive to imply war. Messages are divided into three classes—first, State telegrams between heads or ministers of the Governments in their official capacity; secondly, those passing between the administrative heads of the telegraphic departments relating to their administration; and thirdly, private telegrams. Cipher or secret language may be used in the first two kinds, and in the third only between States consenting to such usage. Then the restrictions contained in arts. 7 and 8 come in. Art. 7 gives each signatory State an absolute control over private messages, and art. 8 a power of temporarily suspending the entire service, on condition of notifying to this effect the other contracting Governments.[1] Now these two

The St. Petersburg Convention (1875).

Division of telegrams.

Restrictions of arts. 7 and 8 of St. Petersburg Convention.

[1] Hertslet's Collection of Treaties, XIV., 96–7.

articles apply also in time of war; for indeed the rights implied follow as a natural consequence from the principle of State sovereignty. As M. Renault says, "C'est une conséquence du droit de souveraineté que chaque État se réserve ainsi d'exercer d'une manière absolue, suivant ses intérêts et sans avoir à rendre compte aux autres États de sa conduite."[1] It will be seen that the restriction in art. 7 is applicable only to private despatches, and to private despatches, moreover, of every kind. This is confirmed by the Buda-Pesth Regulations, 1896. The third paragraph of art. 46 says, "La transmission des télégrammes d'État et des télégrammes de service se fait de droit. Les bureaux télégraphiques n'ont aucun contrôle à exercer sur ces télégrammes."

Does the St. Petersburg Convention include submarine cables?

M. Desjardins insists that the St. Petersburg Convention comprises telegraph of all kinds, submarine as much as terrestrial, as the former were before 1875 assimilated to the latter, at least in so far as the landing-cables and those in terrestrial waters are concerned; for the Paris Convention regards only cables in the open sea. Hence, the States on whose territory cables land

[1] "Nouvelle Revue Historique" (1877), p. 449. *Cf.* also the remark of Fiore ("Trattato di Diritto Internazionale Pubblico," III., p. 167): "Non vi è dubbio che ciascuna delle parti belligeranti possa sospendere il servizio telegrafico nel proprio territorio ed anche per i terzi stati che volessero servirsi delle sue linee. Questo è un diritto di sovranità."

Recent examples to show the affirmative.

have a jurisdiction over them in time of war, in accordance with arts. 7 and 8. In recent wars many instances have occurred which emphasise this consequence. In the last Russo-Turkish war, secret language on lines between Russia and Turkey was forbidden. In 1882, the Egyptian Government forbade cipher, and permitted only communications in certain prescribed languages. Three years later the same Government suspended messages going to or coming from Suakim excepting those which were manifestly private or commercial; the latter had to be couched in clear language, and limited to English, French, and Italian languages. State telegrams, however, were free from such restrictions. Again, in the case of the Dahomey expedition in 1892, France disallowed the use of secret language in certain kinds of messages, and adopted the same course of action in the Madagascar campaign of 1895. More important examples occurred in the Spanish-American war. The head-office of the American cables at Key West was under military occupation, and the most rigorous censorship was exercised on all messages. In this war, which, as Scholz observes, was "zu einem grossen Teil ein Kabelkrieg,"[1] the belligerents themselves mainly suffered through telegraphic interferences; but in the Transvaal war, neutral States were also affected. All communications with South Africa

[1] *Op. cit.*, p. 31.

were placed under the control of the censor. On October 11th, 1899, a despatch forwarded to Madagascar by a French commercial company was intercepted. On January 2nd of the following year another telegram though in clear language was stopped. These measures, notwithstanding the consequent injury inflicted on neutral commerce, were adopted in the case of all telegrams, no matter of what origin they were. Towards the end of October, 1899, many protests were made against this action in the continental press, especially in Germany; and so on March 21st, 1900, the British Government authorised the use of certain codes. But even in this case, no absolute concession was made; for the declaration stated specifically that all messages whatever would be subjected to the established censorship, and would be transmitted at the risk of the senders. There were more violent outbursts of protestation against this proceeding, and in fact the *Cologne Gazette* of January 6th, 1900, stated that the Russian Government had actually forwarded circulars to the chief States, inquiring whether such conduct was consistent with the St. Petersburg Convention.

Interception of messages by Great Britain.

In truth, Great Britain had not committed any infraction of this convention. Her action resulted from a thorough application of arts. 7 and 8, and so far was legitimate, though in some quarters on the continent complaint was made of excessive

Action of Great Britain in accordance with the Convention.

rigour in certain cases. Commandant Bujac[1] contrasts England's severe measures exercised in her own war, with her "complaisance inexcusable" shown to the United States in the war with Spain. He points out that of the fourteen lines which connected Europe with America, twelve belonged to English companies, and messages were allowed to be forwarded to the United States containing information relative to the war. To what extent this accusation is true cannot be said; at any rate, in England's own war self-preservation and the advancement of her cause called for the strictest vigilance and censorship, and she was guided by the exigencies of the occasion; whereas in the Spanish-American war there was not such great need for similar rigour, and a less degree of strictness is not necessarily tantamount to a violation of neutrality.

Thus, it appears that the right of a belligerent State on its own territory is of the largest nature possible. This is allowed by the convention, and has been clearly exemplified in a large number of cases in recent warfare.

Rights of a belligerent on occupied enemy's territory.

Now what are the rights of a belligerent on the enemy's territory in case of occupation?

Distinction between connecting cable and câble d' atterrissage.

The connecting-cable, that is, that portion which is on land, and connects the cable proper with the land telegraph ought to be regarded in

[1] "La Guerre Hispano-Américaine," referred to by F. Rey in "Revue Générale de Droit International Public" (1901).

the same light as the land telegraph itself; whereas the landing cables—the câbles d'atterrissage—which connect the coast with the cables lying in deep water are not considered in the same category; their assimilation, which was proposed at conferences in Brussels and at the Hague, was not allowed. Things in general may be divided according as they are, or are not, instruments of war; and telegraphic apparatus may furnish an instrument of the utmost importance in war. A belligerent occupying an enemy territory does not acquire an absolute right over everything. Only over the means of war does he obtain not merely possession but also property, and consequently is permitted to use them, to sell them, or dispose of them in any other manner, and even to destroy them. But in regard to those objects which are not instruments of war, occupation does not carry with it a right of destruction or confiscation, but only a right of use; "il doit les administrer selon leur destination pacifique." According to the regulations concerning the laws and customs of war on land, which were revised at the Hague in 1899, a belligerent entering into occupation of his enemy's territory may regard railways and telegraphs as accessories to the soil. If they belong to the State no indemnity is due for use or damage whilst in use, on evacuation. But if they are the property of private persons, an indemnity is due for use and damage incurred,

Occupation and objects not instruments of war.

on the principle that private property is not subject to confiscation.

Rights of a belligerent in occupation as to the telegraph.

Thus the belligerent in occupation may make what use of the telegraph he deems necessary for his own communication, but of course he will be obliged to allocate his own officials to the various branches of the service. He is permitted also to put the whole telegraphic service under sequestration and suppress it. In case the occupation be only temporary, and he is compelled to withdraw, he may cut the wires and disorganise the apparatus. In the Spanish-American war, various neutral cable stations in Cuba and Porto Rico came into the possession of the Americans, who allowed the proprietary companies one of two alternatives, either to give up their property entirely, or to continue the service under military control. The cables terminating in occupied territory were of great use to the Americans, who also made use of those of Jamaica and Hayti. Such being the rights of belligerents as to the land telegraph and submarine cables, so far as it is possible to exercise such rights over the cables, what are their rights on sea?

Rights of belligerents as to cables on sea.

The Paris Convention (1884).

The Paris convention of 1884, to which the chief powers of the world were signatory, afforded protection to submarine cables to the following effect:—

(1) Intentional or culpably negligent damage to a cable in the open sea is to be punished by all

the signatory powers, except when such damage is caused through self-preservation.

(2) Ships must keep at a certain distance from buoys indicating cables which are being laid or which are damaged.

(3) The Courts of the flag State of the infringing vessel are exclusively competent to deal with such offences.

(4) Men-of-war of all signatory powers have a right to stop and verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty. This convention, however, contains no clause relative to a state of war; for art. 15 specifically states: "La convention ne s'applique pas en cas de guerre et les États bélligerants conservent leur liberté d'action." At the time of the Spanish-American war, the question was raised in the House of Commons as to the right of belligerents to cut a cable in the open sea. Mr. Balfour in reply stated that "a convention to which Great Britain, Spain, and the United States were parties, was concluded at Paris on March 14th, 1884, providing for the protection of submarine cables. But by art. 15 thereof, in times of war a belligerent signatory to the convention was free to act with respect to submarine cables as if the convention did not exist. He was not prepared, therefore, to say that a belligerent on the ground of military exigency would under no circumstances be justified

No application to war.

in interfering with cables between the territory of the opposing power and any other part of the world."[1]

Belligerents and cables in the open sea.

It is at present extremely difficult to settle with any degree of definiteness the rights of belligerents in the open sea as to cables connecting them with neutrals. Their position on their own territory with regard to the same cables has been shown above; but as to their legitimate powers outside their territory and outside enemy territory there is no precise law. Indeed there is no absolute agreement amongst States respecting the laws of maritime warfare in general; and in so far as rules of international law exist, they have been in various cases subjected to different interpretations by the States. Of course there are some rules which are no doubt established law; and it cannot by any means be said, because of the indefiniteness and doubtful character of certain regulations and of the controverted significance of others, that the rights of belligerents on sea are unlimited, even though necessity press hard. As M. Rey says: "Mais il est certains principes, comme ceux proclamés dans la déclaration de Paris, que la conscience universelle des peuples a imposés aux gouvernements et dont la force morale est si grande que les États qui n'avaient pas voulu s'engager à les respecter, n'ont pas osé les violer . . . . . On peut donc dire que la liberté

Vagueness and elasticity of International Law.

[1] *Times*, April 27th, 1898.

des belligérants n'est pas absolue et qu'il existe un droit de la guerre qui s'impose à tous les peuples civilisés, avec plus ou moins de force suivant qu'ils ont la conscience nette ou obscure de leur responsabilité devant l'humanité."[1] One may say, in general, that cables which are not utilised for military purposes should be respected by both belligerents, no matter who the owners are. Thus, during the Spanish-American war, Spain refrained from cutting the cables connecting the United States with Europe, in spite of the great advantages derived from the communication by her enemy. But here lies the great difficulty. What guarantee has a belligerent that a line between her enemy and a neutral is used only for purely private and commercial purposes, and does not convey military information to her enemy? So long as this uncertainty will exist, such cables will be cut by a belligerent for the sake of self-defence.

Cables not utilised for purposes of war.

Since war and commerce began there has been the antagonism between the rights of neutrals and the rights of belligerents. Neutrals must throughout a war preserve an attitude of strict impartiality. Grotius terms neutrals *medii in bello*, and the few words he says on the duties of neutrality are to the point and furnish an admirable rule, although the principle of

Antagonism between rights of neutrals and of belligerents. Duties of neutrals.

[1] "Revue Générale de Droit International Public," VIII. (1901), p. 725.

neutrality was, in his time, in its infancy, "Eorum qui a bello abstinent officium est nihil facere, quo validior fiat is qui improbam favet causam, aut quo justum bellum gerentis motus impediantur, in re vero dubia aequos se praebere utrisque in permittendo transitu, in commeatu praebendo legionibus, in obsessis non sublevandis."[1] On the other hand, a belligerent must not suppress a neutral's legitimate intercourse, especially its innocent commerce with the enemy. There are some continental writers[2] who hold that no rights accrue to a neutral State because of its impartiality, and hence no corresponding duties on the part of a belligerent, on the ground that acts which have not to be committed to a neutral's injury in time of war must similarly be avoided in time of peace. But this ground is invalid, as not all cases are covered, for example, the non-appropriation of enemy goods on neutral vessels.

Duties of belligerents.

Essence of neutrality.

The essence of impartiality is abstaining from active, or, what is sometimes more important, passive co-operation with either of the belligerents. War must be legitimate, and not anarchy; and certain relationships between

[1] III., c. 17.

[2] *E.g.*, Heffter, "Das Europäische Völkerrecht der Gegenwart" (1888), § 149; Gareis, "Institutionen des Völkerrechts" (1901), § 88; Heilborn, "System des Völkerrechts" (1896), p. 341; and others

neutrals and belligerents must be preserved. But there have been marked oscillations in practice, of the rights of belligerents and neutrals; a powerful State at war would naturally assert to the full its rights, and often claim an extension of them. Thus the views of English jurists conscious of the maritime supremacy of England, have often been opposed by the views of the continental writers; and Britain has been denounced as egotistical and tyrannical. Since the middle of the nineteenth century there has been a tendency "to insist that, peace being the normal order of things, the interests of neutrals should prevail in a conflict with those of belligerents,"[1] though in view of the events in the recent Russo-Japanese war, it would seem as though a re-assertion of belligerent rights had unmistakably been manifested, though not without strong protests from many quarters. As the Lord Chancellor said at the meeting of the Institute of International Law at Edinburgh, in November, 1904, "Because two nations go to war they have no right to interrupt and interfere with the commerce of the world. They must recognise that people who are not engaged in the quarrel have a right to carry on their commerce."

Variability of practice in regard to their relationship.

It has been asserted, often in the heat of controversy, that the right of commerce having

Does the right of telegraphic communication follow

[1] Sir John Macdonell, *Nineteenth Century*, July, 1904.

from right of commerce?

been established, the right of telegraphic communication follows as a natural consequence. The conclusion would be more true if the premise were; for there are exceptions to such freedom of commerce. In the first place, a neutral State cannot trade by loading belligerent vessels with their goods, without exposing themselves to the risk of having their cargo turned away from the route. Further, a neutral is not permitted to communicate with blockaded ports; hence from this duty of forbearance would seem to follow the corresponding belligerent right to cut a cable running from a neutral territory to the blockaded port. And again neutrals cannot convey contraband to belligerent territory, whether blockaded or not. And despatches may undoubtedly partake of the nature of contraband, for telegraphic communications are not necessarily "pacific," and the same supervision cannot be exercised over them as over despatch-vessels, in which case a belligerent, to obtain greater security for himself, will have no alternative but to cut the cable.

Restrictions on neutrals.

Despatches as contraband.

From the duty of impartiality incumbent upon a neutral follows his obligation to prevent his men-of-war, his diplomatic envoys, or couriers from giving information relative to the war to either of the belligerents. There has been some difference of opinion as to whether a neutral ought to stop couriers carrying

despatches from a belligerent over his neutral territory. This is related to the question whether a neutral ought to allow telegraphic messages from a belligerent over his territory. Calvo supposes a case where there are two neighbouring and allied belligerents with a neutral state lying between them; and he comes to the conclusion that it is no infraction of neutrality to permit despatches, telegraphic or otherwise, to cross its frontiers, since it is entirely ignorant of the nature of their contents, and has no right to investigate their purport; for telegrams in cipher do not *prima facie* relate to warfare. "Accuser le neutre de manquer à ses devoirs en pareille occurrence, ce serait comme si l'on traitait de complice une administration des postes, pour avoir transporté la correspondance de deux voleurs méditant un mauvais coup."[1] Messages, however, sent by telephone or telegrams in ordinary language are controllable, though even here one cannot strictly say that an absolute duty lies on a neutral to prevent such communication. It depends on the fact, scarcely determinable, whether there is a deliberate connivance on the part of the neutral, and a clear intention to benefit one belligerent to the detriment of the other. The rule, in this respect, of the Institute of International Law, at its Brussels meeting of 1902,

Ought a neutral to allow telegraphic messages of a belligerent over his territory

[1] Calvo, "Le Droit International," IV. (1888), p. 521.

is thus expressed, " Il est entendu que la liberté de l'État neutre de transmettre des dépêches n'implique pas la faculté d'en user on d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants." But it would seem no violation of neutrality if cable despatches were admitted for both opposing belligerents alike, and without any partiality, subject to the common agreement of the belligerents, for then the cable would virtually become *neutralised.*

Belligerent laying a cable on neutral territory.

It is otherwise if a belligerent is about to lay a cable on neutral territory, to facilitate his war communication; it would be an abuse of neutral territory, and the neutral State must prevent it. Thus at the time of the Franco-Prussian war, Great Britain, owing to her neutrality, refused to consent to the laying of a cable by the French from Dunkirk to the north of France, the cable to go from France to England, then back to France. More recently in the Spanish-American war, Great Britain similarly refused her consent to the laying of a cable by the United States from Manila to Hong Kong. The American Government acquiesced in the British decision, which was later followed by their own Attorney-General. Dr. Scholz embodies this practice in his rule: " Es ist mit den Pflichten eines neutralen Staates nicht vereinbar auf seinem Staatsgebiet die Landung eines Kabels zu gestatten, das von

dem Landgebiet eines der beiden kriegführenden Staaten ausgehen soll." [1]

Despatches as contraband.

Some writers have held that certain kinds of despatches should be treated as contraband of war, and that a vessel carrying persons or despatches to a belligerent is capturable by the enemy. But contraband—whether absolute or conditional, whether things "quae in bello tantum usum habent," to use the phrase of Grotius, or things which are "usus ancipitis"—consists of goods only and never of persons or despatches. Yet telegraphic despatches may be regarded as *quasi-contraband*, as also despatches and persons on board a vessel destined for a belligerent. The analogy to contraband lies not in the intrinsic character of the acts or objects themselves, but rather in the nature of the remedy available in regard to them, that is they may be intercepted on the open sea or in the territorial waters of a belligerent by force, if necessary, and captured.

Telegraphic despatches as *quasi-contraband.*

Liability of mail-steamers.

Mail steamers are not entirely privileged, for the mail-bags are subject to the right of search; but the practice has somewhat varied in different wars, though there is a tendency to modify the rigour of the rule.[2] The criterion as to what is

[1] *Op. cit.*, p. 157.

[2] At the Second Hague Conference, mail-bags—whether of an official or of a private nature—have been rendered inviolable, even though the bags or the ships carrying them are belligerent. In case of the vessel's seizure, the captor must without delay forward the bags. Thus, art. 1 of Convention XI. says: "La

or is not contraband, and incidentally as to the partiality or otherwise of a non-combatant State, may be expressed in the vigorous words of Demosthenes: "That person, whoever he be, who prepares and furnishes the means of my destruction, he makes war upon me though he have never cast a javelin or drawn a bow against me."[1]

If destruction permissible, *where* may a cable be cut?

Now assuming the destruction of the cable to be allowed by international law, the question arises in *what places* it may be cut.[2]

Not in neutral waters.

A cable may not be cut in neutral waters,—a rule which follows naturally from the recognition of the principle of State sovereignty, as shown above. Similarly, art. 2 of the instructions issued by the United States Navy Department in 1900 declares that no act of hostility whatever can be exercised in the territorial waters of a neutral State,—the duty of a belligerent correlative to the right of another State in virtue of its

correspondance postale des neutres ou des belligérants, quel que soit son caractère officiel ou privé, trouvée en mer sur un navire neutre ou ennemi, est inviolable. S'il y a saisie du navire, elle est expédiée avec le moins de retard possible par le capteur.

Les dispositions de l'alinéa précédent ne s'appliquent pas, en cas de violation de blocus, à la correspondance qui est à destination ou en provenance du port bloqué" (*Rev. de droit int.*, 1907, No. 6).

[1] "Ὁ γαρ, οἷς ἂν ἐγὼ ληφθείην, ταῦτα πράττων καὶ κατασκευαζόμενος, οὗτος ἐμοὶ πολεμεῖ κἂν μήπω βάλλῃ, μηδὲ τοξεύῃ."

Whiston's "Demosthenes," I., 209.

[2] The subsequent remarks will illustrate and supplement the cases already considered.

neutrality. Besides, art. 3, paragraph 1, of the St. Petersburg Convention puts the telegraph under the protection of each State within the limits of its jurisdiction.

It has already been indicated that a belligerent entering into occupation of enemy territory may treat the latter's land telegraph and cables also on the shore as accessories to the territory. But has he also a right to destroy cables in the enemy's territorial waters? This right has generally been conceded in theory. Thus art. 5, paragraph 2, of the United States Naval War Code says that "submarine telegraph cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy." M. von Bar maintains that belligerents have no such right; that occupation of the territorial sea in order to be effective must imply occupation of the shores also; and that a belligerent's right to interrupt communication between neutrals and the enemy will follow only from occupation of the enemy territory or blockade. "Der einzige Rechtsgrund für das Abschneiden oder die Beschlagnahme eines Kabels, welches einen neutralen Staat mit dem feindlichen verbindet, dürfte vielmehr das Recht der Verkehrshinderung sein, und dies existirt nur in dem Falle der Blokade und in dem Falle einer wirklichen Occupation feindlichen Territoriums."[1]

Cables in enemy's territorial waters.

Effective blockade as the criterion.

[1] "Archiv fur Öffentliches Recht," XV. (1900), p. 418.

Difficulty as to exact extent of territorial waters.

The difficulty, however, lies in the determination of the exact extent of the territorial waters; for, if destruction is authorised in a territorial sea, it might also take place beyond, for what is the line of demarcation between the territorial sea and the high sea? Some writers wish to fix the limit at a distance of three miles from the shore (the Institute of International Law at Paris in 1894 considered six marine miles necessary), and others[1] to such a distance that the intervening sea may be effectively commanded from the coast either by guns or by means of a coast-guard, which is in accordance with the maxim of Bynkershoek: "Terrae potestas finitur ubi finitur armorum vis."[2] It is also pointed out that the possible reservation by a State to its own subjects of the exclusive right of fishing is a confirmation of the fact that a maritime belt may be appropriated. Ortolan denies the right of property, and allows only the right of supremacy and jurisdiction,[3] and Calvo uses almost identical terms.[4] Professor Holland holds that telegraphic communication may be interrupted not only in strictly territorial waters but even at a distance from the shore

[1] *Cf.* Despagnet ("Droit International Public," p. 444): "La mer territoriale est celle qui est adjacente au rivage, jusqu'à la limite où l'Etat peut, de la côte, exercer sa puissance par la force des armes."

[2] "Quaestiones Juris Publici."

[3] "Diplomatie de la Mer," II., c. 7.

[4] *Op. cit.*, § 244.

where a blockading squadron might reasonably be placed.[1]

Maritime warfare and land warfare not identical.

It is possible, however, to go too far in the assimilation of maritime warfare with land warfare. In the latter case occupation is of course possible, and with it possession and property of enemy goods; but in the former case, one can scarcely say with strict accuracy that the sea is capable of that absolute seizure which constitutes occupation, though it is not denied that a belligerent may make war on the enemy in his very territorial waters. So that any attempts on cables that may be justified at all are the natural results of supremacy at sea, and not of a right of property or possession.

Destruction of cables and right of angary.

Is the destruction of the cable in territorial waters of the enemy a result of right of angary? Some jurists have tried to demonstrate justification on this ground. But the right of angary—which, however, was condemned by the Institute of International Law in 1898—involves a positive use, in the interests of a belligerent, of a thing belonging to a neutral; whereas the destruction of a cable is an act rather of a negative character, depriving the enemy of certain resources, and purposely intending his injury. Further, angary supposes the use of the thing on an occupied territory, but the occupation of the territorial sea is by no means universally recognised.

[1] "Journal de droit international privé" (1898), p. 650.

Destruction of cables on the high sea.

With regard to cables on the high sea, Mr. Morse absolutely denies the right of destruction. Professor Holland allows cutting at a distance where blockade is possible, but as a blockade by cruisers is permissible by the Anglo-American doctrine, the distance may be rather considerable. M. von Bar, instead of considering the possibility of blockade, adopts the continental doctrine of *effectivity*. Indeed, some jurists go even further and assert that in those cases where cable-cutting is permissible at all, it is permissible also on the open sea. In the United States Naval War Code, art. 5, interruption of cables is specifically allowed within the territorial jurisdiction of the enemy, but on the high sea it is not stated as inadmissible. Captain Squier of the United States Signalling Corps says that in the Spanish-American war his Government viewed cables between neutral and enemy territory as contraband, but adds that the right to cut such a cable on the high sea is considered "as unsettled and of doubtful expediency."[1]

Practice of U.S. as to cables between neutral and enemy territory.

In the Spanish-American war, in which the practice will probably be considered as furnishing precedents of some authority, many cases occurred of the cutting of cables connecting enemy with neutral territory; and the American admirals did not always confine themselves to enemy territorial waters. Cables were cut between

[1] "Proceedings of the United States Naval Institute" (1900).

Santiago and Jamaica, between Cuba and Hayti, between Havana and Santiago, between Hong-Kong, Manila and Spain, and several others. "In the absence of definite international law upon many points involved, the United States was forced to take the initiative and use this powerful military weapon for the benefit of the cause of the United States, while at the same time respecting and subserving the rights of neutrals with an equity and fairness which characterised the actions of this Government."[1]

Unanimity in only one case.

Of the above four cases there seems to be unanimity amongst the nations in only one, the case where a submarine cable unites two neutral territories. In the other cases greater or less restrictions have been suggested from time to time, but no laws or authoritative regulations have been laid down; for, indeed, strict laws in all these cases to meet all possible emergencies are simply impossible. Considering the relations of the belligerents and neutrals, the variability, the precariousness of the conditions arising, the frequently unexpected results that the fortune or misfortune of war brings, the ever-changing nature of the compromise between what Grotius[2]

Conflict of *belli rigor* and *libertas commerciorum*.

[1] *Ibid.*

[2] "Nam quominus gens quaeque cum quavis gente seposita commercium colat, impediendi nemini jus est: id enim permitti interest societatis humanae; nec cuiquam damno id est: nam etiam si cui lucrum speratum, sed non debitum, decedat, id damni vice reputari non debet" (*De Jure Belli*, II., ii., 13, 5).

termed *belli rigor* and the *commerciorum libertas*, the predominant, irresistible instinct of self-preservation in nations and individuals alike: considering all these circumstances it is certainly an unprofitable expenditure of time and ingenuity to lay down a code of detailed rules beforehand determining the limits of action of a belligerent.

Predominance of belligerent interests in actual war.

If it is at all essential to formulate any such rules, the safer plan would be to lean towards the side of the belligerent, otherwise international law would be a mere name. "Jus commerciorum aequum est, at hoc aequius, tuendae salutis." In other matters, too, of international law there is no unanimity of opinion amongst nations. There

Reluctance of States to commit themselves in regard to new questions.

were several acts in the Russo-Japanese war, which were stigmatised by many critics as contrary to established law or custom; yet the States acquiesced, and would not venture to commit themselves distinctly as to any declaration or pronouncement and so fetter their own future action. ". . . . It is too much to expect belligerents always to keep within the four corners of the rules. There will be circumstances, it may be anticipated, in which they will not suffer, if they can help it, a telegraphic cable, no matter who is the owner or what are its termini, to be used to their detriment. To whatever rules they assent will probably be added the sacramental formula, 'so far as circumstances permit.'"[1]

[1] Sir John Macdonell, *Nineteenth Century*, July, 1904.

Necessity in war and international laws.

At the Brussels meeting of the Institute of International Law in 1879, it was agreed that "il est à désirer, quand les communications télégraphiques doivent cesser par suite de l'état de guerre, que l'on se borne aux mesures strictement nécessaires pour empêcher l'usage du câble."[1] But this "pious wish" leaves the whole question really in the same position; for the treatment of cables is left to the discretion of the hostile belligerents. In fact it is held by several German writers,[2] as also by Rivier, that the laws of war in general lose their binding power in case of extreme necessity; they emphasise the maxim that "Kriegsräson geht vor Kriegsrecht." A distinction has been made between *Kriegsmanier*, the ordinary rules of war, and *Kriegsräson*, the *titulus necessitatis* of Grotius, that which is permitted in exceptional cases. Professor Lueder who works out this distinction in a most elaborate manner affirms that to attain the object of the war all regulative limitations may be disregarded. "Wenn deshalb die Sachlage sich so gestalten sollte, dass die Erreichung des Kriegszwecks und die Befreiung aus der äussersten Gefahr durch Schranken der

Does necessity over-ride law?

[1] *Cf.*, Art. 13 of the Declaration de Bruxelles; and art. 23 of the Règlement of 1899 on Laws and Customs of War on Land.

[2] *E.g.*, Lueder in "Holtzendorff's Handbuch des Völkerrechts," IV., 254–7; Ullmann, "Völkerrecht," § 144; Liszt, "Das Völkerrecht" (1904), § 39; Rivier, "Principes du Droit des Gens," II., 242.

Kriegsmanier gehindert würde, und wenn also der Zweck nur dadurch erreicht und die äusserste Gefahr nur dadurch beseitigt werden kann, dass die Schranke der Kriegsmanier durchbrochen wird: so darf letzteres geschehen." He emphasises that what must happen ought to happen; and that *Kriegsräson* is related to *Kriegsmanier* as necessity is to criminal law. But such a distinction, as in the strong objection raised by Professor Westlake, seems scarcely valid, for all acts in war are founded on necessity, and to make an elaborate distinction between the varying degrees of necessity is to border somewhat on a legal casuistry.[1]

So, as it is apparently hopeless to expect the conduct of belligerents to conform to a strict formulation of rules of warfare, and especially rules as to the destruction of cables, it would seem that the only remedy available to neutrals, the only remedy feasible, is a restitution and compensation by the belligerent who may cut

[1] *Cf.* the statement made by Baron Marschall von Bieberstein at the Second Hague Conference: "A belligerent who lays mines assumes very heavy responsibility towards neutrals and towards peaceful shipping. No one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character. . . . But it would be a great mistake to issue rules the strict observation of which might be rendered impossible by the law of facts" (quoted by Prof. Westlake, *Quarterly Review*, January, 1908). A firm stand, however, was taken on this point by Sir Ernest Satow. Great Britain showed her determination to resist any conduct due to such alleged "necessity."

or otherwise interfere with a cable, in which a neutral has an interest. "I put less trust in rules which there may be an irresistible temptation to break or evade than in a proper system of compensation by belligerents, not only for structural injuries, but loss of traffic, meted out by a tribunal possessing general confidence. In legal development when a new principle has not yet been evolved, and when in the absence of accepted rules, each case depends on its peculiar circumstances, compensation is, as here, the only possible alleviation of hardships."[1] At present, however, there is some difference of opinion as to compensation. At the 1879 meeting of the Institute, M. Clunet asked how there could be a duty on the part of a belligerent to repair a cable, when the damage may have been really necessitated by the conduct of the enemy. Eventually the opinion was adopted that there was a collective obligation on both belligerents, though Professor Holland strongly objected to this view.

Rules safer in a system of compensation.

If a cable between a belligerent and a neutral State is the property of neutral subjects, damages ought to be paid in case of destruction, but not necessarily if the owners are subjects of one of the belligerents. If the cable is the property of one of the belligerent States, it is not entitled to damages in case of legitimate destruction by

When damages payable.

[1] Sir John Macdonell, *Nineteenth Century*, July, 1904.

the enemy; and it seems there is no compulsory compensation if a cable belonging to a neutral is destroyed on belligerent territory or in belligerent territorial waters. Thus, in 1890, when Admiral Dewey cut the cable between Manila and Hong-Kong, the Eastern Extension Company's claim for indemnity was held invalid by the United States Government, on the advice of its Attorney-General, on the ground that "the property of a neutral permanently situated within the territory of our enemy is, from its situation alone, liable to damage from the lawful operations of war, which this cutting is conceded to have been." But the lengthened exposition of the inadmissibility of the claim has been objected to as merely technical, and not satisfying the sense of justice of ordinary men.

U.S. Attorney-General's strictures as to claims.

With regard to cables in the open sea, even General Greely thought cutting was hardly justifiable, and consequently it may be assumed that a claim for damages in such a case is maintainable.

Damages for cable-cutting in the open sea.

The difficulties inherent in the determination of the rights and duties of the belligerents and neutrals as to submarine cables have been seen to be very great; but a still more perplexing question arose in the Russo-Japanese war with regard to wireless telegraphy. Indeed, before long international jurists will be confronted with problems of aerial navigation. So quickly have inventions and scientific applications to warfare

The newer question of wireless telegraphy.

multiplied that the axiom of Grotius to the effect that war is not an art is completely refuted. As in the case of submarine cables, so in this latest innovation of wireless telegraphy, there has already been a conflict of belligerent and neutral interests, and there seems to be as little consensus of opinion in the one case as in the other.

The *Haimun* was fitted up by the *Times* with wireless telegraphy apparatus, and a correspondent sent messages in cipher to Wei-hai-Wei, thence telegraphed over a neutral cable to London. It is clear that the vessel was subject to right of search; in fact it was carefully examined by both belligerents, who were satisfied that nothing was being done to advance the cause of the one or injure that of the other party. However, on April 15th, 1904, a Russian proclamation was made to this effect: "In case neutral vessels having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwantung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes." The Under-Secretary of State for Foreign Affairs in reply to a question in the House of Commons on April 20th used the expression "correspondents who are communicating information to the

The *Times* innovation.

Russian declaration as to wireless telegraphy correspondents.

Expansion of espionage.

enemy." Of course there is a profound difference in the purport of the two expressions, and it is doubtful whether the latter only was meant. In any case Admiral Alexeieff's expansion of the term *spy* is most unjustifiable. A belligerent is entitled to prevent the establishment of wireless telegraphy apparatus within the zone of his operations; or if already established he may prohibit its use or place it under certain restrictions, and turn away any correspondent who does not submit to his ruling; but a correspondent who is a subject of a neutral State and is engaged in sending information to his employer in the neutral State cannot conceivably be treated as a spy. Indeed, even if he actually conveys such information *to the enemy*, he is not, according to the established international law of espionage, a spy. He is merely in the same position as though he carried despatches for the enemy, or signalled between two of his squadrons; in which case his vessel and everything on it would be lawfully capturable. The Russian threat recalls Prince Bismarck's contention during the Franco-Prussian war that persons passing in balloons over the German lines were spies; but imprisonment only and not death was inflicted on such persons captured. In 1874, the Brussels Conference on the laws of war negatived this opinion, and the Prussian Government acquiesced in the decision. And according to art. 29 of the Hague Convention

Rights of a belligerent as to correspondents.

Bismarck's threat as to balloonists.

"an individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain, information in the zone of operations of a belligerent with the intention of communicating it to the hostile party."[1] This definition is as applicable to maritime war as to war on land.

Essence of espionage.

In the case of the *Times* correspondent there was neither secrecy nor false pretences, nor was his object to communicate information specifically to the Japanese. The presence of the steamer was quite open, and the messages forwarded were guaranteed to be in cipher, to which neither Russia nor Japan had the key. Thus, all the elements essential to constitute espionage were absent.

Still, a belligerent ought to have the power to place certain restraints on correspondents. At present, a State whose forces they follow, imposes certain conditions, *e.g.*, right of search, censorship of despatches; but at a critical point of the war a belligerent ought to be able, through an international convention, entirely to exclude war-correspondents from a quarter where important developments were taking place. The interests of a belligerent in such circumstances more than

Desirable extension of a belligerent's powers as to war correspondents.

[1] "Ne peut être considéré comme espion que l'individu qui, agissant clandestinement ou sous de faux prétextes, recueille ou cherche à recueillir des informations dans la zone d'opérations d'un belligérant, avec l'intention de les communiquer à la partie adverse."

counterbalance the interests of a neutral State, who is desirous to receive news as to the course of the war.

The Russian declaration and the three-mile limit.

It appears that the Russian declaration applied also beyond the three-mile limit. When Count Cassini was asked in New York about this, he replied: "I assume it takes in the entire waters within the zone of war. There is, naturally, no precedent, as wireless telegraphy has never before been a factor in war. It cannot be expected that Russia would permit the sending of wireless despatches from which the Japanese who have wireless apparatus on their ships, could gain valuable information. This will make wireless telegraphy apparatus contraband of war"[1] This has been condemned, too; but it is submitted that given absolute jurisdiction within the three-mile limit, control could justifiably extend beyond that limit; for wireless telegraphy operations can be made to include a very wide area. And besides there is no settled rule, in any case, in international law as to a three-mile limit.[2]

Wireless apparatus as contraband.

Interception of wireless messages.

Cables can be cut and "tapped," but under ordinary conditions, that is a distinct breach of law. In the case of wireless telegraphy, however, the further question of the interception of a

[1] The *Times*, April 18th, 1904.

[2] See further on these points, *infra*, the rules of the Institut de Droit International, and the regulations of the Second Hague Conference.

belligerent's messages presents itself. No one has a monopoly of the atmosphere, and the apparatus as used for wireless messages is yet, in some cases, capable of being interfered with by competing operators; for the number of wave-lengths obtainable in practice is limited. If a rival operator by experimenting with different wave-lengths, for example, at last obtains the appropriate one by which he is able to intercept messages from a belligerent, and transmits them, either by the same apparatus or in any other manner, to the other belligerent, he is clearly guilty of espionage. Then again, it is possible not only to intercept messages but also to interfere with a belligerent by sending to his receiver false information or undecipherable despatches. Such proceedings do not necessarily amount to espionage, but it is submitted, the said belligerent is entitled to regard the authors of such interferences as enemies, who consequently become liable to be captured as prisoners of war.

Should a neutral permit a belligerent's apparatus on his territory?

Finally, the question arose in the recent war whether a neutral was entitled to permit a belligerent's wireless apparatus to be installed on his territory. During the siege of Port Arthur the Russians established an apparatus at Chifu, seventy-seven miles away on the Chinese side of the Gulf of Pechili; and in this way communicated with the beleaguered garrison, in spite of the strictures of the blockade. The solution to

this novel problem is only obtainable by analogy with the case of cable messages—if such analogy be strictly valid. From this, it would follow that it is the neutral's duty to prevent such an abuse of his territory.[1]

ADDITIONAL NOTE.

Rules of the Institut de Droit International as to wireless telegraphy.

At the recent meeting (September 26th, 1906) of the Institut de Droit International in Ghent, held three months after the above was written, the following conclusions were arrived at in reference to the use of wireless telegraphy in war (and it is gratifying to the present writer to find that these conclusions are substantially the same as those submitted above) :—

"Art. 6. On the high sea, in the zone covered by the sphere of action of their military operations, belligerents may prevent the despatch of Hertzian waves by a neutral State.

"Art. 7. Individuals who, in spite of the prohibition of the belligerents, engage in the transmission of messages by wireless telegraphy between different sections of a belligerent army or territory, are, if captured, to be considered as prisoners of war and treated as such. Ships and balloons belonging to neutrals which by movements in concert with the enemy may be considered as

[1] *Cf.*, as above, the refusal of England in 1898 to permit the United States to land a cable at Hong-Kong.

being engaged in his service may be confiscated, as well as the despatches and wireless telegraphic apparatus found on them.

"Art. 8. A neutral State is not obliged to prevent the passage over its territory of Hertzian waves destined for a belligerent State.

"Art. 9. A neutral State is obliged to close, or take under its own administration, any radiographic establishment belonging to a belligerent State which it had authorised to operate within its territory."

The following are the exact conclusions arrived at by the Institut de Droit International, September 24th, 1906[1]:—

"Art. 1. L'air est libre. Les États n'ont sur lui, en temps de paix et en temps de guerre, que les droits nécessaires à leur conservation.

"Art. 2. À défaut de dispositions spéciales, les règles applicables à la correspondance télégraphique ordinaire le sont à la correspondance télégraphique sans fil.

"Première Partie.—*État de paix.*

"Art. 3. Chaque État a la faculté, dans la mesure nécessaire à sa sécurité, de s'opposer, au-dessus de son territoire et de ses eaux territoriales, et aussi haut qu'il sera utile, au passage d'ondes hertziennes, que celles-ci soient émises

[1] "Annuaire de l'Institut de Droit International," Vol. XXI., p. 327 *et seq.*

par un appareil d'État ou par un appareil privé placé à terre, à bord d'un navire ou d'un ballon.

"Art. 4. Au cas d'interdiction de la correspondance par la télégraphie sans fil, le Gouvernement devra aviser immédiatement les autres Gouvernements de la défense qu'il édicte.

"Seconde Partie.—*État de guerre.*

"Art. 5. Les règles admises pour le temps de paix sont, en principe, applicables en temps de guerre.

"Art. 6. Sur la haute mer, dans la zone qui correspond à la sphère d'action de leurs opérations militaires, les belligérants peuvent empêcher les emissions d'ondes, même par un sujet neutre.

"Art. 7. Ne sont pas considérés, en principe, comme espions de guerre, mais doivent être traités comme prisonniers de guerre, s'ils sont capturés, les individus qui, malgré la défense du belligérant, se livrent à la transmission ou à la réception des dépêches par télégraphie sans fil entre les diverses parties d'une armée ou d'un territoire belligérant. Il doit en être autrement si la correspondance est faite sous de faux prétextes.

"Les porteurs des dépêches transmises par la télégraphie sans fil sont assimilés à des espions lorsqu'ils emploient la dissimulation ou la ruse.

"Les navires et les ballons neutres qui, par leurs communications avec l'ennemi, peuvent être

considérés comme s'étant mis à son service, pourront être confisqués ainsi que leurs dépêches et leurs appareils. Les sujets, navires, et ballons neutres, s'il n'est pas établi que leur correspondance était destinée à fournir à l'adversaire des renseignements relatifs à la conduite des hostilités, pourront être écartés de la zone d'opérations, et leurs appareils saisis et séquestrés.

"Art. 8. L'État neutre n'est pas obligé de s'opposer au passage, au-dessus de son territoire, d'ondes hertziennes destinées à un pays en guerre.

"Art. 9. L'État neutre a le droit et le devoir de fermer, ou de prendre sous son administration, l'établissement d'un État belligérant qu'il avait autorisé à fonctionner sur son territoire.

"Art. 10. Toute interdiction de communiquer par la télégraphie sans fil, formulée par les belligérants, doit être immédiatement notifiée par eux aux Gouvernements neutres."

THE SECOND HAGUE CONFERENCE, AND SUBMARINE CABLES, AND WIRELESS TELEGRAPHY.

The second Hague Conference and war on land.

At the second Hague Conference of 1907 great improvements in the regulations relative to war on land were effected. The interests of neutral States have been somewhat more safeguarded, the rights and duties on land more clearly defined, with greater advantage to non-combatant States. Moreover, any infraction of the regulations is to be met by an indemnity.

Danish proposal as to submarine cables.

In reference to the destruction of submarine cables in time of war, the Danish delegation, following up the policy previously advocated by its Government, proposed that art. 53 of the Hague Laws of War be supplemented by the following rule[1]: "Submarine cables uniting an occupied or enemy territory to a neutral one shall not be seized or destroyed except absolute necessity requires it. They also shall be restored and indemnities regulated at the conclusion of peace." The second paragraph of art. 53 referred to runs thus:—

"Le matériel de chemins de fer, les télégraphies de terre, les téléphones, les bateaux à

[1] J. Westlake, "International Law," Part II., p. 280.

vapeur, et autres navires, en dehors des cas régis par la loi maritime, de même que les dépôts d'armes, et en général toute espèce de munitions de guerre, même appartenant à des sociétés ou à des personnes privées, sont également des moyens de nature à servir aux opérations de la guerre, mais devront être restitués, et les indemnités seront reglées, à la paix."

The Danish proposal, however, fell to the ground, as submarine cables do not entirely come within the scope of the said article, which refers to land war, the shore ends of the cables being already protected by virtue of their assimilation with the land telegraph.

Improvements in rules as to use of wireless telegraphy in war.

With regard to the use of wireless telegraphy in time of war, a decided improvement has been made by the regulations conferring rights and imposing duties on neutral States and belligerents. Thus belligerents are prohibited from installing their own apparatus on neutral territory, or utilising purely military apparatus established by them before the war. These conditions are expressly laid down in art. 3 of the fifth Convention[1]:—

"Il est également interdit aux belligérants—

Belligerents not to set up apparatus on neutral territory.

(a) d'installer sur le territoire d'une Puissance neutre une station radio-télégraphique ou tout appareil destiné à servir comme

[1] "Revue de Droit International," 1907, No. 6, p. 658.

moyen de communication avec des forces belligérantes sur terre ou sur mer ;

(b) d'utiliser toute installation de ce genre établie par eux avant la guerre sur le territoire de la Puissance neutre dans un but exclusivement militaire, et qui n'a pas été ouverte au service de la correspondance publique."

Neutrals must prevent such acts, or punish infringement of rule.

Not only is this negative duty imposed on combatants, but the further positive obligation is laid on neutrals to prevent the performance of these acts on their own territory, and punish any infringement of the rule.

"Art. 5. Une Puissance neutre ne doit tolérer sur son territoire aucun des actes visés par les articles 2 à 4.

"Elle n'est tenue de punir des actes contraires à la neutralité que si ces actes ont été commis sur son propre territoire."[1]

Neutrals must treat the two belligerents equally

Neutrals are not obliged to interfere with belligerents in their use of the ordinary telephonic or telegraphic (wireless or otherwise) services of the country; they are bound only to apply equally to both belligerents such prohibitive or restrictive measures as necessity or expedience may require. This is the substance of arts. 8 and 9 of the fifth Convention :—

"Art. 8. Une Puissance neutre n'est pas

[1] "Revue de Droit International," 1907, No. 6, p. 658.

tenue d'interdire ou de restreindre l'usage pour les belligérants des câbles télégraphiques ou téléphoniques, ainsi que des appareils de télégraphie sans fil, qui sont, soit sa propriété, soit celle de compagnies ou de particuliers.

" Art. 9. Toutes mesures restrictives ou prohibitives prises par une Puissance neutre à l'égard des matières visées par les articles 7 et 8 devront être uniformément appliquées par elle aux belligérants.

" La Puissance neutre veillera au respect de la même obligation par les compagnies ou particuliers propriétaires de câbles télégraphiques ou téléphoniques ou d'appareils de télégraphie sans fil."[1]

[1] " Revue de Droit International," 1907, No. 6, p. 658.

THE SECOND HAGUE CONFERENCE AND INTERNATIONAL ARBITRATION.

For some time the world had been waiting anxiously for the results of the second Hague Conference, which first met on June 15th, 1907, and concluded its session on October 18th.

President Roosevelt's message; his hopes for arbitration.

In his message to Congress December 5th, 1905, President Roosevelt, while denouncing "the demagogues of peace, . . . who advocated peace at any price," yet expressed a hope that the second Conference "may be able to divine some means to make arbitration the customary way of settling disputes in all save a few classes of cases which should themselves be as sharply defined and rigidly limited as the present governmental and social development of the world will permit." He hoped that the aim would be to bring about an organisation of the civilised nations. It may be recalled that Bluntschli advocated such organisation several years before, and even maintained that to bring this about would be a simpler task than had been the federation of the German States.

Different estimates as to

However, as for the actual amount of effective work accomplished last year, some people have

expressed disappointment at the little advance made; others have regarded the results as almost revolutionary. The truth, indeed, lies between these two extremes. A distinct progress has been made, but progress of a moderate character, and necessarily so. At least, it is sufficient to justify a hopeful desire for the holding of a third Conference, and then to begin where the second left off. It is quite clear that the possibility of the various States of the world meeting in conference at all indicates the widespread aspirations to expand and ameliorate the body of international law; and earnest desire is frequently the father to realisation.

work done at the Hague, 1907.

The proceedings at the first Peace Conference were rather of a diplomatic character. At the second Conference a new element was conspicuously introduced, viz., a wider consideration given to public opinion, and this factor constantly modified or neutralised the natural tendency to assume a merely diplomatic attitude. Indeed, it has been said that the recent Hague meeting adopted the "forms of a democratic legislature,"[1] but, of course, not with the inevitable principles of action which such a constitution implies.

Comparison of the procedure of the 1899 Conference with that of 1907.

The main defect was the lack of clear organisation and systematised procedure, which would have avoided constant repetitions, and would have facilitated the despatch of more solid

Main defect of the 1907 procedure.

[1] Professor Westlake in *Quarterly Review*, January, 1908.

business, assuming, of course, that the delegates had been armed with sufficient authority. And so the debates involved a "welter of *Interessenfragen*," and constantly betrayed, and by no means without some advantage, a conflict of various principles: nationalism and internationalism, law and diplomacy. "The cynical militarism of some Powers was too often in sharp contrast with the sentimental humanitarianism of others."[1] In a resolution recommending the Powers to prepare for a subsequent Conference, the proceedings of the assembly were characterised as wanting "the indispensable authority and rapidity."

Conflict of various principles.

Division of the business of the Conference.

The business of the Conference was divided between four main committees, which respectively considered the following subjects: (a) arbitration and kindred matters, (b) land war, (c) maritime war, and (d) prize law. The final result—so far on paper, of course—is an *acte final* embracing thirteen conventions, together with one declaration, two expressions of opinion, five *vœux*, and one recommendation. We are mainly here concerned with the first category.

Progress in the rules relating to arbitration.

With regard to arbitration, one of the most difficult and delicate of the questions submitted to the Conference, a distinct advance has been made. For some time to come, no doubt, this pacific method of settling disputes will not wholly

[1] Professor Holland in *Law Quarterly Review*, January, 1908.

do away with the adoption of violent measures. Human nature changes so slowly. The hope is that a modified human nature will see things differently, will see the barbarous vulgarity as well as the heroism of war. More frequent *rapprochements* between the States by means of these Conferences will do much to foster that international *esprit de corps* which will rapidly and effectually promote the interests of arbitration.

Marquis of Ripon on the work of the Conference.

On January 29th last, on the occasion of the King's Speech, the Marquis of Ripon stated, in the House of Lords, that in his opinion much good had come of the recent Conference. "He believed that it had laid the foundation upon which an advance could be made in the interests of peace on a similar occasion in the future."[1]

Mr. Balfour's estimate of international arbitration.

Again, in the House of Commons, Mr. A. J. Balfour said: "I attached great importance to what was done in past times at the Hague. I am an optimist in regard to international relations in the future. I believe the great work . . . of international arbitration has already prevented, and will in the future prevent, more and more wars which do not spring out of intolerable wrong or causes which a nation feels cannot be dealt with by any third party or any arbitrator, however well intended."[2] Mr. Asquith thought the

Mr. Asquith on the second Hague meeting.

[1] The *Times*, January 30th, 1908.

[2] *Ibid.*

time spent at the Hague had by no means been wasted. "Although the results may not equal the anticipations the more sanguine amongst us formed, yet, even when you come to judge the Conference by solid results, serious and substantial advance has been made in the direction which we all hope the world will gradually take."[1] In this connection it is of interest to refer to a portion of the King's Speech: "Negotiations are being conducted with the Government of the United States for an agreement to refer to the international court of arbitration at the Hague questions pending between the two Governments which relate to the Newfoundland fisheries. It is hoped that by this friendly procedure a long-standing source of difficulty may be satisfactorily removed."[2]

The King's Speech and arbitration.

Let us now briefly consider more specifically the nature of the actual progress that has been made by the second Conference as regards international arbitration, this "friendly procedure."

Tentative work of the 1899 Conference.

At the 1899 Conference the delegates were feeling their way, and only tentative proposals were made. Each desired to ascertain the real attitude of the others; hence they constantly adopted phraseology such as "as far as circumstances will allow," and apotheosised "national honour" and "vital interests," with whatever

[1] The *Times*, January 30th, 1908.

[2] *Ibid.*

meaning was attached to those expressions. Only a rudimentary court was established, consisting of a list of judges from amongst whom the disputing parties could make their choice; but no definite procedure was arranged regulating the manner in which the parties should appear before that court. The drawing up of the *compromis* (agreement of reference) clearly stating the matters in dispute was left to themselves; but this is a step of vital importance and of the greatest difficulty where adverse claims are made.

Element of compulsory arbitration introduced.

Now, however, by the rules adopted at the 1907 Conference, the Hague court is empowered—

(1) To settle the agreement of reference at the request of both contending parties, and

(2) To settle it at the request of one of them should they have failed to agree by other methods,—

(a) If the difference falls within a general treaty of arbitration, and the other party does not deny its applicability to compulsory arbitration;

(b) If the difference arises from contractual debts claimed from one party by the other as due to its subjects, and the offer of arbitration has been accepted.

Compare the fuller statement of these regulations as set out in the Convention :—

"Art. 53. La cour permanente est compétente

pour l'établissement du compromis, si les Parties sont d'accord pour s'en remettre à elle.

"Elle est également compétente, même si la demande est faite seulement par l'une des Parties, après qu'un accord par la voie diplomatique a été vainement essayé, quand il s'agit—

(a) If difference falls within a general treaty of arbitration.

(1) D'un différend rentrant dans un traité d'arbitrage général conclu ou renouvelé après la mise en vigueur de cette convention, et qui prévoit pour chaque différend un compromis et n'exclut pour l'établissement de ce dernier ni explicitement ni implicitement la compétence de la cour. Toutefois le recours à la cour n'a pas lieu si l'autre Partie déclare qu'à son avis le différend n'appartient pas à la catégorie des différends à soumettre à un arbitrage obligatoire à moins que le traité d'arbitrage ne confère au tribunal arbitral le pouvoir de décider cette question préalable :

(b) If difference arises from contractual debts.

(2) D'un différend provenant de dettes contractuelles réclamées à une Puissance par une autre Puissance commes dues à ses nationaux, et pour la solution duquel l'offre d'arbitrage a été acceptée. Cette disposition n'est pas applicable si l'acceptation a été subordonnée à la condition que le compromis soit établi selon un autre mode." [1]

Thus a step of considerable importance has been taken to introduce obligatory arbitration by which, subject to the conditions above stated, one State is enabled to summon another before

[1] "Revue de Droit International," 1907, No. 6.

the permanent court, and to obtain an independent judicial decision. An attempt was made, on British initiative, to draw up a list of subjects to which compulsory arbitration should be applied, but the proposal did not meet with success. The main point secured, involving anything of the nature of compulsion, is (as was shown above) that contractual claims, even though held by one party to be of a non-arbitrable character, cannot under the given circumstances be exempted from the jurisdiction of the Hague court to draw up the *compromis* at the request of the other party. The court is enabled to determine the validity of the claim, the amount of the debt, and the time and manner of payment; and, in order to be able to settle the latter point, the court is bound to investigate the financial condition of the debtor State, and the nature of the excuses offered for its default.

Attempt to draw up a list of subjects for obligatory arbitration.

Duty of the court to determine validity of claim, amount of debt, etc.

Art. 2 of the second Convention—*Convention concernant la limitation de l'emploi de la force pour le recouvrement de dettes contractuelles*—says: " . . . Le jugement arbitral determine, sauf les engagements particuliers des Parties, le bien-fondé de la réclamation, le montant de la dette, le temps et le mode de paiement."

The attempt to introduce fully the principle of obligation into a general arbitration treaty failed; and the Drago doctrine was not entirely accepted. The Conference unanimously recognised the

principle of obligatory arbitration, and expressed the conviction that "certain differences are susceptible of submission to obligatory arbitration without any restriction."[1] For the present, however, the proposal for *general* compulsory arbitration has been "respectfully relegated to Cloudcuckootown."[2] But one can expect only slow progress in this difficult question; and what has already been achieved certainly brings us a little nearer to the goal aimed at.

Constitution of the court.

With regard to the nature of the court itself, some effort was made to reconstitute the existing court, or to establish another to work independently, to either of which disputants could resort. But the various suggestions made did not lend themselves to unanimous acceptance; and ultimately the Conference gave expression to a *vœu* recommending an amended plan for the organisation of a court of arbitral justice, which was to comprise salaried judges representing the various States of the world. "Dans le but de faire progresser la cause de l'arbitrage, les Puissances contractantes conviennent d'organiser, sans porter atteinte à la cour permanente d'arbitrage, une cour de justice arbitrale, d'un accès libre et facile, basée sur l'égalité juridique des États, réunissant des juges représentant les divers

[1] *Edinburgh Review*, January, 1908.

[2] Professor Holland in *Law Quarterly Review*, January, 1908, p. 77.

systèmes juridiques du monde, et capable d'assurer la continuité de la jurisprudence arbitrale."

Here can be seen a clearly expressed desire for the growth of international law by means of a gradual formulation by a court possessing judicial capacity of principles and cases which would serve as precedents for guiding subsequent decisions on the one hand and regulating international relationships on the other. However, the proposal for the establishment of such a court failed in consequence of the determined opposition offered by a small minority. The minor States demanded nothing less than equal representation, to which principle the greater Powers refused to risk their interests.

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